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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2021

CORAM:

THE HONOURABLE Mr. JUSTICE S.S.SUNDAR

C.M.A. No.1315 of 2021

1.Dr.K.Parameswaran
2.B.Madhuranthakan

.. Appellants/Petitioners

Versus

1.R.Rangasamy
2.O.A.Palaniswamy
3.Vinayaka Education Development Trust,
Rep. by Founder Chairman
O.A.Palaniswamy
S/o.Angappa Mudaliar
No.12, Annai Indhira Nagar,
Kovilpalayam, Pollachi Taluk,
Coimbatore District.

4.Einstein
5.B.T.Pandian
6.B.T.Murali
7.B.T.Kumar
8.Mrs.Rathinam Sivakesan

.. Respondents/Respondents

Appeal filed under Order 43 Rule 1 of Civil Procedure Code, against the Fair and Decreetal order passed in I.A.No.1 of 2019 in A.S.No.54 of 2013 dated 23.12.2020 on the file of learned 1st Additional District Judge, Coimbatore.

For Appellants : Mr.M.Arunkumar
For Respondents : No Appearance for R1
Not Ready in Notice for R2 & R3
Mr.B.K.Sreenivasan for R4 to R8

O R D E R

This civil miscellaneous appeal has been filed to set aside the fair and decreetal order passed in I.A.No.1 of 2019 in A.S.No.54 of 2013 dated 23.12.2020 on the file of the learned 1st Additional District Judge, Coimbatore.



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2.The appellants in this appeal are the plaintiffs in the suit in O.S.No.17 of 2005 before the Sub Court, Pollachi. The suit filed by the appellants was dismissed by the trial Court by a judgement and decree dated 03.04.2012.

3.Aggrrieved by the judgement and decree of the trial Court, the appellants preferred an appeal in A.S.No.54 of 2013 before the 1st Additional District Judge, Coimbatore. It is stated that the appeal was originally presented before the Principal District Court, Coimbatore. It is also admitted that later the appeal was transferred to the 1st Additional District Court, Coimbatore. It is stated that the transferred Court issued notice to the appellants for their appearance. Finding that the notice sent to the appellants was returned with an endorsement "Door locked and intimation given", the lower appellate court dismissed the appeal for non-prosecution, by assuming that the appellants failed to appear before the Court even after intimation about the posting of the appeal.

4.Therefore, the appellants filed an application in I.A.No.1 of 2019 in A.S.No.54 of 2013 to restore the appeal which was dismissed by an order dated 09.04.2018. Aggrrieved by the same, the appellants have preferred the above civil miscellaneous appeal before this Court.

5.The learned counsel for the appellants submitted that the petition for restoration was filed without any delay. It is also brought to the notice of this Court that it is not the case where the lower court has made any observation regarding the conduct of appellant. In other wards, there is no evidence or material to suggest that the appellants have caused delay intentionally to the prejudice of the respondent. When a petition for restoration is filed, the Court should always lien in favour of the appellants and the endeavour of the Court is to see that the parties get fair opportunity to conduct the case and get a decision on merits. In the present case, it is stated that the petition for restoration was filed by the present counsel who came to the scene by change of vakalat. The case of the appellants is that the previous counsel engaged by the appellants did not even communicate the order of dismissal of the appeal for non-prosecution. Even then, the appellants filed the petition for restoration without any delay. The appeal was filed in time and there is nothing to suggest that the delay had



caused any irreparable injury to the respondent. Even in cases where there is enormous delay in filing a petition for restoration, the Hon'ble Supreme Court has ruled that a liberal, pragmatic, justice oriented and non-pedantic approach should be shown while dealing with an application for condonation of delay.

6. Having regard to the settled law and the principles taken and followed by this Court and the Hon'ble Supreme Court in several judgments/precedents, this Court is unable to accept the reasons adduced by the lower appellate court for dismissing the petition for restoration.

7. The lower appellate Court has dismissed the petition only for the following reasons:

a) The appellants have not produced medical certificates to prove their contentions.

b) The Doctors who had treated the 1st appellant/petitioner are not examined.

c) Though it is stated that the 1st appellant/petitioner was taking treatment, there is no explanation why the 2nd appellant could not give instructions to prosecute the appeal. There is no evidence to prove that the 1st appellant was permanently staying in Bangalore.

8. The respondents have not produced any concrete evidence to disprove the reasons stated by the appellants for their non-appearance on 09.04.2018. Merely because the appellants or their counsel did not appear on 09.04.2018, it should not be the position that the appeal should be dismissed for non-prosecution and that the appeal cannot be restored even if sufficient reason is stated. The appellants have given sufficient reasons. While analysing whether the reasons are genuine, the Court has to apply its mind with the probabilities. Unless there is positive evidence against the appellants, the Court cannot simply disbelieve the reasons and dismiss the petition, on the ground that there is no positive proof to substantiate the reasons for non-appearance on a single day.



9. Since the attitude of the Court below as seen from the order is contrary to the principles settled and in order to give a fair opportunity to the appellants to prosecute the appeal, this Court is unable to sustain the order passed by the learned 1st Additional District Judge, dismissing the petition for restoration. Therefore, the order made in I.A.No.1 of 2019 in A.S.No.54 of 2013 dated 23.12.2020 on the file of the learned 1st Additional District Judge, Coimbatore is set aside.

10. Accordingly, this civil miscellaneous appeal stands allowed. No Costs.

11. The learned counsel appearing for the respondents 4 to 8 submitted that the suit is filed under Section 92 of CPC and therefore a regular appeal is maintainable only before this Court. It is noted that, from the judgement and decree, this Court is unable to come to the conclusion as to whether the suit was filed under Section 92 of CPC., after getting permission from the Court. In the said circumstances, it is open to the respondents to raise objections before the lower / Appellate Court. In case the preliminary objections raised by the respondents with regard to maintainability of appeal can be sustained on facts, the lower appellate Court may pass appropriate orders returning the appeal papers, so that the appellants can prefer an appeal before the appropriate forum.

Sd/-

Assistant Registrar (CS-CCC)

// True Copy //

Sub Assistant Registrar

ssr

To

The 1st Additional District Judge, Coimbatore.

Copy to

The Section Officer, VR Section, High Court, Madras.

+1CC to Mr.SampathKumar & Associates, Advocate, SR.No. 33055

+1CC to Mr.B.K.Sreenivasan, Advocate, SR.No. 33070

C.M.A. No.1315 of 2021

LN(CO)

B.VC (24/08/2021)