



CMP(MD) No.5156 of 2023

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

Thursday, the Twenty First day of September Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice P. VADAMALAI

CMP(MD) No.5156 of 2023

IN

SA(MD)SR.No. 2451 of 2023

1 D.PALCHAMY (DIED),

2 D.SHANMUGAM,

3 D.KANAGARAJ

4 P.SARASWATHY

5 P.SOUNDARAJAN

...PETITIONERS/ APPELLANTS

**(*)CAUSE TITLE IS ACCEPTED VIDE COURT ORDER
DATED 13-04-2023 MADE IN CMP(MD)No.4500/2023 in
SA(MD)SR.No. 2451 of 2023 by AQJ**

Vs

1 M. ANBURAJ

**2 DISTRICT COLLECTOR
THENI DISTRICT.**

**3 THE THASILDAR
PERIYAKULAM, THENI DISTRICT.**



CMP(MD) No.5156 of 2023

4 VILLAGE ADMINISTRATIVE OFFICER,
ERUMALAINAIKANPATTY, PERIYAKULAM TALUK,
THENI DISTRICT.

5 THE PRESIDENT
ERUMALAINAIKANPATTY PANCHAYAT,
PERIYAKULAM TALUK,
THENI DISTRICT.

6 A.MUTHUMANIKAM (DIED).

7 M.RAJA

8 S.KUMAR (DIED)

9 CELLADURAI

10 MURUGAN

11 VIJAYALAKSHMI ...RESPONDENTS/ERSPONDENTS

(*)MEMO DT 19.07.2023 IS RECORDED, AS ISSUANCE
OF NOTICE TO THE RESPONDENTS 9 AND 10 IS
DISPENSED WITH VIDE COURT ORDER DATED
21.07.2023 MADE IN CMP(MD) No. 5156 OF 2023 in SA
(MD)SR.NO. 2451 of 2023 by PVMJ.

Civil Miscellaneous 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 224 days in filing the Second Appeal against Judgment and decree made in A.S.No.13 of 2019 on the file Sub Court, Periyakulam dated 26-02-2021 confirming the judgment and decree made in O.S.No.204 of 2011 on the file District Munsif Court, Periyakulam dated 11-04-2019.

PRAYER IN SA(MD)SR.No. 2451 of 2023:

To set aside the judgment and decree made in A.S.No. 13 of 2019 on the file of Sub Court, Periyakulam dated 26.02.2021 confirming the judgment and decree made in O.S.No. 204 of 2011 dated 11.04.2019 on the file of the District Munsif Court, Periyakulam, allow the above second appeal.



CMP(MD) No.5156 of 2023

ORDER : This Civil Miscellaneous 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.S. KUMAR, Advocate for the petitioner and of MR.P.THIYAGARAJAN, Advocate for the 1st Respondent and of MR.A.BASKARAN, Additional Government Pleader for the Respondents 2 to 5 and the Respondents 7 & 11 not appearing either in person or by an advocate on behalf of the Respondents the court made the following order:-

Reserved on : 07.08.2023

Pronounced on : 21.09.2023

This Civil Miscellaneous Petition is filed to condone the delay of 224 days in filing Second Appeal against the judgment and decree dated 26.02.2021 passed in A.S.No.13 of 2019 on the file of the Sub Court, Periyakulam, confirming the judgment and decree dated 11.04.2019 made in O.S.No.204 of 2011 on the file of the District Munsif Court, Periyakulam.

2. The petitioners have stated reasons in the accompanying affidavit filed along with the Civil Miscellaneous Petition are follows:

The first respondent filed a suit in O.S.No.204 of 2011 on the file of the District Munsif Court, Periyakulam seeking injunction and mandatory injunction in respect of public pathway. The petitioners have filed detailed written statement strongly opposing the plaint. After contest, the Trial Court has passed judgment and decree dated 11.04.2019. Aggrieved by the same, the petitioners have preferred appeal in A.S.No.13 of 2019 before the Sub Court, Periyakulam and the appeal was also dismissed on



CMP(MD) No.5156 of 2023

22.06.2021. The petitioners have filed copy application on 01.03.2021 for certified copies of judgment and decree to prefer appeal and the same was delivered on 07.07.2021. Since there was Covid-19 pandemic between 15.03.2020 to 31.03.2022 the petitioners could not file the Second Appeal. The Hon'ble Supreme Court has also excluded pandemic period from 15.03.2020 to 31.03.2022. After pandemic period, the petitioners got back the case file from their counsel in April 2022 and immediately handed over the same at counsel of Madurai. Then only the petitioners came to know about the death of some appellants in 1st appeal was not recorded and they obtained death certificates and legal heir certificates during December 2022 and hence, there is a delay of 224 days in preferring the Second Appeal.

3. The first respondent filed counter affidavit and objected the petition and stated as follows:

The original suit was filed to remove the encroachments made by the defendants 5 to 10 and it was decreed on 11.04.2019 in favour of the respondents. The petitioners preferred first appeal in A.S.No.13 of 2019 before Sub Court, Periyakulam and the same was also dismissed on 26.02.2021. Though the petitioners obtained certified copies of judgment and decree and other documents on 07.07.2021, the petitioners are not vigilant to approach this Court in time to prefer Second Appeal.

The petitioners have not explained the reason for the delay. It is true that the Apex



CMP(MD) No.5156 of 2023

Court excluded the periods between 15.03.2020 to 28.02.2022 in order to calculate the period for limitation. But, the petitioners did not act immediately even after lifting of lock down between 28.02.2022 to April 2022 and the petitioners have not offered any valid explanation. The petitioners knew very well about the death of three appellants even before the 1st Appellate Court, but they failed to take necessary steps. After giving sufficient time to the petitioners to prefer Second Appeal and the petitioners did not file Second Appeal within the stipulated time, the first respondent filed E.P.No.1 of 2022 for execution of decree. The petitioners have appeared through their counsel and sought several adjournments and they were set ex-parte and delivery order was passed on 09.03.2023. The petitioners have filed this petition to deprive the first respondent from enjoying the benefits of decree. The petitioners slept till the executing court passed delivery order. The prejudice caused to the respondent has to be considered. Hence, the petition has no valid reason and the same is liable to be dismissed.

4. Heard both sides and perused the records in this Civil Miscellaneous Petition.

5. The learned counsel for the petitioner has submitted that the impugned judgment passed by the First Appellate Court 26.02.2021 during the period Covid-19 and the Hon'ble Supreme Court has also excluded pandemic period from 15.03.2020 to 31.03.2022. He has further submitted that after relaxation of pandemic period, the



CMP(MD) No.5156 of 2023

petitioner took steps for preferring the appeal and at that time they came to know about the death of few appellants and obtained death certificates and legal heirs particulars. Therefore, there happened delay. The petitioners have properly explained the delay. When the delay has been satisfactorily explained, there is no bar in condoning the delay. In support of his argument the learned counsel for the petitioners relied on citation reported in (2021) 7 Supreme Court Cases 313 (Sesh Nath Singh and Anr. Vs. Baidyabati Sheoraphuli Co-Operative Bank Limited and Anr., wherein it is held in paragraph No.61 as follows:

“61. Section of the 5 Limitation Act, 1963 does not speak of any application. The section enables the court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under section 5 of the Limitation Act, 1963, in order to enable the court or tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the court/tribunal within the time prescribed by limitation, there is no bar to exercise by the court/tribunal of its discretion to condone delay, in the absence of a formal application.”



CMP(MD) No.5156 of 2023

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6.The learned counsel for the first respondent contended that the first respondent filed Execution Petition in E.P.No.1 of 2022 after sufficient time given to the petitioners to prefer appeal. The appellants have appeared through their counsel and sought several adjournments and only after delivery was ordered, the petitioners have filed this petition with Second Appeal. The petitioners knew very well about the death of certain appellants during appeal proceedings before the first Appellate Court. Therefore, the petition has to be dismissed with exemplary costs.

7. Considered the arguments of both and the material records of the case. The parties made rival claim over the common path way in which the petitioners alleged to have encroachments and thereby the first respondent sought mandatory injunction and succeeded upto first Appellate Court. The petitioners' case is that their evidences and documents have not been properly appreciated and they have good defense. The suit property is stated to be common pathway. It is admitted by respondents that the Hon'ble Supreme Court has excluded pandemic period from 15.03.2020 to 31.03.2022 for preferring appeal. The petitioners have also explained that there caused some delay for obtaining death certificate and legal heir certificate of few appellants. The first respondent argued that the petitioners knew well about the death of few appellants and they appeared in execution proceedings and only after delivery was



CMP(MD) No.5156 of 2023

ordered, the petitioners field this petition. Considering both side arguments and in view of the citation reported in 2021(7) SCC 313 relied on by the petitioners, the explanation of the petitioners accepted. It is settled principle that every litigant has right to prefer appeal and the delay caused because of counsel should not affect the right of litigant. Mere long delay, the right of appeal to a party should not be affected. The rival contentions of both parties regarding subject matter of suit and appeal are not necessary to be discussed in this delay condone petition. Therefore, this Court is inclined to give an opportunity to the petitioners to prefer the Second Appeal and at the same time the inconvenience caused to the first respondent has to be compensated. Considering the above facts and circumstances, the delay is to be condoned by imposing condition to meet out the inconvenience caused to the first respondent.

8. In the result, this Civil Miscellaneous Petition is allowed on condition that the petitioners shall pay a cost of Rs.5,000/- (Rupees Five Thousand only) to the contesting first respondent within a period of two weeks from the date of receipt of a copy of this order, failing which this Civil Miscellaneous Petition stands dismissed automatically without any further reference to this Court.



CMP(MD) No.5156 of 2023

WEB COPY

9. On such payment being made within the stipulated time, the Registry is directed to number the Second Appeal, if it is otherwise in order and list it for admission in the usual course.

sd/-
21/09/2023

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/09/2023
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

VSD
TO

- 1 THE SUBORDINATE JUDGE
PERIYAKULAM.
- 2 THE DISTRICT MUNSIF
PERIYAKULAM.

COPY TO

- 1 THE SUB ASSISTANT REGISTRAR
AE SECTION,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.



CMP(MD) No.5156 of 2023

2 THE SECTION OFFICER,
JUDICIAL SECTION,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

ORDER
IN
CMP(MD) No.5156 of 2023
IN
SA(MD)SR.No. 2451 of 2023
Date :21/09/2023

PKP/VRS/SAR- /27.09.2023/ 9P/ 5C

Madurai Bench of Madras High Court is issuing certified
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