



CMP(MD) No.10895 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Civil Appellate Jurisdiction)

Wednesday, the Eighteenth day of October Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice P. VADAMALAI

CMP(MD) No.10895 of 2023

in

SA(MD) SR.No.55404 of 2023

MADASAMY

... PETITIONER/ APPELLANT

Vs

1 M.AVUDAITHANGAM

2 M.SAKTHIVEL,

3 M.DANDAYUTHAPANI,

4 M.MUNIYANDI,

5 M.MURUGESHWARI,

... RESPONDENTS/RESPONDENTS

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 of 223 days in filing the main Second appeal against the Judgment and decree dated 09.09.2022 passed in A.S.No.22 of 2020 on the file of the Principal District and Sessions Court, Virudhunagar District at Srivilliputtur.

PRAYER IN SA(MD) SR.No.55404 of 2023 :

To set aside the Judgment and decree dated 09.09.2022 passed in A.S.No.22 of 2020 on the file of the Principal District & Sessions Court, Virudhunagar District at Srivilliputtur reversing the judgment and decree dated 22.01.2020 passed in O.S.No.268 of 2021 on the Additional Sub Court, Srivilliputtur by allowing this Second Appeal.

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.V.MEENAKSHI SUNDARAM, Advocate for the petitioner and of MR.M.ASHOK KUMAR, Advocate on behalf of the Respondent Nos.1 to 4 and none appeared either in person or by an advocate on behalf of the 5th Respondent, the court made the following order:-



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CMP(MD) No.10895 of 2023

Reserved on : 20.09.2023

Pronounced on : 18.10.2023

This Civil Miscellaneous Petition is filed to condone the delay of 223 days in filing the Second Appeal against the judgment and decree dated 09.09.2022 made in A.S.No.22 of 2020 on the file of the Principal District and Sessions Court, Virudhunagar District at Srivilliputtur.

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

The petitioner has filed a suit for partition in O.S.No.268 of 2012 on the file of the Additional Subordinate Court, Srivilliputtur against the respondents seeking 1/6th share in the suit properties. The respondents filed their written statement and contested the suit. After adducing evidence by both parties and after hearing both, the Trial Court has decreed the suit as prayed for on 22.01.2020. The respondents preferred an appeal in A.S.No.22 of 2020 before the Principal District and Sessions Court, Virudhunagar District at Srivilliputtur. The respondents also filed the petition in I.A.No.1 of 2022 for examination of additional witness. The First Appellate Court passed common judgment by dismissing the said application in I.A.No.1 of 2022 and partly allowing the appeal. Thereby, the First Appellate Court reversed the decree of the Trial Court and partly decreed that the petitioner is entitled 1/6th share only in



CMP(MD) No.10895 of 2023

respect of 1st item of 1st schedule property in other respects the suit was dismissed.

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The petitioner has instructed his counsel to file the Second Appeal. At that time, the petitioner's counsel shifted the office to the new place and so there occurred delay in filing copy application for preferring the Second Appeal. The petitioner has preferred this Second Appeal with the delay of 223 days.

3. The second respondent has filed a counter affidavit and objected the petition that the petitioner has to prove his averments. The shifting of advocate office is unwarranted. Moreover, the appeal has been filed after one year from the date of judgment passed by the First Appellate Court. The petitioner has no proper and satisfactory reason.

4. The learned counsel for the petitioner has submitted that the petitioner has filed the main suit for partition of 1/6th share in the suit properties, which was decreed by the Trial Court. However, in the appeal preferred by the respondents, the First Appellate Court reversed the decree of the Trial Court and partly decreed only in respect of 1st item of 1st schedule property. The suit properties are consisting four schedules. After passing judgment by the First Appellate Court, the petitioner has properly instructed the counsel for preferring the Second Appeal. Since the office of the advocate was shifted to the new location, there caused delay in applying copy application and therefore, there caused 223 days delay in filing the Second Appeal.

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CMP(MD) No.10895 of 2023

The First Appellate Court has erred in reversing the decree of the Trial Court believing the Ex.B.7 to Ex.B.9 settlement deeds, which were not proved by the respondents 1 to 4 as per the proviso clause of Section 60 of the Indian Evidence Act. The petitioner has fair chance of success in Second Appeal. Therefore, the delay may be condoned.

5. The counsel for the respondents 1 to 4 contended that there is a delay in filing copy application for preferring the appeal. The shifting of advocate office is immaterial and unwarranted. The second appeal is preferred after one year delay, the petitioner has to prove his reason. The petitioner is dragging the proceedings by constraining her aged mother/1st respondent to litigation. Therefore, the petition has no merits and the same is liable to be dismissed.

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

7. It is clear that both parties are close relatives. There is a struggle between the petitioner and the respondents in litigation in partitioning their family properties. The petitioner states that the suit filed by him seeking for 1/6th share in the suit properties was decreed by the Trial Court and that the First Appellate Court reversed the decree believing the settlement deeds under Ex.B.6 and Ex.B.7. So, the petitioner instructed his counsel to prefer the Second Appeal challenging the judgment of the First Appellate Court. But, there is a delay in filing copy application and in getting



CMP(MD) No.10895 of 2023

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certified copies. The reason stated by the petitioner is that the petitioner's counsel has shifted his office from existing location to new location and hence, the delay was happened. On perusal of records, the copy application was filed on 03.06.2023 and the certified copies were made ready on 27.06.2023. In the meanwhile, the petitioner side argued that the respondents made hectic steps to transfer their name in electricity service connection in suit properties defeating the right of the petitioner in suit properties. The petitioner has produced the copy of electricity bills of the respondents stating that the respondents are changing their names to the suit properties. The petitioner states that he has fair chance of success in Second Appeal. The finding of the Courts below has to be taken into consideration. The Trial Court decreed the suit as prayed for whereas the First Appellate Court has reversed the decree and partly decreed the suit only in respect of one item of the suit properties. It is a settled principle that each and every litigant has right of appeal and mere because of delay the appeal right could not be defeated. The delay of 223 days is also not an enormous delay. The reason stated by the petitioner that the shifting of counsel office is acceptable one. However, at the same the inconvenience caused to the respondents has to be compensated. Considering the above facts and circumstances, the delay is to be condoned by imposing certain condition to meet out the inconvenience caused to the respondents.



CMP(MD) No.10895 of 2023

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8. In the result, this Civil Miscellaneous Petition is allowed on condition that the petitioner shall pay a cost of Rs.5,000/- (Rupees Five Thousand only) to the respondents 1 to 4 on or before 16.11.2023, failing which this Civil Miscellaneous Petition stands automatically dismissed without any further reference to this Court.

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/-
18/10/2023

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/10/2023

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

vsd

TO

1 THE PRINCIPAL DISTRICT AND SESSIONS JUDGE,
VIRUDHUNAGAR DISTRICT AT SRIVILLIPUTTUR.

2 THE ADDITIONAL SUBORDINATE JUDGE,
SRIVILLIPUTTUR.

COPY TO

1 THE SUB ASSISTANT REGISTRAR, A.E.SECTION,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

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

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CMP(MD) No.10895 of 2023

ORDER

IN

CMP(MD) No.10895 of 2023

in

SA(MD) SR.No.55404 of 2023

Date :18/10/2023

RS/VRS/SAR-(25.10.2023) 7P 5C

Madurai Bench of Madras High Court is issuing
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