



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Monday, the Twenty Seventh day of January Two Thousand Twenty

PRESENT

The Hon`ble Mr.Justice N.SATHISH KUMAR

CMP (MD) No.2035 of 2019

IN

AS (MD) No.SR41044 of 2010

RETHNAVEL

... PETITIONER/APPELLANT/DEFENDANT

Vs

DHEENA DHAYABARAN

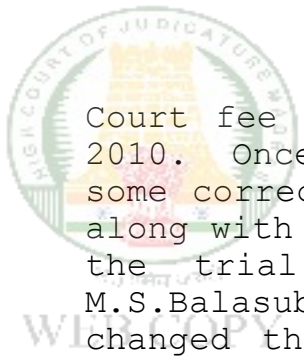
... RESPONDENT/RESPONDENT/PLAINTIFF

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioner to reconstruction of Frist Appeal case bundle in AS SR No.41044 of 2010 on the file of this Honble Court against the judgment and decree dated 07.07.2010 made in OS No.28 of 2008 on the file of the Principal District Court, Ramanathapuram District.

ORDER : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.R.UDHAYAKUMAR, Advocate for the petitioner and of MR.PT.S.NARENDRAVASAN, Advocate on behalf of the Respondent, the court made the following order:-

This application has been filed to reconstruct the appeal papers, which was said to be misplaced in the office of the learned counsel.

2.It is the contention of the petitioner that as against the decree and judgment dated 07.07.2010 passed in O.S.No.28 of 2008 filed for specific performance, an appeal was presented in A.S.(MD) No.S.R.41044 of 2010. The above appeal was presented by one Advocate, namely, K.Vellaisamy on 24.09.2010 with Court fee of Rs.1000/- alone in A.S.(MD)No.S.R.41044 of 2010. Thereafter, the said Vellaisamy died, within few months. Therefore, the petitioner has engaged another Advocate, namely, M.S.Balasubramaniya Iyer for conducting the case on his side. At that time, the petitioner has found that the appeal was returned. Thereafter, the appeal once again re-presented and Court fee of Rs.1,79,000/- has been paid by the said Advocate M.S.Balasubramaniya Iyer. Accordingly, the total



Court fee of Rs.1,80,000/- has been paid in A.S.(MD)No.SR.41044 of 2010. Once again, the appeal was returned on 30.05.2017, mentioning some corrections in appeal papers. After return, the appeal papers along with original and certified copy of the decree and judgment of the trial Court were misplaced in the office of the said M.S.Balasubramaniya Iyer. Therefore, again the petitioner has changed the counsel. The new counsel has filed a fresh appeal. However, the Registry has returned the petition on the ground that since the appeal papers are already returned, the appeal is not maintainable. Therefore, the petitioner seeks permission to reconstruct the case papers in A.S.(MD)No.SR.41044 of 2010.

3.The respondent has filed counter, contending that originally the appeal was filed with Court fee of Rs.1000/- alone, thereafter, in the year 2017, a sum of Rs.1,79,000/- is paid along with an application to condone the delay in filing the deficit Court fee and thereafter, the papers were returned to the Advocate M.S.Balasubramaniya Iyer and thereafter, he has misplaced the papers. Therefore, once the papers were misplaced in the office of the Advocate, reconstruction of the papers is not possible. Only if the papers were misplaced in the Registry, reconstruction is possible. Hence, he prayed for dismissal of the application.

4.Heard the learned counsel appearing on either side and perused the entire materials.

5.On perusal of the entire records, it is made very clear that the respondent has filed a suit in O.S.No.28 of 2008 for specific performance. The same was decreed on 07.07.2010. As against which, the appeal was originally filed in A.S.(MD)No.SR.41044 of 2010 along with Court fee of Rs.1000/- alone and the appeal was presented by one Vellaisamy. After presenting the appeal, the said Vellaisamy died, which is not disputed by both sides. Thereafter, one M.S.Balasubramaniya Iyer was engaged to conduct the appeal. Accordingly, he has re-presented the appeal along with necessary Court fee of Rs.1,79,000/- on 20.04.2017. The Registry endorsement also makes very clear that a sum of Rs.1,79,000/- as Court fee is paid and the Court fee realized. It is also relevant to note that the sum of Rs.1,79,000/- has been paid as Court fee along with the petition to condone the delay in filing the deficit Court fee. Thereafter, the Court fee has been received by the Court on 20.04.2017. As per the Registry records, the Court fee was paid by the Advocate M.S.Balasubramaniya Iyer. Even after the receipt of the Court fee, the appeal appears to be returned for certain defects on 30.05.2017.

6.When the appeal is returned and not numbered at the relevant point of time, the respondent filed I.A.No.118 of 2011 in O.S.No.28 of 2008 to amend the schedule of property and door number. The said application was dismissed by the trial Court. As against which, the petitioner has filed a petition in C.R.P.(MD)No.807 of 2012 was filed. This



Court, by its order dated 24.07.2015, has allowed the same and directed the trial Court to consider the application fresh on merits. Thereafter, it appears that the said application was once again taken up by the trial Court and the trial Court has allowed the application on 06.06.2016. Challenging the above amendment, once again C.R.P.(MD)No.1885 of 2016 was filed. This Court, by its order dated 19.10.2016, has set aside the order and remanded the matter once again to the trial Court to consider fresh and pass detailed order.

7.It appears that the amendment has been now allowed by the trial Court on 12.01.2017. This is the factual background of this case. But the fact remains that the suit filed for specific performance was decreed and the appeal was filed in time. The mistake committed by the learned counsel at the time of submitting the appeal is that he has paid a sum of Rs.1000/- only as Court fee. Unfortunately, the said Advocate died immediately within few months, which is not in dispute. Thereafter, another Senior Counsel was engaged and he has re-presented the appeal and paid deficit Court fee of Rs.1,79,000/-, which has been admittedly received by the Registry. The Registry endorsement was made to the effect that the Court fee has been paid. Thereafter, the appeal papers were misplaced. It is also relevant to note that fresh appeal also in the year 2017 was filed by the new counsel on the ground of amendment. At the time, the Registry has returned the appeal on the ground that the appeal is already filed and returned in the year 2017 itself.

8.In such view of the matter, it is to be noted that the mistake is not on the party. The learned counsel originally filed the appeal with deficit court fee died immediately. Thereafter, the deficit Court fee also filed along with a petition to condone the delay, which is also allowed and the Registry has received the Court fee and the same was realised on 20.04.2017.

9.Such being the position, mere substituting the memorandum of grounds raised in the earlier appeal and reconstructing those papers, no prejudice whatsoever will be caused to none. In the above circumstances, this Court is of the view that the permission has to be given to the petitioner to reconstruct the memorandum of appeal with the aid of xerox copy.

10.It is the case of the learned counsel appearing for the petitioner that at the time of return of the appeal in the year 2017, from the office of the learned counsel, the petitioner has taken the xerox copy of the memorandum of appeal. In the copy available on record filed along with typed set of papers, the Court fee particulars has been clearly mentioned with seal of the Court. Therefore, this Court is of the view that the appeal remedy is statutory remedy. Merely because some mistakes crept in and the



matter properly and died subsequently, another learned counsel having paid Court fee also misplaced the appeal bundle, this Court is of the view that the statutory right of the party to file an appeal cannot be defeated.

11. Admittedly, the value of the Court fee of Rs.1,80,000/- has been paid and realised. Such view of the matter, the petitioner's right which is statutory right cannot be curtailed on technical grounds. Accordingly, the petitioner is permitted to file a fresh memorandum of grounds set out in the original appeal in green sheet along with the certified copy of the decree and judgment passed by the trial Court and present the same before this Court.

12. In the result, this Civil Miscellaneous Petition is ordered.

sd/-
27/01/2020

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/ /2020
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

THE PRINCIPAL DISTRICT JUDGE,
RAMANATHAPURAM DISTRICT.

+1 CC to M/s.R.UDHAYA KUMAR, Advocate (SR-1562[I] dated 28/01/2020)

ORDER
IN
CMP(MD) No.2035 of 2019
IN
AS(MD) No.SR41044 of 2010
Date :27/01/2020

Myr
AE/VR/SAR-IV (03.02.2020) 4P 3C