



WEB COPY

CMP(MD) No.7828 of 2021

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

Reserved on : 04.04.2022

Delivered on : 08.04.2022

PRESENT

The Hon`ble Mrs.Justice R.THARANI

CMP (MD) No.7828 of 2021

IN

SA(MD) No.348 of 2006

1 R.GOPAL

2 L.ANDAL

3 R.DURAIRAJ, ... PETITIONER/APPELLANTS 2 TO 4

Vs

1 M.VENKATACHALAM

2 RAJAGOPAL

ACHAMMAL, (DIED) ,

3 MATHIMARAN, ...RESPONDENTS 1 TO 3/ RESPONDENTS 1 TO 4

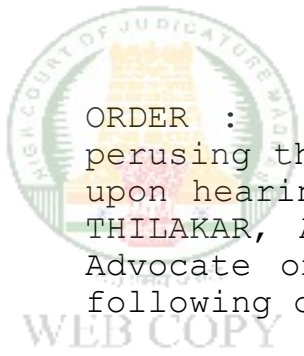
4 S.SAKUNTHALA ... 4th RESPONDENT/1st APPELLANT

5 T.KANNAMMAL, ...5th RESPONDENT/5th APPELLANT

Petition filed praying that in the circumstances stated therein and in the affidavit filed therewith the High Court may be pleased to CONDONE THE DELAY OF 595 days in filing the petition to set aside the order dated 09-07-2018 and restore the second appeal in S.A.No.348 of 2006 on the file of this Hon`ble Court.

PRAYER IN SA(MD)No. 348 OF 2006:

To prefeere this Memorandum of Grounds of Second Appeal to this Hon'ble Court against the Decree and Judgment of the Fast Track Court (Additional District & Sessions Judge)Dindigul made in A.S.No.231/2001 dated 12.08.2005 preferred against the Decree and Judgment of the Court of the Sub-Ordinate Judge, Palani in O.S.No. 160/98 dated 17.09.2001.



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 MR.H.ARUMUGAM, Advocate for MR.S.SIVA THILAKAR, Advocate for the petitioner and of MR.H.LAKSHMI SHANKAR, Advocate on behalf of the Respondents 1 to 3, the court made the following order:-

This petition has been filed condone the delay of 595 days in filing the petition to set aside the order dated 09.07.2018 and to restore the second appeal in S.A.(MD)No.348 of 2006.

2. Brief substance of the petition is as follows:-

2.1. The respondents 1 to 4 herein filed a suit in O.S.No.160 of 1998 on the file of the Sub Court, Palani, for declaration, to declare their title and consequently, for an order of injunction against the petitioners. The respondents claimed the property through an alleged registered settlement deed, dated 18.12.1982. Subsequently, the said settlement deed was cancelled by the first defendant. The alleged settlement deed in favour of the respondents 1 and 2 was not actually a settlement deed. It was only a Will and the father had every right to cancel the document, since the beneficiaries acted against the interest of the father and hence, the trial Court dismissed the suit. Aggrieved by the judgment and decree, the respondents 1 and 2 preferred an appeal in A.S.No.231 of 2001 on the file of the Fast Track Court (Additional District Court), Dindigul. Without considering the points for determination, the Additional District Judge, Dindigul, allowed the appeal. Therefore, the petitioner filed a Second Appeal before this Court.

2.2. Originally the second appeal was filed through the counsels Mr.R.Sridharan and R.Nandakumar. Subsequently, another counsel filed change of vakalat. The second appeal was listed before this Court, on 05.07.2018, "for final hearing" and there was no representation on the side of the appellants, hence, the case was adjourned to 06.07.2018. The counsel on record, filed a memo, dated 27.06.2018, stating that he had already handed over the bundle to the client and hence, the second appeal was dismissed for default on 09.07.2018.

2.3. Due to some family problems and illness due to old age and thereafter, due to COVID-19 pandemic situation, the petitioners could not contact their counsel. On 02.08.2021, the petitioner came to know about the registration of the judgment and decree in the Sub-Registrar office at Ottanchatram and then, he enquired about the stage of the case and found out about the dismissal of the second appeal and hence, there was a delay of 595 days in filing a petition to restore the second appeal. The petitioners are having a very good case, the right of the parties cannot be taken away by the dismissal of the second appeal for default. The petitioners are ready to compensate the respondents by way of costs and prayed the



3. Brief substance of the counter is as follows:-

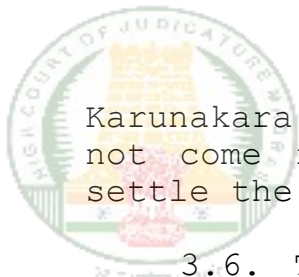
3.1. Originally the second appeal was filed by the counsel mentioned in this affidavit, subsequently, the appellants changed their counsel. The respondents filed a petition to receive additional evidence in order to highlight the active collusion between the petitioners / appellants and one Karunakara Pandian through whom, a collusive suit was filed and the property was brought for auction. The auction purchaser and the present appellants were represented by the very same counsel in the obstruction petition in the E.P.

3.2. When the second appeal came up for final hearing on 26.06.2018, the earlier counsel was not ready for arguments. On 27.06.2018, the previous counsel filed a memo, informing that the appellants had taken back the bundle much earlier. On 05.07.2018, there was no representation on the side of the appellants and hence, the matter was adjourned to 06.07.2018 and then adjourned to 09.07.2018. On 09.07.2018, the second appeal was dismissed for non-prosecution.

3.3. The first petitioner is a practising Lawyer with more than 35 years' of experience. The petitioner failed to engage another advocate, though they are fully aware of the second appeal, which was listed for final hearing. In CRP(MD)No.631 of 2013, a connected CRP, on 11.06.2018, the first petitioner and the auction purchaser jointly appeared through the very same previous counsel. Immediately, after two weeks, the second appeal was listed for final hearing on 26.06.2018. But, on 27.06.2018, the previous counsel filed a memo, stating that the case bundle was taken back by the appellants long back. The petitioners absence in the second appeal was only intentional and wanton.

3.4. Lockdown was declared on 24.03.2020, but, the delay is more than 3 years and the delay was not properly explained. The first petitioner, who is a Senior Member of the Bar has pushed the third respondent to the forefront. The house is in an uninhabitable condition. The first petitioner did not allow any mason from the locality to do the repair works. The petitioners could not make effective repairs. The respondents temporarily relocated during the marriage of the respondents' siblings. The first petitioner is living in the adjacent house and he is preventing the respondent to carry out repair work in the suit property. The respondents 4 and 5, who are earlier with the petitioner, have refused to co-operate the petitioner, now, there cannot be a partial restoration of the second appeal in favour of some of the appellants alone.

3.5. The property was allowed to be attached in an execution proceeding in E.P. No.3 of 2000, before the Sub Court, Palani, as if the property belonged to one Ramasami Naidu, who is the grand father of the first petitioner. In the execution proceedings, the property was sold in Court auction and one



Karunakara Pandian is the auction purchaser. The petitioners did not come forward to prevent the auction sale or to pay off and settle the money decree.

3.6. The petitioners cannot represent the estate of Ramasami Naidu, since the auction purchaser is entitled to all the rights of Ramasami Naidu, the petitioners have no locus standi to present the restoration application. The petitioners will not suffer any legal injury as already they have lost their right over the property, if they had any, when the property was sold through Court auction. The petitioners will not be affected whether the settlement deed is upheld or not, as they are not going to get the property either way. This petition is liable to be rejected. The restoration of the second appeal by condoning the delay will not be *brutum fulmen*. The entire delay was not explained and prayed the petition to be dismissed.

4. On the side of the petitioners, it is stated that due to lockdown the Hon'ble Supreme Court has given an extension in the limitation period from 15.03.2020 till 28.03.2021 and that this period need not be added for calculating the period of limitation and that this instruction is applicable to this case and due to lockdown, the petitioners could not contact their counsel and that the delay is properly explained.

5. On the side of the respondents, it is stated that the actual delay is more than 3 years. The direction of the Hon'ble Supreme Court is applicable only when the default was at the time of lockdown. The period of delay from 09.07.2018 till 15.03.2020 was not explained and the days of delay was not properly explained by the petitioner.

6. On the side of the respondents, it is stated that the first petitioner, who is a counsel with a Bar experience of 35 years, is well aware of the proceedings in the Civil Revision Petition in CRP (MD)No.631 of 2013, which was disposed on 11.06.2018 and the very same counsel, who appeared in the second appeal appeared for the petitioners in that Civil Revision Petition. The very same counsel has filed no instruction memo, on 27.06.2018 in this appeal, stating that the bundle was handed over to the parties long ago. The reasons stated by the petitioners is not genuine.

7. A judgment of the Hon'ble Supreme Court reported in ***AIR-2004-SC-2093 (Shipping Corporation of India Ltd. V. Machado Brothers and Ors.)*** is cited on the side of the respondents.



8. On the side of the petitioners, it is stated that the petitioners came to know about the dismissal of the second appeal only when the judgment and decree was registered before the Sub-Registrar office.

9. On the side of the respondents, it is stated that the petitioners' property was already auctioned, even if the second appeal is restored, the petitioners cannot claim any right in the property as the property was already sold through Court auction.

10. On the side of the respondents, it is stated that since the property was sold in the action purchaser, the petitioners lost their right over the property and they have no locus standi to file the present petition. The petitioners colluded with the auction purchaser and came forward with this petition. Already in the EP proceedings, in the obstruction petition, the first appellant gave evidence in favour of the auction purchaser. The auction purchaser and the petitioners are represented through same counsel and prayed the petition to be dismissed.

11. On the side of the petitioners, it is stated that the petitioners are ready to compensate the respondents by way of costs and the other matters cannot be decided in this petition and that the respondents are trying to argue the appeal in the condone delay petition.

12. Records perused. It is seen that only the appellants 2 to 4 have filed this petition and not the other appellants. It is seen that the property was already auctioned in a money suit. The auction purchaser has filed an E.P and the respondents herein had filed an obstruction petition in the E.P. The fact that the property was already auctioned and that the auction purchaser has filed an E.P against the respondents herein were not denied by the petitioners. It is stated that the petitioners gave evidence in favour of the auction purchaser.

13. The reason for the non appearance of the petitioners on 05.07.2018, 06.07.2018 and 09.07.2018 is stated that there was some family problem and that the petitioner was affected by old age related illness. No document was filed to prove that the petitioner was affected by any old age related illness. What was the family problem that prevented the petitioner to contact his counsel was not stated in the affidavit. Lockdown was declared on 24.03.2020. The reason for the delay from 09.07.2018 till 24.03.2020 was not explained by the petitioner. On 27.06.2018, the then counsel for the petitioners herein filed a memo reporting that he handed over the case bundle to the petitioners long ago. But, on 11.06.2018, the petitioners were represented by the very same counsel in CRP (MD) <https://hnservices3.dcourts.gov.in/00services/> This clearly proves that the reasons stated in the



petition are not genuine. The reasons stated in the petition are not satisfactory and the delay was not properly explained by the petitioners and the petition is dismissed.

sd/-

08/04/2022

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

TO

- 1 THE ADDITIONAL DISTRICT AND
SESSIONS JUDGE, (FAST TRACK COURT)
DINDIGUL.
- 2 THE SUBORDINATE JUDGE,
PALANI.

+1. C.C. to M/S.S.SIVA THILAKAR, Advocate SR.No.18230(F)

+1. C.C. to M/S.H.LAKSHMISHANKAR, Advocate SR.No.17701(F)

ORDER

IN

CMP(MD) No.7828 of 2021

IN

SA(MD) No.348 of 2006

Date :08/04/2022

Ls

PKP/JM/SAR-4/12.04.2022/6P/5C