

C.M.P.Nos.525 to 527 of 2014
in S.A.No.801 of 1993

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RESERVED ON : 01.07.2019

PRONOUNCED ON : 04.10.2019

RMT.TEEKAA RAMAN,J.

One B.Vellingiri Gounder has filed a suit in O.S.No.339 of 1983 on the file of the learned Principal District Munsif, Coimbatore, for specific performance. The suit was decreed on 31.12.1991. Aggrieved by the same, the defendant therein by name S.Venkatachalam has filed an appeal in A.S.No.37 of 1992 before the Sub Court, Coimbatore and the said appeal was allowed on 28.01.1993 by setting aside the judgment and decree passed by the trial Court. Hence, the present Second Appeal No.801 of 1993 was filed by the deceased B.Vellingiri Gounder. When the second appeal was taken up for hearing by this Court on 23.02.2004, it was reported on behalf of the respondent herein that the appellant B.Vellingiri Gounder died on 14.08.2003 and as the legal heirs of the deceased B.Vellingiri Gounder were not

brought on record, this Court had dismissed the second appeal as having been abated. Whiles, the legal heirs of the deceased B.Vellingiri Gounder have filed C.M.P.Nos.525 of 2014 seeking to condone the delay of 3976 days in filing the application to set aside the abatement caused due to the death of the sole appellant B.Vellingiri Gounder; C.M.P.No.526 of 2014 has been filed to set aside the abatement caused due to the death of the sole appellant B.Vellingiri Gounder and C.M.P.No.527 of 2014 has been filed to bring on record the petitioners 1 to 5 as legal heirs of the deceased sole appellant B.Vellingiri Gounder. These petitions were allowed by this Court on 19.06.2019. However, it was represented on behalf of the respondent herein that they were not given an opportunity while passing the order dated 19.06.2019. Therefore, at the instance of the learned counsel for the respondent herein, the order dated 19.06.2019 was recalled and C.M.P.Nos.525 to 527 of 2014 were restored.

2. Mr.T.V.Ramanujam, learned Senior Counsel for Mr.C.Jagadish appearing for the petitioners would submit that the petitioners were

not aware of the second appeal filed by the deceased B.Vellingiri Gounder and they came to know about the pendency of the second appeal during the year 2014 and immediately thereafter, they have filed the present petitions in C.M.P.Nos.525 to 527 of 2014. According to the learned Senior Counsel appearing for the petitioners, the delay is neither willful nor wanton, but due to the fact that the petitioners were never aware of the pendency of the second appeal filed by the deceased B.Vellingiri Gounder. In fact, the deceased B.Vellingiri Gounder never disclosed about the second appeal and he has engaged a counsel on his own.

3. The learned Senior Counsel appearing for the petitioners further submitted that the above three civil miscellaneous petitions have to be considered liberally and an opportunity has to be given to the petitioners to contest the above second appeal on merits. In this context, the learned Senior Counsel appearing for the petitioners relied on a decision of the Hon'ble Supreme Court in the case of ***N.Balakrishnan Vs. M.Krishnamurthy*** reported in **1998 (7) SCC 123**,

wherein, it was held that the length of delay is not a criteria. But the reasons assigned thereof must be liberally considered to render complete justice to the parties to the litigation. The learned Senior Counsel, therefore, prayed for allowing of the above three civil miscellaneous petitions.

4. Per contra, Mrs.V.S.Usharani, learned counsel appearing for the respondent herein would submit that the reasons assigned in the affidavits filed in support of the petitions lacks *bona fide*. The petitioners herein have fully aware of the pendency of the second appeal filed before this Court. However, it was stated as if that they came to know about the pendency of the second appeal only during November 2014, after receipt of a notice in the suit in O.S.No.968 of 2014 filed by the respondent herein in which averments were made relating to the pendency of the second appeal. It is also stated that the first petitioner herself was 46 years old at the time of the death of the deceased B.Vellingiri Gounder and she is now 57 years old. Therefore, it cannot be said that the petitioners were not aware of

the second appeal filed by the deceased B.Vellingiri Gounder. The explanation offered by the petitioners for condonation of inordinate delay of 3976 days is unexplained, vague and not *bona fide*. Therefore, the learned counsel for the respondent herein prayed for dismissal of the above three miscellaneous petitions.

5. Heard both sides.

6. The above three miscellaneous petitions have been filed seeking to condone the delay of 3976 days in filing the application to set aside the abatement caused due to the death of the sole appellant B.Vellingiri Gounder; to set aside the abatement caused due to the death of the sole appellant B.Vellingiri Gounder and to bring on record the petitioners 1 to 5 as legal heirs of the deceased sole appellant B.Vellingiri Gounder respectively. The second appeal has been filed by the deceased B.Vellingiri Gounder questioning the correctness of the judgment and decree passed by the First Appellate Court reversing the judgment and decree passed by the trial Court. The suit was filed by

the deceased B.Vellingiri Gounder for specific performance and it is the subject matter of the present second appeal. The deceased B.Vellingiri Gounder died on 14.08.2003. Admittedly, the suit was filed by the deceased B.Vellingiri Gounder against the respondent herein. The contention of the petitioners is that they were not aware of the institution of the second appeal by the deceased B.Vellingiri Gounder and they came to know about the pendency of the second appeal only on receipt of notice in the suit filed by the respondent herein. The said explanation offered by the petitioners appears to be lacks *bona fide*.

7. It is seen from the records that the original appellant B.Vellingiri Gounder has filed a suit in O.S.No.339 of 1983 on the file of the Principal District Munsif Court, Coimbatore, seeking the relief of equitable relief of specific performance on the basis of the alleged sale agreement dated 23.09.1982. The suit appears to have been decreed on 31.12.1991 and as against which, the defendant appears to have filed an appeal in A.S.No.37 of 1992 on the file of the Sub Court,

Coimbatore. On consideration of oral and documentary evidence, the appeal was allowed by the Appellate Court and consequently, the suit was dismissed on 28.01.1993. The second appeal was preferred by the said B.Vellingiri Gounder in S.A.No.801 of 1993 and the sole appellant/plaintiff died on 14.08.2003. This Court, dismissed the appeal on 25.02.2004 as abated. The present petitions have been filed after lapse of ten years and 326 days.

8. The respondent herein has filed a counter affidavit stating that the petitioners herein ought to have given an explanation for each and every day of the delay which starts from 25.02.2004. In the present case, the petitioners herein have alleged that they came to know about the proceedings of the second appeal filed by their deceased father as they collected documents from their old records in lieu of filing written statement in a suit in O.S.No.968 of 2014 which was filed by the respondent herein before the District Munsif Court, Coimbatore. As per the version of the petitioners, they came to know about the proceedings only in the year of 2014 that too after the

commencement of suit proceedings filed by the respondent in O.S.No.968 of 2014. The above said suit seeking for mandatory injunction as well as recovery of possession was filed only against one S.Sundarapandian and S.Saveetha, who are encroachers of the petitioners' land in S.F.No.456/1-B of Kattampatti Village, Annur Taluk, Coimbatore District and the petitioner's father has been arrayed as 5th defendant and no claim has been prayed against him in the said suit. The petitioners ought to have specifically plead sufficient cause and reason for the inordinate delay of 11 years in filing the above said applications. But the petitioners have never given any reason or sufficient cause or whatsoever in the application to supporting their affidavit to condone the delay of 3976 days. The petitioners have nowhere mentioned about reference alleged to be found in the recent suit in O.S.No.968 of 2014. The deceased B.Vellingiri Gounder had two sons and one daughter. The averment of the petitioners that the legal heirs of deceased B.Vellingiri Gounder were not aware of the proceedings filed by their father is created only for the purpose of the above petitions.

9. Yet another point is that in the counter affidavit, it is specifically stated that all the sons including the petitioners herein are staying in the same village and the disputed property in the second appeal is situated only adjoining to the properties of the petitioners and as such, the allegation of the petitioners that they are ignorant of the second appeal proceeding filed by their father is unbelievable and unsustainable on fact as well as in law. Thus, taking into consideration the entire facts and circumstances of the case, no proper explanation has been given for the long delay of 10 years and 326 days roughly 11 years.

10. In the absence of any positive averments regarding the reason for the delay besides in view of the fact that even in the year 2014, the respondent herein has filed a suit against some other encroachers in the property wherein B.Vellingiri Gounder was arrayed as fifth defendant and he had knowledge and as well as in entirety of the circumstances, I am not inclined to accept the contention of the

learned Senior Counsel appearing for the petitioners. Accordingly, C.M.P.No.525 of 2014 filed for condoning the delay of 3976 days is dismissed. Consequently, C.M.P.Nos.526 and 527 of 2014 are also dismissed.

04.10.2019

Index : Yes
Internet : Yes
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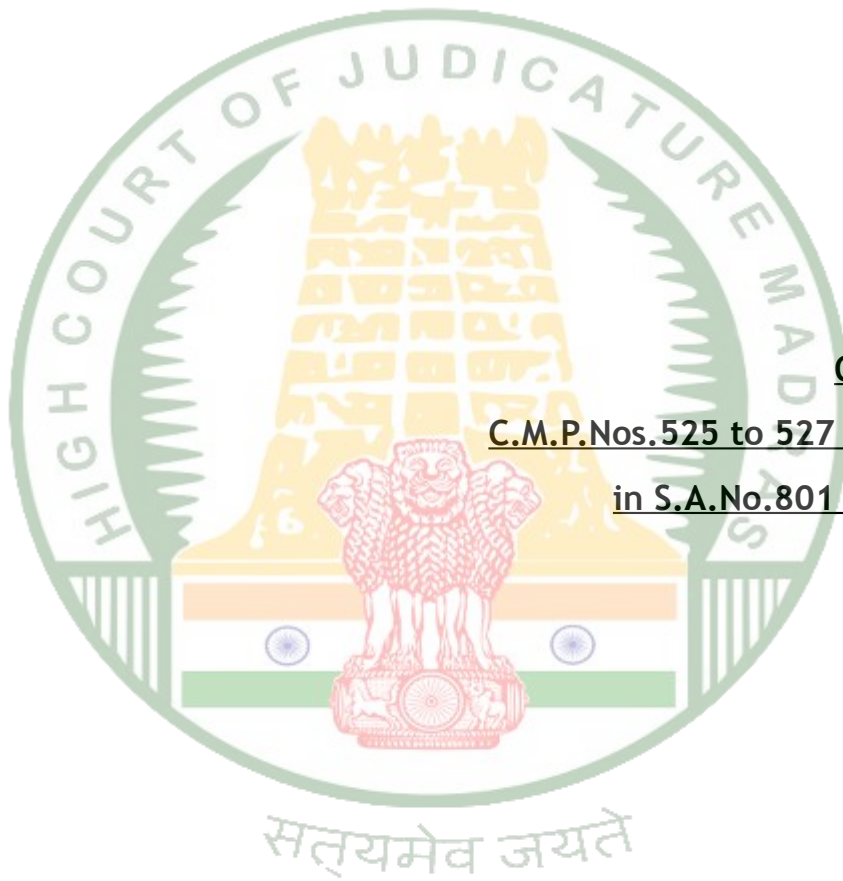


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Order in
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