

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.10.2016

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE N.AUTHINATHAN

Writ Petition No.31080 of 2016
and

W.M.P.No.26947 of 2016

1. R.Lalitha
2. R.Kalpana

...Petitioners

vs.

1. The Registrar,
Debt Recovery Appellate Tribunal,
Ethiraj Salai,
Chennai.

2. The Registrar,
Debt Recovery Appellate Tribunal - I,
No.770, Anna Salai, 6th Floor,
Chennai.

3. Indian Bank,
ARM Branch,
Ethiraj Salai,
Chennai.

...Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for records of the 2nd respondent dated 09.05.2016 in M.A.No.24 of 2015 in IA Sr.No.4945/13 in O.A.No.28 of 1998 and quash the same.

For Petitioners : Mr.B.Ravi Raja

ORDER

(Order of the Court was delivered by S.MANIKUMAR, J)

Order impugned in this writ petition, made in M.A.No.24 of 2015 in IA Sr.No.4945/13 in O.A.No.28 of 1998, dated 09.05.2016, passed by the Debts Recovery Tribunal-I, Chennai, is extracted hereunder.

"MA 24/15 IN IA SR 4945/13 IN OA 28/1998
9.5.2016

This is an application filed by the petitioners/defendants for condonation of delay of 850 days in representation IA SR.No.4945/13 which was returned by the Registry with certain objections. The only ground urged in the affidavit is that the returned application got mixed up with some other papers in the office of the counsel for the petitioners and for that reason, the petition could not be represented in time. It is stated that the delay is neither wilful nor wanton but only due to the above reasons. Thus contending, the petitioners prayed for condonation of delay in representing the petition IA SR.No.4945/13.

2. As notice was ordered to the respondent bank, respondent bank filed a detailed counter affidavit. In the said counter affidavit, the respondent traced the events that led to the filing of the OA and passing of the Final order by the Tribunal on 4.1.1999. The affidavit also contains reference to the citations in support of the plea of the respondent bank that the delay cannot be condoned as a matter of judicial generosity. The respondent thus contending prayed for dismissal of the petition.

3. At the outset, it is to be stated that this being only an application for condonation of delay in representing the returned application, the petition cannot be equated with an application under Sec.5 of the Limitation Act. Therefore, placing reliance on the case law rendered in the contest of Sec. 5 of the Limitation Act, is not proper. The reasons assigned are nothing but routine. Even assuming that the delay can be condoned, yet the application in IA SR No.4945/2013 by the petitioner will once again be liable to be returned, as till date the petitioner did not choose to file any petition to condone the delay in filing the application to set aside the exparte decree. In fact, one of the reasons for returning the IA SR.4945/13 was that it was not accompanied by a petition under Sec.5 of the Limitation Act. The petitioners are not at all diligent in approaching the Tribunal. The date of passing of the decree also has been wrongly mentioned in the affidavit. When a decree passed on 4.1.1999, when sought to be set aside after a lapse of 4 years,

the petitioners must be diligent and shall protect tenable and valid reasons for condonation of delay. Unfortunately this is lacking in this petition. This Tribunal do not see any bonafides on the part of the petitioners. The only aim of the petitioners seems to be to protract the proceedings on some pretext or the other. The reasons assigned are filmsy and unacceptable. Hence, the delay is not condoned. The petition is dismissed."

2. In the supporting affidavit, for condonation of delay, in MA.No.24 of 2015, the petitioners have contended that when an exparte decree was passed by the tribunal in O.A.No.28 of 1998, the petitioners have filed a petition to set aside the exparte decree on 20.08.2013. Registry of the tribunal returned the papers for some clarifications and granted two weeks time for compliance. Returned papers were mixed up with other papers in the learned counsel's office and hence, she could not represent the same, within the time granted by the registry. Thus, the delay of 850 days in representing the petition, arose.

3. Indian Bank, Senior Manager, Chennai, has filed a counter affidavit, wherein he has contended that O.A.No.28 of 1998 was filed against the defendants therein, for recovery of a sum of Rs.33,78,330.55p with future interest, at 19.38% per annum, with quarterly rests. Earlier, the 3rd defendant therein, V.Ranganathan had executed an agreement of guarantee dated 09.02.1995 and created an equitable mortgage by deposit of original title deeds. Both the borrower and the guarantors have defaulted in payment. Hence, OA.No.28 of 1998 was instituted before the tribunal. The defendants remained exparte. Thereafter, the tribunal passed the final order in O.A.No.28 of 1998 on 04.01.1999, by allowing the said OA in favour of the Bank, for a sum of Rs.33,78,330.55p, with further interest, at 12% per annum, from the date of plaint, till the date of realisation. A Debt Recovery Certificate has also been issued.

4. Thereafter, after a huge delay of 5230 days and without filing any condonation petition, petitioners have filed IA SR.No.4945 of 2013, to set aside the exparte decree. The petition has been returned. With a further delay of 850 days in representation, M.A.No.24 of 2015 has been filed. According to the bank, no sufficient cause has been shown for condonation. The Bank has also relied on a decision of this Court in G.Jayaraman Vs. Devarajan, reported in 2007 (2) CTC 643 and Balwant Singh Vs. Jagdish Singh and Others, reported

in 2010 (8) SCC 685. The Bank has also contended that loan was disbursed in 1994 and even after 21 years, money could not be recovered. Adverting to the rival submissions, the tribunal, vide order dated 09.05.2016 extracted supra, declined to condone the delay, and dismissed the petition, M.A.No.24 of 2015.

5. Though, Mr.Mouna Swaminathan, learned counsel for the petitioners contended that a decree has been passed against a dead person, and further contended that the 1st petitioner being a widow, she could not prosecute the petition filed to set aside the exparte decree, we are not inclined to accept the said contention, for the reason that there are two other petitioners/daughters, who could have very well prosecuted the petition, with due care and diligence. As stated supra, there is a huge delay of four years, in setting aside the exparte decree. Even taking it for granted that the petitioners are not aware of the original proceedings, O.A.No.28 of 1998, they cannot claim that they are unaware of the subsequent proceedings taken to setaside the exparte decree. Having filed a petition to setaside the exparte decree, they have not shown due care, caution and diligence, in prosecuting the petition filed to set aside the exparte decree and thereafter. Dehose the above oral contentions, now made before this Court, the only reason shown in the supporting affidavit extracted supra is that the papers were mixed up with other bundles.

6. At this juncture this Court also deems it fit to consider the decision of the Hon'ble Supreme Court on the aspect of condonation and representation in H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another, reported in 2015 (1) Supreme Court Cases 680, wherein the Hon'ble Supreme Court, after considering the Hon'ble Division Bench judgment of this Court in Tamilnadu Mercantile Bank Ltd., Vs. Appellate Authority, reported in (1990) 1 LLN 457 and decision of the Hon'ble Supreme Court in Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649 at paragraph Nos.23 and 24, held as follows:

"23. We may also usefully refer to the recent decision of this Court in Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649], where several principles were culled out to be kept in Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCCp.658-59)

"21.4(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weight the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

24. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bonafides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the Respondents from not paying the Court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bonafides in its approach. It also requires to be stated that in the case on hand, not

refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the Respondents not deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the suit for specific performance and when the trial Court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the Respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

7. Considering the principles of law, laid down in the above decision, we do not find any infirmity in the impugned order of the tribunal, warranting interference. Writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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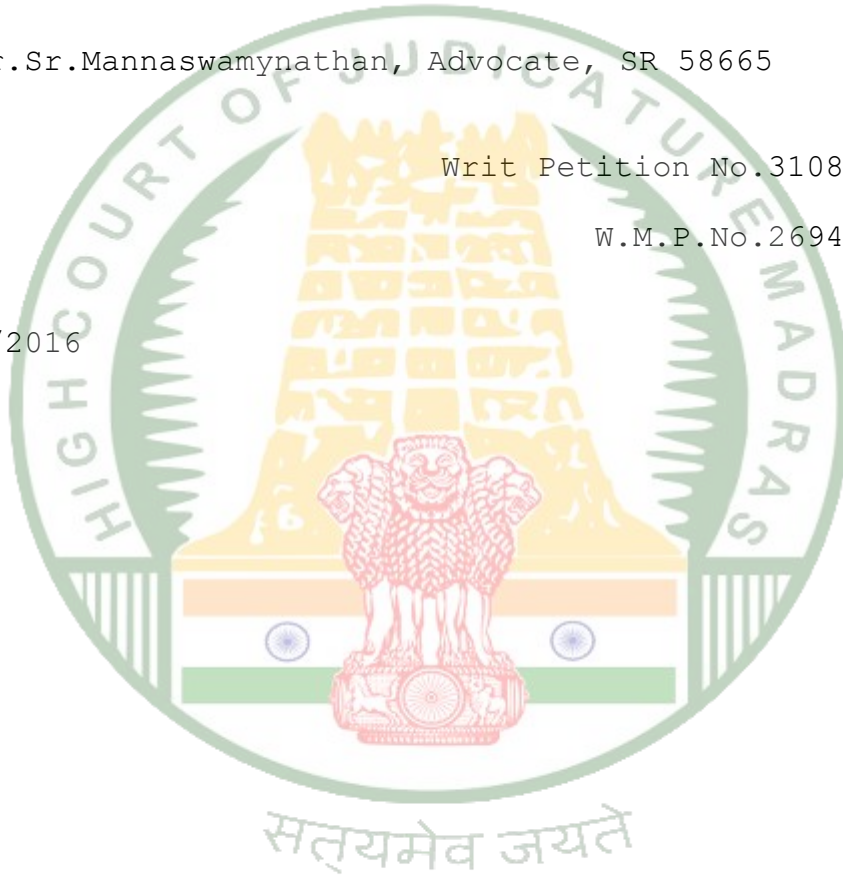
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+1CC to Mr.Sr.Mannaswamynathan, Advocate, SR 58665

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VGI (CO)
PSI 12/11/2016



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