

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.4292 of 2012
and M.P.No.1 of 2012

Muthusamy

.. Petitioner

Vs.

Anbukkarasi

.. Respondent

Revision filed under Article 227 of Constitution of India against the fair and decretal order in I.A.No.702 of 2011 in O.S.No.350 of 2004 dated 12.4.2012 on the file of the District Munsif-cum-Judicial Magistrate Court at Paramathi.

For Petitioner : Mr.P.Valliappan

For Respondents : Mr.C.Prabakaran

ORDER

This revision is directed against the order of the District Munsif-cum-Judicial Magistrate Court, Parmathi in I.A.No.702 of 2011 in O.S.No.350 of 2004 dated 12.4.2012 allowing the petition filed by the respondent to set aside the exparte decree dated 4.7.2007 with a

condition that if the respondent pays a sum of Rs.2000/- on or before 16.4.2012, the petition will be allowed, failing which the petition shall stand dismissed. The petitioner herein is the plaintiff in the suit.

2. The plaintiff has filed the suit for specific performance of contract dated 25.1.2002 executed between the plaintiff and the first defendant for himself and on behalf of his minor daughters namely defendants 2 and 3 in respect of the suit properties and for permanent injunction restraining the defendants 5 to 7 from selling sand to brick kiln. According to the petitioner, the defendants 5 to 7 are subsequent purchasers. The suit was decreed *exparte* on 4.7.2007.

3. The petitioner, who is the 6th defendant in the suit fled petition being I.A.No.702 of 2011 to set aside the *exparte* decree along with petition under Section 5 of the Limitation Act to condone the delay of 1499 days in filing petition under Order O.9, Rule 13 CPC.

4. In the affidavit in support of the petition seeking to condone the delay, the petitioner averred that she and defendant Nos. 5 & 7 have purchased the suit properties for a valid consideration from defendants 1 to 4. When the plaintiff and first defendant approached

and demanded defendant Nos.5 to 7 to sell the suit properties, they refused to sell. Aggrieved over the same, the plaintiff and first defendant joined together and created a false agreement and filed the suit. It is averred that due to heavy menses and uterus problem, the 6th defendant was advised to take bed rest and she avoided long travel in the bus. Due to her ill-health, the 6th defendant could not able to follow the hearing date on 4.7.2007. On 4.7.2007, 6th defendant was called absent and set exparte and exparte decree was passed. After service of notice in the Execution Petition only, the 6th defendant knew about the exparte decree passed in the suit. Immediately, she contacted his advocate and filed petition to set aside the exparte decree along with petition to condone the delay of 1499 days in filing the petition. The delay is neither wilfull, nor wanton and prays for condonation of delay.

5. Resisting the petition, the respondent filed the counter stating that on 6.7.2005 itself an exparte decree was passed. Thereafter, on the application of the 5th defendant, the exparte decree dated 6.7.2005 was set aside and the 5th defendant filed the writ statement, which was adopted by the 6th defendant. According to the respondent,

the 6th defendant deliberately let the matter for exparte on 4.7.2007. On 4.7.2007, the 6th defendant was available in the Court and when the matter was called, she deliberately not appeared. No medical records have been filed by the 6th defendant. Similar petition filed by the 5th defendant to condone the delay of 727 days in filing the petition to set aside exparte decree was dismissed by the Court on 28.9.2010. In order to drag on the proceedings, the 6th defendant has now filed the petition to set aside the exparte decree along with delay condonation petition. The reasoning given in the affidavit is not correct and prays for dismissal of the petition.

6. Before the trial Court, the respondent examined herself as P.W.1 and Exs.P1 and P2 were marked. Court's document Exs.C1 to C4 were also marked.

7. Upon consideration of the rival submissions, the trial Court allowed the petition with condition that if the respondent pays costs of Rs.2000/- on or before 16.4.2012, the petition will be allowed, failing which the petition shall stand dismissed and the matter was directed to be listed on 17.4.2012. Aggrieved by the same, the petitioner, who is the plaintiff in the suit has filed the present revision.

8. I heard Mr.P.Valliappan, learned counsel for the petitioner and Mr.C.Prabakaran, learned counsel for the respondent and perused the entire records.

9.Learned counsel for the petitioner submits that the trial Court erred in holding that the respondent has shown sufficient cause by totally misconstruing the evidence. Learned counsel would submit that the trial Court has failed to consider the fact that the respondent had absolutely no justification for remaining exparte. The reasons given to condone the delay were imaginary and contrary to the truth. He further submits that each and every day delay has not been properly explained by the respondent. In support of his contention, learned counsel relied upon the decision in *Lanka Venkateswarly (D) by L.Rs. v. State of A.P.*, reported in AIR 2011 Supreme Court 1199.

10. Learned counsel for the respondent submits that the 6th defendant is a Doctor by profession and she is running a Clinic at Omalur. Due to uterus problem, she was constrained to avoid long travel and was not able to follow the case. He would submit that the respondent has proved her illness through Exs.P1 and P2. The written

statement filed by the 5th defendant was never adopted by the 6th defendant. He further submits that though the petition filed by the 5th defendant was dismissed, the same cannot be taken into consideration for disposal of the petition filed by the 6th defendant to condone the delay.

11. The point arises for consideration is whether the trial Court was right in allowing the petition on condition to condone the delay of 1499 days in filing petition to set aside the exparte decree dated 4.7.2007.

12. There is no dispute that the 5th defendant has filed I.A.No.443 of 2009 to condone the delay of 727 days in filing the petition to set aside the exparte decree and the same was dismissed by the trial Court on 28.9.2010. After the dismissal of the said petition on 12.9.2011, the 6th defendant filed I.A.No.702 of 2011 to condone the delay of 1499 days in filing petition to set aside the exparte decree dated 4.7.2007.

13. On a perusal of the typed set of papers, I find that the respondent examined herself as P.W.1 and marked Exs.P1 and P2. In

her cross-examination, the respondent (P.W.1) admits that she is a Doctor by profession and running a private clinic. Her husband is a Chief Engineer in Highways Department. She also admits that in the year 2002 itself, she received summons in the suit and immediately, she and the 5th defendant engaged one Thiru.K.Shanmugam, Advocate for their counsel. She further admits that after filing vakalat, she has not contacted the 5th defendant and her Advocate. She used to go to Mettur to take treatment and her Dr.Manojkumar treated her.

14. In order to believe the version of the respondent, the trial Court taken into consideration Exs.P1 and P2 and held that uterus problem of the petitioner is proved through Exs.P1 and Ex.P2 and that the respondent has shown sufficient cause.

15. At this juncture, it is pertinent to point out that in her cross-examination, the respondent admitted that she is taking tablets from 2007 and her Doctor never used to give medical prescription and being a Doctor, she herself purchased medicines from medical shop. More particularly, she admits that no conditional bed rest required for her health condition. The aforesaid admission of the respondent clearly shows that she can able to walk and travel. Despite having telephonic

facility, the respondent has not contacted her advocate to know about the stage of the suit nor contacted personally. For the sake if admitted that the respondent was bed-ridden and ill-health, what prevented her husband, who is an educated and working as Chief Engineer in Highways Department, to enquire about the case from their counsel. The aforesaid act of the respondent shows negligence and inaction on her part.

16. It is also settled law that while negligence and inaction of the petitioner in an application seeking to condone the delay is proved, delay cannot be condoned.

17. Time and again, the Hon'ble Supreme Court as well as this High Court held that application seeking to condone inordinate delay cannot be allowed on the ground that it should be allowed with a view to arrive at finality.

18. In *Lan Venkateswaralu (supra)*, the Hon'ble Supreme Court held that "the concepts such as liberal approach, justice oriented approach, substantial justice cannot be employed to jettison the substantial law of limitation. Especially, in cases where the Court

concludes that there is no justification for the delay”.

19. The Courts have to adopt a justice oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court.

20. In *Maniben Devraj Shah v. Municipal Corporation of Brihan, Mumbai*, reported in 2012 (5) SCC 157, the Hon'ble Supreme Court held as under:

“14. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.”

21. It is also well settled that if the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. As stated supra, in the instant case, the explanation given by the respondent is concocted and doubtful.

22. While considering the 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 and fancies, prejudices or predilections cannot and should not form the basis of exercising discretionary powers. The discretion exercised by the trial Court in condoning the delay of 1499 days is not in accordance with the settled principles of law.

23. It is pertinent to point out that originally the suit was filed before the Sub-Court, Namakkal in the year 2002 and due to pecuniary jurisdiction, the suit was transferred to the file of District Munsif-cum-Judicial Magistrate Court, Paramathi and numbered as O.S.No.350 of 2004. The 5th defendant has also filed written statement way back in the year 2006, which was adopted by the 6th defendant and thereafter, allowed the suit decreed exparte on 4.7.2007. The 5th defendant filed petition to set aside the exparte decree with delay condonation petition in the year 2009 and the same was dismissed on 28.9.2010 on merits. After knowing the dismissal of the petition filed by the 5th defendant and after receiving notice in the Execution Petition, the 6th defendant has filed petition to set aside the exparte decree with delay condonation petition. The aforesaid shows that only to protract the proceedings, the 6th defendant has filed the petition to set aside the exparte decree.

24. The respondent has not explained the inordinate delay of 1499 days properly. The trial Court was not right in saying that mensur problem is uncertain problem and long travel is hazards such women with this problem. Such an observation of the trial Court is

unsupported by a concrete document. Hence, I do find grounds to interfere with the order of the trial Court.

25. In the result, the order of the trial Court in I.A.No.702 of 2011 in O.S.No.350 of 2004, dated 12.04.2012 is set aside and the Civil Revision Petition is allowed. No costs. Consequently, M.P.No.1 of 2012 is closed.

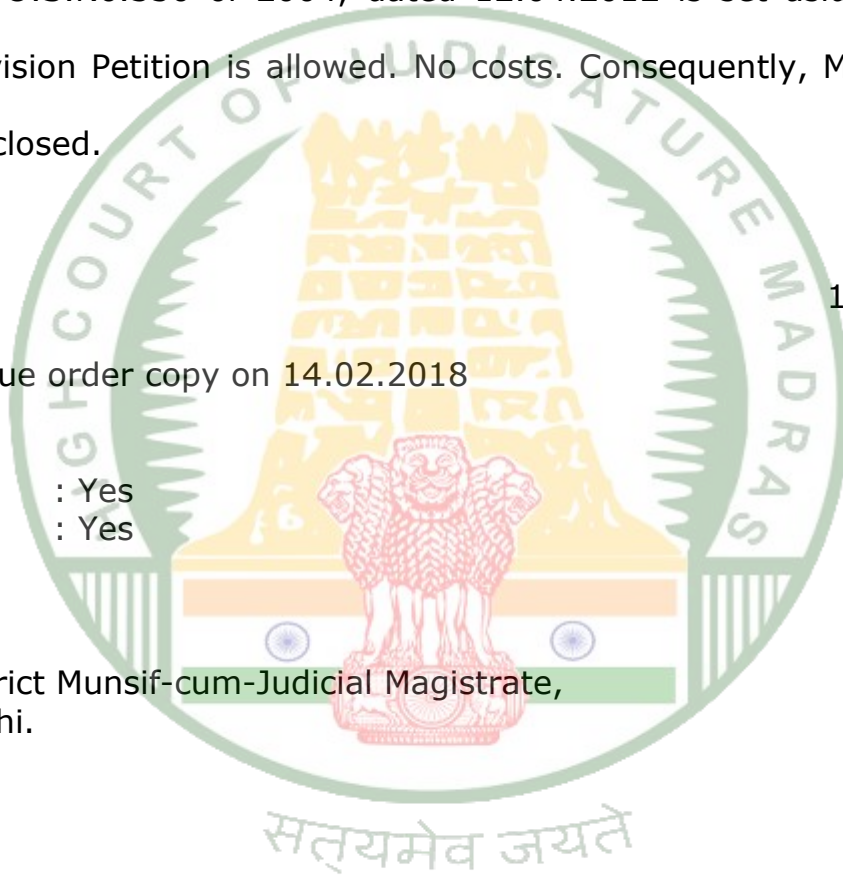
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Note: Issue order copy on 14.02.2018
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Index : Yes
Internet : Yes

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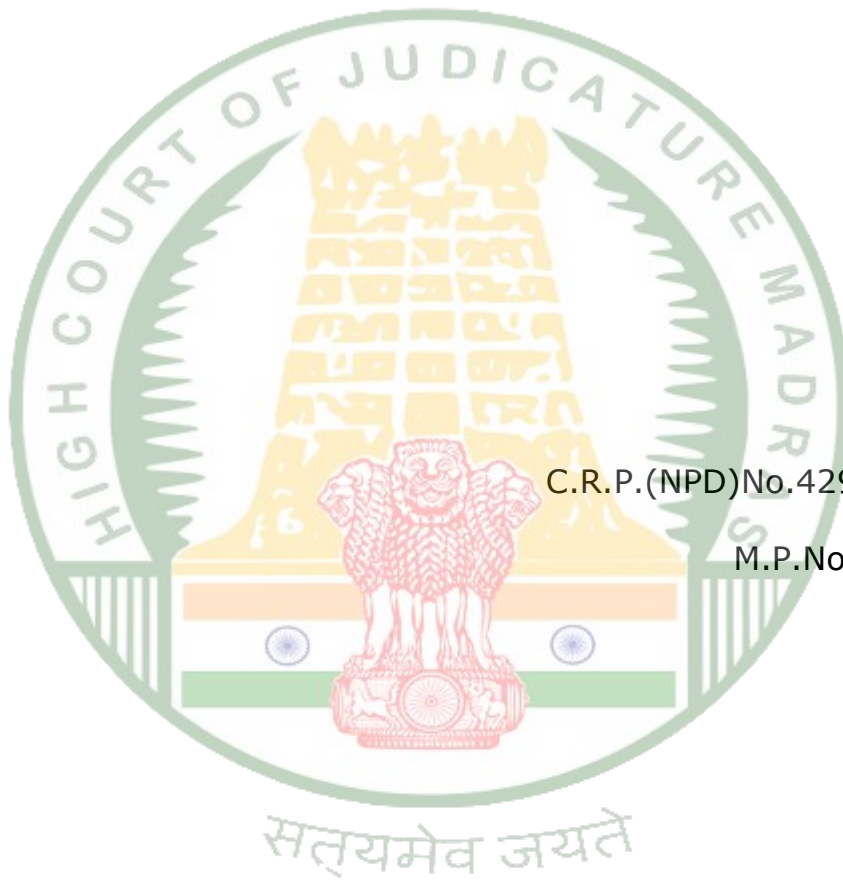
The District Munsif-cum-Judicial Magistrate,
Paramathi.



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M.V.MURALIDARAN,J.

VS



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