



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Wednesday, the Twenty Seventh day of July Two Thousand Sixteen

PRESENT

The Hon`ble Ms.Justice R.MALA

CMP(MD) No.1073 of 2016

IN

SA(MD) No.SR856 of 2010

ILAYAPERUMAL (DIED)
SHANMUGA VADIVU(DIED)
THIRUGNANASAMBANTHAM (DIED)

1.PETCHIAMMAL,
2 ANANCHIAMMAL
3 CHIDAMBARAM,
4 VENKATACHALAPATHY,
5 SELVI W/O.CHINNATHURAI

[CAUSE TITLE ACCEPTED VIDE COURT ORDER DATED
18/01/2016 MADE IN CMP(MD) 205/16 IN SA(MD)
NO. SR. 856/10 BY (CSKJ)]

6 RAVIKUMAR
7 KANNAKI
8 SHANMUGAPRIYA
9 SATHIYAKUMARI
10 SAMPATH SINGH

... PETITIONERS/APPELLANTS

Vs

SHANMUGAM,

... RESPONDENT/RESPONDENT

Petition filed to condone the delay of 2125 days in Re-presenting the above Second Appeal

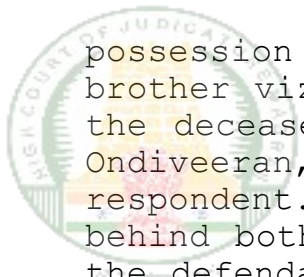
PRAYER IN SA SR.856 of 2010: Second Appeal filed under section 100 of CPC to Judgment and Decree dated 28.08.2009 made in A.S.No.46 of 2008 on the Principal District Judge, Tirunelveli, reversing the judgment and decree dated 28.04.2008 made in O.S.No.75 of 2005 on the file of Sub-Court, Sankarankoil

ORDER : This Application coming on for hearing upon perusing and upon hearing the arguments of on this day M/S. V.SASIKUMAR, Advocate for the petitioner and MR.S.MEENAKSHI SUNDARAM, Advocate for the respondent, for the Petitioner, it is ordered that this Court made the following order:-

Heard both sides.

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2.The learned counsel for the petitioners would submit that the respondent as plaintiff filed a suit for partition and separate



possession of his $\frac{1}{2}$ share in the suit property against his own brother viz., Ilayaperumal. The petitioners are the legal heirs of the deceased Ilayaperumal. The properties are originally owned by Ondiveeran, who is the father of the Ilayaperumal and the respondent. Both Ondiveeran and his wife died intestate leaving behind both the plaintiff and the defendant as their heirs. Since the defendant is not giving share, the plaintiff has constrained to file the suit for partition and separate possession.

3.The defendant raised the defence stating that the plaintiff has no right over the property. The plaintiff is not entitled any share.

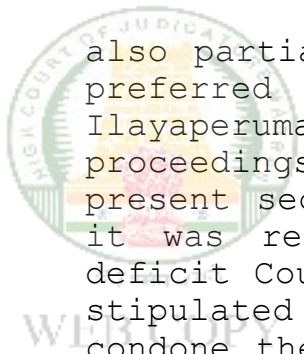
4.But, the trial Court has dismissed the suit for non joinder of necessary parties and partial partition. Against the said judgment and decree, the respondent preferred in A.S.No.46 of 2008, which was allowed. The appellants in A.S.No.46 of 2008/legal heirs of Ilayaperumal filed this second appeal with a delay of 31 days. Now, they have come forward with this application to condone the delay of 2169 days in representing the second appeal.

5.The learned counsel for the petitioners would submit that the brother Thirugnanasambandham alone looking after the case. He filed the appeal on 06.01.2010. He died on 13.09.2014. Therefore, others are not aware of the fact that as to whether the appeal was numbered and admitted. Now only, they came to know that the appeal papers were returned for rectifying some defect and also for payment of deficit court fee. But, the defects were not rectified and Court fee has not been paid in time and the appeal papers were not represented within the time stipulated by this Court and hence, the petitioners have come forward with this application to condone the delay of 2169 days in representing the appeal and prayed for an order.

6.The learned counsel for the petitioners would further submit that they had a fair chance in success. The case was conducted by Thirugnanasambandham, who died on 13.09.2014. Thereafter only, they came to know that the appeal is yet to be numbered and hence, he prayed to condone the delay.

7.The learned counsel for the respondent would submit that there is no sufficient reason assigned for condoning the delay and they have not paid proper Court fee at the time of filing the second appeal and with a view to drag on the proceedings to give the share to the respondent, who is none other than the junior paternal uncle of the petitioners, the present second appeal has been filed with a petition to condone the delay which was returned and not represented within the time. Now, this petition has been filed after five years to condone the delay of 2169 days in representing the appeal. He relied on the decision of Apex Court in **2015(5) CTC 534 - H.Dohil Constructions Co. Pvt. Ltd., V. Nahar Exports Ltd.**, and submitted that delay of more than 5 years in filing the appeal is only with a view to drag on the proceedings and hence, he prayed for the dismissal of the application.

8.Considering the rival submissions made by either and on perusal of typed set of papers, the one Shanmugam/respondent has filed a suit for partition and separate possession of his $\frac{1}{2}$ share in the suit property against his own brother viz., Ilayaperumal. The said suit was dismissed for non joinder of necessary partition and

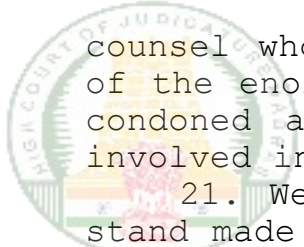


also partial partition. Against which, A.S.No.46 of 2008 has been preferred and during the pendency of the appeal, the defendant Ilayaperumal dies and his legal heirs are impleaded as party to the proceedings and the appeal has been allowed on 28.08.2009. The present second appeal has been presented only on 06.01.2010. But, it was returned for rectifying the defects and for payment of deficit Court fee. However, it was not represented within the time stipulated by this Court. He filed this present application to condone the delay of 2169 for paying deficit Court fee and rectify the defects.

9.At this juncture, it is appropriate to consider the decision relied on by the learned counsel for the respondent reported in **2015(5) CTC 534 - H.Dohil Constructions Co. Pvt. Ltd., V. Nahar Exports Ltd.**, wherein, in paras 20 to 23, it was held that total lack of bonafides and without assigning reason for filing application for condonation is not a ground for condoning the delay. It is appropriate to incorporate paras 20 to 23 of the said decision.

"20.In the case on hand, the delay in re-filing was 1727 days. As rightly pointed out by the learned Senior Counsel for the Appellant(s), the Respondents paid the Scrutiny charges on 11.4.2008 as disclosed in the Receipt No.73 issued by the High Court of that date. When the Appeal papers were filed on 6.9.2007 and the Scrutiny charges were paid on 11.4.2008, it was quite apparent that the processing of papers of the Appeals for its registration did commence in the month of April 2008. Thereafter, if rectification of whatever defects were not carried out by the Respondents or its Counsel between April 2008 and May 2012, it is the bounden duty of the Respondents to have satisfactorily explained such a long delay in re-filing. When we refer to the Applications filed on behalf of the Appellant(s), we find that there was no convincing explanation as to how the Respondents were disabled from rectifying the defects pointed out by the Registry and re-filing the Appeal papers within time. The Respondents only attempted to throw the blame on the previous Counsel to whom Appeal papers were entrusted for filing in September 2007. As pointed out by the learned Senior Counsel for the Appellant(s), there were no details as to whom it was entrusted and what were the steps taken to ensure that the Appeals filed were duly registered for pursuing further remedy as against the said Judgment of the Trial Court. As a matter of fact the Appeal papers were filed without payment of any Court-fee. This only affirms the stand of the Appellant(s) that there was no bona fide in the Respondents' claim and that they were seriously interested in challenging the Judgment of the Trial Court as against the non-grant of relief of Specific Performance. We also fail to see as to how the Respondent No.1, which is a Limited Company involved in the business of exports, which would certainly have its own Legal Department, can plead that after entrusting the papers to some Counsel whose name was not disclosed even before this Court did not even bother to take any follow-up action to ensure that its Appeals were duly registered in the High Court. In this context the maxim *Vigilantibus non-dormientibus jura subveniunt* (Law assists those who are vigilant and not those, who sleep over their rights) aptly applies to the case on hand. The Respondents simply by throwing the blame on the previous

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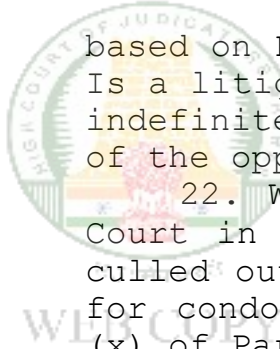


counsel whose identity was not disclosed claimed that irrespective of the enormous delay of 1727 days in re-filing the same should be condoned as a matter of course as there was only 9 days delay involved in filing the Appeals.

21. We express our total disinclination to countenance such a stand made on behalf of the Respondents. In this respect, the claim of the Appellant(s) that serious prejudice would be caused to the Appellant(s) merits acceptance. In the rejoinder filed by the Appellant(s) to the Respondents' Counter, the Appellant(s) has explained as to how they had to spend a huge amount to upkeep the property by approaching the Authorities of the Delhi Municipal Corporation, the enormous amount spent to the tune of Rs.28,00,000/- by way of house tax from the year 2004 up to this date and various other improvements made in the property during the period wherein the delay in the matter of filing of the Appeals and re-filing was made by the Respondents. Therefore, the principle that the Law of Limitation is based on sound Public Policy and therefore, in the absence of bona fide reasons the Applications for condonation of delay should be strictly construed assumes significance. In this context a Division Bench decision of the Madras High Court in **Tamil Nadu Mercantile Bank Ltd., rep. by its Chairman, Tuticorin v. Appellate Authority under the Tamil Nadu Shops and Establishments Act, Madurai and anr.**, 1990 (1) LLN 457 (Mad.), can be usefully referred to. Paragraphs 14 & 17 are relevant for our purpose, which read as under:

"14. We are unable to agree with the reasoning of the learned Judge that no litigant ordinarily stands to benefit by instituting a proceeding beyond time. It is common knowledge that by delaying a matter, evidence relating to the matter in dispute may disappear and very often the concerned party may think that preserving the relevant records would be unnecessary in view of the fact that there was no further proceeding. If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that the records would not be relevant as there was no further proceeding in the matter. Hence, to view a matter of condonation of delay with a presupposition that no prejudice will be caused by the condonation of delay to the Respondent in that Application will be fallacious. In our view, each case has to be decided on the facts and circumstances of the case. Length of the delay is a relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed periods of limitation.

17..... Once it is held that a party has lost his right to have the matter considered on merits because of his own inaction for a long time, it cannot be presumed to be non-deliberate delay, and in such circumstances of the case he cannot be heard to plead that substantial justice deserved to be preferred as against technical considerations. We are of the view that the question of limitation is not merely a technical consideration. Rules of limitation are



based on Principles of Sound Public Policy and Principles of Equity. Is a litigant liable to have a Damocles' sword hanging over his head indefinitely for a period to be determined at the whims and fancies of the opponent?"

22. We may also usefully refer to the recent decision of this Court in **Esha Bhattacharjee** (supra), where several principles were culled out to be kept in mind while dealing with such Applications for condonation of delay. Principle Nos.(iv), (v), (viii), (ix) & (x) of Paragraph 21 can be usefully referred to which read as under:

"(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

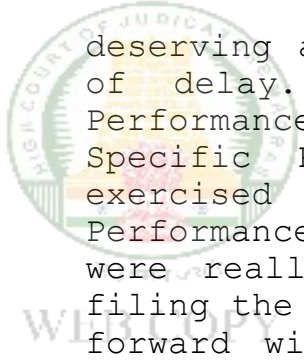
(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the Application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

23. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the Appeals and the enormous time taken in the re-filing can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with proper details as regards the date when the papers were returned for re-filing, the non-furnishing of satisfactory reasons for not re-filing of papers in time and the failure to pay the Court-fee at the time of the filing of Appeal papers on 6.9.2007, the reasons, which prevented the Respondents from not paying the Court-fee along with the Appeal papers and the failure to furnish the details as to who was their Counsel, who was previously entrusted with the filing of the Appeals cumulatively considered, disclose that there was total lack of bona fides in its approach. It also requires to be stated that in the case on hand, not re-filing the Appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to re-filing. The filing of an Application for condoning the delay of 1727 days in the matter of re-filing without disclosing reasons, much less satisfactory reasons only results in the Respondents not



deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the Suit for Specific Performance and when the Trial Court found that the claim for Specific Performance based on the Agreement was correct but exercised its discretion not to grant the relief for Specific Performance but grant only a payment of damages and the Respondents were really keen to get the Decree for Specific Performance by filing the Appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its Appeals registered."

10. In such circumstances, considering the above said decision along with the facts and circumstances of the case, I am of the view that the petitioners have not given sufficient cause for condonation of delay. Therefore, applying the maxim *Vigilantibus non-dormientibus jura subveniunt* (Law assists those who are vigilant and not those, who sleep over their rights), the petitioners are not entitled any relief. Hence, this petition is liable to be dismissed and the same is hereby dismissed. No costs.

Sd/
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

TO

1 THE PRINCIPAL DISTRICT JUDGE, TIRUNELVELI

2 THE SUBORDINATE JUDGE, SANKARANKOVIL

+1. C.C. to M/S. V.SASIKUMAR Advocate SR.No. 39879

+1. C.C. to M/S. MEENAKSHI SUNDARAM, Advocate SR.No. 39677

SMA/NGM-MP/05/08/2016 :6P/5C

ORDER DATED:27.07.2016
ORDER:
CMP(MD) No.1073 of 2016
IN
SA(MD) No.SR856 of 2010

Direction given as stated
within