



C.R.P(MD)No.2399 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

C.R.P(MD)No.2399 of 2015(NPD)

Shanmugam (died)

1.S.Ponnamani

2.S.Praveen

3.S.Thenmozhi

4.S.Dhansekar

...Petitioners/Appellants/
Petitioners/Plaintiffs

.VS.

K.G.Rajendran

... Respondent/Respondent/
Respondent/Defendant

PRAYER: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set aside the order passed in C.M.A.No.28 of 2014 dated 08.06.2015 on the file of the II Additional District Judge, Thanjavur confirming the fair and decretal order made in I.A.No.288 of 2013 in O.S.No.30 of 2012 on the file of the I Additional Subordinate Judge, Kumbakonam, dated 06.06.2014 by allowing the Civil Revision Petition.

For Petitioners

:Mr.H.Lakshmi Shankar

For Respondent

:No appearance



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ORDER

The legal heirs of the plaintiff are the revision petitioners. The respondent herein is the defendant in the suit. The suit was originally filed seeking the relief of specific performance of the agreement of sale dated 05.05.1994. In the suit, on 01.08.2013 there being no representation for the plaintiff, the said suit was dismissed for non-prosecution. In order to set aside the said order of dismissal of the suit, the revision petitioner filed an application in I.A.No.288 of 2013 under Order 9 Rule 9 CPC. The trial Court dismissed the said application holding that the said application was filed beyond the period of 30 days and without filing an application seeking condonation of delay.

2. Aggrieved by the said order, the revision petitioner has preferred an appeal in C.M.A.No.28 of 2014 before the II Additional District Judge, Thanjavur. The learned II Additional District Judge, Thanjavur has dismissed the said appeal on 08.06.2015. Challenging the said judgment of the appellate Court dismissing the application filed under Order 9 Rule 9 to restore the suit, the present revision has been filed.



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3. It is seen from the records that the delay in preferring an application under Order 9 Rule 9 CPC is only two days and in fact, an application under Section 5 of the Limitation Act for condonation of the said delay of two days was also filed which was returned on the ground that I.A.No.288 of 2013 has been dismissed.

4. The learned counsel for the petitioner would place the reliance on the decision of the Hon'ble Supreme Court in *State of MP and another vs. Pradeep Kumar and another* reported in *2000(IV) CTC 434*, where, the Hon'ble Supreme Court has held that if the memorandum of appeal is filed without an accompanying the application seeking to condone delay, consequences cannot be fatal. The ratio laid down by the Hon'ble Supreme Court squarely applies to the facts of the present case.

5. On going through the orders of the Courts below, insofar as the findings of the Court below that no evidence have been let in to substantiate the reasons stated in the affidavit filed in support of the application, I do not find that in the facts of the present case, on the strength of the affidavit filed in support of the application as well as the counter opposing the said application, oral evidence was necessitated in



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the first place. The Courts below considering that the suit was in part heard stage, ought to have given an opportunity to the plaintiffs to pursue the litigation.

6. It is also recorded that the respondent / party-in-person did not appear on the earlier hearing namely 02.11.2023 and only to enable his appearance, the revision was posted today, under the caption for orders. Today also there is no representation for the respondent.

7. It is stated by the learned counsel for the petitioner that the Section 5 application was filed only during the pendency of the CRP and further, originally, the plaintiff had himself filed an application under Order 9 Rule 9. Pending the said application, he died and the revision petitioners herein have also taken out an application to implead themselves. The trial Court has to now decide the said application to implead the legal representatives of the deceased plaintiff in the Order 9 Rule 9 application as well as in the Section 5 application, after hearing the respondent and shall pass orders in accordance with law.



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8. Non filing of an application for condonation of delay is a curable defect and the application under Section 5 can be filed even after filing the application seeking to restore the suit to file. With the filing of the application under Order IX Rule 9 CPC, the delay in filing the same stands crystallized on that day and hyper-technical objections should not be pitted against substantial justice.

9. In fine, with the above directions, this Civil Revision Petition is allowed and the order passed in I.A.No.288 of 2013 in O.S.No.30 of 2012 by the I Additional Subordinate Judge, Kumbakonam is set aside.
No costs.

Index:Yes/No
Internet:Yes/No
NCC:Yes/No
AM

10.11.2023

To

1. The II Additional District Judge,
Thanjavur.
2. The I Additional Subordinate Judge,
Kumbakonam,



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P.B.BALAJI,J.

am

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