

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.P.No.13898 of 2019

in

S.A.SR.No.39401 of 2019

1.Kaliannagounder

2.Mylsamy

..Appellants/Cross Appellants/
Defendants 1 & 2

Vs.

1.Santhamani

.. 1st Respondent/Cross 1st Respondent/
Plaintiff

2.Dhanalakshmi

... 2nd Respondent/Cross 2nd Respondent/
3rd Defendant

Prayer:

Condone delay petition filed under Order XLI Rule 3(a) of the Code of Civil Procedure r/w. Order XLII Rule 1 of the Code of Civil Procedure praying to condone the delay of 2256 days in filing the second appeal.

For Appellants : Mr.K.Magalingam

For Respondents : Mr.S.A.Mohamed Mubarak

J U D G M E N T

This application has been filed seeking condonation of delay of 2256 days in filing the second appeal.

2. Before going into the reasons for the delay, it has to be seen as to whether the appeal itself is necessary, in view of the following facts. The first respondent herein, Santhamani filed a suit in O.S.No.102 of 2010 seeking partition and separate possession of her 1/4th share in the suit properties. The suit itself was based on the claim that the suit properties are the ancestral properties of the joint family of which, the first defendant Kaliannagounder / first appellant in this appeal was the Kartha. The defendants 2 and 3 are the son and other daughter of Kaliannagounder. According to the plaintiff, upon

enactment of Act 39 of 2005, she would become a Co-parcener along with her father and the defendants 2 and 3 and as such she would be entitled to partition and separate possession of her 1/4th share. Certain settlement deeds were claimed to be invalid.

3. The defendants resisted the suit contending that the suit properties are the self-acquired properties of Kaliannagounder and as such neither plaintiffs nor the defendants 2 and 3 would acquire right by birth. The Trial Court, upon consideration of the evidence on record concluded that the suit properties are ancestral properties in the hands of Kaliannagounder. However, the Trial Court concluded that the plaintiff would not be entitled to claim partition during the life of her father. On the said conclusion, the Trial Court dismissed the suit. Aggrieved, the plaintiff preferred an appeal in A.S.No.27 of 2012. The defendants preferred a cross-objection challenging the finding of the Trial Court on the character of the properties.

4. The lower Appellate Court affirmed the finding of the Trial Court with reference to the character of the properties in the hands of Kaliannagounder. It, however, reversed the conclusion of the Trial Court that the plaintiff cannot seek partition during the life time of her father. As a result, the appeal filed by the plaintiff in A.S.No.27 of 2012 was allowed and the cross-objections were dismissed. Aggrieved by the decree namely, the preliminary decree for partition of the 1/4th share of the plaintiff, the defendants had filed an appeal in S.A.No.276 of 2013. No appeal was filed against the dismissal of the cross-objections. It appears that an objection was taken at the time of hearing of the appeal in S.A.No.276 of 2013 that in the absence of the challenge to the dismissal of the cross-objections, the appeal filed by the defendants is not maintainable. In order to overcome the technical objection taken, the present appeal has been filed. I do not think that the technical objection that has been raised by the respondents in S.A.No.276 of 2013 could be sustained. There was only one suit for partition and several issues were decided. One of the issues was as to the character of the property. The Trial Court decided the said issue in favour of the plaintiff but however, it dismissed the entire suit on a decision on Issue No.2 as to whether the plaintiff is entitled to seek partition during the life time of her father or not. Aggrieved by the dismissal, the plaintiff had preferred an appeal. The finding relating to the character of the property alone was made the subject matter of the cross-objections. The lower Appellate Court had affirmed the finding of the Trial Court with reference to the character of the properties while reversing the finding of the Trial Court regarding the entitlement of the plaintiff to sue for partition.

The resultant position is that there is one single decree by which the suit for partition has been decreed. The defendants have filed an appeal against the said decree in S.A.No.276 of 2013 and the same is pending. The question as to whether when two appeals were filed against one suit and they are disposed off by the Appellate Court is one way or the other, whether two second appeals are necessary is no longer res-integra. This Court in Vembayee Ammal and Another Vs. Singaravelu Udayar and Another reported in 2011 (3) MWN (Civil) 509 has considered the very question and concluded that one appeal would be sufficient. While doing so, this Court had after referring to various decisions on the question of maintainability of the single appeal had observed as follows:-

"27. A balance has to be struck. The meaning attributed to the words used in a statute cannot be given a total go-by under the pretext of ushering in the object. There should be reasonable interpretation inconcinnity and in commensurate with the object, when there is ambiguity in the statute. Accordingly, if viewed, allowing the defendants to prefer Appeal would further the cause of justice, as otherwise, the defendants would be put to inconvenience and considerable financial hardship, which would be anathema to the justice and fair play.

28. Technicalities are hand maids of justice and here I am of the considered view that the factual scenario are in support of filing of one Second Appeal rather than two Second Appeals. If the Court ultimately decides that in this case the Plaintiffs do have title over the suit property, then automatically they would be getting both the reliefs of declaration and possession. But on the other hand, if the plaintiffs could not get the declaratory relief, automatically and as a sequel they could not get the relief of possession also. When such is the legal and factual position, allowing the Defendants to file one Appeal as against the common judgment and the two decrees of the First Appellate Court would be justified and accordingly, it is ordered."

5. The learned counsel appearing for the respondents would however invite my attention to the judgment of the Hon'ble Supreme Court in Badri Narayan Singh Vs. Kamdeo Prasad Singh and Others reported in AIR 1962 SC Page 338. The learned Judge, who dealt with Vembayee Ammal's case had also taken note of the said judgment and had concluded that the observations of the Hon'ble Supreme Court made in the above judgment would not apply to a case where, the result of the disposal of the two appeals is one

decree. Hence, I find that the present appeal itself is wholly unnecessary and Appellants/Defendants in O.S.No.102 of 2010 can challenge the findings of the lower Appellate Court regarding the character of the property also in the appeal filed by them against the decree in A.S.No.27 of 2012.

6. In view of the same, this civil miscellaneous petition is dismissed as unnecessary and the S.A.SR.No.39401 of 2019 will stand rejected. It is made clear that the Appellants in S.A.No.276 of 2013 would be entitled to canvass the correctness of the findings of the Courts below with reference to the character of the property also in the said appeal in as much as the same forms part of one single decree passed by the lower Appellate Court.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

kkn

To

1. The Principal District & Sessions Court,
Erode.
2. The Sub Court,
Gobichettipalayam.

+1cc to Mr.S.A.Mohamed Mubarak, Advocate, S.R.No.92653

C.M.P.No. 13898 of 2019
in S.A.SR.No.39401 of 2019

RJI (CO)
CS/06/12/2019

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