

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.08.2019

PRONOUNCED ON : 27.08.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

C.M.P. No. 17380 of 2019

in

A.S. SR. No. 76041 of 2019

C.Nagappan (Deceased)

1. N.Backyanathan

2. N.Sampathnathan

3. N.Jayavel

4. N.Bhaskar

... Petitioners

(Cause title accepted vide order
of the Court dated 02.08.2019
made in C.M.P. No.13809 of 2019
in A.S. SR.No.76041 of 2019)

Vs.

S.Kothandapani

... Respondent

Prayer in C.M.P. No. 17380 of 2019:- Civil Miscellaneous Petition
filed under Section 5 of the Limitation Act 1963 to condone the delay
of 5478 days in the filing the Appeal.

For Petitioners : Mr. Manoj Sreevatsan

For Respondent : Mr. K.Selvaraj

ORDER

The petition has been laid to condone the delay of 5478 days in filing the Appeal against the ex-parte judgment and decree dated 19.03.2004, passed in O.S.No.2558 of 2003, on the file of the VI Additional Judge, City Civil Court, Chennai.

2. The petitioners are found to be the legal representatives of the deceased C.Nagappan.

3. As could be seen from the averments contained in the petition and the counter, it is found that the deceased C.Nagappan, namely, the father of the petitioners had levied the suit in O.S. No.1270/2001, on the file of the City Civil Court, Chennai against the respondent for permanent injunction and for the return of the original documents. The abovesaid suit had been contested by the respondent by filing a written statement. It is further seen that the respondent had filed a suit in O.S.No.2558 of 2003 against Nagappan, on the file of the City Civil Court, Chennai for specific performance. Admittedly, the abovesaid suit in O.S. No.2558 of 2003 ended ex-parte in favour of the respondent on 19.03.2004. It is found that Nagappan had preferred a petition in I.A. No.14096/2004 to set aside the ex-parte decree. The

abovesaid petition has been ordered on the payment of Rs.200/- by the Court. Inasmuch as the cost had not been paid, the abovesaid petition had been dismissed on 01.02.2005. To restore the said petition, it is found that Nagappan had preferred another petition in I.A. No.15602/2005 and the said petition has also been allowed by the Court on the payment of Rs.200/-, however, Nagappan failed to adhere to the said direction and resultantly, the petition in I.A. No.15602/2005 had also come to be dismissed on 25.08.2006.

4. It is further seen that the suit laid by Nagappan in O.S.No.1270 of 2001 had come to be dismissed for default on 07.02.2005 and no steps had been taken by Nagappan to restore the said suit as per law.

5. It is further seen that the respondent had levied the execution petition in E.P. No.1861/2007 against Nagappan to execute the decree obtained by him in O.S.No.2558/2003. After service of notice on Nagappan, he had entered appearance in the matter. Finally, it is seen that the Executing Court had ordered the execution of the sale deed in favour of the respondent on 28.10.2008 and the sale deed had also come to be registered in favour of the respondent.

6. It is further noted that Nagappan had preferred a petition in I.A. No.20467/2009 in O.S. No.2558/2003 to set aside the order dated 25.08.2006, passed in I.A.No.15602/2005. The abovesaid petition had come to be dismissed on merits on 24.08.2010.

7. Nagappan had died on 12.10.2010 and after his demise, it is found that the petitioners had preferred a suit in O.S.No.846 of 2013, on the file of the 13th Assistant Judge, City Civil Court, Chennai to declare that the ex-parte judgment and decree dated 19.03.2004, passed in O.S. No.2558/2003, on the file of the VI Additional Judge, City Civil Court, Chennai is null and void and not binding them, to declare that the sale deed executed by the Court Officer, IX Assistant Judge, City Civil Court, Chennai, vide document No.451 of 2009 in favour of the 1st defendant is null and void and inoperative in law and to grant permanent injunction restraining the respondent, his men, agents, representatives and legal heirs from dealing with the property in any manner by alienation or by way of mortgage, sale etc. It is found that the abovesaid suit was contested by the respondent by filing a written statement and on that basis, the parties went for trial and accordingly, both parties had adduced evidence in support of their respective contentions. It is found that the order passed in I.A.

No.20467/2009 in O.S. No.2558/2003 has been marked as Ex.A12 and as above pointed out, the abovesaid petition had been laid by Nagappan to set aside the order of dismissal dated 25.08.2006, passed in I.A. No.15602 of 2005. On an analysis of the materials placed on record by the respective parties, the Court was pleased to dismiss the suit laid by the petitioners in O.S. No.846 of 2013 on 11.01.2018. It is found that the petitioners had preferred an appeal challenging the same in A.S. No.203/2018 and the abovesaid appeal had also come to be dismissed on merits on 29.03.2019. The petitioners had not preferred any appeal against the judgment and decree passed in A.S.No.203/2018. Hence, it is found that the judgment and decree passed in the abovesaid first appeal has become final.

8. It is found that in the Execution Proceedings laid for recovery of costs, the petitioners had been impleaded as the legal heirs of Nagappan and in that process, the petitioners had preferred E.A.No.1469 of 2013 under Section 47 of C.P.C. which was finally dismissed on 21.03.2014 and pursuant to the same, it is found that the petitioners had deposited the costs in the Execution Proceedings and not challenged the same.

9. In the light of the abovesaid factors, it is found that the challenge made by the petitioners qua the ex-parte decree passed in O.S. No.2558/2003, dated 19.03.2004, in O.S. No.846/2013 and in A.S.No.203/2018 had been rejected and when the abovesaid rejection has not been further questioned by the petitioners, as per law, it is found that the same would be binding upon them.

10. In the light of the abovesaid factors, to say that as the petitioners had been advised to prefer the appeal against the ex-parte decree dated 19.03.2004, passed in O.S. No.2558/2003 and hence, the petitioners had been necessitated to institute the present appeal with reference to the same and thereby, on account of the abovesaid factors, the delay of 5478 days had occurred in preferring the appeal and accordingly, to condone the same, the present petition has been laid by the petitioners.

11. In the light of the abovesaid factors, when it is seen that the deceased Nagappan himself had been challenging the ex-parte decree dated 19.03.2004, in O.S. No.2558/2003 in various manners and the same having ended in vain and when it is further noted that the ex-parte decree had been put in execution by the respondent and not only

that when it is further noted that the petitioners have also put the challenge to the ex-parte decree abovestated in O.S. No.846/2013 and had invited the Court to pass orders on the same on merits and the same ended in dismissal and the appeal preferred by the petitioners also ended in rejection, in such view of the matter, the present reasonings given by the petitioners that as they have been advised to to prefer the first appeal against the ex-parte decree dated 19.03.2004, they had been necessitated to institute the appeal with delay, as such, cannot be countenanced in any manner. When the challenge made by the deceased Nagappan and the petitioners qua the decree dated 19.03.2004 had resulted in rejections on all grounds, to say that as the petitioners are advised to prefer the present appeal, hence, they had been required to prefer the appeal with delay cannot at all be countenanced, particularly, when their is delay of more than 15 years in preferring the appeal. In such view of the matter, it is found that as rightly contended by the respondent's counsel, when the ex-parte decree dated 19.03.2004 has been confirmed in the suit laid by the petitioners and as well as in A.S.No.203/2018 and the petitioners had exhausted their remedy in filing the suit and appeal and though it may be open to the petitioners to adopt two concurrent remedies and they having adopted one remedy as above pointed out,

they cannot be held entitled to condone the time taken by them with reference to the same as the cause for the delay in preferring the first appeal, the other remedy and accordingly, it is seen that only with a view to completely harass and put the respondent to loss and hardship and to ensure that the respondent does not enjoy the fruits of the decree one way or the other and also by misusing the process of the Court, it is found that the deceased Nagappan as well as the petitioners had been delaying the matter endlessly and in such view of the matter, when they had chosen to avail the remedy open to them and proceeded with the same, resultantly, it has to be held that by way of their conduct, they had chosen to abandon the other remedy available to them and in such view of the matter, when their abovesaid conduct show their deliberate inaction and voluntary abandonment of the right of appeal against the ex-parte decree dated 19.03.2004, passed in O.S.No. 2588/2003, in such view of the matter, the huge and inordinate delay projected by the petitioners with reference to the same cannot at all be countenanced.

12. The petitioners' counsel, in support of his contentions, placed reliance upon the decisions reported in **MANU/UP/0384/1970 (Satish Chandra and Ors. Vs. State of Utter Pradesh)**,

MANU/TN/1715/2011 (Meenakshisundaram Textiles Vs. Valliammal Textiles Ltd.), (2012) 11 SCC 574 (Badami (deceased) by her LR Vs. Bhali), (2010) 14 SCC 38 (Ramjas foundation and another Vs. Union of India and others) and (1994) 1 SCC (S.P. Chengalvaraya naidu (dead) by Lrs. Vs. Jagannath (dead) by Lrs and others). Per contra, the respondent's counsel, in support of his contentions, placed reliance upon the decision reported in **1997 (III) CTC 453 (S.Rajalakshmi vs. Ambiga Deivasigamani).** The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

13. Considering the abovesaid factors, in toto, I do not find any bonafides in the preference of the appeal by the petitioners challenging the decree dated 19.03.2004, passed in O.S. No.2558/2003 and accordingly, I do not find any valid cause for condoning the delay of 5478 days in preferring the appeal on the part of the petitioners and in such view of the matter, the petition laid by the petitioners for the condonation of the abovesaid delay is found to be totally devoid of merits.

14. In conclusion, C.M.P. No. 17380 of 2019 is dismissed.

Resultantly, A.S. SR. No. 76041 of 2019 is rejected.

27.08.2019

Index : Yes/No
Internet:Yes/No
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To

The Section Officer,
VR Section,
High Court, Madras.



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C.M.P. No. 17380 of 2019 in
A.S. SR. No. 76041 of 2019

T.RAVINDRAN,J.

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Pre-delivery Order in
C.M.P. No. 17380 of 2019
in
A.S. SR. No. 76041 of 2019

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