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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.03.2022

CORAM :

THE HONOURABLE MRS.JUSTICE S. KANNAMMAL

C.M.P.No.14842 of 2019

in

A.S.No.1083 of 2007

1.V.Indhirani
2.I.V.Senthilnathan
3.K.Sasikala
4.T.Rajendran (deceased)
5.S.Hemalatha
6.P.S.Geetha
7.G.R.Darshini

..Petitioners/Appellants

Versus

1.A.Rajaammal
2.N.Maragathamani
3.S.Gunasundari (deceased)
4.Punniavathy
5.Selvaraj
6.Ravi
7.Maalathi

..Respondents/Respondents

C.M.P.No.14842 of 2019 is filed under Section 5 of the Limitation Act, to condone the delay of 103 days in filing the restoration petition to restore A.S.No.1083 of 2007 which was dismissed on 18.12.2018.

Prayer in A.S.No.1083 of 2007: Appeal filed under Section 96 of CPC against the decree and the judgment dated 31.08.2006 rendered in O.S.No.38/2004 on the file of the Additional District and Sessions Judge, FTC No.III, Coimbatore.

For Petitioners : Mr.V.Sankaranarayanan

For R4 : Mr.T.R.Rajaraman

ORDER

This petition has been filed by the petitioners under Section 5 of the Limitation Act, to condone the delay of 103 days in filing the petition to restore A.S.No.1083 of 2007,



which was dismissed by this Court for default on 18.12.2018.

2. Before advertizing to the averments made in the affidavit filed in support of C.M.P.No.14842 of 2019, a conspicuous narration of background facts of this case is necessary.

3. The suit in O.S.No.38 of 2004 was filed by A.Rajammal, the 1st respondent in C.M.P.No.14842 of 2019. The suit was filed against one V.Indirani and seven others for passing a preliminary decree of partition and to allot three equal shares in her favour. A plain reading of the plaint would indicate the parties to the suit are related to each other. To be specific, the plaintiff, one R.P.Viswanathan and R.T.Manonmani are the children born to Thulasiammal and P.R.Ponnusamy Thevar. The brother of the plaintiff R.P.Viswanathan died and his children are the defendants 1 to 3. Similarly, the children of Manonmani, sister of the plaintiff died and defendants 4 to 6 are her children. The 7th defendant in the suit is the purchaser of a portion of the suit property and the 8th defendant is an agreement holder in respect of a portion of the suit property.

4. The suit was contested by filing a written statement. Before the Trial Court, the parties have let in evidence both oral and documentary. The trial Court, by a decree and judgment dated 31.08.2006 in O.S.No.38 of 2004 passed a preliminary decree of partition. Aggrieved by the judgment and decree dated 31.08.2006 passed in O.S.No.38 of 2004, the 1st defendant in the suit along with others have filed A.S.No.1083 of 2007.

5. The 7th defendant who has purchased a portion of the suit property and a subsequent purchaser has filed Cross Objection specifically to recognize her right over the portion of the property purchased by her.

6. Both the appeal as well as the Cross Objection No.57 of 2009 were pending before this Court atleast for a decade. Admittedly, service of notice was completed in the appeal as well as the Cross objection. While so, when A.S.No.1083 of 2007 along with Cross Objection No.57 of 2009 were taken up for hearing, it was brought to the notice by this Court by the counsel for the appellants that in spite of registered letters sent to them, they did not respond and therefore, the counsel for the appellants reported no instruction. Thereafter, this Court also directed the Registry to send a notice dated 08.01.2018 to the appellants which was also served on them. In spite of the same, when the appeal as well as the Cross Objection were taken up for hearing on 18.12.2018, the appellants were not represented by any counsel. Therefore, this Court dismissed the appeal for non-prosecution.



7.As far as the Cross Objection filed by the 7th defendant is concerned, this Court specifically directed that the preliminary decree passed in the suit shall stand modified to the extent of recognizing the 7th defendant in respect of the portion of the property purchased by her from the first defendant in the suit as the first defendant has no objection for such allotment of share. Accordingly the Cross Objection was ordered.

8.At this stage, the present petition in C.M.P.No.14842 of 2019 has been filed by the 1st defendant in the suit along with others. The affidavit in support thereof was sworn by the 2nd defendant in the suit. In the affidavit filed in support of C.M.P.No.14842 of 2019 the 2nd defendant had stated that on 08.11.2017, the 1st defendant Indhirani suffered cardiac arrest and consequential breathing difficulty. Later, she had also undergone some medical investigation which prevented him from giving instruction to his counsel engaged in this appeal. It is also stated that during January 2018, he had suffered a major accident and was bed ridden and therefore also he could not give instruction to his counsel to prosecute this appeal. He has also filed discharge summary issued to him on 02.03.2018 to substantiate that he suffered some orthopedic injury. He has also enclosed the MRI report dated 22.01.2018 issued to him. He has also annexed various other medical records to show that he was reasonably prevented from issuing instruction to his counsel. Therefore, there was a delay of 103 days in filing this petition to restore the appeal and it is neither willful nor wanton. Therefore he prayed for condoning the delay and to restore the appeal so as to enable him to prosecute it on merits.

9.The petition for condonation of delay was vehemently contested by the plaintiff Rajammal. She has filed a counter affidavit specifically stating that to the best of her knowledge, the 2nd defendant did not met with any accident as alleged. It is also her contention that the 1st defendant did not suffer any medical ailment as alleged. In effect, it is her contention that the medical reasons assigned by the petitioners are false and they are invented for the purpose of filing the present petition. It is also submitted that the suit was contested vehemently by the defendants before the Trial Court by engaging an advocate. Thereafter, the suit was decreed on 31.08.2006 and as against the decree and judgment, the appellant has filed the appeal and kept the appeal pending atleast for a decade before this Court. It is her specific contention that she is already aged 70 years and the present petition, if allowed, would result in dragging on the final decree proceedings for further period. Above all, it is stated that in spite of the dismissal of the appeal by this Court, the petitioner has mortgaged a portion of the suit property, obtained a sum of



Rs.50 Lakhs from Union Bank of India, which would show the conduct of the petitioners to prevent the plaintiff from enjoying the fruits of the decree. Therefore, she would state that the parties must be relegated to the trial Court for passing a final decree in terms of the preliminary decree passed by the trial Court. Thus, the plaintiff/first respondent sought for dismissal of the present petition for condonation of delay.

10.The learned counsel appearing for the petitioners would submit that to prove the ailment suffered by the 2nd petitioner, medical records have been produced. It is also stated that the 1st petitioner also suffered cardiac arrest and breathing difficulty and they were substantiated by the medical records. Even otherwise the delay of 103 days is not inordinate. Therefore, in the larger interest of the justice, the petitioners must be given one more opportunity to prosecute the appeal suit. In support of his contention, he has also taken this Court to the medical records produced on behalf of the petitioners and contended that the 1st petitioner as well as the 2nd petitioner have in fact been hospitalized for some time and it has reasonably prevented the 2nd petitioner from approaching his counsel and to give him instruction. In effect, it is his submission that the petitioners must be given one more opportunity to prosecute the appeal failing which they will be subjected to irreparable loss and hardship.

11.Per Contra, the learned counsel appearing for the 1st respondent/plaintiff, by placing reliance on the counter affidavit, would contend that the suit was filed in the year 2004 for partition of the suit properties by metes and bounds in which a preliminary decree was passed on 30.08.2006. However, the final decree application could not be prosecuted by the plaintiff due to the pendency of the appeal before this Court. The appeal was pending atleast for a decade. The conduct of the appellants in the appeal has been clearly narrated by this Court in the order dated 18.12.2018 by stating that in spite of service of notice on them, they have not chosen to come forward to contest the appeal. Even the counsel engaged by them before this Court has reluctantly reported no instruction in as much as the registered letter sent by him has not been responded to by the petitioners herein. It is in those circumstances, this Court dismissed the appeal for non-prosecution. The appellant is already 70 years old and any further delay in adjudication of the final decree proceedings would cause prejudice to her. He would also submit that the delay has not been properly explained by the petitioners. The affidavit had been filed without any genuine reason for the condonation of the delay. The petitioners having engaged a counsel and having received a letter sent by him ought to have atleast given some instructions to enable him to prosecute the appeals. This shows that the petitioners are



not diligent enough in prosecuting the appeal atleast for a decade. In such circumstances, condoning the delay would cause acute prejudice and hardship to the 1st respondent/ plaintiff and therefore, he prayed for dismissal of the petition.

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12. Heard the counsel for both sides and perused the materials available on record.

13. Admittedly, the appeal suit had been filed during the year 2007. The service of notice to the parties to the appeal has been completed and thereafter, it was taken up for hearing. At that time, it was represented by the counsel for the petitioners that in spite of the communication sent by him, the petitioners did not respond, therefore, he has reported no instruction. Even thereafter, this Court sent draft notice to the petitioners and it was also received by them. Having received the communication sent by this Court, the petitioners kept quite and they did not choose to appear before this Court either in person or any other counsel. It is in those circumstances, this Court dismissed the appeal for non-prosecution on 18.12.2018.

14. It is well settled that condonation of delay is a discretion vested with the Courts. However, such discretion has to be exercised sparingly to sub-serve the interest of justice. The condonation of delay should not be automatic and it is subject to certain factors governing it. A person who seeks to condone the delay must come forward with reasons which had reasonably prevented him from approaching the Court. In effect, sufficient cause must be shown for condoning the delay to the satisfaction of the Courts. This was the ratio laid down by the Honourable Supreme Court in the case of N. Balakrishnan vs. M. Krishnamurthy reported in 1998 (7) Supreme Court Cases 12. In that case it was specifically held that if the reasons assigned by the petitioners for condoning the delay appears to be dilatory strategy and smacks of mala fides, the delay need not be condoned. Applying the above parameters laid down by the Honourable Supreme Court to the facts of the present case, the cause shown by the petitioners is not only satisfactory but appears to be a dilatory strategy intended to prolong the final decree proceedings.

15. The petitioners contested the suit before the trial Court. After the suit having been decreed, they have filed the present appeal in the year 2007 by engaging a counsel. However, when the appeal was ripe for trial and having been intimated by their counsel, they have not chosen to prosecute the appeal. As regards the medical documents produced by the petitioners, it is evident that the 2nd petitioner suffered orthopedic injury during January 2017. Similarly, the 1st petitioner suffered cardiac



arrest on 04.07.2017 and was admitted in the hospital and later discharged. The medical records also unfolded that the 1st petitioner V.Indirani, had taken treatment for her ailment on various dates on 04.07.2017, 27.10.2017, 01.11.2017 and 04.11.2017. Similarly, the 2nd petitioner Senthilnathan has been admitted in Dr.Muthu's Hospital on 21.01.2018 and discharged on 02.03.2018. This, in the opinion of this Court, cannot be said to be a sufficient cause in as much as the appeal was dismissed by this Court during December 2018. Therefore, the injuries said to have been suffered by the 2nd petitioner during January 2018 cannot be a reason to contend that he was reasonably prevented from approaching this Court. Above all, there are totally seven petitioners in this Civil Miscellaneous Petition. Among them medical records have been produced to show that the 1st and 2nd petitioners herein have suffered some ailment during December 2017 / January 2018 respectively. However, in the affidavit filed in respect of the petition there is no whisper to show as to what prevented the other petitioners from approaching the counsel engaged by them. It is not the case of the petitioners that it was I.V. Senthilnathan, the 2nd petitioner is herein is spearheading the cause of the other petitioners. While so, this Court is of the view that the inaction on the part of the other petitioners in this petition to either contact the counsel upon intimation or to take some other steps to prosecute the appeal would be fatal to the present application filed by them for condonation of delay.

16.It is also seen that by the Judgment dated 18.12.2018 passed by this Court, the appeal filed by the appellants was dismissed inter alia the cross-appeal filed by the seventh defendant, to recognize her right in respect of the portion of the property purchased from the first defendant, was accepted and ordered by this Court. However, the present petition has been filed only to restore the appeal which was dismissed for default and the order passed by this Court in Cross Objection remain unassailed. Therefore also, the relief sought for in this petition, which was filed only to restore the appeal dated 18.12.2018 passed in the appeal, cannot be countenanced.

17.Having regard to all the above, this Court declines to exercise the discretionary jurisdiction conferred under Section 5 of the Limitation Act to condone the delay of 103 days. This is more so that the suit was filed for partition in the year 2006 and the preliminary decree passed thereof in the year 2006 and it could not be taken to a logical end even after a decade. In such circumstances, this Court refuses to condone the delay in filing the petition to restore the appeal which was dismissed for default on 18.12.2018.

18.Taking note of the fact that the suit was filed for



partition during the year 2004 in which a preliminary decree was passed in the year 2006 which is the subject matter of the appeal filed in the year 2007 and the parties to the appeal are related to each other, the plaintiff is directed to file an application for passing a final decree in terms of the preliminary decree, if not already filed, within a period of two weeks from the date of receipt of copy of this order. If any such application is filed or already filed, the Court below is directed to dispose of the final decree application within a period of ten months from the date of receipt of copy of this order.

19. In the result, the Civil Miscellaneous Petition filed by the petitioners for condoning the delay of 103 days in filing an application to restore the appeal is dismissed.

Sd/-
Assistant Registrar (CS VII)

//True Copy//

Sub Assistant Registrar

gbi

To

The Additional District and Sessions Judge,
FTC No.III, Coimbatore.

Copy To

The Section Officer,
V.R. Section,
High Court,
Madras.

+1cc to Mr.P.V.Sabaridas, Advocate, S.R.No.20782

C.M.P.No.14842 of 2019

MG (CO)
RGA (22/04/2022)