



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.03.2022
DELIVERED ON : 15.03.2022

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CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.P(MD)No.8931 of 2021
in
S.A(MD)SR.No.53848 of 2021

Ananja Perumal

... Petitioner/Appellant

Vs

Krishnan

... Respondent/Respondent

PRAYER in C.M.P(MD)No.8931 of 2021: Civil Miscellaneous Petition is filed under Order 41, Rule 3(A) r/w Order 42, Rule 2 of the Civil Procedure Code, to condone the delay of 5002 days in preferring the above Second Appeal against the order, dated 04.07.2005 made by the Sub Court, Aruppukottai in Cross Objection in A.S.No.42 of 2003.

PRAYER in S.A(MD)SR.No.53848 of 2021: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree of the District Munsif, Aruppukottai in O.S.No.362 of 1999, dated 14.01.2003 and the judgment and decree of the Sub Court, Aruppukottai in Cross objection filed the respondent herein in A.S.No.42 of 2003, dated 04.07.2005 and allow this appeal and decree the suit as prayed for.

For Appellant : Mr.C.Jawahar Ravindran

For Respondent : Mr.S.Natarajan

ORDER

The present application has been filed in S.A.(MD)SR.No.53848 of 2021 to condone the delay of 5002 days in filing the Second Appeal.

2. The present appellant in the Second Appeal was the plaintiff in O.S.No.362 of 1999 before the District Munsif Court, Aruppukottai. The plaintiff has prayed for the relief of declaration of title and permanent injunction. The plaintiff has further prayed for permanent injunction, declaration, mandatory injunction and



recovery of possession with regard to second schedule property. The suit was partly decreed by the trial Court with regard to first schedule property and dismissed in entirety with regard to second schedule property.

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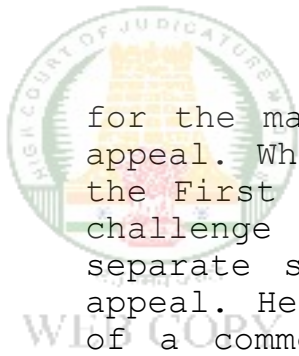
3. As against the judgment and decree, the plaintiff filed A.S.No.42 of 2003 before the Sub Court, Aruppukottai with regard to the dis-allowed portion. The defendant filed cross appeal with regard to the decreed portion. Both the appeal and the cross appeal were heard together. The cross appeal filed by the defendant was allowed and the decree granted in favour the plaintiff with regard to the first schedule property was reversed. The suit was dismissed with regard to the entire first schedule property. By way of a separate decree in first appeal, the learned Subordinate Judge had dismissed the first appeal, confirming the rejection of the prayers sought for by the plaintiff before the trial Court. In the result, the suit filed by the plaintiff has been dismissed in entirety by the decree of the First Appellate Court.

4. The plaintiff had filed S.A(MD)No.1031 of 2007 as against the judgment and decree in A.S.No.42 of 2003. However, no separate second appeal was preferred as against the decree passed by the First Appellate Court in the cross appeal filed by the defendants.

5. When S.A(MD)No.1031 of 2007 came up for a final hearing, the learned Counsel for the respondent in the second appeal has pointed out that in view of non filing of a separate second appeal, as against the decree in cross appeal, the present Second Appeal is not maintainable. After the said technical objection was raised by the learned Counsel for the respondent, the plaintiff has chosen to file the present second appeal on 25.10.2021 as against the decree passed by the First Appellate Court in cross appeal.

6. Since the second appeal was filed beyond the period of limitation, the appellant has filed C.M.P(MD)No.8931 of 2021 to condone the delay of 5002 days in filing the above second appeal. The petitioner in his affidavit has contended that his learned Counsel has not advised to file a separate second appeal as against the decree in the cross appeal. Since the S.A(MD)No.1031 of 2007 was already admitted (filed against A.S.No.49 of 2003), he was under the impression that the pending second appeal also covers the decree passed in cross appeal by the First Appellate Court. Only in view of this wrong impression, no separate second appeal was filed as against the decree in cross appeal. According to the petitioner, the non filing of the second appeal in time is neither wilful nor wanton but only because of misunderstanding of law. Hence, he prayed for condoning the delay of 5002 days in filing the second appeal.

7. The respondent has filed a detailed counter contending that the First Appellate Court has drafted two independent decrees, one



for the main appeal A.S.No.42 of 2003 and the other for the cross appeal. When the appellant has obtained copies of two decrees from the First Appellate Court, the appellant has thought it fit not to challenge the decree in the cross appeal. Only on the premise, no separate second appeal was filed as against the decree in cross appeal. He further contended that when two decrees are arising out of a common judgment, unless two appeals are filed, one of the appeals is not maintainable. Only after objection was raised by the learned Counsel during final hearing of S.A(MD)No.1031 of 2007, the present Second Appeal has been filed after lapse of sixteen years. The respondent has further contended that in view of long delay rights have got accrued in his favour and if the delay is condoned, his rights would be adversely prejudiced. Hence, he prayed for dismissal of the condone delay application.

8. The learned Counsel for the appellant had contended that the non filing of the appeal as against the cross appeal was only due to a misunderstanding of law that one second appeal is maintainable as against the first appeal and cross appeal which were disposed of by a common judgment by the First Appellate Court. The non filing of an independent appeal as against the decree in cross appeal was neither wilful nor wanton. He further contended that there is only one suit out of which A.S.No.42 of 2003 and cross appeal have emerged before the First Appellate Court. Both the appeal and cross appeal have been disposed of by way of a common judgment. At the time of filing of S.A(MD)No.1031 of 2007, he has paid the Court fee which he had paid at the time of filing of the suit. Hence, S.A(MD)No.1031 of 2007 itself covers the challenge to the decree in cross appeal also. The learned Counsel for the appellant relied upon **AIR 1953 SCC page 419** to impress upon the Court that when there was one suit and both the decrees were in the same case and based upon the same judgment and the matter decided concerned the entire suit, the principles of *res judicata* did not apply. The learned Counsel for the appellant also relied upon Exhibit A1, **2011 (2) MLJ page 22** to impress upon the Court that whenever two appellant decrees are emerging out of two connected appeals, there could only be one second appeal. Hence, he contended that even though S.A(MD)No.1031 of 2007 is enough to cover the grievance of the plaintiff, in view of the technical objection raised by the learned Counsel for the respondent, the present Second Appeal has been filed with a delay.

9. Per contra, the learned Counsel for the respondent relied upon **2009 (2) SCC page 526, AIR 1993 SCC page 1202, AIR 1997 SCC page 3760** and a Division Bench judgment of our High Court reported in **2010 (3) CTC page 799** to convince the Court that if the suits are disposed of by way of a common judgment and only one appeal is preferred, as against one of the decrees, the appeal would be hit by the principles of *res judicata* under Section 11 of the Civil Procedure Code. A perusal of all the judgments of the Hon'ble Supreme Court and our High Court would reveal that in all these



cases more than one suit were filed before the trial Court and the suits were disposed of by way of a common judgment.

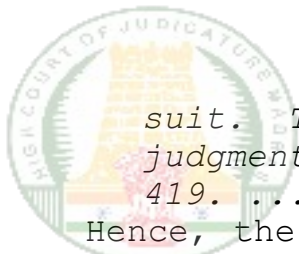
10. In the present case, only one suit has been filed by the plaintiff and there was no counter claim on the side of the defendant. The suit was partly decreed and the plaintiff filed first appeal challenging the dis-allowed portion and the defendant filed a Cross appeal challenging the decreed portion. In the First Appellate Court, appeal filed by the plaintiff was dismissed and cross appeal filed by the defendant was allowed. To summarize the plaintiff's suit was dismissed in entirety. Hence, the appeal preferred by the plaintiff as against A.S.No.42 of 2003 would be sufficient enough to cover the decree passed in cross appeal also. The plaintiff has also paid the entire Court fee in the second appeal as that of the Court fee before the trial Court in the suit. Though there were two separate decrees in first appeal and cross appeal, both the decrees emerged out of one decree in O.S.No.362 of 1999.

11. In view of the judgment of the Hon'ble supreme Court in **AIR 1953 page 419**, one Second Appeal is maintainable as against two decrees of the First Appellate Court which arise out of a single suit. This judgment of the Hon'ble Supreme Court has been followed by a learned Single Judge of this Court in a judgment reported in **1999 (1) L.W. page 471** in paragraph Nos.8 and 10 read as follows:

"8. The issue is covered directly by a judgment of the Supreme Court reported in AIR 1953 SC 419 (Narhari and others v. Shanker and others). In that case, from the decree of trial Court in favour of the plaintiff two separate appeals were taken by two sets of the defendants and both the appeals were dismissed. Therefore, two decrees were prepared and the plaintiffs have filed two appeals. But one of the appeal was dismissed as time barred and on the principle of res judicata. The High Court dismissed the other appeal also. The Supreme Court has held that it was not necessary to file two separate appeals and that the question of res judicata arose only when there were two suits. As there was only one suit and both the decrees were with reference to the same case and based on the same judgment, the matter decided concerned the entire suit and the principle of res judicata will not apply.

9.

10. Therefore, the test in the present case is as to whether the two appeals were from one and the same suit or from different suits. As stated earlier, on the facts of the present case, it is obvious that A.S.No.211 of 1978 filed by the other defendants in the suit and A.S.No.215 of 1979, the subject matter of the present appeal filed by the fifth defendant/appellant arose from and out of one and the same



suit. Therefore, this situation is fully covered by the judgment of the Supreme Court reported in AIR 1953, SC 419."

Hence, the non filing of an independent appeal as against the cross appeal would not operate as *res judicata*, for hearing the pending second appeal, S.A(MD)No.1031 of 2007.

12. When S.A(MD)No.1031 of 2007 covers the decree passed in cross appeal also, the present separate second appeal which is attempted to be filed after a period of sixteen years is superfluous. Lack of proper legal advise cannot be a ground to condone the delay, that too a delay of more than 5000 days. Hence, the reasons assigned in the condone delay application are not sufficient to condone the delay. Therefore, C.M.P(MD)No.8931 of 2021 stands dismissed. Consequently, S.A(MD)SR.No.53848 of 2021 stands rejected.

Sd/-

Assistant Registrar (CS I)

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Sub Assistant Registrar(CS)

btr

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 District Munsif,
Aruppukottai.

2.The Sub Judge,
Aruppukottai.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.NATARAJAN, Advocate (SR-12070[F] dated 15/03/2022)

C.M.P(MD)No.8931 of 2021

in
S.A(MD) SR.No.53848 of 2021

15.03.2022