

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.3744 of 2012
and
M.P.No.1 of 2012**

Kanna Pillai
Petitioner

..

Vs.

Dhanchezhiyan

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair order and decreetal order dated 10.08.2002 made in I.A.No.300 of 2007 in O.S.No.140 of 1996, on the file of the Subordinate Judge, Ranipet, Vellore District.

For Petitioner : Mr.K.V.Ananthakrushnan

For Respondent : Mr.S.Mukunth

ORDER

The case of the revision petitioner is that he is the defendant in the suit. The respondent herein is the only son of the revision petitioner filed a suit against the revision petitioner in O.S.No.140 of 1996 before the Sub-Court, Ranipet for partition and separate

possession. In the said suit the defendant/ revision petitioner was set ex-parte for non filing of the written statement and ex-parte decree was passed against the revision petitioner on 30.09.2002. Based on the preliminary decree for partition, the respondent herein filed final decree application in I.A.No.283 of 2005 in O.S.No.140 of 1996 before the Sub-Court, Ranipet. On receipt of summon in the final decree petition only, the revision petitioner came to know about the ex-parte preliminary decree passed against him.

2.The further case of the revision petitioner is that the counsel engaged by the revision petitioner before the lower court allowed the suit to be decreed ex-partely without filing written statement on behalf of the revision petitioner. Therefore the revision petitioner engaged another counsel to file Vakalat in the final decree petition as well as he requested the same counsel to file a petition to set aside the ex-parte preliminary decree. The lower court counsel told the revision petitioner to come to his office for preparing the affidavit and petition to set aside the ex-parte decree on 20.12.2005. But suddenly the revision petitioner fell ill and his movements were restricted. Hence, the petitioner herein was not in a position to contact his counsel to prepare ex-parte set aside petition. After recovery from the illness, the revision petitioner met his lower court counsel on

08.10.2008 and thereafter immediately on 09.10.2008 an application to condone the delay in seeking to set aside the ex-parte decree was filed in I.A.No.300 of 2007. In filing the application to set aside the ex-parte decree the delay of 1480 days was occurred. The revision petitioner contended that delay is neither willful nor wonton, but due to the above said bonafide reason.

3.The respondent herein filed counter affidavit to the condone delay petition and contended that the revision petitioner ought to have explained each and every day delay. The non-explanation of each and every day delay is a fatal to the case of the revision petitioner. For non filing of the written statement, an ex-parte decree was passed against the revision petitioner on 30.09.2002. The respondent herein filed final decree application in I.A.No.283 of 2005 and in which notice was served to the revision petitioner. Thereafter an ex-parte order of final decree was passed against the revision petitioner and followed by that the Advocate Commissioner was appointed and he also inspected the suit property in the presence of the revision petitioner and filed his report. Even after the appointment of Advocate Commissioner, the revision petitioner has not chosen to file application to set aside the ex-parte preliminary decree. The respondent herein further contended that the petitioner

herein has not filed any medical certificate to show that he was suffered due to the alleged illness. Hence, he prayed for dismissal of condone delay application.

4.Before the trial court on the side of the revision petitioner PW1 & PW2 were examined and Ex.P1 to P5 were marked. On the side of the respondent herein RW1 to RW3 were examined and on his side Ex.C1 to C4 were marked. Upon hearing the rival submission, the Learned Subordinate Judge was pleased to dismiss the condone delay application filed by the revision petitioner by order and decree dated 10.08.2012. Aggrieved over the same the petitioner herein has come up with the present Civil Revision Petition.

5.I heard Mr.K.V.Ananthakrushnan, learned counsel appearing for the petitioner and Mr.S.Mukunth, learned counsel appearing for the respondent and carefully perused the available materials on record. The 1st and foremost contention of the revision petitioner to condone the delay of 1480 days is that the respondent herein who is the son of the revision petitioner. During the pendency of the partition suit filed by him, on 21.07.1996 undertook to withdrawn the suit in the presence of the Village Panchayathors and to that effect he

executed a letter Ex.P5 on the same date. The other reason assigned by the revision petitioner to condone the delay is that he was suffered with illness and for that he took treatment at Meenakshi Medical College and Research Institute at Kanchipuram and in order to prove the illness suffered by him, he produced Ex.P2 to P4 medical records.

6.Per contra, the Learned Counsel for the respondent herein contended that the revision petitioner even after the receipt of summon in the final decree application, has not chosen to file application to set aside the ex-parte preliminary decree passed against him. In the final decree application also the revision petitioner was set ex-parte. Further the Advocate Commissioner was appointed and he has inspected the suit property in the presence of the revision petitioner and even thereafter the revision petitioner has not filed any application to set aside the ex-parte preliminary decree.

7.This Court has perused the impugned order. From the perusal of the impugned order this court noticed that the Learned Sub-Judge has not considered the medical records Ex.P2 to P4 filed by the revision petitioner to establish that he was suffered with illness. It is true that the revision petitioner has not taken steps to set aside the

ex-parte decree passed against him, immediately on receipt of summon in the final decree application. However, the revision petitioner contented that the previous counsel engaged by him allowed the suit to be decreed ex-parte without filing written statement on his side and subsequently the revision petitioner engaged another counsel. Thereafter, before preparing set aside application, the revision petitioner fell ill. The factum of illness of the revision petitioner should have been considered by the trial court. Apart from that, while deciding the condone delay application, the lower court should have considered the same with a liberal approach by giving one more opportunity to the parties. At the same time the delay caused by the revision petitioner shall be adequately compensated to the other side by way of imposing reasonable cost.

8. In this regard it is useful to refer the following Judgments of this Court:

(i) In **2014 (2) CTC 649** in ***Nagarathinammal and others v. 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/-."

(ii) In **2016 (5) CTC 117** in ***Sarasu v. 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”.

(iii) The judgment rendered by the Hon’ble Apex Court recently in Civil Appeal No.(S).3777 of 2015 in which the Hon’ble Apex Court has passed an order on 20.04.2015 is as follows:

“This appeal arises out of an order dated 5th June,

2013, passed by the High Court of Judicature at Madras whereby CRP(NPD)No.266 of 2011 filed by the appellant has been dismissed and the order passed by the first appellate court declining condonation of 882 days in the filing of the appeal by the appellant affirmed.

We have heard learned counsel for the parties at some length. We are satisfied that in the facts and circumstances of the case, the first appellate court could and indeed ought to have condoned the delay in the filing of the appeal. Since, however, the delay is fairly inordinate, we are inclined to direct condonation subject to payment of costs.

We accordingly allow this appeal, set aside the orders passed by the High Court and that passed by the first appellate Court with the direction that upon deposit of a sum of Rs.50,000/- (Rupees fifty thousand) towards costs before the first appellate court within six weeks from today, the delay in the filing of the appeal shall stand condoned. The first appellate court shall hear and dispose of the first appeal filed by the appellant expeditiously and as far as possible within a period of six months from the date the costs are deposited by the appellant. The amount

of costs shall be paid to the respondent.

The appeal is allowed in the terms and to the extent indicated above.”

9.As per the dictum laid down in the above judgments of our High Court, this court feels that to meet the ends of justice, one more opportunity is to be given to the revision petitioner to get a contested decree. Hence, the delay of 1480 days is condoned, however, the revision petitioner is liable to pay cost of Rs.50,000/- to the respondent herein for the suffering caused to him.

10.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order in I.A.No.300 of 2007 in O.S.No.140 of 1996, dated 10.08.2012, on the file of the Subordinate Judge, Ranipet, Vellore District, on condition that the petitioner shall pay a sum of Rs.50,000/- directly to the respondent within a period of four weeks from the date of receipt of a copy of this order and on payment of cost, the revision petitioner is directed to file a memo before the trial Court to that effect;

(b) the trial Court is directed to number the set

aside application and to pass order within 15 days, by giving notice to both the parties and thereafter passing the orders on the set aside application;

(c) the trial Court is directed to dispose the suit within two months thereafter on day to day basis, without giving any adjournment to both the parties. Both the parties are hereby directed to co-operate for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

20.12.2016

Note: Issue order copy on 06.04.2017

Index: Yes
Internet: Yes

vs

To

The Subordinate Judge,
Ranipet, Vellore District.

M.V.MURALIDARAN, J.

VS

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