



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Tuesday, the Sixth day of September Two Thousand and Twenty Two
PRESENT

The Hon`ble Mr.Justice C.V.KARTHIKEYAN

CMP(MD) No.6957 of 2021

and

REV APLC (MD) SR.No.37123 of 2021

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PANNERSELVAM

... PETITIONER/REVIEW APPLICANT

Vs

1.RADHA (DIED)
2.CHANDRA (DIED)
3.U.BALASUBRAMANIAM (DIED)
4.B.RAJESH
5 K.SAMBANDAM (DIED)
6 S.RAMESH

... RESPONDENTS/RESPONDENTS

(APPELLANTS 3 & 4 BROUGHT ON RECORD AS LEGAL
HEIRS OF THE DECEASED SECOND APPELLANTS)

(APPELLANTS 5 & 6 ARE IMPEADED AS LEGAL HEIRS
OF THE DECEASED FIRST APPELLANT)

7 SHANTHA AMMAL (DIED)
8 PASUPATHI
9 RAJAM
10 CHIDAMBARAM PILLAI (DIED)
11 NARAYANI AMMAL (DIED)
12 RAJA

... RESPONDENTS/RESPONDENTS

13 SELVAMANI
14 SASIKALA
15 RATHINAKUMAR
16 KUNJAMMAL (DIED)
17 R.INDHIRANI

... RESPONDENTS/RESPONDENTS

(RESPONDENTS 8 TO 11 BROUGHT ON RECORD AS
LEGAL HEIRS OF DECEASED R5)

(RESPONDENTS 3,4,8 TO 10 ARE RECORDED AS
LEGAL HEIRS OF THE DECEASED R11)

(MEMO FILED IN OSR, 440 DATED 24.01.2017 TO
THE EFFECT THAT R1 DIED IS RECORDED AND R2 IS
RECOGNIZED AS LEGAL HEIR OF DECEASED R1)



Petition filed praying that in the circumstances stated in and in the affidavit filed therewith the High Court may be pleased to CONDONE THE DELAY of 455 days in preferring the Review Application in Rev. Application SR No.37123 of 2021 in AS.No.1070 of 1995 and CMP.No.14521 of 1995.

PRAYER IN REV APLC(MD) SR.No.37123 of 2021 :

To Review the judgment and decree dated 02.11.2018 passed in A.S.No.1070 of 1995 and CMP No.14521 of 1995 on the file of this Hon'ble Court.

ORDER : This petition coming up for orders on this day, upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.A.PRAMILA, Advocate for M/S.P.NETHAJI, Advocate for the petitioner and of M/S.R.PRAKASH, Advocate on behalf of the Respondent Nos.4 & 6 and none appeared either in person or by an Advocate on behalf of the 8th Respondent, the court made the following order:-

The present Civil Miscellaneous Petition has been filed by the second respondent in A.S.No. 1070 of 1995 seeking to condone the delay of 455 days in filing a review application against the Judgment dated 02.11.2018 in aforementioned Appeal Suit.

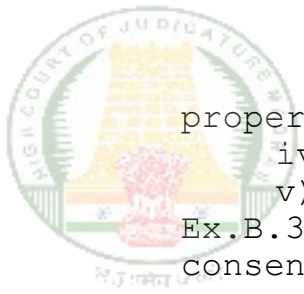
2.The said second respondent was the second defendant in O.S.No. 14 of 1986 which was on the file of the Sub Court at Kumbakonam and which had been disposed of on 21.07.1995. The plaintiffs in the said suit were the appellants in A.S.No. 1070 of 1995. The said suit had been filed by the plaintiffs /sisters seeking a declaration that they are the absolute owners of the suit properties and for consequential relief directing the first defendant to put them in possession of the suit 'A' schedule property and to direct the second defendant, the applicant herein to put them in possession of the suit 'B' schedule properties and to direct the third respondent and sixth defendants to put them in possession of the 'C' schedule properties and to direct the third, fourth, ninth and tenth defendants to put them in possession of the suit 'D' schedule properties. By Judgment dated 21.07.1995, the suit was dismissed.

3.The appeal suit came up for consideration before me and on hearing of the learned counsels, the following points were framed for consideration:-

"i) Whether the suit in O.S.No. 14 of 1988 is barred by limitation?;

ii) whether the period of limitation in instituting the suit is to be determined by Article 58 or by Article 65 of the limitation Act?;

iii) Whether the suit had been properly valid and



proper Court fees paid?;

iv) Whether the suit as framed is maintainable?;

v) Whether the Will dated 30.03.1976 marked as Ex.B.37 was executed by Chinnappa Pillai out of free consent and when in sound State of mind?;

vi) Whether the Will was obtained through undue influence?;

vii) Whether the Will had been proved in manner known to law?;

viii) Whether the plaintiffs are entitled for the relief of declaration and recovery of possession?; and

ix) Whether the Judgment under appeal requires interference?"

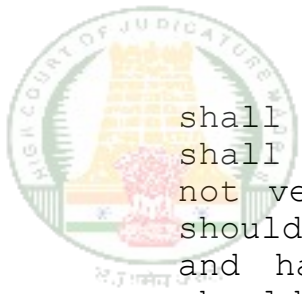
4.The central point was the Will dated 30.03.1976 and which had been marked during the course of trial under Ex.B-37 and whether it had been executed by Chinnappa Pillai out of free consent and when in sound state of mind or whether it was obtained through undue influence and whether it had been proved in manner known to law. After examining and appreciating the evidence, by Judgment dated 02.11.2018, it had been held that the Will had not been proved in manner known to law and therefore, recognising that the plaintiffs as daughters of the family will have a share in the properties, the Appeal Suit was allowed and the Judgment and Decree of the trial Court was interfered with and set aside.

5.The other defendants did not have any ground to question the said Judgment. But the second defendant / petitioner herein had filed the present application seeking to condone the delay of 455 days in filing the Review Application.

6.Mr.P.Netaji, learned counsel, who advanced arguments, also advanced arguments on the merits of the review petition and urged that when it had been found that the trial Court had disposed of the suit on a primary issue, then the proper approach would have been to remand the Appeal Suit back to the trial Court to examine in detail all the issues framed.

7.The learned counsel had relied on a Judgment reported in AIR 1927 Madras 335 equivalent to **1927 52 Madras LJ 90 [Balla Mallayya Vs. Peddi Veerayya and Others]** and made specific reference to the following portion:-

"6.Where the Code contains specific provisions in any department of procedure it is not ordinarily permissible to follow a procedure which might have been, but has not been, included in those provisions. Rule 25 of (). 42 does not provide for a case, like the present, where the issues have been defectively framed by the Trial Court, and it requires that the original Court



shall try the issues framed by the Appellate Court shall return its findings upon them. It is an objection not very easy to meet that the learned Subordinate Judge should have dealt with the case according to this rule, and had no jurisdiction to deal with it otherwise. He should, it may be said, have called for findings upon his issues, and should not have remanded the suit for disposal upon them.

7. Apart, however, from the considerable body of authority in this as well as in other Courts in favour of the opposite view, I think that there are cases, and that a case of the present kind is one, in which the ends of justice are usually better served by adopting the course now called in question. When a District Munsif has mishandled a case and the Appellate Court has had to lay down the lines upon which it should be dealt with, it is ordinarily in the interests of the parties that the case should be remitted to the Lower Court for disposal rather than that the Appellate Court should undertake the Lower Court's functions and pronounce judgment upon submitted findings."

8. The learned counsel then relied on **2017 (4) CTC 690 [J. Balaji Singh Vs. Diwakar Cole and Others]**, wherein the Hon'ble Supreme Court held as follows:-

"18) So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

19) So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court."

9. He then relied on **2018 (3) MWN (Civil) 781 [Corporation of Madras and another Vs. M. Parthasarathy and Others]**, wherein the Hon'ble Supreme Court had stated as follows:-

"17) the first Appellate Court had two options, first it could have either set aside the entire judgment/decreed of the Trial Court by taking recourse to



the provisions of Order 41 Rule 23A of the Code remanded the case to the Trial Court for retrial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the Trial Court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the Trial Court on such limited issues to enable the first Appellate Court to decide the appeals on merits. "

10. Further reliance was placed on **2013 (1) CTC 743 [Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim and others]**, wherein the Hon'ble Supreme Court has held as follows:-

"15. In a situation where the learned Trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the Trial Court was a possible view the Appellate Court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in **Wander Ltd. v. Antox India (P) Ltd. [1990 (Supp) SCC 727,] Para 14** of the aforesaid judgment which is extracted below would amply sum up the situation:

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the



discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles **Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)**

"... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

The appellate judgment does not seem to defer to this principle." "

11. Further reliance was also placed on **2014 (3) MWN (Civil 334 [Hindustan Petroleum Corporation Ltd., Vs. Dilbahar Singh]**, wherein the Hon'ble Supreme Court has held as follows:-

"45.A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned



before it as indicated above. However, to satisfy it to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity. "

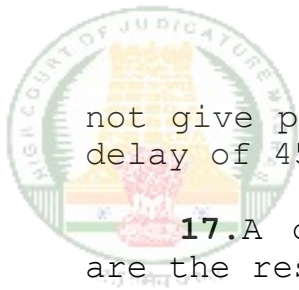
12.The main thrust of arguments advanced by Mr.P.Nethaji was that this Court during the hearing of the First Appeal, having found that the original suit had been disposed of on primary issues should have, after framing points for consideration under Ordre 41 Rule 31 of the Code of Civil Procedure, remanded the matter back to the trial Court for further examinatio of the other issues involved in the suit.

13.That is an order to be passed when an Appeal is preferred against the Judgment in the First Appeal and the appellate forum examines the Judgment of the First Appeal and scrutineses the same to determine whether the Judgment of the First Appeal should stand or whether opportunity must be granted by remanding the Appeal back to the trial Court to examine the other issues. An over all reading of the Judgment of the First Appeal would necessarily have to be undertaken.

14.The scope under Ordr 47 Rule 1 of the Code of Civil Procedure is very narrow. Under Order 47 Rule 1 of the Code of Civil Procedure if there is a material error apparent on the face of the record, then the very same Judge, who passes the Judgment in the first instance, on being called upon by either of the parties by filing an application seeking review of the Judgment, can revisit the Judgment and correct that material error on the face of the record. When a remand order is passed either under Order 41 Rule 23-A of CPC or under Order 41 Rule 25 CPC, the Judgment of the trial Court is set aside and the matter is remanded back either to try the further issues or to examine issues or to try the suit afresh.

15.In view of these facts, I am afraid that sitting in review, it may not be appropriate for this Court to sit as an Appellate Court and re-examine the Judgment already passed. That is a privilege which has to be exercised only by the Appellate Court.

16.While examining the reasons for delay of 455 days, it is claimed that the petitioner suffered from illness and documents to that effect had also been filed. It had been stated that he could



not give proper instructions to the counsel and that there: is a delay of 455 days should be condoned.

17. A counter has been filed on behalf of the plaintiffs, who are the respondents in the application.

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18. Mr. R. Prakash learned counsel who appears for the said respondents, pointed out that though the review petitioner claimed that he was ailing during the relevant period, he had, by exercising influence or other pressure on the revenue authorities in spite of the order had obtained an order to change the patta in his name. This fact is pointed out by the learned counsel to point out that the reason of illness cannot be considered to be a *bona fide* reason which prevented the petitioner herein to file the review application within the stipulated time.

19. Having balanced the arguments advanced, particularly since even if the delay is condoned, the same arguments would be advanced in the review application, which would, I am not inclined to condone the delay. The reasons stated will have to be weighed with the conduct of the petitioner in approaching the revenue authorities and obtaining orders while at the same time filing the Review Application with delay of 455 days and urging this Court to revisit the Judgment already passed.

20. In view of these reasons, I am not able to convince myself to accept the cause urged by the learned counsel for the petitioner and this Petition therefore stands dismissed.

21. I must place on record deep appreciation for the assistance rendered by Ms. A. Pramila, learned counsel, who had assisted Mr. P. Nethaji, during the course of his arguments.

sd/-

06/09/2022

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

+1 CC to M/S.P.NETHAJI, Advocate (SR-43842[F] dated 08.09.2022)

+1 CC to M/S.G.VIDHYA MAHESWARAN, Advocate (SR-43843[F] dated 08.09.2022)

ORDER IN

CMP(MD) No.6957 of 2021 and
REV APLC(MD) SR.No.37123 of 2021
Date :06/09/2022

VSG

RS/SVR/SAR.2 (15.09.2022) 8P-3C

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