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C.M.P.(MD).No.11762 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 17.03.2020

DELIVERED ON : 21.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE **RMT.TEEKAA RAMAN**

C.M.P. (MD) .No.11762 of 2018

and

A.S. (MD) SR.No.44598 of 2018

C.M.P. (MD) .No.11762 of 2020:

1.Malaiyammal

2.Maheswari

.. Petitioners / Appellants

Vs.

1.M.Jothimani

2.R.Lalitha

3.S.Hemamalini

.. Respondents / Respondents

PRAYER: Civil Miscellaneous Petition is filed under Section 5 of the Limitation Act, praying to condone the delay of 2527 days in filing first appeal against the judgment and decree dated 24.08.2011 in O.S.No.148 of 2008 on the file of the learned Additional District Judge, Fast Track No.II, Tiruchirappalli.

For Petitioners : Mr.H.Lakshmi Shankar

For Respondents : Mr T.Antony Arulraj

A.S. (MD) SR.No.44598 of 2018 :

1.Malaiyammal

2.Maheswari

.. Petitioners /Petitioners / Appellants

Vs.

1.M.Jothimani

..1st Respondent/ 1st Respondent/Plaintiff

2.R.Lalitha

3.S.Hemamalini

.. Respondents 2&3/ Respondents 2&3

Respondents 2&3 / Respondents 2&3

PRAYER: First Appeal is filed under Section 96 read with Order XLI of the Civil Procedure Code, against the judgment and decree dated 24.08.2011 in O.S.No.148 of 2008 on the file of the learned Additional District Judge, Fast Track No.II, Tiruchirappalli.

For Petitioners : Mr.H.Lakshmi Shankar

For Respondents : Mr T.Antony Arulraj

ORDER

This Civil Miscellaneous Petition is filed to condone delay of 2527 days in filing the above first appeal against the judgment and decree dated 24.08.2011 in O.S.No.148 of 2008 on the

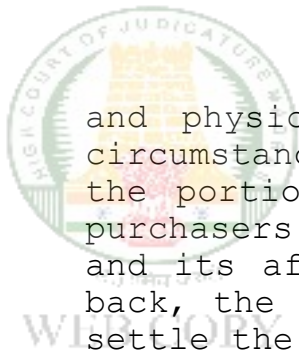


file of the learned Additional District Judge, Fast Track No.II, Tiruchirappalli.

2. Heard the learned counsel for the petitioners/appellants and the learned counsel for the first respondent and perused the records.

3. It is seen from the affidavit that the first respondent as the plaintiff filed the suit for specific performance based on 13.04.2007 agreement. The total sale consideration was 11 lakhs out of which one lakh was paid as advance and a time of 45 days was stipulated for paying the balance and completing the transaction. The legal notice sent on 27.11.2007 was replied on 05.12.2007. Even thereafter, the plaintiff did not act and only on 04.09.2008, the suit was filed. The petitioners/appellants entered appearance through their advocate and contested the matter by filing written statement and the case of the plaintiff had been vehemently denied. Since the plaintiff/1st respondent herein was not ready and willing and they had their pressing needs, sale deeds were executed in favour of defendants 3 and 4.

4. The first petitioner's advocate did not cross examine PW.1 and his proof affidavit along with documents were filed and recorded and an exparte decree came to be passed. The first respondent filed execution petition. The first petitioner/appellant met her advocate and entrusted the matter to him and also requested him to file appropriate petitions to set aside the exparte decree and open the case for contesting it on merits. The counsel for the petitioner filed vakalat. It is subsequently known by the petitioner that only the counter affidavit was filed in the E.P. and applications to set aside the exparte decree was not filed due to the mistake of her advocate's clerk. After learning about the same, when the sale deed was executed, the petitioner met her advocate and he took steps to file an application to set aside the exparte decree with delay of 983 days. This application also came to be dismissed on 21.04.2015. Even during the period, when E.P. was filed and these orders came to be passed, the petitioner's father was said to be continuously suffering from cancer and the petitioner has taken care of her father and accompanying him to various hospitals for treatment and spent money and loss of time. It is averred that as a result, the petitioner could not keep contact with her advocate and learn about the steps necessary for effective prosecution. It is further alleged that the dismissal of the petition was not known to the petitioner. The petitioner's father died on 21.04.2016. After the ceremonies were over, the petitioner thought of contacting her advocate. The petitioner fell ill and was affected from 'Chickengunea'. During June 2016, her daughter took her to her home and was taking care of her for more than a year. She was confined to home and was having severe joint and knee pain. The prolonged illness of her father, which took her entire time, left her mentally



and physically very weak and financially poor. Under compelling circumstances, requiring money for medical treatment of her father, the portions of the suit property were alienated and many of the purchasers had put up constructions. After recuperating from illness and its after effects which included arthritis around seven months back, the petitioner went to meet the first respondent/plaintiff to settle the dispute by paying the money back that was received by the petitioner as advance, with interest.

5. According to the petitioner counsel, the trial Court has passed an exparte judgment for the mere asking and without considering the controversies in respect of the plaintiff's claim which are evidence from the plaint averments themselves. The exparte judgement does not satisfy the definition of the judgement as per Section 2 (d) of C.P.C.

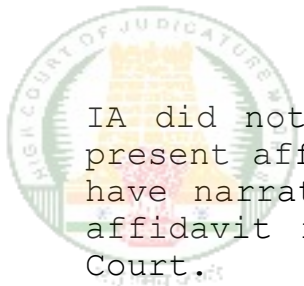
6(a). It is also seen from the records that the above petition is filed by the petitioners/appellants seeking to condone the delay of 2527 days in filing the above appeal against the judgment and decree dated 24.03.2011 made in O.S.No.148 of 2008 on the file of the II-Additional District Judge-cum-Fast Track Court No.II, Trichy.

6(b). The said suit was filed by the first respondent/plaintiff for the relief of specific performance against the petitioners herein. The petitioners entered into an agreement for sale of the suit property for a sum of Rs.11,00,000/- vide agreement dated 13.04.2007. Totally, a sum of Rs.3,00,000/- was paid as advance. However, the petitioners did not take any steps to perform their part as per the agreement and was not willing to perform the contract. Hence, the first respondent was constrained to file a suit in O.S.No.148 of 2008 in which the petitioners filed their written statement.

6(c). After that, they failed to contest the case and as a result, the suit was decreed exparte on 24.08.2011. After that the first respondent/plaintiff filed E.P.No.231 of 2012. In the said execution proceedings, notice was served upon the petitioners herein and they appeared through their counsel on 03.07.2012 and filed their counter on 10.01.2013. After that EP was allowed in favour of the first respondent herein and sale deed was also executed on 31.03.2015 by the Trial Court.

6(d). After they lost their case in the EP, the petitioners chose to file an IA in I.A.No.239 of 2015 under Section 5 of the Limitation Act to condone the delay of 983 days in filing the petition to set aside the judgment and decree dated 24.08.2011.

7(a). It is also seen that the sale deed was executed on 31.03.2015 and on the very next day i.e., on 01.04.2015 this IA for condonation of delay was filed. The affidavit filed in support of the



IA did not disclose any reason at all. On the other hand, in the present affidavit filed in support of the above CMP, the petitioners have narrated a story, which was not at all pleaded in the earlier affidavit filed to condone the delay of 983 days before the trial Court.

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7(b). It is an admitted fact that the said order was not challenged and it has attained finality. Therefore, their second attempt in reopening the case after 983 days was also unsuccessful. No steps was taken thereafter to challenge the order made in I.A.No.239 of 2015.

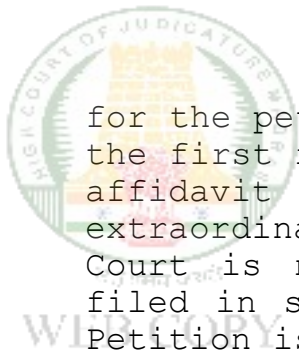
8. The present appeal is filed after four years from the date of dismissal of the said IA. After filing the written statement, they did not pursue the same and allowed to suit to decree exparte. Even after receiving the notice in EP, they did not file application to set aside the exparte decree. They contested the execution proceedings and after losing their case in EP, they filed an application to set aside the exparte decree with a huge delay and without stating any reason.

9. The medical certificate in the typed set of paper does not contain any bonafide reason. They have not chosen to challenge the order made in I.A.No.239 of 2015 in the manner known to law. Even they did not approach this Court by way of appeal forthwith.

10. The appeal is filed only after four years from the dismissal of I.A.No.239 of 2015. There is no bonafide reason in the affidavit filed in support of the CMP. They always blame the advocate even after contesting the case on merits. The suit was decided in favour of the respondent on 2011 and sale deed was executed in the year 2015. Now the respondent settled right is under challenge. If the delay is condoned, the respondent's right will be severely infringed.

11. The agreement is of the year 2007. Suit was filed in the year 2008. It was decreed in the year 2011 and the sale deed was executed in the year 2015. They have purposefully and willfully kept quiet and simply watched all the proceedings. Therefore, the attitude of the petitioners cannot be construed as bonafide. Hence the petitioners do not deserve the discretionary power in condoning the delay. There is an inordinate delay in filing this appeal. The trial Court denied to condone the delay of 983 days and that has attained finality. They contested the EP and they filed IA to set aside the judgment and decree. Therefore the petitioners cannot plead ignorance. After exercising all the opportunity, now they have approached this Court that too with a huge delay of 2527 days in filing the appeal.

<https://hcservices.ecourts.gov.in/hcservices/> Considering the submissions made by the learned counsel



for the petitioners/appellants and the learned counsel appearing for the first respondent, and also considering the reasons stated in the affidavit filed in support of this petition, since the delay is extraordinary, ie., 2527 days in filing this first appeal, this Court is not satisfied with the reasons stated in the affidavit filed in support of this petition, hence, this Civil Miscellaneous Petition is dismissed. Accordingly, the first appeal is dismissed in the SR stage itself. No Costs.

Sd/-

Assistant Registrar (CS II)

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/ /2020

Sub Assistant Registrar(CS)

PJL

TO

The Additional District Judge, Fast Track No.II, Tiruchirappalli.

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-13180[F] dated 22/07/2020)

C.M.P. (MD) .No.11762 of 2018

in

A.S. (MD) SR.No.44598 of 2018

21.07.2020

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