

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2017

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

C.R.P.(NPD)Nos.1257 and 1258 of 2014
and M.P.Nos.1,1 of 2014

1.Mahaboob Bee
2.Babu
3.Shahidha
4.Aabidha
5.Faridha

.. Petitioners in
C.R.P.Nos.1257 and 1258 of 2014

Vs.

1.Amina Bee (died)
2.M.Malick Jan

.. Respondents in
C.R.P.Nos.1257 and 1258 of 2014

PRAYER: Civil Revision Petitions filed under Section 115 of C.P.C., against the dismissal order dated 02.01.2014 passed by the learned I Additional Subordinate Judge, Salem, in I.A.Nos.626 and 628 of 2012 in O.S.No.468 of 1994.

For Petitioners : Mr.J.Sudhakaran

For R2 : Mr.T.Murugamanickam
and Ms.Zeenath Begum

R1 : Died

COMMON ORDER

Civil Revision Petitions are filed against the fair and decreetal order dated 02.01.2014 passed by the learned I Additional Subordinate Judge, Salem, in I.A.Nos.626 and 628 of 2012 in O.S.No.468 of 1994.

2.The respondents as the plaintiffs filed a suit in O.S.No.468 of 1997 for preliminary decree of partition and separate possession. Exparte preliminary decree was passed on 18.10.2004. Thereafter, the plaintiffs/respondents have filed an application in I.A.No.306 of 2006 for passing of final decree and that final decree was passed on 29.03.2010. After receipt of notice in R.E.P.No.44 of 2011 only, the petitioners came to know about the passing of exparte preliminary decree and final decree. Hence, the petitioners/defendants 3,4,7 to 9 have filed I.A.No.626 of 2012 to condone the delay of 2571 days in filing the application for setting aside the exparte preliminary decree dated 18.10.2004 and filed I.A.No.628 of 2012 to condone the delay of 582 days in filing the application for setting aside the exparte final decree dated 29.03.2010. Both the applications were dismissed on 02.01.2014. Challenging the same, the present revisions are preferred by the petitioners/defendants 3,4,7 to 9.

3.Learned counsel for the petitioners would submit that the first

petitioner, who is the third defendant in O.S.No.468 of 1997, is one of the sharers of the suit. The petitioners 2 to 5 are her children. She is aged about 85 years. Since she is a Pardanashin lady, she will not come outside. Due to her ill health, she did not file the petitions to set aside the exparte preliminary decree and final decree in time. That factum was not considered by the trial Court. Hence, he prays for allowing the revisions. To substantiate his arguments, he has relied upon the decision reported in **1998 (II) CTC 533 (N.Balakrishnan v. M.Krishnamurthy).**

4.Resisting the same, the learned counsel for the respondents/plaintiffs would submit that the suit was filed on 07.09.1997. Some of the defendants appeared and filed the written statement. On 18.10.2004, the defendants 1 to 9 were called absent and set exparte and that exparte preliminary decree was passed on 18.10.2004. Thereafter, the respondents have filed I.A.No.306 of 2006 for passing of final decree, in that application, some of the defendants received notice and some of them evaded to receive notice. Publication was also ordered. After appointment of Commissioner, final decree was passed on 29.03.2010 on the basis of his report and plan. Since the petitioners/defendants are in possession of the property, the respondents/plaintiffs filed R.E.P.No.44 of 2011 for delivery of

possession. He would further submit that after receipt of notice in the execution petition only, the petitioners have filed the applications for condonation of delay of 2571 and 582 days in filing the applications to set aside the exparte preliminary decree and final decree. It is further submitted that after a long lapse of eight years, the petitioners have filed the applications without assigning any sufficient and valid reasons. The trial Court has considered all the aspects in proper perspective manner and rightly dismissed the applications. The petitioners only with a view to drag on the proceedings have come forward with the revisions. Therefore, he prays for dismissal of the revisions.

5.Considered the rival submissions made on both sides and perused the typed set of papers.

6.The respondents/plaintiffs filed the suit for partition and separate possession. The petitioners are arrayed as defendants 3,4,7 to 9 in the suit. On perusal of preliminary decree, it reveals that some of the defendants were represented by their counsels and subsequently, they were set exparte and exparte preliminary decree was passed only on 18.10.2004 i.e., after seven years. In final decree proceedings, notice was ordered. Some of the defendants received notice and some of them evaded to receive notice. So publication was

ordered. Thereafter, Commissioner was appointed. He filed his report on 20.10.2008. On that basis, final decree was passed on 29.03.2010. Then the respondents/plaintiffs filed R.E.P.No.44 of 2011, in which, notice was received by the petitioners in the month of April 2011. But they had filed the applications for setting aside the exparte decree only in the month of October 2011.

7. At this juncture, it is appropriate to consider the decision relied upon by the learned counsel for the petitioners reported in **1998 (II) CTC 533 (N.Balakrishnan v. M.Krishnamurthy)**, wherein 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-10,13 and 14, which read as follows:

"10. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is within a certain limit. 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.

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13.A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. Tis Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain v. Kuntal Kumari*, AIR 1969 SC 575 and *State of West Bengal v. The Administrator, Howrah Municipality*, AIR 1972 SC 749.

14.It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the

explanation does not smack of mala fides or it is put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. . . . "

There is no quarrel over the above proposition. But this Court has to decide whether the above decision is applicable to the facts of the present case. In the above decision, it was specifically mentioned that if the length of delay is immaterial, sufficient cause for condonation of delay has to be explained.

8.It is well settled dictum of the Apex Court reported in **2011 (4) SCC 363 (Lanka Venkateswarlu (Dead), rep. by legal heirs) Vs. State of Andhra Pradesh and others**), wherein it is held 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.

9.It is pertinent to note that the suit for partition is filed in the

year 1997 and summons were sent to the address, in which, the defendants were residing. According to the petitioners, the first petitioner, who is 85 years old, is a pardanashin lady and she took active part in the proceedings and due to her ill health, they were unable to appear before the Court and that they were set exparte. The petitioners 2 to 5 are her children. But I am unable to understand as to why the other petitioners 2 to 5, who are younger, were silent. But they have not assigned any reason for this aspect.

10. Furthermore, it is pertinent to note that the exparte preliminary decree was passed on 18.10.2004 and final decree was passed on 29.03.2010. In the final decree proceedings, publication was also effected to the same address, where the suit summons were sent. But the petitioners stated that after receipt of notice in R.E.P.No.44 of 2011 only, they came to know about the passing of exparte decree. As already discussed above that the petitioners/defendants received notice in the execution petition in the month of April 2011, but they had filed the applications for setting aside the exparte decree only in the month of October 2011. So it clearly shows that the petitioners wantonly filed those applications to drag on the proceedings and to prevent the respondents/plaintiffs to enjoy the fruits of the decree. Therefore, applying the dictum laid down in Balakrishnan and Lanka

Venkateswarlu case, I am of the view that the delay has not been properly explained by the petitioners and hence, I am not inclined to condone the delay. So I do not find any illegality or irregularity in the fair and decreetal order passed by the trial Court and therefore, it is hereby confirmed. Consequently, the Civil Revision Petitions stand dismissed.

11.In the result, the Civil Revision Petitions shall stand dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

10.02.2017

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To
I Additional Subordinate Judge, Salem.

R.MALA,J.

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