

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.07.2021

CORAM

THE HON'BLE MR.JUSTICE **M.M.SUNDRESH**
and
THE HON'BLE MS.JUSTICE **R.N.MANJULA**

C.M.P.No.7698 of 2021
in O.S.A.Sr.No.2367 of 2021

R.Srinivasan .. Petitioner

Vs

K.Soundaram .. Respondent

Petition filed under Order XIV Rule VIII of O.S. Rules to condone the delay of 177 days in filing of the appeal against the order dated 17.07.2019 in A.No.3820 of 2019 and O.A.No.205 of 2019 in C.S.No.159 of 2019.

For Petitioner : Mr.V.Balasubramani

For Respondent : Mr.Adinarayana Rao

ORDER

(Made by *M.M.SUNDRESH, J.*)

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This case has got a chequered history. This petition has been filed seeking to condone the delay of 177 days in filing the appeal. It is agreed by both sides on the last occasion that the main appeal along

with the condonation of delay petition would be taken up for hearing. Accordingly, it is taken up for hearing and arguments have been heard both in the appeal as well as in the petition for condonation of delay. Suffice it to note that the Rent Control Appeal filed by the petitioner was dismissed on 06.01.2021 and thereafter wisdom dawned upon him to file the appeal along with condonation of delay petition on the next day - 07.01.2021.

2.The respondent's father purchased the property under registered sale deed in Document No.800 of 1933. Thereafter, he executed a settlement deed in favour of his wife Kamalambal on 09.07.1962. The father of the respondent died on 16.05.1973. The mother of the respondent Kamalambal executed a Will which was also probated in O.P.No.567 of 2000 by order dated 27.02.2002.

3.An attempt was made by the petitioner to convert a portion of the property into commercial use and a suit was also filed in O.S.No.3202 of 2005 before the III Assistant City Civil Court, Chennai, which was decreed. The respondent filed RCOP No.207 of 2008 seeking an order of eviction. The petition was allowed on 10.01.2017 and the appeal filed in R.C.A. No.319 of 2017 was also dismissed on

06.01.2021.

4.In the meanwhile, the petitioner has filed a suit in O.S.No.3571 of 2015 on the file of the VI Assistant City Civil Court, Chennai seeking permanent injunction, claiming to be in possession on the ground of permissive occupation given by the father of the respondent. A plea of adverse possession was also raised in the said suit. Obviously, the aforesaid suit was dismissed.

5.As against the dismissal of R.C.A.No.319 of 2017 dated 06.01.2021, the present appeal has been filed with the petition for condonation of delay of 177 days. In the meanwhile, the petitioner filed a suit in C.S. No.159 of 2019 in the month of December 2018 seeking a prayer for declaration and permanent injunction on the basis of adverse possession. The cause of action is stated to be from the year 1958 without any specific time or date.

6.The respondent filed an application to reject the plaint. The learned single Judge after narrating the aforesaid facts apart from taking note of the then prevailing law which states that the plea of adverse possession can only be raised as a shield but not as a sword and allowed the application and accordingly rejected the plaint.

Incidentally, a finding has been given that there is a wilful suppression in the plaint about the facts inter se parties. Challenging the same, the present appeal has been filed.

7.Learned counsel appearing for the petitioner raised two primary contentions before us on merit. One is with respect to the plea of adverse possession open to a plaintiff. The second is the effect of the orders passed earlier which is with respect to the other portion. On the question of condonation of delay, it is submitted that the petitioner could not file the appeal as the papers were misplaced in the advocate office, which was shifted from first floor to fifth floor.

8.Learned counsel appearing for the respondent submitted that the reason for condonation of delay is not correct since the present appeal has been filed with condonation of delay immediately after dismissal of the Rent Control Appeal. The learned single Judge allowed the application not only on the ground of non-availability of the plea of adverse possession but also on the misuse of process of law. Therefore, no interference is required.

9.We find absolutely no merit in this appeal apart from inadequate reason for condonation of delay. It is not difficult for us to

appreciate the fact that the appeal has been filed by renewed urgency triggered by the dismissal of the Rent Control Appeal. That is the reason why on the very next day, it has been filed.

10. On merit, we find that the petitioner raised the plea of adverse possession before the City Civil Court in O.S.No.3571 of 2015. Therefore, the plea of Order 2 Rule 2 C.P.C. would come apart from principle of res judicata. The issue qua issue estoppel available under Section 47 of the Indian Evidence Act also would be applicable. The matter does not rest there. The petitioner suffered a decree in O.S.No.3202 of 2005, which was filed on the ground of title. The present suit has been filed during the pendency of the Rent Control Appeal. The petitioner raised the very same plea once again before the learned Rent Controller and lost. The Rent Control Appeal was also dismissed on 06.01.2021. Though it is stated at the bar that revision has been filed, it is yet to be numbered for more than 2 1/2 years as of now. Perhaps, the petitioner wants to know the fate of this case. We may note that the earlier suit is one for permanent injunction and the present suit is one for declaration and permanent injunction.

11. According to the petitioner, he was a permissive occupant. In **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria (dead through LRs) (2012 5 SCC 370)**, the Apex Court has stated that a person in permissive possession cannot be permitted to contend otherwise. The plea of adverse possession is certainly not open to the petitioner to avail of by treating him as the owner against the actual owner.

12. We do not know as to how such a plea can be raised. The original owner Kandasamy Mudaliar executed a settlement deed in favour of his wife Kamalambal as on 09.07.1962. Therefore, even at the relevant point of time, the title passed on to her. It is not the case of the petitioner that Kamalambal has allowed the petitioner or his father to enjoy the property as the absolute owner. The said Kamalambal has executed a Will in favour of the respondent and the Will was also probated as early as 27.02.2002. All these facts will certainly dis-entitle the petitioner from maintaining the said suit as rightly observed by the learned single Judge, it is nothing but an abuse of process of law. This is nothing but a re-litigation in a different form.

13. In such view of the matter, we have no hesitation in holding

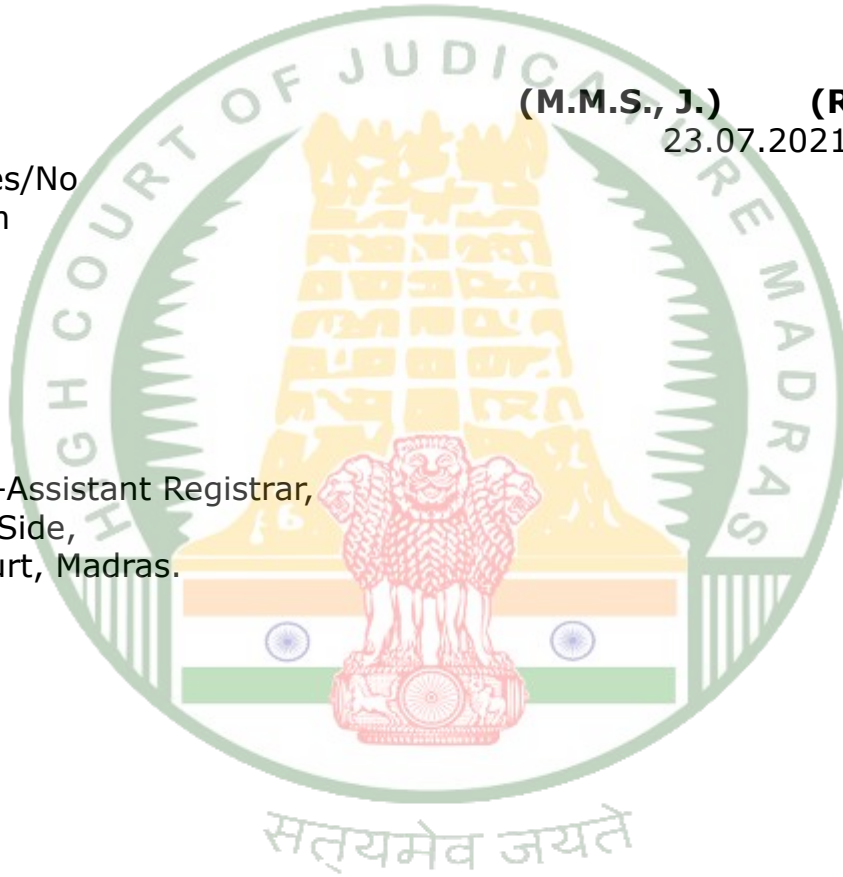
that the order of the learned single Judge is perfectly correct and there is no ground for condonation of delay. Accordingly, C.M.P.No.7698 of 2021 in O.S.A.Sr.No.2367 of 2021 stands dismissed. Consequently, O.S.A.Sr.No.2367 of 2021 stands dismissed. No costs.

(M.M.S., J.) (R.N.M., J.)
23.07.2021

Index:Yes/No
mmi/ssm

To

The Sub-Assistant Registrar,
Original Side,
High Court, Madras.

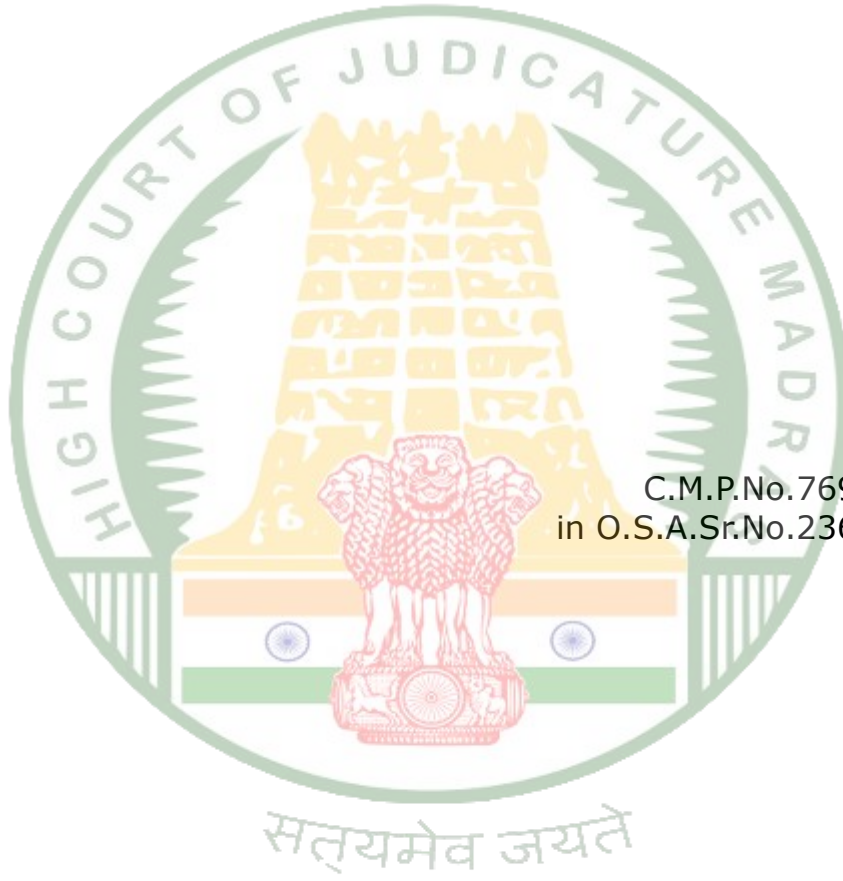


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**M.M.SUNDRESH, J.
and
R.N.MANJULA,J.**

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