

IN THE HIGH Court OF JUDICATURE AT MADRAS**DATED: 23.12.2016****CORAM:****THE HON'BLE MR.JUSTICE M.V.MURALIDARAN****CRP(NPD)No.1608 of 2012****and****M.P.No.1 of 2012**

P.Manickam

... Petitioner

Vs.

Ayyanar

... Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order dated 10.01.2012 made in I.A.No.34 of 2011 in I.P.No.26 of 2009, on the file of the Principal Subordinate Judge, Salem.

For Petitioner : Mr.R.Sugumaran

For Respondent : Mr.K.S.Murugan

ORDER

The case of the revision petitioner is that the respondent herein as petitioner / Creditor has filed the above petition in I.P.No.26 of 2009 u/s 6(D), 2, 3 of Provincial Insolvency Act, 5 of 1920. A suit for Recovery of money was filed in the year 1997, as against the revision

petitioner to adjudge the revision petitioner as an Insolvent for realization of an amount said to have borrowed by the revision petitioner. The Revision petitioner on receipt of notice in the above IP proceedings appeared through an advocate to defend him. Whereupon Vakalath was filed by the said advocate on 12.09.2011. Thereafter it was informed by his counsel that the petition stand adjourned to a future date on 01.11.2010 and therefore he would call the revision petitioner, when it is required. However, there was no call from his counsel before 01.11.2010, hence the revision petitioner contacted, for which it was informed that the case is again adjourned.

2. Therefore, the revision petitioner was under the bonafide expectation of a call from his counsel on required occasion. However, to shock of the revision petitioner now recently he found that he was set exparte on 30.11.2009 and he suffered an Exparte Decree dated 01.11.2010. On verification with the Court records, revision petitioner found that he was set exparte in the event of his failure to file a counter, besides with the failure of his counsel to represent the case before the Trial Court on 30.11.2009. On coming to know about the Ex-parte Decree, the petitioner filed a petition under Section 5 of Limitation Act to condone the delay of 351 days in filing the application

to set aside the exparte decree. Whereas, the trial Court erred in dismissing the revision petitioner's Interlocutory application by order dated 10.02.2012. The said order is impugned herein.

3.I heard Mr.R.Sugumaran, learned counsel appearing for the petitioner and Mr.K.S.Murugan, learned counsel appearing for the respondent and perused the entire records.

4.The learned counsel for the revision petitioner contends that the failure on the part of the revision petitioner to file a Counter on his behalf is neither willful nor wanton, but the same was due to the failure on the part of his Counsel in not intimating or calling upon the revision petitioner, so as to file a counter. For the act of a counsel a litigant could not be allowed to suffer and prejudiced.

5.The learned counsel for the petitioner made reliance upon the decisions of Hon'ble Apex Court in the matter of **Sakuntala Devi Jain -Vs- Kuntal Kumari reported in AIR 1969 SC 575** and **State of West Bengal Vs Administrator, Howrah Municipality**, wherein to ensure substantial justice, the Hon'ble Apex Court had condoned the delay caused in filing an application, by holding that the rules of

limitation are not meant to destroy the rights of the parties.

6.Per contra, the learned counsel for the respondent would contend that the reason put forth by the revision petitioner is untrue and baseless. The revision petitioner has purposely absented himself, so as to protract the suit endless.

7.On perusal of the typed set of papers it is seen that the reason stated by the revision petitioner is his counsel has failed to conduct his case by filing a Counter affidavit. It is further noticed that the revision petitioner's application was rejected by the Learned Trial Judge that the reasons assigned by the revision petitioner is not satisfactory.

8.Whereas admittedly the Decree on hand is an Ex- parte one, at this juncture this Court likes to emphasis some of the decisions of the Hon'ble Apex Court and this Court holding as follows:

- i) 2007 (4) TLNJ 565 (Civil) in the matter of Ramakrishnan Vs The AEEO, Tiruvarur & Ors., wherein it was held that "The term every day's delay should be explained, should not be viewed in pedantic way and the approach of the Court must be in common pragmatic manner."
- ii) 2000-1 L.W. 547, In the matter of Amudha Vs

S.A.Arumugham & Ors., wherein it was held that condonation of delay is a matter of discretion of the Court and section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within certain time.

9. At the same time, the respondent should be compensated for the hardship faced by him. In this regard it is useful to refer the following Judgments of our High Court in 2014 (2) CTC 649 in Nagarathinammal and others -Vs- Madhammal wherein it is held that:

"Through the other averments that the petitioners were misled by the assurance made by the Respondent / Plaintiff to withdraw the case and that the 4th Revision Petitioner had gone to outstations for the treatment of his ailing mother could be construed to be averments not substantiated and insufficient for condoning the delay, the other reason, namely the suspension of the Advocate by the Bar Council of Tamil Nadu, which was not known to the Revision Petitioners previously, can be held to be a valid reason for seeking an order condoning delay in filing the Application to set aside the ex-parte Preliminary Decree.

This Court is of the considered view that, when such is the contention of the Revision petitioner and such is the reason assigned by them, the interest of Justice requires passing of an Order giving the Revision Petitioners one more opportunity to contest the case and get a contested verdict and at the same time, direct the Revision Petitioners to compensate the Respondent/ Plaintiff by a cost of Rs.10,000/- ”.

10. In 2016 (5) CTC 117 in Sarasu –Vs- Ravi wherein it is held that:

“When a Court of Law deals with an Application to condone the delay filed under Section 5 of the Limitation Act, such Application will have to be generally viewed in a liberal and lenient way to do substantial justice between the parties. By projecting an Application to condone the delay as per Section 5 of the Limitation Act, belatedly, no party will file the same with a mala fide intention. If a party files a Delay Condonation Application belatedly, he or she runs a serious risk.

However, if an Application filed under Section 5 of the Limitation Act is allowed by this Court, to advance the cause

of substantial justice, then the maximum that can happen is that a party will be allowed to partake in the main arena of legal proceedings and the main cause can be decided on merits. Per contra, if a meritorious matter is thrown out at the threshold or at early stage the cause of justice will be certainly defeated. In a Condonation of Delay Application filed under Section 5 of the limitation Act, 1963, the length and breadth of the delay is not a material/ relevant factor”.

11. In view of the above dictum laid down by this Court and for the foregoing factual reason behind the delay on the part of the petitioner herein, this Court by setting aside the impugned order deems fit to provide the revision petitioner with one more opportunity to get decided the case on hand on merits, after proper appraisal of the oral and documentary evidence let in by either parties.

12. In the result:

(a) this Civil Revision Petition is allowed by setting aside the order of the learned Principal Subordinate Court, Salem, dated 10.01.2012 made in I.A.No.34 of 2011 in I.P.No.26 of 2009, on condition that the petitioner shall pay a sum of Rs.2,000/- to the

respondent herein within a period of two weeks from the date of receipt of a copy of this order;

(b) on production of the copy of the payment receipt, the learned Principal Subordinate Judge, Salem, is hereby directed to number the set aside petition and dispose the same within a period of one month from the date of receipt of a copy of this order, by giving notice to both the parties;

(c) on passing order in the set aside application, the learned Judge namely the Principal Subordinate Court, Salem, is hereby directed to take up the suit on day to day basis without giving any adjournments to either parties and dispose the same within a period of four months from the date of order passed in the set aside petition. Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

23.12.2016

Note: Issue order copy on 16.11.2017

vs

Internet: Yes

Index: Yes

To

The Principal Subordinate Court, Salem.

WEB COPY

M.V.MURALIDARAN,J.

VS



**Pre-Delivery order made in
CRP(NPD)No.1608 of 2012
and
M.P.No.1 of 2012**

WEB COPY

23.12.2016