



CMP(MD). No.5756 of 2023

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Civil Appellate Jurisdiction

Friday, the Fifth day of January Two Thousand and Twenty Four

PRESENT

The Hon`ble Mr.Justice RMT.TEEKAA RAMAN
AND
The Hon`ble Mr.Justice P.B. BALAJI

CMP(MD). No.5756 of 2023
in
A.S(MD).No. 320 of 2008

M. Maruthappa Pandian ... Petitioner/1st Appellant

Vs

1. M. Murugaiyan (Died)
2. Rengathammal (Died)
3. Mariappan
4. Sankudhurai
5. Selvashobana
6. Minor. M. Jayavijesh
7. Minor. Maheesha
(Minor Respondents 6 & 7, rep. By
their mother and natural guardian
5th respondent)
8. Kuttythai
(Respondents 5 to 8 are added
as LRS of the deceased 1st respondent)



CMP(MD). No.5756 of 2023

9. Indira

... Respondents

(Respondent Np.9 added as LRS of
the deceased 2nd respondent)

Prayer in CMP(MD). No.5756 of 2023 :-

Petition filed under section 5 of Limitation Act to condone the delay of 1144 days in filing the restoration petition in A.S(MD). No. 320 of 2008.

Prayer in A.S(MD). No. 320 of 2008 :-

Appeal Suit filed under section 96 of the Civil Procedure Code to set aside the decree and judgment passed in O.S.No.83 of 2004 on the file of the Additional District Judge (FTC-I) Tirunelveli, dated 25.03.2008.

ORDER:- This Petition coming on for orders on Tuesday, the twenty eighth day of two thousand and twenty three and upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr. T.S.R.Venkatramana, Senior Advocate for M/s.V.Janaki Devi, Advocate for the Petitioner and of Mr.R.J.Karthick, Advocate for the respondents No. 5 to 8 and having stood-over the matter for consideration till this day, this Court made the following order:

(Order of the Court was made by P.B.BALAJI,J.)

The above civil miscellaneous petition has been filed seeking condonation of delay of 1144 days in filing the restoration petition, to restore A.S. (MD)No.320 of 2008, which was dismissed for non prosecution on 10.11.2017.

2. We have heard Mr.T.S.R.Venkatramana, learned Senior Counsel for the petitioner and Mr.R.J.Karthick, learned counsel for the respondents 5 to 8.



CMP(MD). No.5756 of 2023

WEB COPY

3. The learned Senior Counsel appearing for the petitioner / first appellant would contend that only when the Amin visited the suit property on 30.12.2022 and attempted to deliver possession on the basis of an order of the Executing Court in E.A.No.3 of 2022, the petitioner came to know about the dismissal of the Appeal for non prosecution on 10.11.2017. Further, he would contend that without even impleading the petitioner in the Execution Application, the respondents 5 to 8 are attempting to take advantage of the dismissal of the appeal and having got a sale deed registered in their name, are attempting to take possession. The learned Senior Counsel would also state that the Execution Proceedings in E.P.No.6 of 2009 are also without jurisdiction and it offends Section 16 of the Code of Civil Procedure. He would also state that the appeal was dismissed only because the petitioner's lawyer reported "no instructions", after trying get in touch with the petitioner at his earlier residence. According to the learned Senior Counsel for the petitioner, the petitioner shifted his residence and he is also the President of Veerakeralam Pudur Panchayat for 15 years and unfortunately, his former Lawyer had communicated regarding the appeal, to his old address and thereafter has reported "no instructions". The learned Senior Counsel would further submit that the petitioner has been a diligent litigant and has been dutifully attending to various legal proceedings and therefore, the absence of



CMP(MD). No.5756 of 2023

the petitioner was neither wilful nor wanton and only under *bonafide* circumstances.

WEB COPY

4. Per contra, the learned counsel for the respondents 5 to 8 would submit that the petitioner has suppressed the true facts and approached this Court with unclean hands. According to the learned counsel for the respondents 5 to 8, the Execution Petition was filed in E.P.No.6 of 2009 and after disposal of the appeal, the Executing Court, after hearing the petitioner as well as the respondents, allowed the application, directing the Execution of sale deed and in this order was passed on merits and the same has not been challenged by the petitioner, till date. In fact, the petitioner has also filed E.A.No.9 of 2023, to implead himself in E.A.No.3 of 2022 and the said E.A.No.9 of 2023 has also been dismissed on 05.09.2023. The petitioner participated in the Execution proceedings and the Execution Court also dismissed this application filed by the petitioner, on merits. According to the learned counsel for the respondents 5 to 8, there are no merits in the application taken out for the restoration of the Appeal and he would pray for dismissal of the application.

5. We have paid our anxious and careful consideration to the rival submissions advanced by the learned Senior Counsel for the petitioner as well as the learned counsel for the respondents 5 to 8.



CMP(MD). No.5756 of 2023

WEB COPY

6. (a). The suit is one for specific performance of an agreement of sale dated 18.10.2000. The suit was decreed in favour of the plaintiff, as against which, the first Appeal was preferred at the instance of the petitioner / first appellant herein.

6. (b). We have perused the “B Diary” in the Execution Proceedings. We find from the records that the present application seeking restoration of the Appeal has been filed only on 12.01.2023. Even according to the petitioner / first appellant, he came to know about the dismissal of the appeal, on 30.12.2022. We are unable to find anything suggesting from the “B Diary” that the petitioner herein appeared before the Execution Court and participated in the Execution Proceedings as contended by the learned counsel for the respondents. Even in E.A.No.3 of 2022, we find that the petitioner was not shown as a respondent in the said E.A and one respondent, by name, Indra, who is alleged to be the legal heir of the first defendant was shown in the said application for delivery of possession.

6. (c). We, however, find in E.P.No.6 of 2009 that the petitioner herein has been cited as the second respondent and the petitioner herein was represented by a counsel before the Execution Court. The Execution Court has taken note of the fact that the appeal has been dismissed and proceeded with the Execution Petition as early as on 27.03.2017.



CMP(MD). No.5756 of 2023

WEB COPY

6. (d). Even in February – 2021, the Execution Court has granted time to the petitioner to file his counter and subsequently time has also been extended on several occasions upto 31.08.2021, on which date recording that the petitioner herein has not filed a counter, despite matter being posted as a last chance, the Executing Court adjourned the matter “for enquiry” and on 23.09.2021, the Executing Court directed filing of draft sale deed and subsequent to the draft sale deed being filed and verified, registration of sale deed was ordered and thereafter recording that the sale deed have been registered, the E.P was closed.

6. (e). The petitioner herein was very much represented by a counsel through out the execution proceedings and despite several opportunities granted for filing of a counter, no counter affidavit has been filed and only thereafter, the Execution Court proceeded with the enquiry and directed execution of sale deed.

7(a). The grievance of the petitioner is that he was not made a party in E.A.No.3 of 2022. The said E.A has been taken out by the decree holder only for recovery of possession, which according to the decree holder, was only with the name respondent mentioned in the said E.A and therefore they were justified in not impleading the petitioner herein as the respondent in the said E.A.

7(b). The petitioner was all along represented by a counsel before the Execution Court and never choose to contest the execution proceedings and allowed



CMP(MD). No.5756 of 2023

an order to be passed in the execution proceedings and he cannot turn around and
WEB COPY

blame his counsel for not informing him about the appeal being dismissed for non prosecution. In fact, it is seen from the affidavit sworn by the petitioner/first appellant that he is a very popular person in the locality and everybody knew him as he was the President of the Panchayat for more than 15 years. Even going from the self serving averments made by the petitioner, it can only be stated that there would have been no difficulty for his lawyer to get in touch with him.

7(c). We are unable to accept the reasons assigned by the petitioner for seeking condonation of delay of more than 5 years in restoring the First Appeal, which was dismissed for non prosecution. Moreover, being the defendant in the suit for specific performance, it is the duty of the petitioner to have diligently followed up the matter with his counsel, without expecting the counsel to keep him informed about the case. The long silence for more than 5 years, has not been properly or sufficiently explained and the delay is also inordinate.

8. We do not find any just and sufficient reason or cause for condoning the delay of 1144 days in filing the application to restore the Appeal. In fine, we do not see any merit or bonafide reasons in the application taken out for condonation of



CMP(MD). No.5756 of 2023

delay of 1144 days. In fine, this Civil Miscellaneous Petition is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/02/2024

Sub Assistant Registrar
(CS-I / II / III / IV)

Is

TO

1. The Additional District Judge (FTC-I),
Tirunelveli.

Copy to:

The Section Officer,
Judicial Section,
Madurai Bench of Madras High Court, Madurai

+1CC to M/s. V.Janaki Devi, Advocate, SR.No.625



WEB COPY



CMP(MD). No.5756 of 2023

ORDER DATED : 05/01/2024

=====

ORDER

=====

CMP(MD). No.5756 of 2023

in

A.S(MD).No. 320 of 2008

Giving direction and etc.
as stated within.

RD(31/01/2024) 9P / 4C

Madurai Bench of Madras High Court is issuing certified copies in this format from 17.07.2023.