

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **28.04.2016**

CORAM

THE HONOURABLE Dr. JUSTICE. **S.VIMALA**

CRP (NPD) No.140 of 2015

and

M.P.Nos. 1, 2 and 3 of 2015

M.Vijayanthi

W/o. Late.A.V.Mohan

... Petitioner/1st defendant

..Vs..

1. K.R.Bharathy,

W/o.Radhakrishnan

...1st respondent/plaintiff

2. A.Jayanthi,

W/o.Anjanayelu

... 2nd respondent/2nd defendant

3. S.Vasuvambal,

W/o.Srinivasan

... 3rd respondent/3rd defendant

Civil Revision Petition filed under Section 115 of C.P.C., against the order dated 08.10.2014 made in I.A.No.251 of 2014 in O.S.No.76 of 2005 on the file of the Sub Court, Tambaram, condoning the delay of 1856 days to set aside the decree passed in O.S.No.76 of 2005.

For Petitioner : Mr.S.V.Jeyaraman

For R1 : Mr.J.Ram

For R2 and R3 : Mr.R.Sethuvarayar

ORDER

Whether the dismissal of the application filed to condone the delay of 1856 days, i.e. 5 years and one month, in filing the application to set aside the ex parte preliminary decree is justified, is the issue raised in this Civil Revision Petition.

2. The first defendant in O.S.No.76 of 2005 is the revision petitioner. The plaintiff, the first defendant's husband, the second and third defendants are related as brother and sisters.

2.1. The first respondent herein, as plaintiff, filed the suit in O.S.No.76 of 2005, seeking the relief of partition and separate possession of her 1/4th share in the suit property.

2.2. The defendants 2 and 3 relied upon the Will dated 03.08.1998, whereas the revision petitioner herein relies upon the Will dated 26.06.1995.

2.3. In the suit, the first defendant/revision petitioner herein remained ex parte and preliminary decree has been passed on 11.01.2008. Final decree has also been passed, on 06.09.2011, based on the Commissioner's report in I.A.No.80 of 2010.

2.4. Thereafter, the first defendant in the suit filed I.A.No.251 of 2014 in O.S.No.76 of 2005, praying to condone the delay of 1856 days in filing the petition under Order 9 Rule 13 C.P.C., along with an application to set aside the preliminary decree dated 11.01.2008. This affidavit is dated 11.03.2013.

2.5. The said application was opposed by the plaintiff/first respondent herein by filing counter, disputing the allegations. Thereafter, that application came to be dismissed, by order dated 08.10.2014. Challenging the same, this revision petition has been filed.

3. In the affidavit filed, the petitioner has stated that Doctor advised her to be under complete medication and rest, on account of cancer, therefore, she was not able to concentrate on her case and therefore, she was ex parte in the Execution Petition also on 01.03.2013. This is the main reason stated to condone the delay.

4. The learned counsel for the revision petitioner would submit that it is not a case of no knowledge, but, having acquired knowledge, the ill-health of the widowed lady, who was suffering from cancer, did not give her a peaceful mind to attend to the case and therefore, it is a clear case for condonation of delay.

4.1. The further contentions of the learned counsel for the revision petitioner are that a) the word 'sufficient cause' should receive liberal interpretation and the lower Court misinterpreted Section 5 of the Limitation Act; b) the lower Court did not consider the medical documents relating to the prolonged cancer of the petitioner; c) the length of delay is not a matter and the acceptability of the explanation is the only criteria; and d) the refusal to condone the delay and the refusal to adopt a pedantic approach would result in meritorious matter being thrown out.

5. Exs.P1 to P10 and P29 to P34 are relied upon to substantiate the contention of the petitioner that she was suffering from cancer.

6. The lower Court has considered the documents, i.e. Exs.P1 to P10 and P29 to P34 and has given a finding that those documents are not germane for consideration and if the date of knowledge is taken into account, the application should have been filed in the year 2010. The language employed by the lower Court may be inappropriate, but, perusal of the facts and circumstances and the documents filed would go to show that the finding is correct.

6.1. A perusal of details of list of documents would go to show that the investigation and the treatment for cancer had been done during the year 2007 and 2008.

6.2. The suit itself had been filed after the death of her husband.

6.3. There is no medical record to show that even after 2008, she was suffering from cancer. On the contrary, there are records, which would go to show that she was well to the extent of teaching the students.

6.4. No doubt, if a killer disease like cancer prevented her from discharging her normal duties, the Court has to be lenient. But, in this case, when the cancer did not prevent her from attending the School and did not prevent her from attending the Lok Adalat and did not prevent her from engaging counsel at every stage, one cannot understand, what could have been the difficulty to her to give evidence alone.

6.5. Moreover, as already pointed out, it is not a case of no knowledge. During this period of 1856 days, she had entered appearance before the Court thrice, i.e. first time, in the hearing of the suit (2005), second time during the hearing of application for passing of final decree (2010) and third time during the hearing of the execution petition (2013) and each and every occasion, there is no progress after entering appearance, the logical conclusion is that the petitioner had been waiting and watching the proceedings for the reasons best known, one of which could be drag on the proceedings. Her silence only corroborated the contention that somebody is financing the litigation and that she is tuned

to act in accordance with the direction of somebody else, cannot be ruled out. Under such circumstances, sympathy if any shown would be only a misplaced sympathy.

6.6. If really she was prevented from concentrating upon her case, she should have filed the affidavit giving complete details of her activities without any suppression regarding her attending the school. Suppression of material facts and omission in the affidavit itself are the grounds to reject the application. But, for the provisions of Right to Information Act, the plaintiff would not have been in a position to get the details of her employment.

7. The contentions of the learned counsel for the first respondent are that a) the lethargic callous and recalcitrant attitude of the petitioner cannot be the sufficient causes to condone the delay; b) when due diligence was not exercised even after knowing every stage of the case, it cannot be a cause to be condoned; c) in a case of condonation of delay, the Court must take a liberal view, but, the Court should not do so on exercising equity; if it is done, it would be nothing but extension of limitation, which is not available to a party under an enactment; and d) no application to set aside the preliminary decree can be entertained after the passing of the final decree.

7.1. In support of the contentions, the following decisions are relied upon by the learned counsel for the first respondent herein:

(i) 2012 (1) CTC 849 (R.Jagadeesan (died) and two others vs. Santhakumari)

"9. Merely filing an Application and leaving the matter there at, would only go to show that the Judgment-debtor did not show due diligence. When he has suffered an order against him, he should not have been careless and idle. The inaction on the part of the judgment-debtor is further fortified by the conduct of the judgement-debtor in the Execution Proceedings. In the Execution Proceedings also, the judgment-debtor after having entered appearance, kept quite for more than 1 year and six months and thereafter, filed an application once again for condonation of delay. This shows utter callousness and irresponsible attitude."

(ii) 2007 (4) CTC 506 (Sivakumar and another vs. R.Sengodan)

"6. It was the utter carelessness on the side of the petitioners to take such a time of 656 days. It is well settled that in a case of condonation of delay, the Court must take a liberal view; but, at the same time, as far as the condonation of delay is concerned, the Court should not do so on exercising equity. If it is done, it would be nothing but extension of limitation what is not available to a party under an enactment. Under the circumstances, this Court is of the opinion that in the absence of sufficient and convincing reasons in such a case, the Court should not excuse the delay. Hence, the delay cannot be condoned. The lower Court was perfectly correct in dismissing the application. Nothing requires interference."

(iii) 2009 2 L.W. 809(Ranganatha Iyengar vs. Thangarasu)

“14. In the decision, [Sri Veera Hanuman Rice & Flour Mill vs. State Bank of India](#), reported in 2000 AIR SCW 2575, the Hon'ble Supreme Court has held that while indulgence should be shown in considering claims of parties there is no justification to ignore the subsequent facts and the realities of the situation. Though the Law of Limitation may sometimes harshly affect a particular party, while considering the matters that fall under [Section 5](#) of the Limitation Act, discretion has to be exercised cautiously only in the interest of justice. Therefore, mechanically, the unreasonable, unexplained inordinate delay cannot be condoned.”

7.2. These decisions are applicable to the facts of this case and the conduct of negligence and inaction as pleaded by the first respondent have been exhibited by the lower Court and the details run as under:

i) The revision petitioner herein has filed vakalat in O.S.No.76 of 2005.

ii) She has received a notice in I.A.No.102 of 2005 (Ex.R3)

iii) She has received a notice in I.A.No.80 of 2010 in O.S.No.76 of 2005 (Ex.R5)

iv) Advocate has entered appearance in I.A.No.80 of 2010 (Ex.R6)

v) She has worked as a Teacher for a period of seven months

vi) The revision petitioner has submitted a letter to the Commissioner dated 04.12.2010, objecting the measurement of the property.

vi) On information being sought under Right to Information Act, the School has provided the information that the revision petitioner herein worked as a Tutor, for the period from October 2010 to April 2011. This certificate has been issued by the Memorial Telugu School.

7.3. These circumstances only indicate that despite knowledge from the year 2005, the petitioner had been exhibiting supine indifference, adopting dilatory strategy and thus, she shut the door against herself.

8. The more serious contention of the learned counsel for the plaintiff/first respondent is that the revision petitioner herein was not interested in pursuing the litigation, but, it is only the vested interest, who want to earn more money, is utilizing the petitioner and pressuring her to conduct the litigation for illegal gain and therefore, the delay should not be condoned.

8.1. The letter dated 24.11.2005 has been addressed to the revision petitioner by the State Bank of Hyderabad, stating that one V.Maria Robert has paid a sum of Rs.4,20,000/- and that amount has been appropriated towards compromise settlement of M/s.Maheswari Export on 23.09.2005. This compromise settlement pertains to the claim made in O.S.No.637 of 1996, in which, for the suit claim, the revision petitioner's husband is the Guarantor.

8.2. This letter is relied upon to show that somebody is financing the litigation. Without giving an opportunity to the petitioner to explain the circumstances, under which, the letter was received by her, no conclusion can be arrived at.

9. The learned counsel for the revision petitioner would submit that the ex parte decree itself is an invalid decree as the Will has not been marked through any attesting witness and therefore, the decree is liable to be set aside. It ought to have been questioned at appropriate stage before appropriate forum. One of the remedies open to the revision petitioner is to file an appeal challenging the ex parte decree. That is not done.

9.1. Normally, apart from acceptability of reason is considered along with the merits of the claim also. Already, she is entitled to 1/4th share in the property. The petitioner had the earliest opportunity to make for claim when she received the suit summon. But, she has not chosen to contest the suit. Therefore, at this stage, the delay cannot be condoned.

10. The next contention is that the revision petitioner has spent a sum of Rs.7,00,000/- in discharging a bank loan and that was not taken care of by the Court which passed the final decree on 06.09.2011. Had necessary application been filed the Court would have taken into consideration. The persons, who are claiming right over the property, should be ready to bear the liability also. Under such circumstances, the

revision petitioner herein is permitted to raise the claim for proportionate contribution of Rs.7,00,000/- from the shareholders of the property from the Court which passed the final decree. Granting liberty to this extent, CRP is dismissed.

11. In the result, the revision petition is dismissed granting liberty to the extent of raising the issue of contribution. No costs. Consequently, connected miscellaneous petitions are closed.

28.04.2016

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To

1. The Sub Court,
Tambaram.

S.VIMALA, J.

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