



CMP(MD)NO. 9249 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.02.2025

Pronounced on : 28.03.2025

CORAM

THE HONOURABLE MR JUSTICE P.VADAMALAI

CMP(MD)NO. 9249 of 2024

in

A.S(MD)No.104 of 2013

Jeyakumar,
S/o. Narayana Pillai, Kankarai Vaishnav,
Thiruvattar Desom, Thiruvattar Village, Thiruvattar Post,
Kalkulam Taluk, Kanyakumari District and another

Petitioner(s)

Vs.

Sarafunnisa,
D/o. Nabeegathu Beevi, W/o. Ibrahim,
Thekkanaya Ulakanppichai Kudiyiruppu Puthen Veedu,
Pattanam Desom, Painkulam Village, Painkulam Post,
Vilavancode Taluk, Kanyakumari District.

Respondent

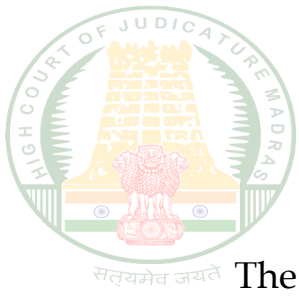
For Petitioners : Mr.K.P.Narayanakumar

For Respondent : Mr.T.Lajapathi Roy
Senior Counsel
for Mr.S.Rajasekar

ORDER

This Civil Miscellaneous Petition is filed to condone the delay of 572 days in filing restoration petition in A.S(MD)No.104 of 2013.

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



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The petitioners have filed the suit in O.S.No.47 of 2008 before the District and Sessions Judge, Kanyakumari for the relief of specific performance against the respondent. The suit was dismissed on the ground of limitation and non examination of the first plaintiff. The petitioners preferred the appeal before this Court and the appeal was admitted and numbered as A.S(MD)No.104 of 2013. The petitioners were not informed by their counsel in the appeal that the case was posted for final hearing. On 20.03.2024, while the petitioners contacted their earlier counsel, it is informed by him that the appeal was dismissed on 04.08.2022 for non prosecution as there was no representation on the petitioners' side. Immediately, the petitioners got back the bundle from their earlier counsel and engaged the present counsel and hence, there is a delay of 572 days in filing the restoration petition. The petitioners have not committed any intentional error and the petitioners have a fair chance of success and they are ready to proceed with the appeal at any date fixed by the Court. Therefore, the petitioners have filed this petition to condone the delay of 572 days in filing restoration application.

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

The petitioners have preferred this appeal against the dismissal of their suit in O.S.No.47 of 2008 for specific performance. The trial Court passed the judgment



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and decree on 05.11.2012. The petitioners have no case and hence, after admission of appeal, they kept silent. The reason stated by the petitioners that their erstwhile counsel has not informed them about the listing of the appeal for final hearing is false and invented for the purpose of this petition. The appeal was dismissed on 04.08.2022. Prior to dismissal, the case was listed on 23.06.2022 and 18.07.2022, whileso the previous hearing might have been informed by the counsel to the petitioners. So, there is no valid reason assigned by the petitioners and the same is liable to be dismissed.

4. The learned counsel for the petitioners has submitted that because of non appearance by the previous counsel to the petitioners, the appeal was dismissed for non-prosecution. Because of the default of advocate, the litigant should not suffer in their case. When the appeal is taken on file, it is continuation of the suit. The petitioners specifically undertook in their affidavit that they are ready to argue the appeal even for the first hearing on restoration. The petitioners should be given a chance to hear the appeal and it is a settled position that all litigation has to be disposed of on merits.

5. Per contra, the learned counsel for the respondent vehemently contended that the petitioners are pursuing the suit proceedings from 2008 and since their suit was dismissed, the petitioners have to be vigilant in their case, the petitioners could not



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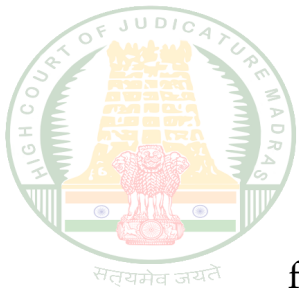
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blame on counsel. Only to protract the proceedings and to harass the respondent, the petitioners have filed this petition with invalid reason, hence, the petition may be dismissed. In support of his argument, the learned counsel for the respondent relied on the order of the Hon'ble Supreme Court passed in SLP (Civil) 935-936 of 2021, dated 21.11.2024 (Rajneesh Kumar & Anr. vs. VED Prakash) and Order of this Court reported in 2016 SCC Online Madras 9609 (N.Sengottaiyan & Anr. vs. Shanmughavadivu & Ors.)

6. I have considered the submission of both side and perused the case records. The petitioners have filed the suit in O.S.No.47 of 2008 for the discretionary relief of specific performance on the basis of alleged sale agreement to sell the suit property at Rs.12,000/- per cent. It is also alleged that the respondent received Rs.2,00,000/-. The suit was dismissed by the trial Court in toto on merits on 05.11.2012. The petitioners preferred the appeal and the same was admitted as A.S(MD)No.104 of 2013. It is a settled principle that in civil cases, when the appeal is preferred against the judgment of the trial Court and taken on file, the civil case has to be treated as continuation of the case.

7. On perusal of records, it is clear that when the appeal was listed on 04.08.2022, this Court passed the order as follows:

“Today (04.08.2022), when the matter is taken up



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for hearing, there is no representation on behalf of the appellants. The learned counsel for the respondent is present. Since the appeal is pending from the year 2013, the appellants are not interested to prosecute the appeal. Therefore, this Appeal Suit stands dismissed for non-prosecution. No costs.”

8. From the above order, it is clear that there is no representation on behalf of the petitioners. From this, it is also clear that the petitioners have not been given instructions about the listing of the case for final hearing. If the petitioner’s counsel did so, he would definitely represent the Court as ‘no instruction’. But, it is clear from the above order that the petitioner’s counsel has not reported as ‘no instruction’, only that there is no representation on behalf of the petitioners. Moreover, in a catena of decisions rendered by the Hon’ble Supreme Court, whenever an appeal is preferred, the same has to be disposed of on merits after perusing the records and the appeal should not be dismissed for non prosecution.

9. In this case, the petitioners’ specific allegation is that their erstwhile counsel has not intimated them about the listing of the case, and when they came to know about the dismissal for default, they engaged the present counsel. It is also their undertaking that they are ready to argue the appeal even on the first hearing itself on



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restoration. I have carefully perused the rulings relied on by both sides. The citations relied on by the respondent, one relates to the delay in filing the appeal and another is to condone the delay of 1600 days in ex-parte set-aside petition. Both are not applicable to the facts of this case. The litigant should not be suffered for the default or error of the advocate. It is also settled principle that the mistake or error committed by the advocate would not affect the right of the litigants.

10. In this case, the erstwhile counsel did not appear and represent the appeal while hearing before the Court. The erstwhile counsel for the petitioners has not represented and report that there is no instruction from the petitioners. Therefore, the petitioners' reason is accepted. It is a settled principle that every litigant has the right to prefer the appeal and the appeal has to be disposed of on merits. The undertaking of the petitioners that they are ready to argue the appeal immediately on restoration on the first hearing itself is also taken into consideration. Whiles, there will be no prejudice to other side for disposal of the case on merits.

11. The suit is filed for discretionary relief of specific performance. There is a delay of only 572 days in filing the petition for restoration. Mere delay would not affect the right of a litigant and the right of appeal to a party should not be affected. The rival contentions of both parties regarding the subject matter of the suit and appeal are not necessary to be discussed in this delay condone petition. Therefore,



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this Court is of the opinion that the petitioners have to be given an opportunity to hear the appeal and at the same time, the inconvenience caused to the respondent 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 respondent.

12. In the result, this Civil Miscellaneous Petition is allowed on condition that the petitioners shall pay a cost of Rs.10,000/- (Rupees Ten Thousand only) to the respondent on or before 29.04.2025, failing which the petition shall stand automatically dismissed.

sd/-
28/03/2025

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/04/2025

Sub-Assistant Registrar (C.S.-I/ II /III/ IV)
Madurai Bench of Madras High Court,
Madurai - 625 023.

vsd
TO

THE DISTRICT AND SESSIONS JUDGE, KANYAKUMARI AT NAGERCOIL.

ORDER
IN

CMP(MD) No.9249 of 2024
IN

AS(MD) No.104 of 2013
Date :28/03/2025

NBF/SAR/ (22/04/2025) 7P/2C

Madurai Bench of Madras High Court is issuing certified copies in this format from 17/07/2023