

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.02.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.No.482 of 2016

1.Vasantha Rao @ Vasudevan

2.G.Baskaran

..Appellants/Petitioners/
Plaintiffs

vs.

1.K.Vijayalakshmi

2.K.Nandini

3.Anusuya

4.Mohan

5.Santhakumar

6.Ramani

7.Neela

8.Laksha

9.Thilakavathi

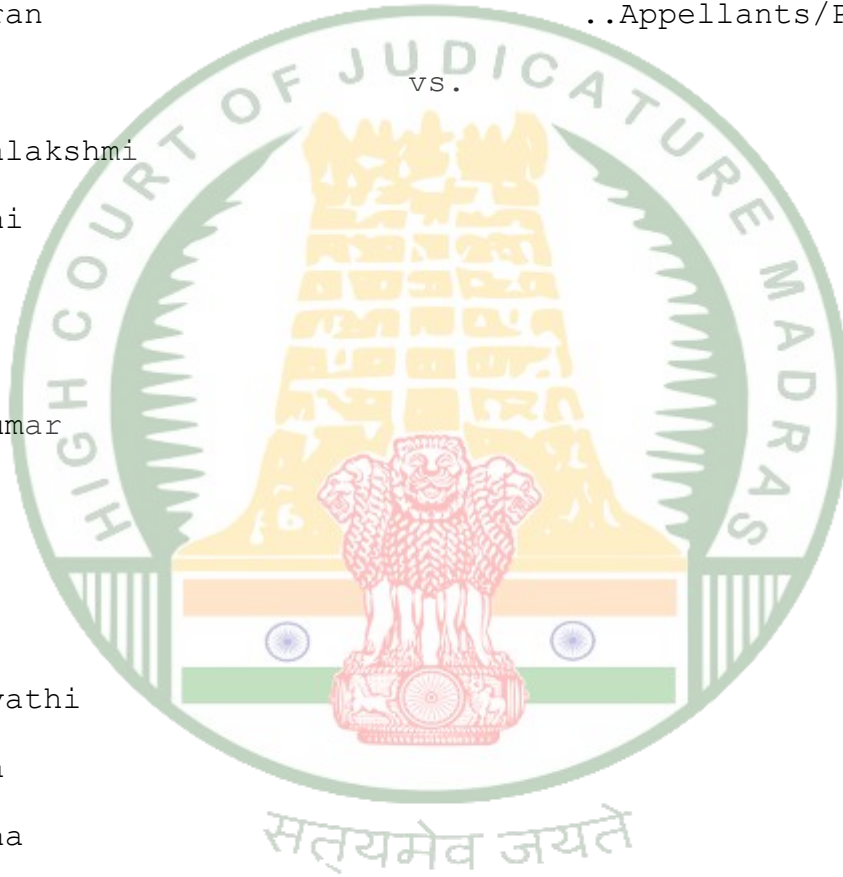
10.S.Neela

11.S.Rajina

12.S.Ramesh

13.Doraikannu

.. Respondents/Respondents/
Defendants



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PRAYER : Civil Miscellaneous Appeal filed under Order XLIII Rule 1(d) of C.P.C, against the Fair and Decreetal Order in I.A.No.3 of 2013 in O.S.No.11023 of 2010 dated 21.01.2015 passed by the learned XV Additional Judge (Fast Track) City Civil Court, Chennai.

For Petitioners : Mr.M.Kamalanathan

For Respondents : Mr.S.Muthuvenkatraman for R4
No-appearance for RR1 to 3, 5 to 13

O R D E R

The Fair and Decreetal Order dated 21.01.2015 passed in I.A.No.3 of 2013 passed in O.S.No.11023 of 2010 is under challenge in the present Civil Miscellaneous Appeal.

2. The suit was instituted by the appellants. The relief sought for in the suit is for declaration and permanent injunction. The first plaintiff/Pattammal died on 27.12.2006. During the relevant point of time, Tr.C.M.P.No.319 of 2011 was pending before this Court and I.A.No.8239 of 1990 in O.S.No.2750 of 1964 was pending before the IX Assistant City Civil Court, Chennai. When the Transfer Civil Miscellaneous petition was taken up for hearing, the suit was transferred on account of pecuniary jurisdiction, and subsequently found that the suit was re-numbered as C.S.No.985 of 2001 and transferred to XV Additional Judge, City Civil Court, Chennai and further, it was dismissed on 02.06.2011 for default. It is contended that the appellants were not aware of the order of the dismissal on 02.06.2011. The application in I.A.No.3 of 2012 was filed on 21.12.2012. On perusal of the A-Diary, it was found that Mr.Umesh, learned counsel represented before the trial Court that Mr.G.RM.Palaniappan undertook to file vakalat for the plaintiffs and the same was recorded by the learned trial Judge. On 18.03.2011, Mr.G.RM.Palaniappan, learned counsel appeared for the defendants 1 to 5 and there was no representation for the plaintiffs on that day. Thus, the notice was ordered to the learned counsel for the plaintiffs and it was not returned on 07.04.2011 and 27.04.2011. Thus, the suit was adjourned on 02.06.2011 and on that day, it was dismissed for default.

3. Interlocutory Application in I.A.No.3 of 2013 was filed on 21.12.2012 and the same was dismissed on 21.01.2015. Thus, the appellant is constrained to file the present appeal.

4. The main contention raised is that there was a delay in filing the interlocutory application to set aside the order dismissing the suit for default and no application under Section 5 of the Limitation Act was filed. Thus, I.A.No.3 of 2013 is not maintainable. When the Interlocutory Application was filed to set aside the ex-parte order of dismissal of the suit and the same is numbered and the respondents filed counter stating that there was a delay in filing the petition to restore the suit, the trial Court ought to have provided an opportunity to file an

application to condone the delay. Contrarily, the trial Court dismissed the suit itself. The learned counsel appearing for the appellants cited the judgment reported in 1996 T LNJ Page No. 49 in the case of T.Balasundaram vs. R.Palaniswamy, wherein it was held that "if the application is filed as if there is no delay and the said application is taken on files the presumption is that there was an oral application for condoning the delay and the said application to set aside the ex-parte order is maintainable."

5. The contention of the respondents are that once the Interlocutory application is filed to restore the suit and to set aside the order dismissing the suit for default, the condone delay petition should accompany the said Interlocutory application, failing which, the interlocutory application to set aside the order itself is not maintainable.

6. This Court is of the considered opinion that undoubtedly, while filing an interlocutory application to set aside the order of dismissal passed by the trial Court, the appellant ought to have file an application under Section 5 of the Limitation Act to condone the delay in filing the Civil Miscellaneous Appeal. However, in the present case, Interlocutory application was numbered as I.A.No.3 of 2013. The trial Court has not raised any objection nor returned the papers. The appellant was under impression that the interlocutory application was filed in time, in view of the fact that they were not aware of the order of the dismissal on 02.06.2011.

7. Under these circumstances, an opportunity must be provided to the appellants enabling them to file an application to condone the delay. Contrarily, the contention of the respondent in this regard cannot be accepted so as to dismiss the interlocutory application itself. However, in the present case, the suit was dismissed for default on 02.06.2011 and the application to restore the suit was filed. Thus, merely on the technical ground that another interlocutory application to condone the delay is not filed, the rights of the parties cannot be denied at all. The suit is for declaration and permanent injunction and the parties must be provided with an opportunity to adjudicate the issues on merits. This being the principles to be followed, this Court is of the considered opinion that the findings in this regard by the trial Court is not sound. Accordingly, the Fair and Decreetal Order dated 21.01.2015 passed in I.A.No.3 of 2013 in O.S.No.11023 of 2010 is set aside and consequently, delay in filing the Interlocutory application also stands condoned and consequently, O.S.No.11023 of 2010 stands restored.

8. The trial Court is directed to dispose the suit as expeditiously as possible preferably within a period of one year from the date of receipt of a copy of this order. The parties to the suit are directed to co-operate by not seeking unnecessary adjournments on flimsy grounds.

9. Accordingly, the Civil Miscellaneous Appeal stands allowed.
No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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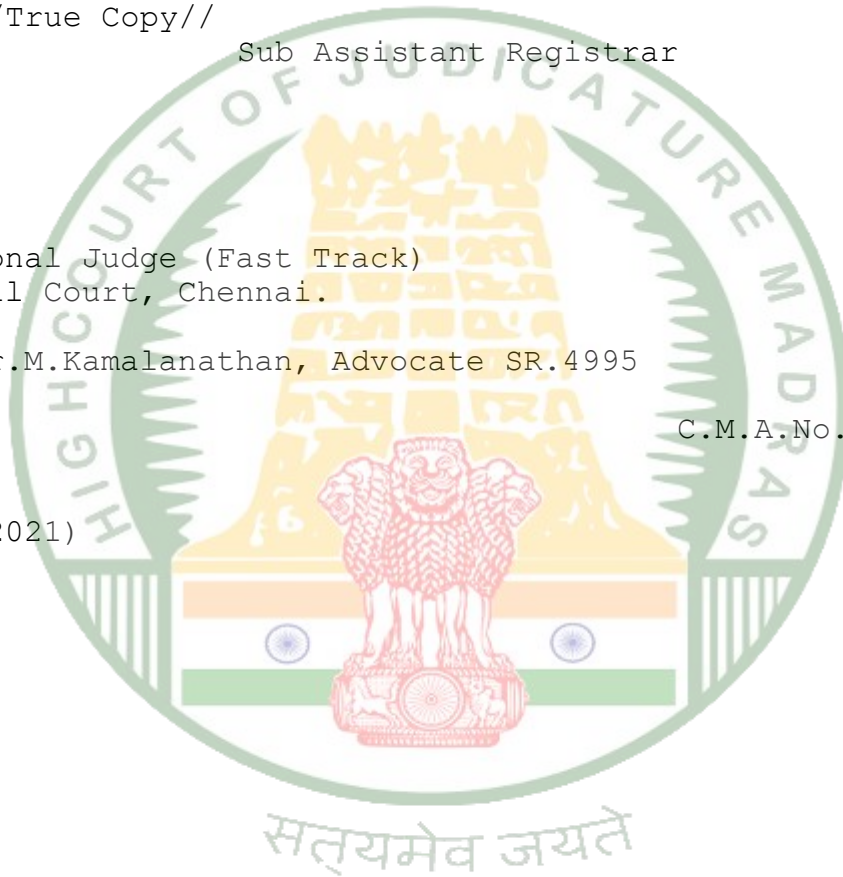
To

XV Additional Judge (Fast Track)
City Civil Court, Chennai.

+1cc to Mr.M.Kamalanathan, Advocate SR.4995

C.M.A.No.482 of 2016

SSD(CO)
CB(03/03/2021)



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