

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2016

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(NPD).No.3914 of 2016
and C.M.P.No.20048 of 2016

Arukkani @ Pappathi

.. Petitioner/1st Defendant

Vs.

1.Thulasimani

.. 1st Respondent/Plaintiff

2.Chinnammal

3.Gunasekaran

.. Respondents 2 and 3/Defendants 2 and 3

Prayer:- Civil Revision Petition is filed under Section 115 of C.P.C., against the fair and decreetal order dated 22.10.2016 made in I.A.No.439 of 2016 in O.S.No.465 of 2014 on the file of the II Additional District Munsif Court, Erode.

For Petitioner : Mr.M.Guruprasad

ORDER

Civil Revision Petition is filed against the fair and decreetal order dated 22.10.2016 made in I.A.No.439 of 2016 in O.S.No.465 of

2014 on the file of the II Additional District Munsif Court, Erode.

2. At the time of admission, argument of the learned counsel for the petitioner is heard in length.

3. The first respondent as a plaintiff filed a suit in O.S.No.465 of 2014 for partition and separate possession of $\frac{1}{2}$ share in the suit property stating that originally, the property was purchased by her father Kuppamoopan @ Kuppusamy Nadar on 14.09.1973. Apart from the suit property, her father also owned title house with vacant site measuring 999 sq.ft. with common passage. He has four daughters viz., plaintiff, one Saraswathi, first and second defendants. Since the said Kuppusamy Nadar died intestate, the plaintiff and defendants succeeded the property. During first week of November 2000, the plaintiff and her sisters orally partitioned the property. Under the oral partition, the suit property was allotted to the share of the plaintiff and the first defendant in common and the property purchased by the father was allotted jointly to the share of Saraswathi and second defendant. Ever since from the oral partition, the plaintiff and the first defendant are in possession and enjoyment of the suit property in common without any partition and they are entitled to $\frac{1}{2}$ share each in the suit property. But the first defendant alone is in possession and she

is not willing to give the share to the plaintiff. Hence, the plaintiff has constrained to file the suit for partition and separate possession of her ½ share in the suit property. But she has not sought for any relief against second and third defendants. Since they are sisters and son of sister(third defendant), they are impleaded only as parties to the suit. That suit was decreed and preliminary decree of partition was passed. Therefore, the first respondent/plaintiff filed an application in I.A.No.337 of 2015 for passing final decree. At that time, the petitioner/first defendant has come forward with the application in I.A.No.439 of 2016 under Section 5 of the Limitation Act for condonation of delay of 326 days in setting aside the exparte preliminary decree dated 22.07.2015 passed in the suit.

4.The trial Court, after considering both sides arguments, dismissed the application, against which, the present revision is preferred by the first defendant/petitioner.

5.Learned counsel for the petitioner would submit that even though the plaintiff has not claimed any relief against the defendants 2 and 3, they have filed the written statement. Merely because the suit has been decreed on the basis of the written statement filed by

defendants 2 and 3, the first defendant cannot set exparte, she has every right to file an application for setting aside the exparte decree. But that factum was not considered by the trial Court. Further, the trial Court has not discussed anything about the condonation of delay. Therefore, he prays for allowing the revision.

6. On perusal of the typed set of papers, it reveals that the first respondent as the plaintiff filed the suit for partition and separate possession of $\frac{1}{2}$ share in the suit property stating that the suit property was originally purchased by her father and apart from that, her father has also already purchased one property. Since the father died intestate, his four daughters succeeded the property. Under the oral partition done in the first week of November 2000, the suit property was allotted to the petitioner/first defendant and first respondent/plaintiff. As the first defendant/petitioner did not want to give the half share to the plaintiff, she filed the suit for partition and separate possession of $\frac{1}{2}$ share in the suit property against first defendant alone. Even though she has impleaded defendants 2 and 3 as parties to the suit, she has not sought for any relief against them. They had also filed the written statement. Even though the first defendant appeared through her counsel, she has not filed the written

statement. The trial Court, after considering the written statement filed by the second and third defendants, passed the preliminary decree of partition.

7.It is pertinent to note that after filing the application by the plaintiff for passing final decree only, the petitioner/first defendant has filed the petition for condonation of delay of 326 days in setting aside the exparte decree. But the trial Court has held that since the defendants 2 and 3 have filed written statement, the suit was decided on merits and that the application filed by the first defendant was dismissed. It is true, the suit was decreed exparte as against the petitioner/first defendant.

8.Now this Court has to consider whether the delay has been properly explained by the petitioner? It is seen from the affidavit filed by the petitioner in support of the Section 5 application, it shows that she had instructed her counsel to file the written statement. Meanwhile, as she was suffering from jaundice for about two months and she was bed ridden, she could not meet her counsel. But admittedly, at the time of dismissal of the application, the petitioner has not let any evidence and not filed any document to prove the

same.

9.As per the dictum of the Apex Court reported in **AIR 1998 SC 3222 (N.Balakrishnan v. M.Krishnamurthy)**, it was specifically held that if the length of delay is immaterial, sufficient cause for condonation of delay has to be explained. It is appropriate to extract para-9 to 11, which read as follows:

"9. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

10.The reason for such a different stance is thus:The primary function of a Court is to adjudicate

the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. . . . "

On considering para-3 and 4 of the affidavit filed in support of the application under Section 5 of the Limitation Act, the petitioner/first defendant did not assign any sufficient cause for condonation of delay and she neither let any evidence nor produce any document.

10. Further, in the judgment of the Apex Court reported in **2011 (4) SCC 363 (Lanka Venkateswarlu (Dead), rep. by legal heirs) Vs. State of Andhra Pradesh and others**), in para-19, 23, 28 and 29, it was held as follows:

"19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this

country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. This principle is well settled and has been set out succinctly in *Collector, Land Acquisition v. Katiji* (1987) 2 SCC 107.

20. ...

21. ...

22. ...

23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in *Balwant Singh v. Jagdish Singh* (2010) 8 SCC 685 as follows:- (SCC p.696, paras 25-26)

"25. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise (sic a lis). These principles should be adhered to and applied appropriately depending on the facts and

circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly"

24. ...

25. ...

26. ...

27. ...

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and

restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers."

It is well settled dictum of the Apex Court that for condonation of delay, the discretion has to be exercised in a systematic manner informed by reason and justice must be done to both parties. Further, the condonation of delay is only a discretion that too judicial discretion and while exercising the judicial discretion, the Court should consider the loss caused to the opposite party.

11. Considering the aforesaid circumstances of the case, I am of the view that the property was purchased by the father of the plaintiff and first defendant. After his death, under oral partition in the first week of November 2000, the suit property was allotted to the share of the petitioner and the first respondent in common. Since the suit property is in possession and enjoyment of the petitioner/first defendant alone and she is not willing to give the share of the plaintiff, the first respondent/plaintiff constrained to file the suit for partition and separate possession of $\frac{1}{2}$ share in the suit property. Even though the petitioner/first defendant appeared through her counsel, she did not file the written statement. She kept quiet all along and after filing the application for passing final decree, the petitioner/first defendant has come forward with the appeal with the delay of 326 days. It clearly shows that the petitioner with an intention to prevent the plaintiff from enjoying the fruits of the decree, has preferred the application with such delay. Therefore, applying the dictum laid down in Balakrishnan and Lanka Venkateshwarlu cases, I am of the view that the delay of 326 days has not been properly explained and hence, I am not inclined to condone the delay. Accordingly, the Civil Revision Petition stands

dismissed.

12.In the result, this Civil Revision Petition shall stand dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

20.12.2016

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Index:Yes/No

To

II Additional District Munsif Court, Erode.

R.MALA,J.

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