

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.P.No.19589 of 2018
in Rev.Appl.SR.No.112646 of 2018

1.Ramasamy Nadar(deceased)
2.Chinnapillai
3.Kanthan @ Chinnapaiyan
4.P.Murugesan
5.Chinnathambi

.. Petitioners

Vs.

1.Alamelu
2.Govindaraj
3.Bhoopathi
4.Palaniammal
5.Amaravathi
6.Kathamuthu
7.Natarajan
8.Ganesan

.. Respondents

PRAYER: C.M.P.No.19589 of 2018 is filed to condone the delay of 56 days in filing the above Rev.Appl.SR.No.112646 of 2018.

Rev.Appl.SR.No.112646 of 2018 is filed under Order 47 Rule 1 of C.P.C read with Section 114 of C.P.C, to review the judgment dated 16.07.2018 made in S.A.No.31 of 2016 on the file of this Court.

For Petitioners : Mr.M.Elango

ORDER

This Civil Miscellaneous Petition is filed to condone the delay of 56 days in filing the above Review Application.

2(i).The petitioners in the affidavit filed in support of the above Civil Miscellaneous Petition has stated that the father of their counsel was hospitalized for brain stroke at K.M.C.H, Coimbatore and he could not appear before the Court to conduct the Second Appeal. They have received all the papers with change of vakalat on 15.07.2018 and requested their counsel to get one more adjournment to engage a new counsel. On 18.07.2018, they engaged another Advocate viz., Mr.Prabhakaran and came to know that the Second Appeal was dismissed on 16.07.2018 itself. According to the petitioners, their counsel did not appear and argue the matter and his friend Mr.Ponraj, Advocate appeared on 16.07.2018 and had submitted that the counsel has given change of vakalat and sought adjournment by a week. In spite of the same, this Court dismissed the Second Appeal on merits. This Court ought to have dismissed the Second Appeal for non-prosecution as per Order XLI Rule 17 explanation. The petitioners have raised five

other Substantial Questions of Law apart from the Substantial Questions of Law framed by this Court. The petitioners must be given an opportunity while deciding the case. Mr.Ponraj, learned counsel did not know the facts of the case and did not argue the matter on that day, except seeking adjournment. The petitioners made a request to the present counsel to apply before the Registrar for getting CCTV footage of the Court hall. The judgment dated 16.07.2018 was made in violation of the above explanation, the same should be treated as an order passed for default and Second Appeal must be re-admitted as per Order XLI Rule 19 of C.P.C. The petitioners have also filed two applications to declare that Second Appeal was dismissed for default and to set aside the judgment dated 16.07.2018. The said applications are pending before the Registry. Without prejudice to the above said applications, the petitioners have filed the Review Application. The memorandum of grounds in the Review Application may be treated as part and parcel of this petition. There is an error apparent on the face of the judgment and hence, the petitioners have filed Review Application.

2(ii).According to the petitioners, the copy of the judgment was made ready on 24.09.2018 and due to their pre-occupation in

agriculture they could not file the Review Application in time and the delay of 56 days in filing the Review Application has occurred, which is neither wilful nor wanton. The learned counsel appearing for the petitioners referred to grounds of Review and contended that D.W.1 did not admit that the respondents/plaintiffs are in possession and enjoyment of two acres and there is an error apparent on the record in the finding that D.W.1 admitted the possession and enjoyment of the respondents/plaintiffs. This Court erred in holding that there is no complicated facts in the suit and there is no necessity to seek relief of declaration in the suit filed by the respondents. No opportunity was given to the petitioners' counsel while deciding the Second Appeal. This Court has not given any finding on the contentions of the petitioners. This Court has committed an error in not considering all the Substantial Questions of Law raised by the petitioners.

2(iii).In support of his contentions, the learned counsel appearing for the petitioners relied on the judgment reported in **(2009) 9 SCC 689 [Shub Karan Bubna Alias Shub Karan Vs. Sita Saran Bubna and others]:**

"5.'Partition' is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners,

resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6.*A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother."*

3. Heard the learned counsel appearing for the petitioners as well as the .. and perused the materials available on record.

4(i). From the materials on record, it is seen that Mr. Ponraj, Advocate appeared before this Court representing Mr. Elango, counsel on record and argued the Second Appeal on behalf of the

petitioners. After considering the averments made on behalf of the petitioners as well as the counsel for respondents 1 to 5, this Court decided the Second Appeal on merits and also decided the Substantial Questions of Law framed by this Court at the time of admission on 06.09.2016 against the petitioners. No additional Substantial Questions of Law were framed at the time of admission and no such additional Substantial Questions of Law arises for consideration in the Second Appeal after admission of Second Appeal and at the time of hearing.

4(ii).As far as the error with regard to admission of D.W.1 is concerned, the Trial Court in paragraph 12 Issue No.2 has given categorical finding that the defendants in the cross examination admitted that the plaintiff constructed the house in the suit property and was residing in the said house. Ramasamy Nadar [1st defendant examined as D.W.1] who died pending Second Appeal deposed as D.W.1 and admitted the possession of respondents/plaintiffs. Mr.Ponraj, representing Mr.Elumalai counsel for the petitioners argued the matter on merits and this Court has considered his contention as well as the arguments of the learned counsel for the respondents 1 to 5 and dismissed the Second Appeal on merits. The

judgment relied on by the learned counsel for the petitioner is not relevant to the facts of the present case. The contentions of the learned counsel for the petitioners raised in the grounds of Review Application and averments in the affidavit are not valid for reviewing the judgment dated 16.07.2018. The petitioners have stated that due to their pre-occupation in agriculture, they could not file Review Application in time and delay of 56 days has occurred. The said reason is not sufficient and valid for condoning the delay.

5. For the above reason, the Civil Miscellaneous Petition is dismissed and the Review Application is rejected at the SR stage itself. No costs.

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V.M.VELUMANI, J.

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