



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 04.08.2023

Delivered on : 14.08.2023

CORAM

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.P.(MD)No. 6755 of 2023
in
A.S(MD)No.SR 56753 of 2022

C.Muthukumar

... Petitioner

Vs.

1.Vadivammal
2.C.Chellapandi
3.C.Arumugam
4.Gomathi
5.Vijaya
6.Sushila
7.Pushpalatha
8.Kavitha
9.Perumal
10.Parveen Banu

: Respondents



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

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PRAYER in C.M.P(MD)No. 6755 of 2023: Civil Miscellaneous Petition filed under Section 5 of Limitation Act, to condone the delay of 288 days in filing the Appeal Suit against the order passed in I.A.No.232 of 2015 in O.S.No.13 of 2012 on the file of the Principal District Court, Tirunelveli.

PRAYER in A.S(MD)No.SR 56753 of 2022 : Appeal Suit is filed under Order 41 Rule 1 of C.P.C., against the final decree and judgment made in I.A.No.232 of 2015 in O.S.No.13 of 2012, dated 08.04.2021 on the file of the Principal District Court, Tirunelveli.

For Petitioner : Mr.K.Rajeshwaran

For Respondents : Mr.S.Kumar, for R1.

: Mr.D.Srinivasaragahavan, for R10.

: No Appearance, for R2 to R9.

ORDER

The above application has been filed seeking orders to condone the delay of 288 days in filing the first appeal, challenging the order passed in I.A.No.232 of 2015 in O.S.No.13 of 2012 on the file of the Principal District Court, Tirunelveli.



*C.M.P.(MD)No.6755 of 2023
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WEB COPY

2. The factual aspects that are necessary for deciding the above application in short are as follows :

(a) The first respondent has filed a suit in O.S.No.13 of 2012 on the file of the Principal District Court, Tirunelveli, claiming partition and allotment of 1/5 share in the suit properties. The respondents 9 and 10/defendants 11 and 12 alone had contested the suit. The petitioner/second defendant and the respondents 2 to 8/defendants 3 to 8 and 10, had remained ex-parte. After, trial, the trial Court has granted preliminary decree, dated 12.03.2015.

(b) Since no appeal has been filed against the preliminary decree, the first respondent/plaintiff filed an application in I.A.No.232 of 2015 for passing of final decree. The respondents 9 and 10 alone have entered into appearance and contested the final decree application. The petitioners and the respondents 2 to 8 had remained ex-parte and the final decree came to be passed on 08.04.2021.



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

(c) During the pendency of final decree application, the petitioner has filed an application in I.A.No.2 of 2019 for setting aside the ex-parte order passed on 16.09.2015 in the final decree petition and the said petition, after enquiry, was ordered to be dismissed on 04.07.2019.

(d) The first respondent/plaintiff has then filed an application in E.A.No.31 of 2022, for delivery of possession based on the final decree. The petitioner and the seventh respondent herein filed counter statement and contested the same. The Executing Court, after hearing arguments of the first respondent's side, posted the case for orders on 30.09.2022.

(e) Thereafter, the petitioner/7th respondent filed another application in E.A.No.2 of 2022 to stay of all further proceedings in E.A.No.31 of 2022 and after enquiry, the same was also dismissed on 13.03.2023 and delivery was ordered on 08.04.2023. Since the first respondent was not able to take possession of the property, as the petitioner resisted it, he filed applications in E.A.Nos.8 and 9 of 2023 for survey of his land and for police protection and the same were ordered on 06.06.2023.



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

WEB COPY

(f) The first respondent had taken delivery of the property situated in T.S.No.3/3 shown in the Commissioner's sketch, on 26.06.2023 through Court Amin, but the delivery could not be effected in respect of the two shops in T.S.No.2/3 as the petitioner has locked those two shops. Since the warrant was returned for want of break open orders, the first respondent filed an application in E.A.No.10 of 2023 to break open the two shops and the same was allowed on 14.07.2023. Meanwhile, the petitioner has preferred the appeal, challenging the final decree passed in I.A.No.232 of 2015 in O.S.No.13 of 2012, dated 08.04.2021, on the file of the Principal District Court, Tirunelveli, along with the application under Section 5 of Limitation Act to condone the delay of 288 days in filing the present appeal.

3. At the outset, it is pertinent to note that the petitioner in the affidavit filed in support of the above application, has not canvassed any reason or explanation for the delay occurred. But on the other hand, he has stated that the execution petition in E.P.No.31 of 2022, has been posted to 27.04.2023 for attachment; that the petitioner has got a good case on merit



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

and fair chance of succeed in the appeal and that he will be put to irreparable loss and hardship, if the further proceedings are not stayed.

4. When the petitioner's affidavit which does not contain any explanation for the delay, was pointed out by the learned counsel for the first respondent at the enquiry, the petitioner's counsel in the subsequent hearing has filed an additional affidavit allegedly sworn by the petitioner on 18th August 2023, but filed before the Court on 02.08.2023.

5. It is pertinent to note that the petitioner has neither filed any application seeking permission to file the additional affidavit nor assigned any reasons for not disclosing the additional grounds in the original affidavit. In the additional affidavit, the petitioner has taken a stand that his elder brothers/respondents 2 and 3 promised him that they would make all legal arrangements to defend the case together; that they were only following and conducting the case on behalf of the petitioner in the trial Court; that after the judgment, when he contacted his elder brothers/respondents 2 and 3, they used to say that the appeal is under filing process before this Court and he believed their words; that during the



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

first week of April 2022, he enquired about the specific stage of the case and at that time, they informed that they will not do anything on behalf of the petitioner and the petitioner alone should take care of his assets and cases; that the petitioner came to know that they had not taken any steps to file the above appeal before this Court and that therefore, he contacted a counsel and immediately obtained certified copies, mobilized the funds and thereafter, due to his ill-health, he could not contact his counsel in time to file the appeal in time and that thereafter, he contacted his counsel at Madurai and made arrangements to file the first appeal.

6. According to the petitioner, the delay occurred is neither willful nor wanton, but due to the above said circumstances and that the petitioner will be put to irreparable loss and hardship, if the delay is not condoned.

7. The first respondent has filed a counter, raising serious objections by stating that since the petitioner has failed in all his earlier attempts to protract the Court proceedings, he filed the above appeal with delay of 288 days; that he could not find even a single explanation in the



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

affidavit filed in support of the delay condonation petition; that the petitioner has knowledge about the passing of preliminary decree and final decree; that the petitioner has successively and actively filed applications one after another to drag on the proceedings with a view to prevent the respondents to take delivery of properties; that the conduct and attitude of the petitioner is to protract the proceedings as far as possible; that the petitioner has not shown any sufficient cause for the delay occurred and that therefore, the petition is liable to be dismissed.

8. As already pointed out, the petitioner has nowhere whispered any reason or explanation for the delay of 288 days in filing the appeal, in the affidavit filed in support of the above petition. Admittedly, the suit was filed in the year 2012 and preliminary decree was passed on 12.03.2015 and final decree was passed on 08.04.2021. The explanation now offered in the additional affidavit that his elder brothers/respondents 2 and 3 promised him that they would take care of the legal proceedings and on that belief, he remained silent till first week of April 2022, is very hard to believe.



C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022

9. As already pointed out, the petitioner had remained ex-parte in the trial proceedings as well as in the final decree proceedings. After the commencement of execution proceedings, the petitioner has started to file one application after another to protract the proceedings.

10. It is also not in dispute that the first respondent had already taken possession of one property situated in T.S.No.3/3 on 26.06.2023 and he could not taken possession of two shops situated in T.S.No.213 as the same was locked by the petitioner. According to the learned counsel for the first respondent, he had already obtained orders for break open and for police protection.

11. It is settled law that liberal approach should be extended while considering the application for condonation of delay. The Division Bench of Hon'ble Supreme Court in ***Tamil Nadu Mercantile Bank Limited, Tuticorin., Vs. Appellate Authority under the Tamil Nadu Shops and Establishments Act, Madurai*** reported in (1990) 1 LLN 457, has held that sufficient caution has been exhibited to note that wherever there is lack of bona fides or attempt of hood-wink the Court by the party



C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022

concerned who has come forward with an application for condonation of delay, in such cases, no indulgence should be shown by condoning the delay applied for. It is also clear to the effect that it is not the number of days of delays that matters, but the attitude of the party which caused the delay. In other words when the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay, the Court if satisfied that the delay occasioned not due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.”

12. No doubt, the Hon'ble Supreme Court in catena of decisions has repeatedly held that "sufficient cause" appearing in Section 5 of the Limitation Act should be liberally considered and the Court should be slow in shutting the door of justice to a litigant on the score of limitation. When the reason for the delay is properly explained, the Court is to adopt a pragmatic approach to condone the delay when there is no negligence, inaction or want of *bona fide* on the part of the Applicant. But, some time,



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

the discretion must be exercised with vigilance and circumspection and the delay cannot be condoned as a matter of judicial generosity. Rendering substantial justice is not to cause prejudice to the opposite party.

13. As already contended by the learned counsel for the first respondent, it cannot be stated that lethargic litigant can leisurely choose his own time in preferring appeal. In the case on hand, as already pointed out, the petitioner who remained ex-parte in the entire preliminary decree and final decree proceedings from 2012 to 2021, has been attempting to drag on the execution proceedings with sole intention to prevent the decree holder from realizing the fruits of the decree.

14. As already pointed, the petitioner has not canvassed any acceptable reason or explanation for the delay of 288 days in filing the appeal, which is inordinate. Since the conduct and attitude of the petitioner, exhibits want of bona fides and his intention to protract the matter, this Court is not inclined to exercise the discretion in favour of the petitioner. Considering the above, this Court concludes that the above petition is devoid of merits and the same is liable to be dismissed.



*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

WEB COPY

15. In the result, the Civil Miscellaneous Petition is dismissed and the appeal suit in A.S(MD)No.SR 56753 of 2022, is rejected at the SR stage itself.

14.08.2023

NCC : Yes /No
Index : Yes / No
Internet : Yes / No
das

To

1.The Principal District Court, Tirunelveli.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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*C.M.P.(MD)No.6755 of 2023
in A.S(MD)No.SR 56753 of 2022*

K.MURALI SHANKAR,J.

das

Pre-delivery order made in
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