



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

C.R.P. (MD) NPD No.171 of 2016

and

C.M.P. (MD) No.790 of 2016

1.Antony Saverimuthu

2.Innasi Saverimuthu

:Petitioners/Defendants

Vs.

1.John Peter

2.Anthony Selvam

:Respondents/Plaintiffs

Prayer: Civil Revision Petition is filed under Section 115 of C.P.C. to call for the entire records on the file of the Principal District Munsif, Thenkasi in I.A.No.238 of 2015 in O.S.No.659 of 2011 dated 05.08.2015, to set aside the same.

For Petitioners : Mr.P.Pethu Rajesh

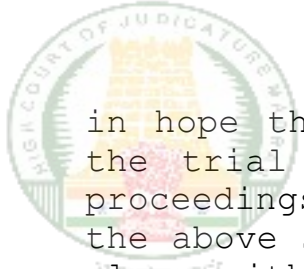
For Respondents : Mr.M.Saravanan

#### ORDER

The Civil Revision petition arises against the order dated 05.08.2015 in I.A.No.238 of 2015 in O.S.No.659 of 2011 on the file of the learned Principal District Munsif, Thenkasi.

2.According to the learned counsel for the petitioners, the respondents herein filed a suit in O.S.No.659 of 2011 on the file of the learned Principal District Munsif, Thenkasi, seeking a relief of declaration, permanent injunction and also for mandatory injunction with regard to the schedule property. When, the said suit was posted for filing written statement, the petitioners did not appear and file written statement before the trial Court and hence, the petitioners/defendants were set exparte and an exparte decree was also passed on 26.06.2013. Therefore, the petitioners filed an application to set aside the set exparte decree along with the instant application in I.A.No.238 of 2014, to condone the delay in filing the said application. The trial Court dismissed the said application stating that the petitioners have not properly explained the delay of 425 days in filing the application. Aggrieved against the said order, the petitioners have come forward with this present civil revision.

3.The learned counsel for the petitioners would submit that in I.A.No.238 of 2015, the petitioners have state that their father is aged about 92 years and he was suffering from illness and hence, they could not attend the court and they were



in hope that the counsel would file the written statement before the trial Court. When they have been served in the execution proceedings, they came to know about the exparte decree and hence, the above said delay has been occurred. It is further stated that along with said application, the petitioners have filed written statement and hence, in the interest of justice, the exparte decree passed by the trial Court is liable to be set aside and opportunity shall be granted to the petitioners to put forth his case and prayed for allowing of the revision.

4.The learned counsel has further submitted that the petitioners have produced more than nine documents before the Court below to establish that there was registered partition entered among the family members of the petitioner as well as the elders of the respondent family and no prejudice would be caused to the petitioner, if the said application is allowed.

5.The point for consideration is that the application filed by the petitioners to condone the delay of 425 days has to be condoned or not?

6.Heard the learned counsel for the petitioners and the learned counsel for the respondents.

7.Perusal of the affidavit shows that the petitioners have stated that his father is aged about 92 years and he was suffering from illness and the petitioners were accompanying with him for the treatment and hence, they were not in a position to appear before the Court on the date of hearing for filing the written statement. The said non filing of the written statement and they were set exparte and the exparte decree would come to know the petitioner when they received summons from the execution petition filed by the respondents/defendants in E.P.No.83 of 2013.

8.At this juncture, it is appropriate to consider the decision relied on by the learned counsel for the respondent reported in 2015(5) CTC 534 - *H.Dohil Constructions Co. Pvt. Ltd., V. Nahar Exports Ltd.*, wherein, in paras 20 to 23, it was held that total lack of bonafides and without assigning reason for filing application for condonation is not a ground for condoning the delay. It is appropriate to incorporate paras 22 and 23 of the said decision.

"22. We may also usefully refer to the recent decision of this Court in *Esha Bhattacharjee* (supra), where several principles were culled out to be kept in mind while dealing with such Applications for condonation of delay. Principle Nos.(iv), (v), (viii), of Paragraph 21 can be usefully referred to which read as under:



"(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.

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

(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.

(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 weigh 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.

(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.

23. 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 re-filing can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides 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 re-filing, the non-furnishing of satisfactory reasons for not re-filing of papers in time and the failure to pay the Court-fee at the time of the filing of Appeal papers on 6.9.2007, 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 bona fides in its approach. It also requires to be stated that in the case of Shri. S. S. Srinivasan v. Shri. S. S. Srinivasan, the Court re-filing 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 re-filing. The filing of an Application for condoning the delay of 1727 days in the matter of re-filing 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."

9. Considering the above said decision along with the facts and circumstances of the case, I am of the view that the petitioners has given reasons for the delay of 425 days in filing the petition to set aside the exparte decree. Therefore, in the interest of justice, I am of the view that it is fair and reasonable to allow the revision with heavy cost imposed on the petitioners to condone the delay in filing the application to set aside the exparte decree and accordingly, I am inclined to pass the following order:

(I) The civil revision petition is allowed on payment of cost for Rs.10,000/- (Rupees ten thousand only) payable by the petitioners to the respondents, within a period of three weeks from the date of receipt of a copy of this order.

(ii) On such payment, the order dated 05.08.2015 made in I.A.No.238 of 2015 in O.S.No.659 of 2011 is set aside and the delay of 425 days in filing the application to set aside the exparte decree is condoned.

(iii) Further, in the event of application filed under Order 9 Rule 13 of C.P.C. is allowed, the trial Court is directed to dispose of the suit in O.S.No.659 of 2011 as expeditiously as possible. No Costs. Consequently, connected miscellaneous petition is closed. The Registry is directed to post the matter after three weeks from the date of despatch of the order for reporting compliance.

Sd/-

Assistant Registrar(CS-I)

/True Copy/



Encl: Cost Momo filed in USR.4981

To

The Principal District Munsif, Thenkasi.

Copy to : The Section Officer, Judicial Section,  
Madurai Bench of Madras High Court, Madurai.  
(Concerned Posting Seat,  
Through the Chief Posting Clerk (Judicial)  
for posting the case as directed)

+1cc to M/s.P.Pethu Rajesh, Advocate in SR.55882

Order made in  
C.R.P. (MD) NPD No.171 of 2016  
and  
C.M.P. (MD) No.790 of 2016  
26.09.2016

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