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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.06.2019

PRONOUNCED ON : 05.07.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

CMP No.3193 of 2018
in
SA.SR.No.91530 of 2017

K. Duraisamy gounder ... Petitioner/Appellant

Vs.

Rathinam ...Respondent/Respondent

Prayer: Civil Miscellaneous Petition filed under Order 41 Rule 3A CPC r/w Order 42 Rule 1 of CPC to condone the delay of 1646 days in filing the Second Appeal against judgment and decree dated 28.01.2013 made in A.S.No.62 of 2011 on the file of the Sub Court, Dharapuram confirming the judgment and decree dated 28.09.2011 made in O.S.No.287 of 2007 on the file of the District Munsif Court, Kangayam.

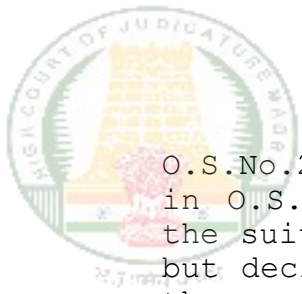
For Petitioner : Mr.N. Manokaran

For Respondent : Ms. Elizabeth Ravi

ORDER

The petition has been preferred by the petitioner for condoning the delay of 1646 days in preferring the second appeal.

2. It is found that the respondent / plaintiff has levied the suit against the petitioner in O.S.No. 50 of 2005 before the trial court for the relief of declaration and permanent injunction. The said suit has been contested by the petitioner. It is further seen that the petitioner has levied the suit in O.S.No.287 of 2007 against the respondent for permanent injunction. Furthermore, it is also seen that one Sivaselvi had levied the suit in O.S.No.74 of 2009 against the respondent for the relief of declaration. All the abovesaid three suits have been clubbed together and it is seen that the trial court was pleased to dismissed the suit laid by the petitioner in



O.S.No.287 of 2007 and also dismissed the suit laid by Sivaselvi in O.S.No.74 of 2009 and granted the relief of declaration in the suit laid by the respondent / plaintiff in O.S.No.50 of 2005 but declined the relief of permanent injunction. Aggrieved over the same, the respondent / plaintiff has preferred A.S.No.16 of 2012 challenging the declinement of the relief of permanent injunction and the petitioner has preferred A.S.No.63 of 2011. Similarly, the petitioner has also preferred A.S.No.62 of 2011 against the dismissal of his suit in O.S.No.287 of 2007. The first appellate court has dismissed all the abovesaid three appeals by way of the common judgment dated 28.01.2013. Further according to the petitioner, it is found that the respondent has preferred the Execution Petition in E.P. No.20 of 2017 for enforcing the decree.

3. It is the case of the petitioner that his wife Kamalathal was hospitalised for various ailments in the mean time and taking treatment as inpatient for several months and the petitioner had been necessitated to take her to Jipmer hospital, Puducherry, for better treatment and after the prolonged treatment, she died on 09.10.2017 and on account of the abovesaid factors and the petitioner's family position and financial constraints, he was unable to prefer the second appeal in time and therefore, the delay of 1646 days had occurred in preferring the second appeal and prays for the condonation of the same.

4. The respondent / plaintiff has challenged the reasons projected by the petitioner for the delay and disputed that the petitioner's wife was hospitalised for various ailments from the year 2013 and that the petitioner had been providing treatment to her at various hospitals as put forth by the petitioner and according to the respondent/plaintiff, the abovesaid reasons are falsely projected for the condonation of the delay. Further, according to the respondent / plaintiff, the petitioner has not placed any materials evidencing that his wife had been taking treatment at various hospitals for the period of nearly five years as put forth by the petitioner. Further, it is stated that, the petitioner, only to stifle the Execution Petition preferred by the respondent / plaintiff, has come forward with the appeal with delay with false reasons and therefore, prays for the dismissal of the petition.

5. As could be seen from the case projected by the respective parties, the petitioner has suffered decrees in both the courts. It is seen that the petitioner is aware of the dismissal of his appeal by the first appellate court on 28.01.2013 as well as the dismissal of the other appeals. It is further seen that the respondent has levied the Execution Proceedings against the petitioner for enforcing the decree.



The abovesaid Execution petition was filed in the year 2017 and the decree of the first appellate court is dated 28.01.2013. Now, according to the petitioner, as his wife was suffering from various ailments and taking treatment for nearly five years at various hospitals and further on account of his family situation and other factors he was unable to prefer the appeal in time and thereby the delay had occurred. The abovesaid reasons projected by the petitioner for the delay are being stoutly challenged by the respondent / plaintiff. Despite the same, the petitioner has not placed any material whatsoever, atleast prima facie, buttressing the reasons projected by him for the delay. It is seen that in the typed set projected by the petitioner, certain medical records are enclosed as if the treatment had been given to his wife and the abovesaid records are pertaining to the period 07.07.2017 to 15.09.2017. As rightly put forth by the respondent / plaintiff, there is no material at all, placed on the part of the petitioner, to evidence that his wife had been taking treatment at various hospitals from the year 2013 onwards till her demise. When the records put forth by the petitioner are found to be pertaining to the year 2017 and when there is no material evidencing that his wife had been taking treatment for various ailments from 2013 onwards at various hospitals, in such view of the matter, the reasons projected by the petitioner that on account of the illness of his wife and her treatment at various hospital from the year 2013, he was unable to prefer the appeal in time, cannot be accepted sans material pointing to the same. As above seen, only after the respondent / plaintiff had levied the Execution proceedings in the year 2017, it is found that the petitioner had chosen to prefer the appeal with delay. As there is no sufficient cause on the part of the petitioner for the condonation of the delay, as rightly put forth, he is unable to substantiate the same with acceptable materials, even prima facie. Therefore, the case projected by the petitioner that on account of the illness and the treatment of his wife from the year 2013, he was unable to prefer the appeal in time, cannot, at all, be countenanced, particularly, when there is no material pointing to the same and on the other hand, it is found that only to delay the execution proceedings levied by the respondent / plaintiff, it is found that the petitioner has come forward with the appeal with delay without any justifiable cause and accordingly unable to buttress the same with convincing and reliable material.

6. In the light of the abovesaid factors, no acceptable case has been projected by the petitioner for the delay and even the case projected by the petitioner had not been substantiated by him with prima facie reliable and convincing materials. In such view of the matter, I do not find any acceptance with the reasons projected by the petitioner for the delay.



7. For the reasons aforesated, the petition is devoid of merits and is accordingly dismissed and consequently, the Second Appeal in S.R.No.91530 of 2017 is rejected.

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Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
Dharapuram,
Tiruppur District.

2.The District Munsif,
Kangayam.

+1cc to Ms.Elizabeth Ravi, Advocate SR.56738

CMP No.3193 of 2018
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