



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on :16.03.2020

Delivered on : 01.03.2021

CORAM

THE HONOURABLE MRS. JUSTICE R.THARANI

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C.M.P. (MD) .No.10768 of 2018
in S.A. (MD) .No. SR39536 of 2017

1.Muthammal
2.Velappan
3.Esakkiammal
4.Ramalakshmi
5.Rajangam
6.Parameswaran
7.Ganapathi Pillai
8.Soundararajan ... Petitioners/Petitioners/Appellants
Vs.

Thangam ... Respondent/ Respondent/Respondent

Prayer in C.M.P. (MD) .No.10768 of 2018 : Petition under Order 41 Rule 19 of C.P.C., to rehear the CMP(MD)No.9633 of 2017 in SA(MD) No.SR39536 of 2017 dated 17.09.2018.

Prayer in C.M.P. (MD) .No.9633 of 2017 : Civil Miscellaneous Petition is filed under Order 41 Rule 3-A read with under Order 41 Rule 1 and 2 of C.P.C., to condone the delay of 5075 days in filing the petition this Second Appeal.

Prayer in S.A. (MD) .No.SR39536 of 2017: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in A.S.No.96 of 1999 on the file of the District Court, Kanyakumari, dated 13.08.2003 confirming the judgment and decree in O.S.No.1388 of 1990 on the file of the II Additional District Munsif Court, Nagercoil, dated 31.08.1999.

For Petitioners : Mr.M.Sakthi Kumar

For Respondent : Mr.N.Dilipkumar

O R D E R

This petition is filed by the petitioners to rehear CMP(MD) No.9633 of 2017 in SA(MD)No.SR39536 of 2017 dated 17.09.2018.

2. Brief substance of the petition is as follows

The respondent filed a suit in O.S.No.1388 of 2019 seeking a relief of partition and separate possession against the first defendant before the learned 2nd Additional District Munsif,



Nagercoil. The suit was decreed on 13.08.2003. The first defendant filed an appeal in A.S.No.96 of 1999 on the file of the District Court, Kanniyakumari. All the present petitioners are impleaded as the legal heirs of the deceased first defendant. That appeal was dismissed. The Second Appeal was filed with a delay of 5075 days. A petition to condone the delay was filed in CMP(MD)NO.9633 of 2017. The respondent filed a counter. That petition was listed on 17.09.2018. On 17.09.2018, when the matter was called upon, the learned counsel for the petitioner was ready for argument. The learned counsel for the respondent wanted a short pass over. For which, the learned counsel for the petitioner agreed. Subsequently, without intimation, the pass over case was again taken over in the absence of the learned counsel. The Court has dismissed the above condone delay petition without hearing the petitioner. Order 41 Rule 17 empowers the Court to dismiss the appeal for appellant's default. But, it does not confer any power to decide the matters on merits. In case, the absence is on the side of the respondent, the Court is empowered to pass an order ex-parte. It cannot be done vice versa. The dismissal on merits by this Court is not proper. The Second Appeal arises from preliminary decree in a partition suit. Unless, the decree is set aside, the appellant will be put in to irreparable loss and great hardship.

3.On the side of the petitioners, it is stated that an ex-parte disposal of appeal without any opportunity to the appellant of being heard is not justified. A judgment of the Hon'ble Supreme Court published in **1990 (Supp) Supreme Court Cases 76** is cited wherein it is decided as follows:-

"3.Having heard learned counsel for the parties, it appears to us that the High Court was not justified in rejecting the prayer for re-hearing. The appellant appears to have engaged a counsel who was not afforded an opportunity of hearing. That apart, there was no proper assistance to the High Court when it disposed of the revision petition. There is no reason for hustling through in a matter where serious questions affecting the rights of parties arise for determination. The High Court should not give that impression to the litigant public."

4.On the side of the petitioners, it is stated that, the High Court could have dismissed the appeal for default in the absence of the learned counsel for the appellant. But it could not avert to the case. A judgment of the Hon'ble Supreme Court published in **(1996) 5 Supreme Court Cases 625** is cited where it was decided as follows:-

"Non-appearance of one of the appellants' advocates - Dismissal of the appeal on merits when



proper - Appellant's duty to see that his counsel was ready - High Court dismissing the second appeal on merits confirming the decree of the first appellate court - Held, appeal rightly dismissed on merits - Practice and procedure."

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5.On the side of the respondent, it is stated that Order 41 Rule 3 (A) is applicable only for appeals and not for delay condone petitions and hence, re-hearing a petition filed by the petitioners is not maintainable. The delay is more than 15 years. After the dismissal of the first appeal, the petitioners appeared before the trial Court in the final decree proceedings and that the delay of 15 years in filing the Second Appeal is not acceptable. On the date of the previous hearing itself, the Court has heard both sides arguments. Only after hearing the arguments, this Court called for the records from the Lower Court. Hence, the allegation of the petitioners that they were not heard is wrong. The delay was not satisfactorily explained by the petitioner. Hence, no re-hearing is possible. Order 41 Rule 17 is not applicable to the present stage of the case. Already sufficient opportunity was given to the petitioners in the delay execution petition itself. Only after getting so many adjournments, the learned counsel for the petitioners made his submissions. After hearing the arguments, the High Court called for the records from the lower Court. Even after receiving that report, the appellant counsel was not present at the time of hearing of the case. When the matter is listed as the 5th case in the list, it is the duty of the learned counsel for the appellant to be present before the Court.

6.On the side of the petitioner, it is stated that all that the petitioners sought for is only an opportunity to represent and an opportunity to rehear the matter.

7.On the side of the respondent, it is stated that this Court has already dismissed number of delay execution petitions. Wherein, the delay is much less than the period of delay in the present case. A judgment of this Court published in **2017 (1) MWN (Civil) 626** is cited wherein it was decided as follows:-

"Delay of 2571 days in seeking to set aside ex-parte Preliminary Decree and 582 days in seeking to set aside ex-parte Final Decree - Discretion to condone delay has to be exercised under systematic manner, informed by reason - Justice must be done to both parties - While exercising judicial discretion, Court should consider loss to Opposite Party - Suit for Partition of year 1977 - Though Defendants received Notice in Execution Petition in April 2011, they filed Application to set aside ex-parte Decree



only in October 2011 - It is clear that Defendants intended to drag proceedings - Delay has not been properly explained."

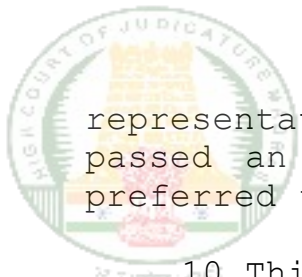
8. On the side of the petitioners, a judgment of the Hon'ble Supreme Court published in **1996 (5) Supreme Court Cases 625** is cited. But this citation is contrary to the case of the petitioners. Wherein dismissal of an appeal on merits was upheld by the Hon'ble Supreme Court. The facts of that case is applicable to the present case. The Hon'ble Supreme Court has clearly discussed that an order can be passed on merits.

"The question raised in this appeal is whether the High Court was competent to dispose of the appeal on merits when one of the appellants was absent? The learned counsel placed strong reliance on Order 41 Rule 17 sub-rule (1) read with Explanation CPC and contended that the appeal could not be heard on merits. We find no force in the contention. When the appeal was posted for hearing, it is but the duty of the counsel to appear. When the counsel was not present, the Court is not incumbent to adjourn the case. Even otherwise we are not inclined to accept the contention that the appellate court could not dispose of the appeal on merits. The appeal was rightly dismissed on merits by the High Court confirming the decree of the appellate court and it does not warrant interference."

"Non-appearance of one of the appellants' advocate - Dismissal of the appeal on merits when proper - Appellant's duty to see that his counsel was ready - High Court dismissing the second appeal on merits confirming the decree of the first appellate court - Held, appeal rightly dismissed on merits - Practice and procedure."

- In the above cited case, the Hon'ble Supreme Court has clearly held that when the counsel was not present, the Court is not incumbent to adjourn the case.

9. The matter to be decided in this petition is whether the petitioners are entitled for a prayer of rehearing CMP(MD)No.9633 of 2017. Both sides arguments were heard on 31.08.2018 and after hearing both sides, this Court called for reports from the Lower Court. The report from the Lower Court was received by this Court on 12.09.2018 and the case was posted to 17.09.2018. When the matter was called upon on 17.09.2018, as there was no



representation on the side of the petitioners, this Court has passed an order on merits. Against that order, the petitioners preferred this Civil Miscellaneous Petition.

10.This Civil Miscellaneous Petition for rehearing was listed on 08.07.2019. From 08.07.2019 till 16.03.2020, the learned counsel for the petitioners was not ready for arguments. Totally 12 adjournments were given to the petitioners. Only on 16.03.2020, the learned counsel for the petitioners has submitted his arguments in this Civil Miscellaneous Petition.

11.The question raised by the petitioners is whether this Court is having a right to pass an order on merits. The petitioners have filed an appeal along with a delay excuse petition before this Court. The learned counsel for the petitioners has submitted his arguments in CMP(MD)No.9633 of 2017 on 31.08.2018, and on that date itself, this Court called for a report from the lower Court. A report was received on 12.09.2018 and the matter was adjourned to 17.09.2018 giving sufficient time for the petitioners to submit further arguments if any. When the matter was posted as item No.5 in the list, it was the duty of the counsel to be present in the Court. Unfortunately the petitioner's counsel was not present. Since the petitioner's counsel was not present, this Court passed the order on merits based on the earlier submissions made by the petitioner's counsel.

12.The judgment of the Hon'ble Supreme Court published in **1996 (5) Section 625** cited by the petitioners is squarely applicable to the present case. Wherein the Hon'ble Supreme Court has clearly observed that "it is the appellant's duty to see that his counsel was ready. High Court dismissing the second appeal on merits confirming the decree of the first appellate court-Held, appeal rightly dismissed on merits". The Hon'ble Supreme Court has observed that the High Court is not incumbent to adjourn the case when the counsel was not present and that the dismissal of appeal on merits is correct.

13.It is pertinent to note that the arguments of the petitioner in CMP(MD)No.9633 of 2017 was already heard on 31.08.2018 itself. Even in this rehearing petition, the learned counsel for the petitioners has taken 12 adjournments, which took almost a year.

14.On the side of the petitioners, it is stated that the petitioners are having the right to file a petition to re-hear the matter under Order 41 Rule 17 of CPC. The learned counsel for the petitioners failed to prove that Order 41 Rule 17 is applicable for condone delay petitions.



15. On the side of the petitioners, it is stated that under Order 41 Rule 17, the delay excuse petition has to be dismissed only for default and this Court cannot pass an order on merits. Order 41 Rule 17 is applicable for appeals and is not applicable for condone delay petitions. Even as per Order 41 Rule 3 (A), there is no provision to rehear the matter already disposed of by this Court.

16. In the above circumstances, there is no reasons sufficient enough to re-hear the matter. Accordingly, this Civil Miscellaneous petition is dismissed. No costs.

Sd/-

Assistant Registrar(AE)

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Sub Assistant Registrar(CS)

dss

To

1. The II Additional Subordinate Judge, Nagercoil.

2. The District Judge, Kanyakumari.

3. The II Additional District Munsif, Nagercoil.

+1 CC to Mr.N.DILIPKUMAR, Advocate SR.No. 7836

Note: (i) Both sides present. The learned counsel for both sides consented for pronouncing the order today. Order was already ready and only due to lockdown, the order could not be pronounced earlier. With the consent of the learned counsel for both sides, the order is pronounced today.

(ii) In view of the present lock down owing to COVID -19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

Order made in

C.M.P. (MD) No.10768 of 2018

in

SA (MD) No. SR 39536 of 2017

01.03.2021

sss (CO)

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