



C.M.P.No.8404 of 2022 in
SA.SR.No.130510 of 2019

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.09.2022

PRONOUNCED ON: 23.11.2022

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

C.M.P.No.8404 of 2022
in
S.A.SR.No.130510 of 2019

Bakkiyam

... Petitioner/Appellant

Vs.

Arokiyasamy

... Respondent/Respondent

Prayer in C.M.P.:- Civil Miscellaneous Petition filed under Order 41 Rule 3A r/w. Order 42 Rule 1 of Code of Civil Procedure, praying to condone the delay of 900 days in the payment of the deficit Court fee of Rs.4250/- in the above Second Appeal in SR.No.131510 of 2019.



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Prayer in Second Appeal.:- Appeal is filed under Section 100 of the CPC against the judgement and decree made in A.S.No.12 of 2015 (On the file of the II Additional District and Sessions Court, Thiruppur) dated 07.04.2017 confirming the Judgement and Decree made in O.S.No.58 of 2009 (On the file of the Sub Court, Udumalpet dated 28.11.2014).

For Appellant : Mr.V.Ravi
For Respondent : Mr.B.Vijayakumar

ORDER

The plaintiff is the appellant before this Court. The petition before me is for condoning the delay of 900 days in paying the deficit Court Fee of a sum of Rs.4,250/-. Both the counsels have submitted their arguments on the premise that the petition for the condonation of the delay in paying Court fee is one for condoning the delay in filing the Second Appeal. A perusal of the affidavit which is filed in support of the petition now before me would state that it was only a sum of Rs.1/- which had come un-



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2. The deponent in Paragraph No.2 has stated as follows:-

" 2. I, Submit that the above appeal was filed on 16-10-2019 and while filing the above appeal, the stamps were calculated and a sum of Rs.750/- was arrived at and the same was affixed. The stamp papers to the value of Rs.750 and a label of Rs.10 was affixed while filing. However, the same was not properly pasted and as such, had fallen from the stamp papers and there is a deficit of one rupee in the payment of the court fees."

However, though the deponent would submit that it was only a deficit of Rs.1/- in Paragraph No.2. However, in Paragraph No.3, the petitioner would state that there is a deficit Court Fee of Rs.4,250/- and a delay of 900 days in paying the same. Therefore, the reason given for the delay in Paragraph No.2 and the relief claimed in Paragraph No.3 do not co-relate.



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3. That apart, the appeal is also filed with a delay of nearly 647 days, although in normal circumstances the Court is liberal while considering a petition for condoning the delay, however, in the instant case, the respondent had seriously objected to the delay being condoned (though he was under the impression that it is an application to condone the delay in filing the appeal) stating that there is absolutely no merits in the appeal and would request the Court to look into the merits of the case and thereafter the merits in the condone delay petition. Therefore, both counsels had made their submissions on the main appeal itself. Therefore, it is necessary for me to briefly extract the facts of the case and the submissions made by either counsel.

4. The plaintiff as already stated is the appellant before this Court. The plaintiff had filed a suit O.S.No.58 of 2009 on the file of the Sub Court, Udumalpet for a partition and separate possession of her half share in the suit schedule properties. The suit schedule properties consisted of 2 properties one at Iluppu Nagaram Village, Udumalpet and the other at



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Virgulpatti Village of Udumalpet. The plaintiff would contend that the suit properties belonged to her grandparents Palanichamy Naikkar and his wife Velammal. They had a son Rajagopalasamy who is the father of the plaintiff and the defendant. Velakuttiammal is the mother of the plaintiff. It is her case that on 16.08.1946, the suit property was settled on Rajagopalasamy and his wife Velakuttiammal by Palanichamy and Velammal retaining a life interest for themselves. After their death, the property was being enjoyed by the plaintiff's parents. On 30.04.1950, the plaintiff's father had executed a release in favour of plaintiff and the defendant who were then minors and their mother stood as their guardian. After, the demise of their mother the property was being run and managed by her maternal grandfather Balakrishnasamy till 1976 and thereafter the property was handed over to the plaintiff and the defendant who have been in joint possession and enjoyment of the same. The father of the parties passed away on 26.01.2009. The plaintiff and defendant would therefore get an equal share in the suit schedule property and therefore the plaintiff had filed the above suit for partition, since the defendant was not coming forward to execute the deed.



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5. The defendant had filed a written statement inter alia denying the various allegations contained in the plaint as false and misleading. He would submit that in the year 1975, the plaintiff had married one Seshadri, the maternal uncle of the defendant. After the demise of the defendant's mother, the plaintiff and her husband were living under the same roof along with the defendant and their father and were taking care of the father. After the defendant's marriage, the plaintiff and her husband set up a separate residence and had moved out of the joint property. Thereafter, on 20.01.1988, the father of the parties had orally partitioned the property between themselves, wherein the 1st item was allotted to the defendant and the 2nd item to the plaintiff.

6. It is the case of the defendant that it is only with the written consent of the plaintiff that the service connection had been transferred to his name. The defendant had developed the 1st item of the suit property by planting several coconut trees, digging two borewells and enjoying it



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for over 23 years. The plaintiff has not made any mention about this oral partition in her plaint.

7. The Trial Court had on considering the evidence on record come to the conclusion that the parties have indeed partitioned the property and are in enjoyment of their respective shares, therefore the suit came to be dismissed. Challenging the said judgement and decree the plaintiff had filed A.S.No.12 of 2015 on the file of the II Additional District Court, Tiruppur.

8. The learned II Additional District Judge, Tiruppur also concurred with the findings of the Trial Court and decreed the suit. Challenging the same the plaintiff is before this Court with petition to condone the delay in paying the deficit Court fee.

9. Mr.Ravi, learned counsel appearing on behalf of the appellant/plaintiff would submit that the petition is one for condoning the delay of 900 days in filing the appeal. He would submit that the suit is



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one for partition. He would submit that the oral partition has not been proved by the defendant. He would submit that even assuming that there was an oral partition, the same has not been acted upon, in fact when the parties were borrowing the loans from the Cooperative Banks they had each obtained the no objection from the other in respect of the lands for carrying on the agricultural activities. He would therefore submit that there was no partition which had been given effect to.

10. The learned counsel would further submit that Ex.B.47 which is a patta filed on the side of the defendant has been marked subject to objection and this cannot be relied upon. That apart, taking into account the fact that for obtaining the loan the signatures of the plaintiff had been obtained by the defendant would only go to show that the parties have not divided the properties and the Court's below have been totally misdirected into contending that the parties have orally partitioned the suit properties.



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11. The learned counsel would rely upon the judgement reported in **2000 - 1 - LW 488 - Subbiah Niaicker and 5 others Vs. Guruvammal and 3 others** in support of his contention that a mere convenience in enjoyment will not by itself prove that there has been a partition of the properties. He would then rely upon the judgement reported in **2022 (2) CTC 593 - Annakodi Vs. A.Natarajan & others** where the Hon'ble Supreme Court has rejected the plea of oral partition stating that oral partition would not take away the right of the daughter. He would also rely upon the judgement of the Hon'ble Supreme Court reported in **(2008) 17 SCC 491 - Bachhaj Nahar Vs. Nilima Mandal and Another** in support of his contention that without a pleading the party cannot be set up a different case by way of evidence therefore any evidence which was not supported by pleadings cannot be taken into consideration. He would also rely upon the much quoted judgement of the Hon'ble Supreme Court reported in **(1998) 7 SCC 123 - N.Balakrishnan Vs. M.Krishnamurthy** in support of his argument that Courts have to be liberal while



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considering an application for condoning the delay.

12. Per contra, Mr.B.Vijayakumar, learned counsel appearing on behalf of the respondent /defendant would contend that even during the life time of the father the oral partition has been effected between the parties by the father himself. Each of them have been in enjoyment of their respective shares of the properties. The defendant was in enjoyment of the 1st item of the suit schedule property and the plaintiff was in enjoyment of the 2nd item of the suit schedule property, both of which are situated in two different villages.

13. The learned counsel would further submit that it is only on account of this oral partition that the plaintiff had endorsed her no objection for having the service connection changed into the name of the defendant. That apart, the defendant has invested huge sums of money for developing the 1st item of property by planting the coconut trees and by digging two borewells. He would further submit that each of the



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parties have been in enjoyment of their respective shares for well over 23 years. He would rely upon the various admissions made by the plaintiff as P.W.1 which would go to show that the parties have partitioned the property and which has been set out in great detail both by the Trial Court as well the Appellate Court. The oral partition has been proved by the defendant by filing Ex.B.1 to Ex.B.55 which start from the year 1990 onwards. He would further submit that in order to prove the oral partition, D.W.4 has been examined and who has adduced evidence to that effect and which has not been rebutted by the plaintiff. He would further submit that the Courts below have rightly considered the evidence and non-suited the plaintiff.

14. Heard both counsel.

15. As stated in the beginning, though the application is one for condoning the delay in paying the deficit Court fee, both the counsels have made their arguments on the basis that the petition is one for condoning the delay in filing. Even assuming that the application is one



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for condoning the delay in paying the deficit Court Fee. However, the reason given and the amounts shown as deficit does not co-relate with the relief claimed. Apart from the delay in paying the deficit Court fee of over Rs.4,250/- there is also a delay of 647 days which has prompted this Court to consider the merits to find out if prima facie a case has been made out for condoning the delay. The reasons given in the affidavit is totally out of context. The suit is filed for partition on the ground that parties continued to remain jointly, however, the defence is that there has been an oral partition between the parties and that the each parties have been in possession and enjoyment of the same for over two decades.

16. The defendant has filed documents to show his independent enjoyment of the 1st item of the property in the form of Ex.B.1 to Ex.B.55. The House Tax receipts, the Electricity receipts, the Kist etc; would show the name of the defendant only. The defendant has also independently borrowed money from the bank on the security of the 2nd item of the suit property. The plaintiff has also admitted in her cross-



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examination that in the suit 1st item of the property, the defendant has put up a construction and that he has been in possession of the property since 1990 and has been paying the tax etc; in respect of the same. The plaintiff would submit that the electricity service connection stands only in the name of the defendant. Their father had expired only in the year 2009 whereas the defendant has been in exclusive possession of the 1st item of the property from the year 1990 as per the evidence of P.W.1. The mutation of the revenue records had taken place even during the lifetime of the father who has not objected to the same. It appears that the plaintiff has deliberately not produced the revenue records relating to the 2nd item of the property as it may show that the same has been transferred into her name. The documents that have been filed by the plaintiff are the settlement deed, release deed and the death certificate. In fact the plaintiff has admitted that she is in occupation of the 2nd item of the suit property and both the Courts below have discussed the evidence on record in great detail and proceeded to dismiss the suit.



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17. The appellant/plaintiff has now filed this application where no reasons have been given for the delay. The judgements cited by the appellant/plaintiff do not support the case of the appellant/plaintiff. Further, the judgement relied upon by the appellant's/plaintiff's counsel for condoning the delay namely **(1998) 7 SCC 123 - N.Balakrishnan Vs. M.Krishnamurthy** is also a case where though the learned Judges would advocate a liberal approach, however, there is a word of caution that has been expressed by the bench in Paragraph Nos.9 and 10 as follows:-

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court



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accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

"10. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."



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18. Therefore, while exercising jurisdiction, a duty is cast upon the Court not only to do justice but substantial justice both to a person approaching the Court by way of an appeal as also to a person who is defending the case. Therefore, in order to condone the delay, this Court has to definitely look into the merits of the main case. The discussion above would clearly demonstrate that the plaintiff has not made out any case to show that the judgements of the Courts below are perverse and further the Second Appeal does not give rise to any substantial question of law. That apart no reasons for condoning the delay has been stated. Therefore, the Civil Miscellaneous Petition (C.M.P.No.8404 of 2022) stands dismissed. Consequently, the Second Appeal is rejected at the S.R. stage itself. However, there shall be no order as to costs.

23.11.2022

Index : Yes / No
speaking Order : Yes / No

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To,

1. The II Additional District and Sessions Court, Thiruppur.
2. The Sub Court, Udumalpet.
3. The Section Officer,
V.R.Section,
High Court, Madras -104.



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P.T.ASHA, J.,

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Pre-delivery Judgment in
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