



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED :14.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE S.BASKARAN

CMP.(MD) .No.2920 of 2017

and

S.A.(MD)No.SR47372 of 2016

Narayanasamy

... Petitioner

vs.

1.Kesavan

2.Murugan

... Respondents

Prayer in CMP(MD)No.2920 of 2017: Petition filed under O.41 R.3A (1) of C.P.C to condone the delay of 1736 days in filing the second appeal.

Prayer in SA(MD)No.SR47372 of 2017: Appeal sought to be filed under Section 100 of C.P.C against the judgment and decree rendered in A.S.No.23 of 2006 dated 18.10.2011 on the file of Additional District Judge/FTC, Periyakulam confirming the judgement and decree in O.S.No.152 of 1996 dated 27.09.2002 on the file of Sub-Court, Periyakulam, Theni District.

For Petitioner

: Mr.Sivakumar

For R-1

: G.Vanjinathan

ORDER

The petitioner, who was the second defendant in the suit filed by the first respondent herein seeking relief of specific performance has come forward the petition seeking to condone the delay of 1736 days in filing the second appeal.

2.The first respondent herein filed in O.S.No.152 of 1996 dated 27.09.2002 on the file of the Sub-Court, Periyakulam, Theni District, seeking relief of specific performance and possession of the property and against the second respondent herein/ first defendant and petitioner herein/second defendant. The suit was decreed as prayed for on 27.09.2002 and aggrieved over the same, the petitioner/second defendant herein preferred A.S.No.23 of 2006, on the file of the learned Additional District Judge/ Fast Track Court, Periyakulam and the same was dismissed, by a judgment dated 18.10.2011, confirming the judgment and decree of the Trial Court passed in O.S.No.152 of 1996, dated 27.09.2002

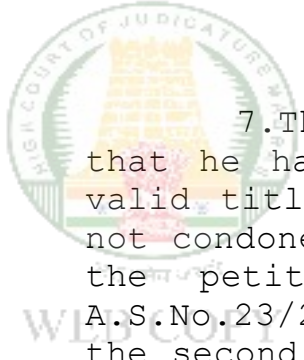
3.Challenging the said finding of the first appellate court in A.S.No.23 of 2006, the petitioner/second defendant has now come forward the petition to condone the delay of 1736 days in preferring the second appeal.



4.The learned counsel for the petitioner states that after dismissal of the first appeal in A.S.No.23 of 2006, he obtained judgement and decree copy to prefer the second appeal and handed over the same to Mr.V.S.Balamurugan, learned Advocate, Madurai and paid him the fees and also for filing second appeal. The petitioner, due to age and sickness, contacted his counsel over phone and he was given reassuring reply. However, even after a lapse of time, as the advocate was unable to give the appeal number, the petitioner went to his office and contacted him. Then, he was informed that the said advocate was appointed as Judicial Officer and left the practice. After hectic efforts, the petitioner retraced the case bundle on 04.12.2016 and immediately took steps to file this appeal. Thus, delay of 1736 days has occurred in filing the second appeal and the same is sought to be condoned.

5.On the other hand, opposing the petition, the learned counsel for the first respondent contended that the petitioner has not approached the Court with clean hands and he suppressed the materials facts. According to the first respondent/ plaintiff, the suit in O.S.No.152 of 1996 was filed by him seeking specific performance on the basis Ex.A1/sale agreement and the same was contested by the petitioner/second defendant herein, Claiming to have purchased the suit property under Ex.B1/ sale deed. However, both the courts below found that Ex.B1 is not valid document and rejected the claim of the petitioner herein. Subsequently, the first respondent/plaintiff herein pursuant to the decree passed in O.S.No.152 of 1996 got the sale deed executed through Court and filed E.A.No.228 of 2012 in E.P.No.51 of 2009 on file of Sub Court Uthamapalayam, seeking delivery of possession and same was prolonged by the petitioner for over a length of period.

6.When the delivery was about to be ordered, on the instigation of the petitioner, one Vasuki preferred a claim petition in E.A.No.156/2013 in E.A.No.228 of 2012 in E.P.No.51 of 2009, claiming that the petitioner herein has sold the property to her, vide sale deed dated 08.03.2011, during the pendency of the first appeal itself. The said E.A.No.156 of 2013 was dismissed on 18.10.2016 and the said Vasuki preferred Civil Revision petition in C.R.P(MD)No.2668 of 2016 before this court and the same was dismissed by this Court vide order dated 19.01.2017. Thereafter, another person by name S.N.Prabakaran had filed E.A.Nos.64, 65 & 66 of 2017 in E.A.No.228 of 2012 in E.P.No.51 of 2009, claiming title over the property and the same are pending. Suppressing all the above facts, the petitioner has now come forwarded with the petition seeking to condone the delay of 1736 days and he has not stated any specific reason for not filing the second appeal for more than five years. The petitioner has not explained the delay properly and the petition is filed only to harass the respondents herein. Hence the respondent seeks dismissal of the petition.



7. The learned counsel for the petitioner herein contents that he has purchased the property and the petitioner is having valid title and his rights would be prejudiced, if the delay is not condoned to enable him to file the second appeal. Admittedly, the petitioner/appellant was aware about the dismissal of A.S.No.23/2006 and he has contacted his counsel at Madurai to file the second appeal. However, in the affidavit filed along with the petition, no detail is given by the petitioner as to when he contacted his counsel and when he came to know about his counsel leaving the bar to join the judicial service. Similarly, the petitioner has not stated that as to when and by whom, he was informed about his counsel leaving the bar. He has only stated that the case bundle was retraced on 04.12.2016. The affidavit is bereft of details regarding the dates on which, the petitioner contacted his counsel or any other particulars. Admittedly, E.P. proceedings was going on and the petitioner being a party to the E.P proceedings should have been aware of the same. The learned counsel for the petitioner relied upon the ruling of this court, reported in **2015 (1) CTC 811, (Ajay Kumar Gulecha Vs. Jijayakumar and others)** to contend that right over valuable property is in issue and as such, in the interest of justice, an opportunity should be given to him to contest the matter on merits. The learned counsel for the petitioner also pointed out that in the said ruling referred to above, the delay of 1753 days has occurred in taking steps to set aside the ex parte decree and the same was allowed. In the said ruling, it is held as follows:

16. As already stated, the Law of Limitation cannot be invoked for destroying the rights of the parties. No prejudice would be caused to the petitioner, if the First respondent is given an opportunity to contest the case on merits. If the petitioner is so sure about the case that he can get favourable order on merits instead of getting ex-parte Decree, as the first respondent has denied the petitioner's, claim and many issues are to be adjudicated after full pledged trial. While comparing the loss to the petitioner and the loss to be caused to the First respondent, namely loss of property worth about crores, the delay has to be excused and the case has to be decided on merits.

17. The Trial Court in terms of the Judgment of the Hon'ble Supreme Court in Esha Bhattacharjee, took a liberal, pragmatic, justice-oriented, non-pedantic approach and condoned the delay. Interest of justice requires an opportunity to the first respondent by condoning the delay to set aside the ex-parte Decree. In view of that the order passed by the Trial Court, cannot be found fault with and the Revision is



dismissed. Considering the fact that the Suit was filed in the year 2006, the Trial Court is directed to pass appropriate orders in the setting aside petition on or before 31st July 2014 thereafter proceed with the suit after giving opportunity to the respondents to file Written Statement and dispose of the Suit within six months thereafter. The Civil Revision Petition is dismissed. No costs. Consequently the connected M.P.No.1 of 2014.

8.The learned counsel for the petitioner also contended that even assuming he has sold away the property, he can continue to contest the matter and in support of the same, relied upon the ruling of the Apex Court reported in **2015 (4) TLNJ 114 (Civil), Sharadamma Vs.Mohammed Pyrejan and others**, wherein, it is held as follows.

6.It would be open to the assigner to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute. He can continue the proceedings for the benefit of assignee. The question in more res integra.

9.Disputing the same, the learned counsel for the respondents would contend that the facts on hand is different and here, the trial court as well the first appellate court, disposed of the case, after full contest and the petitioner having knowledge of the same, has kept quiet for five years and now only comes forward with this petition to condone delay without any valid reason. The learned counsel for the respondent also pointed out that the petitioner was aware of the E.P. proceedings and the claim petition was filed by the third party, only at the instigation of the petitioner / second defendant herein. The learned counsel for the respondent would contend that each day delay has to be explained in the present case and enormous delay of 1736 has not been explained and the mere allegation that the previous counsel failed to file the appeal in time cannot be accepted and in the absence of bonafide reasons, the plea of the petitioner should not be entertained. In support of the same, he relied upon the ruling of the Apex Court reported in **2015 (5) CTC 534, (H.Dohil Constructions Company Private Limited Vs. Nahar Exports Limited)**, wherein, it is held as follows:

20.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



WEB COPY

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 the case on hand, admittedly the petitioner was aware of the disposal of first appeal on 18.10.2011 itself. Subsequently, he ought to have taken steps to file the second appeal in time, but the second appeal has been presented only on 07.12.2016. There is no acceptable explanation for such enormous delay in filing second appeal. The only averment in the affidavit that the papers were given to the counsel at Madurai and he failed to file the appeal, is not justifiable, valid reason. No details were given as to when he contacted his counsel and other particulars were not furnished by the petitioner. Further, even if the petitioner can continue to contest the matter on merits, after selling the property, he ought to have been diligent in filing the appeal in time, but he failed to do so. Further, the petitioner has not given any valid acceptable explanation for the enormous delay of 1736 days in the filing appeal. In such circumstances, following the ruling relied upon by the first respondent herein, it is clear that a such long delay ought to have been explained properly, but in the absence of any bonafide, proper explanation, by the petitioner herein, this court is not inclined to entertain the petition. The point is answered accordingly,

11. In the result, this Civil Miscellaneous Petition is dismissed. Consequently, S.A. (MD) No. SR47372 of 2016 is rejected.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar



To

1. Additional District Judge FTC,
Periyakulam.

2. Subordinate Judge, Periyakulam,
Theni.

3. The Section Officer,
Judicial Section,
Madurai Bench of Madras High Court,
Madurai.

SMI

VB/CVC/SAR1/01.03.2018/7P/4C

CMP. (MD) .No.2920 of 2017
and
S.A. (MD) No.SR47372 of 2016
14.12.2017