



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 17.03.2022
DELIVERED ON : 01.04.2022

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THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.P (MD)No.4614 of 2019
in
S.A (MD) SR.No.18680 of 2019

V.Albert Sathianesan ... Petitioner/Appellant
Vs.

1.Grace Bai
2.Christal Gracelet
3.Bright Pakkia Lizi
4.Josewin Mettledestor
5.Hepsi Bai
6.Ravindran

... Respondents/ Respondents

PRAYER IN CIVIL MISCELLANEOUS PETITION: Civil Miscellaneous petition filed under Section 5 of the Limitation Act, to condone the delay of 94 days in filing the Second Appeal.

PRAYER IN SECOND APPEAL: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the Court of the Additional District and Sessions Judge(Fast Track Court), Nagarcoil, Kanyakumari District, dated, 12.07.2018 in A.S.No.12 of 2011 confirming the judgment and decree of the Court of the Subordinate Judge, Padmanabhapuram, Kanyakumari District, dated, 19.10.2010 in O.S.No.103 of 2006.

For Petitioner : Mr.S.Xavier Rajini
For Respondents : Mr.V.M.Balamohan Thampi
for R6
For R1 to R4 : Died

ORDER

The present application has been filed to condone the delay of 94 days in filing the above second appeal.

2. It is contended in the affidavit that the respondents in the appeal have filed O.S.No.103 of 2006 before Sub Court, Padmanabhapuram for the relief for partition. The said suit was decreed on 19.10.2010.

3. Aggrieved over the same, the present appellant filed A.S.No.12 of 2011 before Additional District and Sessions Court(Fast
<https://hcservices.ecourts.gov.in/hcservices/>



Track Court), Nagarcotil. The said appeal was dismissed on 12.07.2018. According to the learned counsel for the appellant, the copy application was filed belatedly due to misconceptions and there is a delay of 94 days in filing the above second appeal.

4. A perusal of the judgment of the First Appellate Court indicates that the first appeal was not dismissed on merits. Pending first appeal, the 3rd respondent in the appeal/who was the 3rd plaintiff in the suit had passed away. Despite several adjournments, the appellant has not taken steps to implead the legal heirs of the deceased 3rd respondent. Hence, the First Appellate Court has chosen to dismiss the appeal as against the 3rd respondent as abated. Since the 3rd respondent is the 3rd plaintiff in the suit and the decree for partition is indivisible, the First Appellate Court has proceeded to dismiss the appeal in entirety as abated.

5. The second appeal under Section 100 of Civil Procedure Code could be filed if a substantial question of law is raised in the appeal. In the present case, the first appeal has been dismissed by the First Appellate Court only on the ground that it is abated for not taking steps to implead the legal heirs.

6. The only remedy available to the appellant is to file an application to set aside the abatement along with condone delay to implead the legal heirs of the deceased respondents in the appeal. When an order has been passed on the ground that the appeal has been dismissed as abated, it is an administrative order taking the appeal out of the files of the Court for the default on the part of the plaintiff/appellant to implead the legal heirs of the deceased defendant/respondent. The abatement is not dependant upon the order passed by the learned Judge, but an appeal gets abated as per the provisions of Order 22 Rule 4 of Civil Procedure Code.

7. That apart, the appellant is entitled to file an application under Section 5 of the Limitation Act, explaining the reasons for not filing the application to set aside the abatement in time. Instead the appellant has chosen to file the present second appeal as if the First Appellate Court has been disposed of the appeal on merits. The second appeal itself is not maintainable. Hence, C.M.P (MD)No.4614 of 2019 is dismissed. Consequently, S.A(MD)SR.No.18680 of 2019 stands rejected. However, the appellant is at liberty to file applications to implead the legal heirs of the deceased respondents 2 and 3 and to restore the appeal. The First Appellate Court is directed to consider the said applications on merits and in accordance with law. This Civil Miscellaneous Petition stands dismissed.

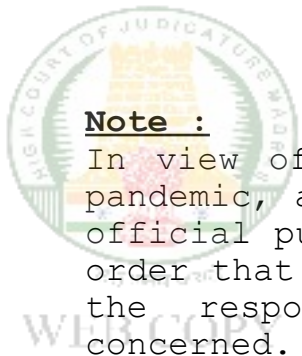
Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)



Note :

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.

To

- 1.The Additional District and Sessions Judge(Fast Track Court),
Nagarcoil,
Kanyakumari District
- 2.The Subordinate Judge,
Padmanabhapuram,
Kanyakumari District.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

C.M.P (MD) No.4614 of 2019
in
S.A (MD) SR.No.18680 of 2019
01.04.2022

MGJ(08.04.2022) 3P 5C