

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.09.2019

CORAM

THE HON'BLE MR. JUSTICE **R.PONGIAPPAN**

CRP.NPD.No.2791 of 2014

1.A.Pavalavalli
2.P.Raju

..Petitioners

Vs.

1.P.Loganathan
2.L.Seenivasan

..Respondents

PRAYER:

The Civil Revision Petition is filed under Section 115 of the Civil Procedure Code to set aside the fair and decreetal order dated 25.04.2014 passed in I.A.No.76 of 2012 in A.S.No. Of 2012 on the file of the learned Subordinate Judge, Sankagiri.

For Petitioners : Mr.V.V.Sairam

For Respondents : Mr.P.Valliappan

ORDER:

Aggrieved over the order dated 25.04.2014 made in I.A.No.76 of 2012 in unnumbered A.S.No. of 2012, the petitioners / appellants preferred this Civil Revision Petition.

2.The petitioners as a plaintiffs filed a suit in O.S.No.18 of 2003 as against the respondent / defendant on the file of the learned District Munsif, Sankagiri. After elaborate trial the learned District Munsif, Sankagiri had dismissed the suit on 14.09.2009. As against the said judgment and decree, the petitioners instructed the lower court counsel to file an appeal before the learned Subordinate Judge, Sankagiri. As per the instruction counsel has also filed appeal but for some defects the same was returned. Subsequently, the appeal has not been re-presented within the stipulated period. Therefore, along with the appeal memorandum the petitioners filed an interlocutory application in I.A.No.76 of 2012 and prayed to condone the delay of 854 days in re-presenting the appeal memorandum. After affording opportunity to the respondent the learned Subordinate Judge, Sankagiri on 25.04.2014 dismissed the application filed by the petitioners. Feeling aggrieved over the same, the petitioners are before this Court with this Civil Revision Petition.

3.Today when the petition is came up for hearing, both the counsel appearing for the petitioners and the respondents are present.

4.The learned counsel appearing for the appellants would contend that immediately after disposal of the suit, the petitioner filed

an appeal memorandum. After receiving the said appeal, the Registry attached with the learned Subordinate Judge has returned the appeal memorandum after pointing out some mistake found in the appeal memorandum. The returned appeal memorandum was received by the Advocate only on 06.04.2010. Subsequently since the appeal memorandum was mixed with other case records, the learned counsel appearing for the petitioners has not re-presented the same within the time fixed by the Court. Only in the said circumstances the petitioners without any option filed this application for condoning the re-presentation delay of 854 days. So, the mistake committed by the petitioners is a bonafide one. But, the learned trial Court without appreciating the same had dismissed the application filed by the petitioners.

5. On the other hand, the learned counsel for the respondents would contend that before the trial court, the suit filed by the first respondent in O.S.No.192 of 2001 and the suit filed by the petitioners in O.S.No.18 of 2003 are jointly tried and common judgment was pronounced. In both the suits the subject matter of the suit property is one and the same. Fortunately O.S.No.192 of 2001 is decreed and the injunction was granted in favour of the plaintiff. On the other hand

O.S.No.18 of 2003 which filed by the petitioner was dismissed. After disposal of the above suits, the petitioners herein have not challenged the findings made in O.S.No.192 of 2001. In otherwise, he has challenged the dismissal order passed in O.S.No.18 of 2003. Therefore, non challenging the findings of O.S.No.192 of 2001 is a hurdle to decide the appeal which is in respect of O.S.No.18 of 2003 filed by the petitioners. Therefore, he prayed for the said score alone, the application filed by the petitioners deserves to be dismissed.

6.Submissions made by the counsel appearing on either side is considered.

7.The issue in this Civil Revision Petition is in respect to the impugned order passed in I.A.No.76 of 2009 alone. In respect to the contention raised by the respondents, first of all we have to decide as to whether non preferring of appeal in connected suit is a hurdle to the present appeal or not. It is admitted that in respect to the findings arrived in a suit which was filed along with the suit pertains to the Civil Revision Petition, no appeal has been preferred. Since, the subject matter of both the suits and the issue involved in both the suits are one and the same, it is relevant to see the judgment of **Muniammal**

Vs. Annadurai(deceased) and 7 others reported in **2008 (4) CTC 589**, in which this Court has held as follows:

"10. A perusal of those judgments and more specifically, the excerpts extracted supra would unambiguously highlight the point that out of two appeals filed, if one appeal for any reason was dismissed either on technical grounds or on merits, the same would constitute an embargo as Res judicata for the appellant in one other appeal involving the same issues to proceed further de hors the judgment in the earlier appeal. There is no quarrel over such a proposition. It has become a settled law. However, it has to be seen as to whether the previous judgment in A.S.No.98 of 1990 passed by the Principal District Judge, Vellore on 08.11.2007 would be an embargo for Muniammal herein to proceed with her appeal questioning the validity of the Will - Ex.B.1."

8. Therefore, no doubt non preferring the appeal against the judgment rendered in O.S.No.192 of 2001 is an embargo for the petitioners 1 to 5.

9. In respect to the delay, the only reason stated by the petitioner is the returned appeal memo is mingled with other case records. If it is true, we cannot blame the petitioner for the wrong committed by the advocate. But in the affidavit filed by the petitioner, he has not stated anything about the date on which the appeal memorandum was preferred, date of return, time fixed for

re-presentation. In fact, the said reason stated by the petitioner is not supported by the documents. It is the duty of the petitioner to watch the day to day proceedings in the appeal court.

10.As per the maxim, the person who slept over the rights cannot be entitled to any relief. It is true the order passed for the relief prayed by the petitioners is discretionary one, but for getting the same the petitioners must act with vigil and care. In this case, the petitioner approached this Court not with a bonafide reasons. It cannot be the reason that the appeal memorandum was mingled with other case record for the period of two years. Therefore for the reason that the petitioners have not stated bonafide reasons for this petition and for the reason that non filing of appeal in respect to connected suit would fatal to the petition filed by the petitioners.

11.In view of the above reasons, the Civil Revision Petition is dismissed. No costs.

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Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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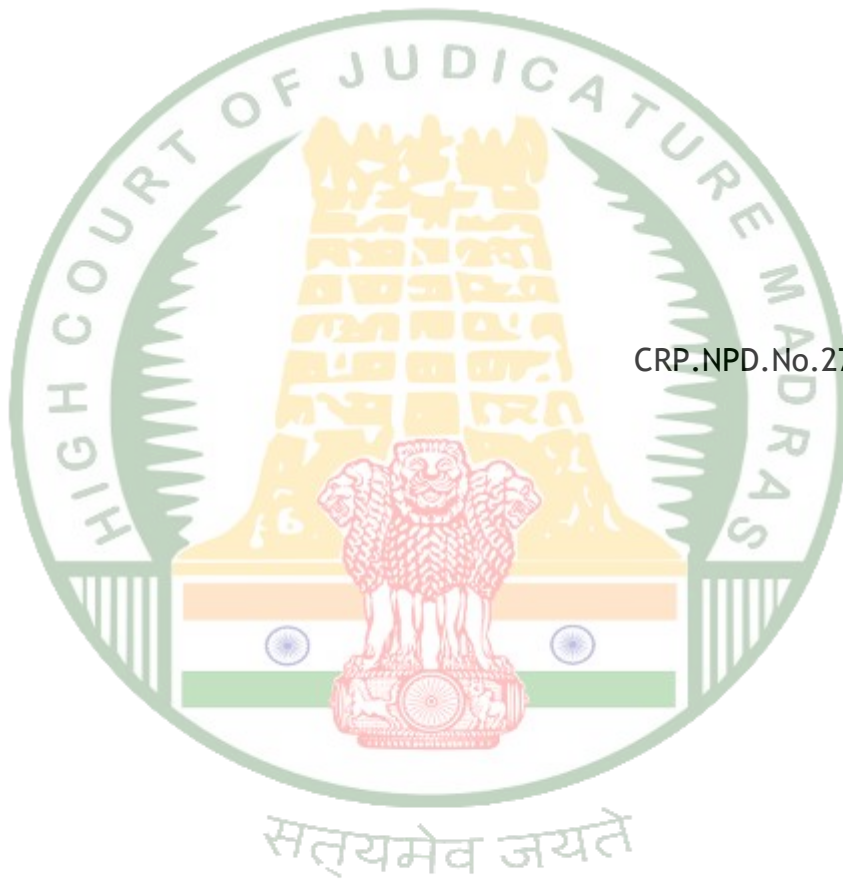
To
The learned Subordinate Judge,
Sankagiri.



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R.PONGIAPPAN,J.

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