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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.A.No.3351 of 2021

Srirangan

... Appellant/Petitioner

Vs

1.Kopna Gounder @ Natesa Gounder
Palani Gounder (Died)
2.Kalaiselvan
3.Mahalingam
4.Gopindammal
5.Chandra

... Respondents/LRS of deceased Palani/Respondent

Prayer: Civil Miscellaneous Appeal filed under Order XLIII Rule 1(t) of the Code of Civil Procedure, praying to set aside the fair and decretal order of the learned III Additional District Judge, Salem passed in I.A.No.1 of 2019 in A.S.No.17 of 2018 dated 13.09.2019.

For Appellant : Ms.J.Prithivi

For Respondents : Ms.Zeenath Begum for caveator/ R1.

J U D G M E N T

A comedy of errors has resulted in this Civil Miscellaneous Appeal.

2. The petitioner is the appellant in A.S.No.17 of 2018. The said appeal came to be dismissed for default on 10.12.2018. An application for restoration of the appeal was filed on 08.01.2019 i.e., within the time allowed under law. A counter was filed to the said application for restoration of the appeal stating that the 2nd respondent had died on 16.03.2019. However, no steps were taken to bring on record his legal representatives.

3. The learned Additional District Judge observed that the date of dismissal of the appeal has been wrongly mentioned in the affidavit filed in support of this application. That



conclusion of the learned Additional District Judge is wrong.

4. The learned Additional District Judge further found that the affidavit filed in support of the application for restoration, which was numbered as I.A.No.1 of 2019, was neither signed by the deponent, nor attested by the counsel. The learned Additional District Judge pointed out these errors and the failure on the part of the petitioner/ appellant herein to take steps to bring on record the legal representatives of the deceased 2nd respondent, dismissed the application.

5. The said order was again erroneously challenged by way of a Revision in C.R.P.No.11 of 2021. Upon an application being filed seeking conversion, the Revision was converted into Civil Miscellaneous Appeal, in view of the fact that Order XLIII Rule 1(t) makes orders passed under Order XLI Rule 19 specifically appealable. Thus, last of the errors committed has been rectified, but the earlier errors continue.

6. The Registry of the District Court ought not to have numbered the application, which was supported by an un-signed affidavit. If only the Registry had been little more cautious, it would have returned the application, for proper presentation and the appellant herein would have got an opportunity to rectify the error, that has not been done. I am unable to concur with the conclusion of the learned appellate Judge in throwing out the appeal on such a technical deficiency.

7. In Collector, Land Acquisition Vs. MST.Katiji reported in (1987) 100 LW 676, the Hon'ble Supreme Court has pointed out that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. It was also pointed out that the Courts are respected for their ability to do justice and not to legalise in justice.

8. After all, the appellants seek a re-hearing of their appeal. A right of the appeal, that too a regular first appeal, is very valuable right, which should not be denied on flimsy technical grounds. I am therefore of the opinion, that the remedial measures should be put in place immediately.

9. Hence, the following order is passed in this Civil Miscellaneous Appeal:

- ➔ The Civil Miscellaneous Appeal is allowed, the order of the learned III Additional District Judge, Salem dated 13.09.2019 made in I.A.No.1 of 2019 will stand set aside;



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- The III Additional District Judge, Salem is directed to de-number I.A.No.1 of 2019 and return the Interlocutory Application to the counsel for the petitioner before him, requiring him, to re-present it by rectifying the defects viz., obtaining the signatures of the deponent in the affidavit and proper attestation;
- Thereafter, the appellant is required to take steps to bring on record the legal representatives of the deceased 2nd respondent also;
- The pendency of Revisions and Civil Miscellaneous Appeals shall be taken into account, by the learned Additional District Judge, while considering the delay in seeking to set aside the abatement caused by the death of the 2nd respondent;
- After steps are taken to bring on record, the legal representatives of the 2nd respondent, the learned Additional District Judge is directed to dispose of the application on merits;
- In order to mitigate the loss caused to the respondent, by this process, the petitioner is required to pay costs of Rs.5,000/- to the counsel for the respondent appearing in this Revision.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

dsa

To

The Additional District Judge-III,
Salem.

+1cc to Mr.S.Kaithamalaikumaran, Advocate SR. No.64671
+1cc to Ms.Zeenath Begum, Advocate SR. No.64713

CMA No.3351 of 2021

RR (CO)
PR (27/12/2021)