

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2016

CORAM :

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

Civil Revision Petition (NPD) No.2195 of 2012
and M.P.No.1 of 2012

Ashiq Niazuddin

.. Petitioner

Vs.

M/s.Digiterati,
A Registered Firm,
rep. by its Partner Smt.Subhapradha,
85, First Main Road,
Gandhi Nagar,
Adayar,
Chennai – 600 020.

.. Respondent

Revision filed under Article 227 of Constitution of India against the fair and decreetal order of the XIII Assistant City Civil Judge, Chennai in I.A.No.5151 of 2011 in O.S.No.11773 of 2009 dated 05.08.2011.

For Petitioner : Mr.J.Ramakrishnan

For Respondent : Mr.S.Kothandaraman

ORDER

This revision is directed against the fair and decretal order of the XIII Assistant City Civil Judge, Chennai in I.A.No.5151 of 2011 in O.S.No.11773 of 2009, dated 5.8.2011, dismissing the petition filed by the petitioner under Section 5 of the Limitation Act, to condone the delay of 161 days in filing the petition to set aside the exparte decree dated 22.9.2010. The petitioner herein is the defendant in the suit.

2. The plaintiff has filed the suit for recovery of a sum of Rs.1,50,525/- together with interest at the rate of 18% per annum from the date of plaint till the date of realisation. Resisting the suit, the defendant has also filed the written statement.

3. The case of the petitioner is that the suit was taken up for trial and the plaintiff was examined as P.W.1 in chief by way of proof affidavit and the suit was directed to be listed on 22.9.2010 for cross-examination of P.W.1. On 22.9.2010, due to pre-occupation of the work and since the case bundle was misplaced in the petitioner counsel's office and also the date of material hearings of the suit have been wrongly noted by the counsel, the petitioner could not present before the Court for cross-examination and the petitioner was called absent and set exparte and the suit was decreed. When the petitioner

contacted his counsel, he came to know that the suit was decreed exparte on 22.9.2010. Delay of 161 days occurred in filing petition to set aside the exparte decree. The petitioner filed petition to set aside the exparte decree along with petition to condone the delay of 161. The delay is neither wilfull, nor wanton. Hence, the petitioner prays for condonation of delay of 161 days in filing petition to set aside the exparte decree.

4. Resisting the application, the respondent filed the counter stating that in order to drag the proceedings and also to evade the execution of the decree, the petitioner has filed petitions to set aside the exparte decree along with condonation of delay of 161 day. No valid ground to condone the delay of 161 days in filing the petition to set aside the exparte decree has been stated in the affidavit. The affidavit is silent how the petitioner's counsel who lost the case bundle has come to know the passing of exparte decree. If the delay of 161 days is condoned, the respondent will be put to irreparable loss and hardship. Hence, prays for dismissal of the petition.

5. Upon consideration of the submissions of both sides, the trial Court dismissed the petition holding that the petitioner has failed to prove the nature of ailment and also his profession. The trial Court held that the affidavit also silent about the details when the case

bundle was misplaced and when it was traced out. The trial Court finally observed that the delay of 161 days has not been properly explained.

6. Aggrieved by the order of the trial Court, the petitioner has preferred the present revision.

7. I heard Mr.J.Ramakrishnan, learned counsel for the petitioner and Mr.S.Kothandaraman, learned counsel for the respondent and perused the entire records.

8. Learned counsel for the petitioner submits that the trial Court erred in discarding the fact that the petitioner was suffering from ailment and due to pre-occupation of his professional work and also the case bundle misplaced in his counsel's office and the material hearings of the suit have been wrongly noted by the petitioner's counsel, representation could not be made on his behalf. He further submits that the trial Court failed to see that the delay in filing petition is neither wilfull nor wanton, but due to the reasons stated in the affidavit. Learned counsel finally submits that the defendant has a valid defence in the suit. If the delay is condoned, no prejudice would be caused to the respondent.

9. Per contra, learned counsel for the respondent submits that the trial Court has passed the order after considering the materials produced before it and the said order is well considered one and therefore, no interference is required. He further submits that in order to protract the proceedings, the petitioner has filed the petition and if the delay is condoned, the respondent would be put to irreparable loss and hardship.

10. The point arises for consideration is whether the trial Court was right in dismissing the application to condone the delay of 161 days in filing petition to set aside the ex parte decree.

11. Admittedly, before the trial Court, the petitioner has not adduced any oral evidence to substantiate his plea. Like wise, to disprove the allegations set out in the affidavit of the petitioner, the respondent has also not adduced any evidence.

12. In the order, the trial Court observed that the suit was posted for trial on 20.7.2010 under special list and on that day, the respondent as P.W.1 filed his proof affidavit in chief and thereafter, the matter was adjourned to 19.8.2010 and 6.9.2010 respectively for cross-examination of P.W.1 by the petitioner's side. Both the aforesaid hearing dates, there was no representation on the side of the

petitioner. Therefore, the matter was posted for orders on 18.9.2010 and on 20.9.2010. Since on 29.9.2010 also there was no representation on the side of the petitioner, exparte decree was passed. The trial Court further observed that it is the duty of the petitioner to explain each and every day delay, but the petitioner has failed to do so.

13. Though the petitioner has failed to show "sufficient cause" to condone the delay, I find that since the suit is one for recovery of money and the petitioner has filed a detailed written statement way back in March 2010, in order to give a chance to defend the suit, in the interest of justice the delay of 161 days in filing petition to set aside the exparte decree has to be condoned.

14. In catena of decisions, the Hon'ble Supreme Court held that while considering the scope of expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, the said expression "sufficient cause" is to receive liberal construction so as to advance substantial justice.

15. It is well settled that there is no presumption that delay in approaching the Court always deliberate. Generally delays in preferring petition to condone the delay in filing the petition to set aside the

exparte decree are required to be condoned in the interest of justice, where no gross negligence or deliberate inaction or lack of *bona fide* is imputable to the party seeking condonation of delay.

16. Having regard to the short range of delay, in my considered view, the the trial Court ought to have condoned the delay of 161 days in filing the application under O.9, Rule XIII C.P.C. If the said shorter range of delay is condoned, no prejudice would be caused to the respondent. As stated supra, no prejudice would be caused to the respondent, if the delay is condoned. On the other hand, if the delay is not condoned, much prejudice would be caused to the petitioner. Therefore, delay of 161 days in filing petition to set aside the exparte decree is condoned.

17. In the result, the order of the trial Court in I.A.No.5151 of 2011 in O.S.No.11773 of 2009 is set aside and the Civil Revision Petition is allowed. No costs. Consequently, M.P.No1. of 2012 is closed.

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Note:Issue order copy on 13.02.2018

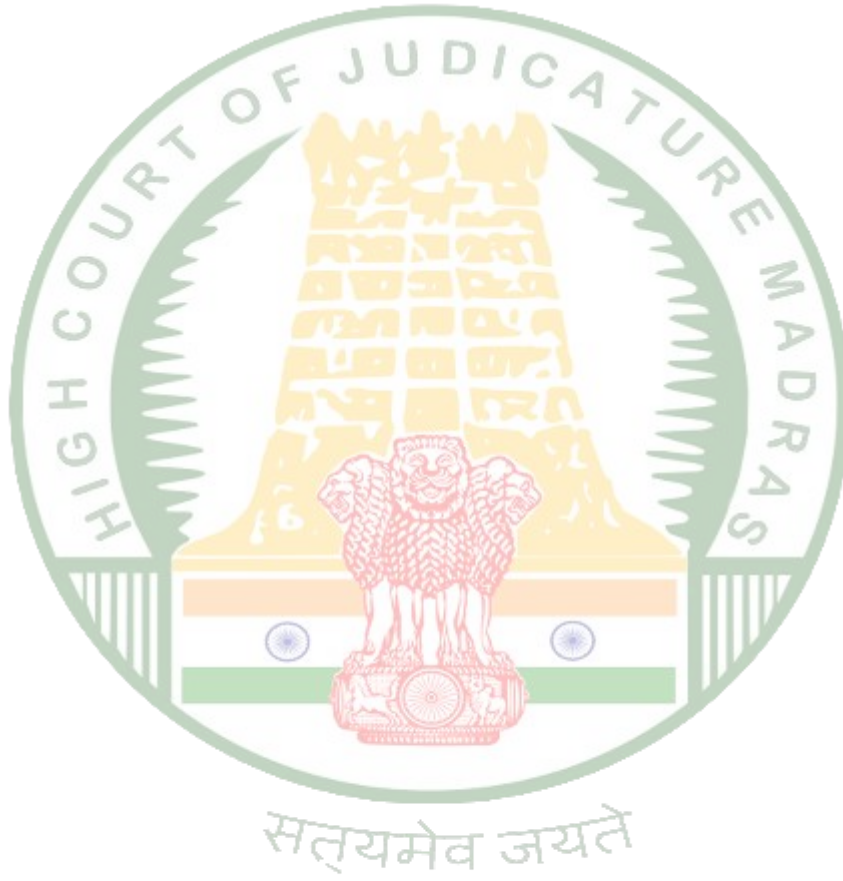
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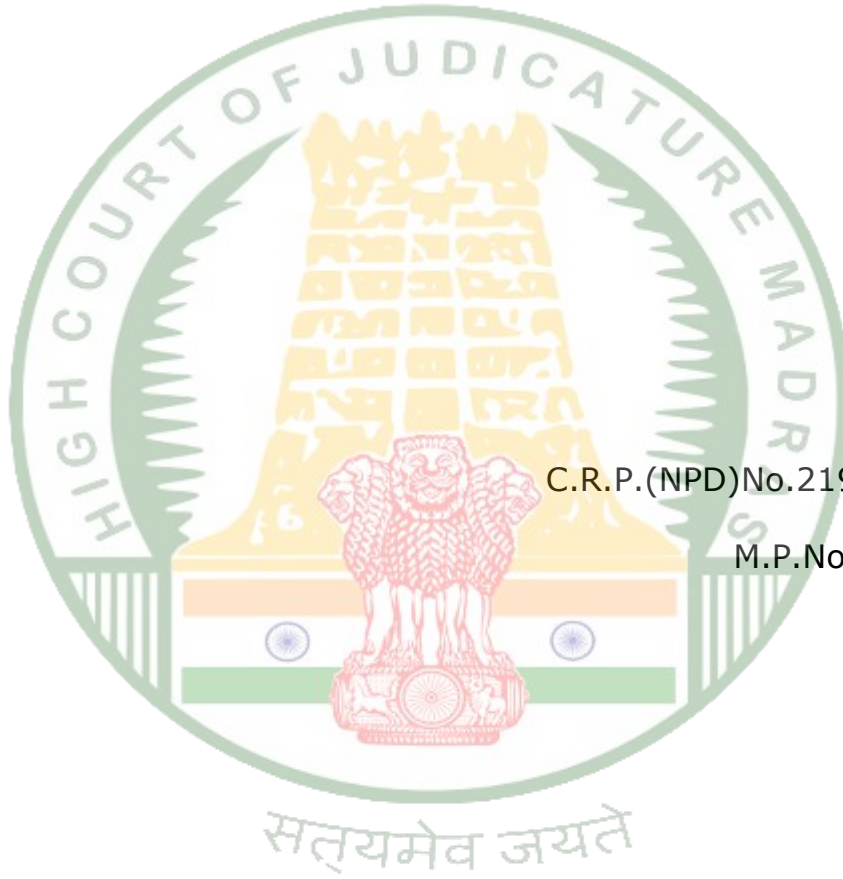
The XIII Assistant City Civil Judge,
Chennai.



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M.V.MURALIDARAN,J.

VS



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and
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