



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Civil Appellate Jurisdiction)

Wednesday, the Nineteenth day of February Two Thousand Twenty

PRESENT

The Hon`ble Mr.Justice N.SATHISH KUMAR

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CMP(MD). Nos.11804 of 2018 and 2832 of 2019
in SA.No.410 of 2002

CMP(MD) . No.11804 of 2018 :

Sethu @ Raghavan
S/o.Ramasamy Chettiar Meenakshipuram
Arimalam Thirumayam Taluk Pudukkottai District
... Petitioner/2nd Respondent

Vs

- 1 Sri Brahadambal Agency
a Partnership Firm Rep.By its Managing
Partner Kumarasamy, No.34 Housing Unit
Rajagopalapuram, Pudukkottai
- 2 R.A.Kumarasamy
- 3 Indira
- 4 Shanmugam
- 5 S.Geetha
- 6 S.Vallinayagam
- 7 S.Vanamamalai ...Respondents 1 to 7/Appellants
- 8 S.Ramasamy Chettiar (Died) ...8th Respondent/1st Respondent
- 9 R.M.Subramanian
- 10 R.M.Chidambaram,
- 11 R.M.Sellappan
- 12 Adaikkarammai Achi
- 13 Sambantham Chettiar
- 14 R.M.Lakshmi Aachi
- 15 P.Mallika ... Respondents No.8 to 15/Respondents No.3 to 9

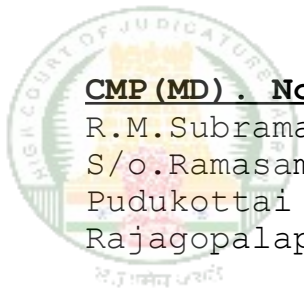
Prayer in CMP(MD). No.11804 of 2018:-

Civil Miscellaneous Petition is filed under Section 5 of Limitation Act, praying this Hon'ble Court to condone the delay of 901 days in filing the petition re-hear the second appeal in S.A.No.410 of 2002.

Prayer in SA.No.410 of 2002:-

Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 15/12/1999 made in AS No.77 of 1995 on the file of the Principal District Judge, Pudukkottai, confirming the judgment and decree dated 13.09.1994 made in O.S.No.163 of 1987 on the file of the Subordinate Judge, Pudukkottai.

<https://hcservices.courts.gov.in/hcservices/>



CMP(MD). No.2832 of 2019

R.M.Subramanian,
S/o.Ramasamy Chettiyar, Meenakshipuram, Arimalam, Thirumayam Tk,
Pudukottai District Now at Flat No.994,
Rajagopalapuram Housing Unit, Peraiyur Nagar, Pudukottai.
...Petitioner/3rd Respondent

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VS

1. Sri Brahadambal Agency A Partnership Firm,
Rep. by its Managing Partner, Kumarasamy, 34,
Housing Unit, Rajagopalapuram, Pudukottai.
2. R.A.Kumarasamy
3. Indira
4. Shanmugam
5. S.Geetha
6. S.Vallinayagam
7. S.Vanamamalai ... Respondents 1 to 7/Appellants
8. S.Ramasamy Chettiyar (Died) ... 8th Respondent/1st Respondent
9. Sethu A Raghavan ... 9th Respondent/2nd Respondent
10. R.M.Chidambaram
11. R.S.Sellappan
12. Adaikkammai Achi
13. Sambantham Chettiyar
14. R.M.Lakshmi Achi (Deceased)
15. P.Mallika ... Respondent 10-15/Respondents 4 to 9

Prayer in CMP(MD). 2832/ 2019 :

Civil Miscellaneous Petition is filed under Section 5 of Limitation Act, praying this Hon'ble Court to pass suitable orders to condone the delay of 1127 days in the matter of filing the petition for re-hearing in the above Second Appeal.

Prayer in SA.No.410 of 2002:-

Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 15/12/1999 made in AS No.77 of 1995 on the file of the Principal District Judge, Pudukottai, confirming the judgment and decree dated 13.09.1994 made in O.S.No.163 of 1987 on the file of the Subordinate Judge, Pudukottai.

ORDER:- Civil Miscellaneous Petitions are coming on for hearing on Monday the Tenth day of February Two Thousand and Twenty and upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr.H.Arumugam, Advocate For Petitioner in Cmp(MD).No.11804 of 2018 and of Mr.S.Parthasarathy, Advocate For the Petitioner in Cmp(MD).No.2832 of 2019, and of MR.V.Ramamurthy, Advocate representing Mr.V.Balaji, Advocate For the Respondent in Both Cases, having stood over considering for the above, this Court made the following order:

<https://hcservices.ecourts.gov.in/hcservices/>



COMMON ORDER

The application in C.M.P.(MD).No.11804 of 2018 has been filed to condone the delay of 901 days in filing the petition to re-hear the second appeal in S.A.No.410 of 2002.

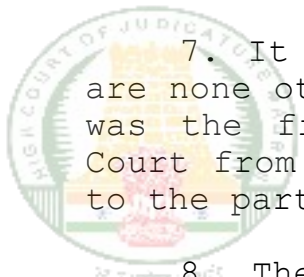
2. The main contention of the petitioner is that he was the second respondent in the second appeal in S.A.No.410 of 2002. He hotly contested the suit and the first appeal and succeeded before the Courts below. But, he was not aware of the pendency of the second appeal and he never received or refused any notice sent either by the Principal Bench or the Madurai Bench of Madras High Court, in the second appeal. On 17.08.2018, the first respondent and others came to the suit property and cut down the trees standing in the suit property to an extent of 21 hectares. Thereafter only, the petitioner came to know that the second appeal was allowed on 04.02.2016. Hence, the petitioner has filed an application before this Court to re-hear the appeal on 23.08.2018 i.e., within 30 days from the date of knowledge. If the delay is calculated from 04.02.2016, there is a delay of 901 days in filing the application to re-hear the appeal. Hence, he prayed for condoning the delay of 901 days in filing the petition to re-hear the second appeal in S.A.No.410 of 2002.

3. The application in C.M.P.(MD).No.2832 of 2019 has been filed to condone the delay of 1127 days in filing the petition for re-hearing the second appeal in S.A.No.410 of 2002.

4. The main contention of the petitioner is that he was the third respondent in the second appeal in S.A.No.410 of 2002 and no notice whatsoever was served on him in the second appeal, whereas, his non-appearance was recorded by this Court, by order dated 04.02.2016. He came to know about the disposal of the second appeal only on 19.02.2019. Hence, there is a delay of 1127 days in filing the petition for re-hearing the second appeal.

5. The first respondent has filed a counter denying the averments of the petitioners. It is the contention of the first respondent that the Court notice sent to the petitioner/second respondent in the appeal was returned as 'Absent affixed' vide Amin return, dated 03.12.2015. Subsequently, private notice was taken to the petitioner/second respondent on 10.12.2015 and the same was also returned as 'not claimed' by the petitioner/second respondent on 21.12.2015, after giving prior intimation on 12.12.2015 and 14.12.2015.

6. Though it is contended by the petitioners/respondents 2 and 3 that notice has not been served on them in the appeal and they have no knowledge about the second appeal, their contention *prima facie* found to be false, on verification of records.



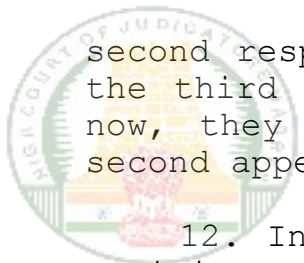
7. It is to be noted that the petitioners/respondents 2 and 3 are none other than the brothers and sons of Ramasamy Chettiyar, who was the first defendant. The registered notice sent through the Court from the year 2011 indicate that despite the intimation given to the parties, they evaded the notice.

8. The report from the Principal District Court, Pudukottai, affidavit and return of the Amin dated 03.12.2015, clearly show that notice was 'refused', R3 absent and not affixed. Several notices were sent and on 06.01.2016, again R2 refused. The affidavit is also sworn by the Bailiff on 07.01.2016. It is also to be noted that in pursuant to the preliminary decree passed by this Court, final decree was also taken by the appellants/plaintiffs. A counter affidavit has also been filed by one of the legal heirs. Therefore, it cannot be said that they have no knowledge whatsoever with regard to the pendency of the appeal.

9. Further, the petitioners are the brothers. The 13th respondent/7th defendant has filed a suit in O.S.No.69 of 2012, wherein the petitioners have filed a written statement mentioning the pendency of the second appeal. These facts clearly show that the petitioners have the knowledge about the pendency of the second appeal.

10. From the records, it could be seen that R2 has not claimed the first notice and again on 21.03.2002, another notice was ordered. Thereafter, the appeal was transferred to Madurai Bench. Again, on 27.09.2004, notice was ordered to the respondents 2 and 3 and the same has not been served on them, on the ground of non-availability of parties. Further, on 09.06.2011, affixture recorded in the Amin return. Thereafter, again, private notice was ordered on 22.12.2015 and the respondents 2 and 4 refused. The endorsement of the postal authorities shows that R2 intimation given on 12.12.2015 - 'intimation refused'. Therefore, returned to the sender. Again, in the main second appeal, R2 refused on 07.01.2016. Thereafter only publication was effected. The communication sent by the Principal District Judge, Pudukottai to the Registrar (Judicial) of this Court clearly show that on 04.12.2015 itself the notice was refused by R2.

11. Further, it is also relevant to note that the records also clearly show that on 18.04.2002 itself notice sent to the second respondent was returned as 'not claimed'. The endorsement made by the Amin dated 07.06.2011, indicate that R2 went to some other place on the particular date and hence, the notice could not be served. Again, on 03.12.2015, the notice was refused and the affidavit of the Amin also clearly mentioned the same. It is to be noted that in the suit in O.S.No.69 of 2012 filed by the 13th respondent/7th defendant, the petitioners have filed a written statement indicting the pendency of the S.A.No.410 of 2002. In the said suit, the petitioners are arrayed as defendants. The written statement was filed on 23.06.2014. Therefore, when the parties are aware of the proceedings and the return of the Amin clearly indicate that the



second respondent has admittedly refused to receive the notice and the third respondent also intimation served and both are brothers, now, they cannot contend that they came to the knowledge of the second appeal only in the year 2018 - 2019.

12. In support of his contentions, the learned counsel for the petitioner in C.M.P. (MD).No.11804 of 2018 also place reliance on the following decisions:

(i) in **the Motor & General Finance Limited represented by its Regional Manager vs. S.Durailingham also known as S.Duraisingam and another** reported in 2009 (3) CTC 342,

(ii) in **Bhagmal and others vs. Kunwar Lal and others** reported in 2010(5) CTC 827,

(iii) in **C.K.Lokesh vs. P.E.Panduranga Naidu** reported in (1996) 11 SCC 353,

(iv) in **Panna Lal v. Murai Lal (dead) by his legal representatives** reported in AIR 1967 SC 1384,

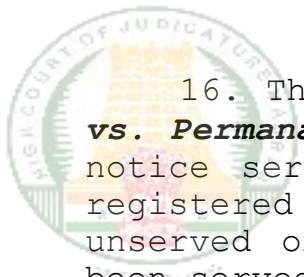
(v) in **Nahar Enterprises vs. Hyderabad Allwyn Limited and another** reported in (2007) 9 SCC 466.

13. No doubt, when the appeal was proceeded ex-parte, the respondent can apply for re-hearing the appeal by stating that he was prevented by sufficient cause from appearing before the Court. If the Court finds that the reasons assigned in the affidavit are not *bona fide* and he has knowledge about the appeal long back and there is no sufficient cause, the application is liable to be rejected. This has been held by the Hon'ble Apex Court in the case of **Harbans Pershad Jaiswal (dead) by legal representatives vs. Urmila Devi Jaiswal (dead) by legal representatives** reported in (2014 (5) SCC 723).

14. This Court, in the case of **Muthu Pillai vs. Seruvakkal** reported in 1998(2) M.L.J. 147, has held that,

"In the instant case, as against the evidence of service of notice through registered post which has been sent by Court, the burden is on the petitioner to show that it was not received by her and she has not discharged the same. On the other hand, the Courts below accepted the said acknowledgment as well as the summons served on her personally by the process server, which is supported by the affidavit of the serving officer, and held the service sufficient and set her ex-parte.

15. The Hon'ble Apex Court, in the case of **Indu Bhushan v. Munna Lal & another** reported in AIR 2007 (SC) 1114, has held that the process server report with regard to the service of summons and their endorsements were sufficient to show service of notice related to the appeal.



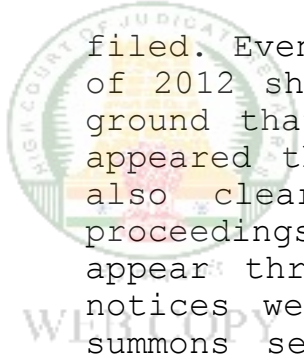
16. The Hon'ble Supreme Court, in the case of **MST. Bhabia Devi vs. Permanand Pd. Yadav** reported in **1997 (3) SCC 631**, has held that notice served on the petitioner by way of process server and by registered card AD and by Gazette publication, notice returned unserved on alleged refusal, held, notice must be deemed to have been served, as per Section 27 of the General Clauses Act, 1897.

17. The Hon'ble Supreme Court, in the case of **Gujarat Electricity Board and another vs. Atmaram Sungomal Poshani** reported in **1989 (2) SCC 602**, has held that service of registered letter, presumption of refusal to accept the registered letter when arises, the burden is on the party alleging non-service.

18. It is also relevant to note that the suit filed subsequently in O.S.No.69 of 2012 is also struck off by this Court in a revision petition in C.R.P.No.1179 of 2018. In the said suit, the present petitioners are also the parties. Therefore, the petitioners have the knowledge about the pendency of the second appeal in the year 2014 and the written statement was also filed in O.S.No.69 of 2012. Besides that, the copy of the communication sent by the Principal District Judge along with the statement recorded by Amin evidencing proper service of notice, dated 04.12.2015 and R2 has refused to receive the notice. Similarly, on 08.01.2016, the learned Principal District Judge, Pudukottai has sent a report indicating that on 06.01.2016, the second respondent has refused to receive the notice.

19. It is specifically recorded in the affidavit of the Amin that R2 has received the notice and copy, read over it and informed that the matter related to his father's case filed earlier and there is no connection with him. The affidavit was also sworn before the Central Nazir. That apart, in the year 2014, a written statement was filed in another suit in O.S.No.69 of 2012 and they have the knowledge about the pendency of the second appeal. Therefore, it cannot be said that they have no knowledge about the pendency of the second appeal and no notice has been served on them. Hence, the contention of the petitioner in C.M.P.(MD).No.2832 of 2019 that he came to know about the disposal of the second appeal only in the year 2019, cannot be countenanced. Similarly, the contention of the petitioner in C.M.P.(MD).No.11804 of 2018 that neither he received any notice nor he refused to receive any notice, cannot be countenanced.

20. When the process server filed an affidavit, there was no material to disbelieve such affidavit sworn before the Central Nazir and a report has been sent by the trial Court in this regard. Without proper verification, the trial Court would not send any such communication. Therefore, the very conduct of the parties clearly show that they have been just watching the proceedings, without actually entering into the filing of the final decree petition and in order to thwart the same, the present applications have been



filed. Even the notice paper appended in the typed set of O.S.No.69 of 2012 show that several times notice has not been served on the ground that 'not claimed'. Only after publication, the defendants appeared through an Advocate on 09.12.2013. The above endorsement also clearly indicate that the defendants are aware of the proceedings in respect of the suit properties and they suddenly appear through an Advocate only on publication. Despite several notices were sent in the appeal, two instances they refused the summons served personally by the process server. For the third respondent also the intimation was given. Once the notice sent by RPAD with correct address of the third defendant, it is deemed as proper service. But, in any event, the earlier proceedings, particularly the suit in O.S.No.69 of 2012 clearly indicate the knowledge about the second appeal. Therefore, the contention of the petitioners that they came to know about the second appeal only in the year 2018 - 2019 is an afterthought only to delay the proceedings. As against the judgment of the S.A.(MD)No.410 of 2002, one of the defendants preferred an S.L.P. before the Hon'ble Supreme Court, which also appears to be dismissed in S.L.P.(C)No.in Diary No.31238 of 2018, on 05.07.2019.

21. When the Court exercising its discretion to condone the huge delay, should also have regard to the conduct, behaviour, attitude of the party and *bona fideness*. The Second Appeal was disposed of in the year 2016 itself. Having known that they were parties to the suit and the appeal was pending, refused to receive notice, now they cannot contend that they have not been heard on merits. This Court has elaborately discussed various issues and found that the adoption pleaded by the first defendant has not been established without any evidence. D.W.1 himself has admitted in his evidence that his mother was not aware of the adoption.

22. Such being the position, the trial Court and the first appellate Court have dismissed the suit as well as the appeal only on surmise and inference and this Court has analysed all the evidence and found that the judgment and decree of the Courts below are erroneous and allowed the appeal. Therefore, this Court is of the view that even on merits, the petitioners have no case, considering the entire matters. Accordingly, these petitions are dismissed.

Sd/-

Assistant Registrar(CO)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



TO

1. The Principal District Judge, Pudukkottai.
2. The Subordinate Judge, Pudukkottai.

+3CC TO MR.V.BALAJI, Advocate Sr. No.7501, 7500 and 7008
+1CC TO MR.S.PARTHASARATHY, Advocate Sr. No.7022
+1CC TO MR.H.ARUMUGAM, Advocate Sr. No. 7305

ORDER DATED : 19/02/2020

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ORDER

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CMP(MD). Nos.11804 of 2018
and 2832 of 2019
in SA.No.410 of 2002

Giving direction and etc.
as stated within.

NS (CO)
TR(28.02.2020) 8P 8C