



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

C.M.S.A.No.37 of 2019

and

C.M.P.No.26351 of 2019

Divya

...Appellant

Vs

1.G.Umapathy

2.Minor G.Raghupathy(rep by guardian father T.Ganesan)

3.D.Vasugi

4.Santhi

5.Supriya

...Respondents

PRAYER : This Civil Miscellaneous Second Appeal is filed under Order 9 Rule 13 of CPC R/w. Section 100 of Civil Procedure Code, as against the fair and decretal order dated 19.08.2019 passed in C.M.A.No.10 of 2016 on the file of the learned II Additional Sub-Judge, Cuddalore, confirming the fair order and decretal order dated 29.06.2016 passed in I.A.No.832 of 2014 in O.S.No.331 of 2004, on the file of the Principal District Munsif Court, Cuddalore.

For Appellant : Mr.D.Bhaskar
For Mr.S.Seralathan

For Respondents : Mr.P.Dinesh Kumar[R1]
Not ready in Notice [R2 to R5]

JUDGMENT

This appeal has been argued not on merits but on a preliminary issue namely maintainability of the Civil Miscellaneous Second Appeal.

2. The contentions of the respondent is that the original application which is the subject matter of the present Second Appeal is a petition that is filed for setting aside the exparte decree namely a petition under Order IX Rule 13 of CPC. This application in I.A.No.832 of 2014 in O.S.No.331 of 2004 was dismissed by the learned Principal District Munsif, Cuddalore by order dated 29.06.2016. Challenging the said order, the appellant herein had filed C.M.A.No.10 of 2016 on the file of Sub-Judge, Cuddalore. The II Additional Sub-Judge, Cuddalore



had also confirmed the order passed by the Principal District Munsif in I.A.No.832 of 2014. Challenging this concurrent orders, the appellant has filed the present Civil Miscellaneous Second Appeal.

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3. The contentions of the respondents is that as per Section 104 of the Code of Civil Procedure, no further appeal would lie from any order passed in the appeal under this Section. Section 104 deals with the various orders against which an appeal would lie and one of them as provided in Section 104(1)(i) reads as follows:

' ' Section 104: Orders from which appeal lies.

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:---

(i) any order made under rules from which an appeal is expressly allowed by rules:

4. Therefore, it is his contention that since an appeal under the provision of Order 43 Rule 1 CPC falls within the category of orders described in Section 104(1)(i), by reason of the provisions to Sub-section(2) a further appeal is not maintainable.

5. The language of Section 104(2) clearly brings a finality to orders passed under the provisions of Order 43 Rule 1 and the other orders described in Section 104(1) of the Code of Civil Procedure.

6. The learned counsel appearing for the appellant would contend that this Court should permit the appellant to convert the appeal as Civil Revision Petition, considering the fact that the appellant have been bonafidely prosecuting the proceedings in this appeal.

7. The learned counsel for the respondent would submit that the Revision is also hit by limitation in the light of the Order 4 Rule 20 of the Appellate Side Rules. He would rely on the following judgments in respect of his contention that the exclusion clause under Section 14 of the Limitation Act cannot be availed by the appellant, reported in (1990) 4 SCC 309 and the judgment reported in ILR Vol.XXIII pg.14. He would further fairly concede that in the judgment of the Hon'ble Supreme Court reported in (1998) 6 SCC 200 in the case of Ghasi Ram and others vs. Chait Ram Saini and others the Hon'ble Supreme Court had dilated on the term prosecuted in 'good faith' found in Section 14 of the limitation Act as follows:



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Act. Does the interest of justice demand that plaintiff should be refused benefit of Section 14 of the Act on account of the negligence on the part of his counsel, ill advising him to file a revision instead of filing a fresh suit? An illiterate litigant cannot be made to suffer when he is ill-advised by his counsel. On the facts and circumstances of this case, we are satisfied that the plaintiff-appellant prosecuted the earlier civil proceeding in good faith.'

8. Heard the learned counsel for the appellant and the learned counsel for the respondents.

9. In the case on hand also, the litigant viz., the Appellant had followed the legal advice offered to her by an expert, namely, her Advocate. It is not the case of the respondent that there has been a delay on the side of the appellant in prosecuting the case. The only defence that has been raised by the respondent is that the Civil Miscellaneous Second Appeal is not maintainable. Therefore, applying the observation enunciated by the Hon'ble Supreme Court in the judgment of Ghasiram cited supra, the appellant herein should also be given opportunity to contest her case, considering the fact that she has been bonafidely contesting the Civil Miscellaneous Second Appeal before this Court and as the Civil Miscellaneous Second Appeal has been entertained by this Court.

10. In these circumstances, the appellant is permitted to convert the appeal into Civil Revision Petition and the period taken for prosecuting the Civil Miscellaneous Second Appeal shall be excluded for calculating limitation.

11. Registry is directed to return the original papers to the appellant so as to enable her to convert the same into Civil Revision Petition. The said exercise shall be completed within a period of one week from the date of receipt of a copy of this order. The appellant shall take the return of papers and represent the same as Civil Revision Petition.

12. With the above direction, this Civil Miscellaneous Second Appeal is disposed of. No costs. Consequently, connected civil miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar



ssn
To

1. The II Additional Sub-Judge,
Cuddalore.
2. The Principal District Munsif Court,
Cuddalore.
3. The Section Officer,
V.R.Section,
High Court,
Madras.
4. The Section Officer,
E.R.Section,
High Court,
Madras.

(To return th Original Papers to the appellant)

C.M.S.A.No.37 of 2019
and
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GPL (CO)
RN (04/04/2022)