

IN THE HIGH COURT OF JUDICATUURE AT MADRAS

RESERVED ON : 22.07.2016

PRONOUNCED ON: 01.11.2016

CORAM

THE HON'BLE MR.JUSTICE **M.V.MURALIDARAN**

CRP(NPD)No.2161 OF 2011

and

M.P.No.1 of 2011

1.N.Sengottaiyan

2.S.Shanmugham

.. Petitioners

-VS-

1.Shanmughavadivu

2.Pavanu

3.S.N.Natarajan

.. Respondents

(3rd Respondent given up herein
as unnecessary party)

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and final order dated 07.12.2010 made in I.A.No.295 of 2007 in O.S.No.121 of 2000, on the file of the Sub-Court, Bhavani.

Petitioners : Mr.T.Murugamanikkam

Respondents: Mr.V.S.Kesavan (for R2)

No Appearance (for R1)

ORDER

The defendants 2 and 3 are the petitioners before this Court.

2. The case of the plaintiffs is that the first plaintiff is daughter and the second plaintiff is wife of the first defendant viz., S.N.Natarajan. The suit schedule of properties was inherited as per the partition deed dated 09.02.1987 as partitioned between the first plaintiff and the first defendant and the said property is in ancestral property. As per the above partition deed dated 09.02.1987, half of the suit schedule of property belongs to the first plaintiff and the other half of the property belongs to the first defendant. Due to the continuous drunken stage of the first defendant and to continuous request of the second plaintiff, the second plaintiff left the first defendant with the first plaintiff and living at O.Nanjangoundampalayam from 1996 onwards. From that day onwards, the first defendant is not visited the plaintiffs' family and not paid any maintenance amount. In fact, the first defendant is earning from his employment and also from the agricultural Rs.5,000/- per

month and the same was used for drinking as well as illegal activities. The first defendant on the corner site of the northeast for the suit schedule of property to an extent of 1450 sq. ft. has constructed house and living there and thereafter he has sold the said property along with the house on 05.05.1995 in favour of the second defendant.

3. Though the first plaintiff has believed that the first defendant had mend his way, and living with the plaintiffs but he has not maintain them. The first defendant also not chosen to take back the plaintiffs or paying maintenance to them. In fact the first defendant has not paid any single paise for the Maintenance, Education and Medical expenses and also for the Marriage expenses of the first plaintiff. Therefore, the second plaintiff, who is the wife of the first defendant, without any income, she was very much suffering from running the family. But, on the other hand, being the husband of the second plaintiff, the first defendant ought to have paid the maintenance to the first plaintiff. In fact, the first plaintiff till the attaining of the majority, the second plaintiff alone spent money for education and for family maintenance to the first plaintiff and for marriage expenses, the second plaintiff spent more than Rs.75,000/- for marriage expenses and hence the first defendant ought to have

pay a sum of Rs.1,500/- per month to the second plaintiff for her maintenance and Rs.75,000/- for the marriage expenses.

4. But with an aim to cheat the second plaintiff, on 27.09.1999 the first defendant has sold 10 cents of land in the suit schedule of property in favour of the third defendant. Hence, the sale in respect of the transaction of land in favour of the third defendant is binding of the plaintiffs. Therefore, in the circumstances, on 20.11.1999, the plaintiffs has sent a lawyer notice to the defendants, but the notice sent to the first defendant is returned and the defendants 2 and 3 were received, no reply was given. Therefore, even after the receipt of the above notice, the defendants particularly, the first defendant has not come forward either to cancel the sale deed dated 27.09.1999 or paying the maintenance amount at the rate of Rs.1,500/- per month and the marriage expenses of Rs.75,000/- till date to the plaintiffs. Therefore, in the above circumstances, the plaintiffs were approached the learned Subordinate Court, Bhavani and filed the suit in O.S.No.121 of 2000 for declaration declared the sale deed dated 27.09.1999 is not valid and for partition of suit schedule of property in to two share and for maintenance at the rate of Rs.1,500/- per month to the second plaintiff.

5. On receipt of summon, the third defendant alone has filed a written statement stating that he admitted that the plaintiffs are the daughter and wife of the first defendant. But, he denied that the partition deed dated 09.02.1987 was not taken place and denied the entire facts contained in the plaint. Each and every allegations made in the plaint has totally false and the same was created by the plaintiffs for the purpose of filing the case.

6. The third defendant further states that as on date the plaintiffs and the first defendant are living as the joint family and the allegations that due to the consuming arrack and also do illegal activities, the plaintiffs left with the first defendant and has living separately is totally false. As per the sale deed dated 05.05.1995, the first defendant has executed the sale deed in favour of the second defendant and maintenance of the plaintiffs, the said sale deed dated 05.05.1995, the second plaintiff being the mother of the first plaintiff has put her signature as witness in the sale deed. But suppressing the fact, the second plaintiff has claimed that the sale deed dated 05.05.1995 has not executed with the knowledge of the plaintiffs.

7. The third defendant has also stated that on 27.09.1999, the first defendant has executed the sale deed for himself and his minor

daughter viz. the first plaintiff for a total consideration of Rs.3,00,000/- in favour of the third defendant. After purchase the sale deed on 27.09.1999, the third defendant has constructed a building and running a shop in the said property. But suppressing all these facts, the above suit has been filed. The claim of the plaintiffs about the partition as well as the maintenance is totally false. Therefore, the third defendant has sought for dismissal of this petition.

8. The suit was posted for trial on 31.01.2003, but due to non intimation by the defendants' counsel, the suit was set exparte. Therefore, to set aside the exparte decree dated 31.01.2003, the petitioners / defendants 2 and 3 were filed an application in I.A.No.295 of 2007 with a delay of 1600 days for filing the set aside application.

9. The petitioners / defendants 2 and 3 were stated in the affidavit that they were appeared before in the Court for the reason that their advocate were informed that the suit is pending. But later on they were informed them that the suit was set exparte on 31.01.2003 due to non appearance of the petitioners/defendants 2 and 3. The said suit was decreed exparte on 31.01.2003 on the ground that the petitioners / defendants 2 and 3 were not filed the written statement. Therefore, there is a delay of 1600 days in filing the set

aside application. Therefore, they prayed the Court for condoning the delay of 1600 days in filing the set aside application filed in I.A.No.295 of 2007.

10. On receipt of the notice, the respondents 1 and 2 were filed their counter by stating that the suit was filed for declaration and for maintenance, the petitioners filed for condoning the delay of 1600 days is not maintainable. In fact, the defendants 2 and 3 were received the summon from the Court in the suit on 30.06.2000 and the second defendant also engaged one Mr.S.Devendran, as an Advocate, but till 31.01.2003 i.e. more than 3 years, they have not filed any written statement in the suit and kept pending for more than 3½ years. Apart from this, the respondents 1 and 2 were stated that for the huge delay of 1600 days, the petitioners / defendants 2 and 3 were not given any explanation and as per the orders of this Court and the Hon'ble Apex Court for each and every day delay they have to be given explanation or reasons. But, they were failed to give the same. Apart from this, the respondents 1 and 2 were stated that on 12.10.2000 itself, the second defendant N.Sengottaiyan was called in the open Court, but he was not appeared before the Court. Hence, he was set exparte on that day itself and that the third defendant engaged counsel Mr.Devendran. On 22.02.2001 till 31.01.2003, fair

opportunity given to the defendants for filing the written statement, but they failed to file the written statement and hence exparte decree was passed against them on 31.01.2003. Therefore, the respondents 1 and 2 were sought for dismissal of the application in I.A.No.295 of 2007.

11. Considering their case, the learned Judge namely the Subordinate Judge, Bhavani has dismissed the application on 07.12.2010 on the ground that the petitioners / defendants 2 and 3 were not given any valid reasons for the huge delay of 1600 days in filing the set aside application. Apart from this, the petitioners have not given any reason for each and every day delay, which was held by the Hon'ble Apex Court. Therefore, he dismissed the application on 07.12.2010. Challenging, the said order of dismissal, the petitioners / defendants 2 and 3 were filed the present civil revision petition before this Court.

12. Heard Mr.T.Murugamanickam, learned counsel appearing for the petitioners and Mr.V.S.Kesavan, learned counsel appearing for the second respondent and No representation for the respondents 1 and 3 and perused the documents filed by both the parties.

13. It is admitted fact that the suit was filed by the plaintiffs against the defendants 1 to 3 for declaration declaring the sale deed dated 27.09.1999 executed by the first plaintiff in favour of the third defendant for partition of the suit schedule of property by two shares and put the plaintiffs in possession of one share and also for maintenance to the second plaintiff at the rate of Rs.1,500/- per month.

14. Originally summon was received by the defendants 2 and 3, but they were not chosen to file their written statement. In fact, the second defendant was received summon and while he was called for in open Court on 12.10.2000 he was not appeared on that day, he was set exparte. The exparte order was passed against the second defendant. In fact, the defendants 2 and 3 were not filed their written statement. But, I found that the written statement filed by the third defendant is enclosed in the typed set of papers in this civil revision petition and I was noticed that the said written statement was filed on 18.07.2007 before the Court below viz., Subordinate Court, Bhavani, passed an exparte decree against the defendants 2 and 3 on the ground that they were not filed their written statement. Even after giving fair opportunity particularly on 22.02.2001 to 31.01.2003. But even then, they have not chosen to file their written statemen. Hence,

they were set exparte.

15. Admittedly, as per Section 5 of the Limitation Act, this petitioners / defendants 2 and 3 should have filed the application for setting aside the exparte decree within a period of 30 days from the date of exparte decree. But, this application was filed after a long delay of 1600 days and there was no proper explanation given by the petitioners / defendants 2 and 3.

16. The Hon'ble Apex Court time and again directed the parties to give proper explanation for each and every day delay, but they were not given any proper reasons in this case. During the course of arguments the learned counsel appearing for the respondents has produced two judgments referred by this Court is as follows:-

(1) ***Subramaniam and another v. K.Veerakumar***
reported in 2014 (2) MWN (Civil) 74

(2) ***Mariappan v. Prema and others reported in***
2013 (2) MWN (Civil) 347

17. In the case cited supra, this Court reported in ***2014 (2) MWN (Civil) 74***, there was a delay of 190 days in filing the Petition under Order 9 Rule 13. In other case, it is a delay of 183 days in filing

the application under Order 9 Rule 13 for setting aside the ex parte decree, but in both cases, this Court confirmed the dismissal of the application filed by the respective parties.

In the case reported in **2014 (2) MWN (Civil) 74**, this Court has stated the reasons as follows:

“13. It is a settled legal principle that law of limitation is founded on Public Policy not meant to destroy rights of parties, but to see that the parties do not resort to dilatory tactics. Likewise, it has been held that liberal approach in considering an Application under Section 5 of the Limitation Act should not override the substantial law of limitation and no premium can be given for lethargic attitude or utter negligence.

14. Bearing these settled legal principles in mind, if the case on hand is examined, the only answer that could be given is that the plea of the Petitioners lacks *bona fide*. Such conclusion is supported by following reasons.

15. As pointed out by the Respondent in the Counter filed in I.A.No.1175 of 2009, the Petitioner participated in the proceedings before the Revenue

Court at Bhavani by appearing before the said Court in T.R.No.20 of 2007 on 29.6.2009, 6.7.2009, 28.8.2009, 7.9.2009 & 14.9.2009. That apart, the Second Petitioners had participated in the proceedings in O.S.No.284 of 2007, on the file of the District Munsif Court, Bhavani on several dates between the period 4.6.2009 and 11.9.2009. Apart from that in another Suit in O.S.No.308 of 2007, the Second Petitioner has appeared and given oral evidence in the said Suit during the period from 16.6.2009 to 31.8.2009. That apart Affidavits have been filed in other Suits and oral evidence have also been given on 1.9.2009, 7.9.2009, 9.9.2009 & 14.9.2009. Further, in the Final Decree proceedings in the present Suit also, the Petitioners have entered appearance through Counsel and filed Counter. Therefore, the plea raised by the Petitioners in the Affidavit stating that on account of ill-health, they could not contact their Counsel and only on 2.12.2009, they were able to contact their Counsel lacks *bona fide*. That apart their conduct clearly

shows gross negligence and their actions were deliberate in not defending the matter. In such circumstances, the Trial Court was fully justified in rejecting the Petition. Further, the Petitioners were unable to establish before the Court about the sickness by producing any record or evidence.

16. Thus the Petitioners having been guilty of gross negligence and laches, this Court has no hesitation to hold that the Petitioners have not shown sufficient cause for condonation of delay. Accordingly, the Civil Revision Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.”

In the case reported in **2013 (2) MWN (Civil) 347**, this Court has stated the reasons as follows:

“6. The learned Counsel for the Petitioner / 2nd Defendant would place reliance upon the decision of the Honourable Supreme Court reported in G.P.Srivastava v. R.K.Raizada and others, 2000 (3) SCC 54, wherein it has been held as follows:

“Under Order 9, Rule 13, C.P.C. an ex

parte decree passed against a Defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the Defendant or he was prevented by any "sufficient cause" is shown for non-appearance of the Defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The word 'was prevented by any sufficient cause from appearing' must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9, Rule 13, has to be construed as an elastic expression for which no hard and fast Guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient

cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the Defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the Defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other

side can be compensated by adequate costs and the lis decided on merits.”

7. In the above said case, the ex parte decree was passed on 10.3.1983 and Application for setting aside the ex parte decree was filed on 7.4.1983 within 30 days. However, it was dismissed by the Trial Court assigning reason that the Medical Certificate filed by the Appellant therein was not from the Government Doctor, but from a private Doctor. The High Court also dismissed the Revision filed by the aggrieved party. The Honourable Supreme Court, on further Appeal, allowed the Appeal stating that sufficient cause has been made for non appearance of the Defendant therein on the date fixed for hearing and he cannot be penalized for any previous negligence, which had been overlooked, and thereby condoned the delay. Further it is observed that in the case where Defendant approaches the Court immediately and within the stipulated time specified, the discretionary power is exercised in his favour treating the absence as not made intentionally.

8. The facts in the said case are different from the

facts of the present case. In the present case, in earlier occasion also there was a delay of nearly 6 months and the Court condoned the delay on Application. In the present occasion also, the Defendants have come forward with Application for condonation of delay of 183 days. They have not shown sufficient reasons for the delay in approaching the Court within the statutory time specified. When the 2nd Defendant was unable to contact his Advocate, there is no embargo for the Defendants 1 & 3 to contact their Advocate. Further, the period of illness is absent in the Application. Under these circumstances, the Petitioner could not take recourse to the benefit of the above said decision of the Honourable Supreme Court. The delay of six months on the part of the Petitioner shows their indifference towards the Court proceedings, because the case was in part heard stage. PW1 was examined in chief and was to be cross-examined by the Defendants and at that stage, they were absent.

9. The Court expects the parties to be vigilant and sensitive on the proceedings of the Court and when the case was in the part heard stage, it is the duty of the

parties to follow the conduct of the case and contact their Advocate also to know about the stage of the case. But, the Defendants have failed to follow the proceedings because of their lethargic attitude. It is well settled principle that the length of the delay is not material, but whether the delay has been sufficiently explained has to be looked into.

10. Considering the facts and circumstances of this case, this Court is of the view that the delay remains unexplained and the Petitioner is to be non-suited for the relief prayed for. There is no valid ground made out to interfere with the order passed by the Court below, which deserves to be confirmed. Accordingly, the impugned order of the Court below is confirmed.”

18. Admittedly there is a delay of 1600 days in filing the set aside application, if at all the petitioners / defendants filing the petition for setting aside the exparte decree, they have to approached the Court below within the time limit. But, after 1600 days delay, they approached the Court for setting aside the exparte decree, that too after 4 years.

19. For the huge delay of 1600 days delay, there was no proper explanation by the petitioners / defendants 2 and 3, in fact the conduct of the defendants 2 and 3 namely petitioners herein that there was gross negligence on the part of them in depending the matter. This Court and the Hon'ble Apex Court clearly stated that it is a settled legal principle that law of limitation is founded on Public Policy not meant to destroy rights of parties, but to see that the parties do not resort to dilatory tactics. Likewise, it has been held that liberal approach in considering an Application under Section 5 of the Limitation Act should not override the substantial law of limitation and no premium can be given for lethargic attitude or utter negligence. As per the above settled legal principles in mind, if the case on hand is examined, the only answer that could be given is that the plea of the Petitioners lacks *bona fide*.

20. In my consider opinion that the parties ought to be vigilant in Court proceedings and the duty of the parties to conduct the case and contact their advocate in proper. In this case, the petitioners / defendants 2 and 3 were stated that the petitioners were approached their counsel, but they were informed that the case is pending. But it is their bounden duty for the petitioners / defendants 2 and 3 that they would appear before the Court regularly without absenting themselves

and verifying about the status of the case. Therefore, the reason given by the petitioners / defendants 2 and 3 is not acceptable one and the order of dismissal passed by the learned Subordinate Judge, Bhavani, is not warranting any interference by this Court and hence this Civil Revision Petition is liable to be dismissed.

21. Accordingly, this Civil Revision Petition is dismissed without cost. Consequently, connected miscellaneous petition is closed.

01.11.2016

vs

Note: Issue order copy on 03.11.2016.

Index: Yes.

Internet: Yes.

To

The Subordinate Court,
Bhavani.

M.V.MURALIDARAN,J.

VS

**Pre-Delivery order made in
CRP(NPD)No.2161 of 2011
and
M.P.No.1 of 2011**

01.11.2016