

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.126 of 2011
and
M.P.No.1 of 2011**

Vibhushnan

.. Petitioner

Vs.

1.Karunanithi (died)

2.Rangabhashyam

3.Sugumar

4.Valarmathi

5.Suseela

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the fair and decreetal order dated 09.07.2010 made in I.A.No.1090 of 2006 in O.S.No.297 of 1984, on the file of the Principal District Munsif Court, Gingee.

For Petitioner : Mr.A.Palaniappan

For Respondents : Mr.T.Dhanasekaran (for R2 to R5)

R1 - Died

ORDER

The revision petitioner herein is the second defendant in the suit. The said suit for declaration and permanent injunction was filed by the respondents herein as against the revision petitioner and his family members.

2.The case of the revision petitioner is that the suit scheduled property originally belonged to one Pothraji Gounder and he was in possession and enjoyment of the same. From said Pothraji Gounder the suit property was purchased by the revision petitioner and his brother namely Venkatraman, the 1st defendant in the suit, for a valuable sale consideration on 07.02.1964 in the name of their minor sons namely Loganathan and Thalapathy respectively. From that point of time onwards the revision petitioner, the said Venkatraman and their sons are in exclusive possession and enjoyment of the suit property. However, without any right what so ever, the plaintiffs, the heirs of one late Rajagopal who is one another brother of the revision petitioner, managed to file the above suit claiming that the suit property was a Hindu joint family property purchased out of joint family income, by their another brother namely Varadharajan in the name of his brother-in-law Porthraji Gounder.

3. Therefore, the suit was filed by the respondents herein seeking for a declaration to declare them as joint owners and further they sought for an injunction restraining the revision petitioner and his brother Venkatraman. The said claim made by the respondents is untrue and therefore the written statement was filed by the revision petitioner's brother Venkatraman submitting that the claim of the respondent/plaintiff is false and liable to be rejected. In the mean time since the revision petitioner was involved menial business for his livelihood, he was put to a condition of substantial long stay in the nearby states of Kerala and Andhra for years together. Therefore the 1st Defendant Venkatraman was entrusted by the revision petitioner to conduct the case on his behalf. It was further informed by the revision petitioner to his brother Venkatraman and his counsel that he would appear before the trial Court on every occasion whenever it is required by the trial Court. Hence the revision petitioner having left Tamilnadu and stayed in Kerala and Andhra for business, was under a bonofide belief that the suit is ongoing and his counsel would inform him the status of the suit and the days for his appearance. However to the shock of the revision petitioner after his return from Kerala on 05.09.2006, it was found that on 04.01.2000 the suit filed as against

them came to be decreed ex-parte, due to the non appearance of his brother Venkatraman and non appearance of the revision petitioner. It was further found that the revision petitioner was not in a position to receive any communication from his counsel, since he was in Kerala. On coming to know about the ex-parte decree the revision petitioner immediately filed an application to set aside the same through the present counsel with a delay of 2406 days. After elaborate enquiry, the learned judge has erroneously dismissed the condone delay application by order dated 10.07.2013 which is impugned in this Civil Revision Petition.

4.The respondents has opposed the condone delay application by filing counter affidavit and contended that the reason stated by the revision petitioner is false. The revision petitioner never left their native village and he was cultivating therein. Though written statement was filed thereafter neither the revision petitioner nor his brother Venkatraman have not participated in the suit proceedings and therefore, they were set ex-parte on 04.01.2000. The reason assigned by the petitioners herein to condone the delay of 2406 days is not true and in fact the revision petitioner was appearing in one another suit in the year 2005, which show that the revision petitioner was very much available. Therefore, the respondent prayed for

dismissal of the petition.

5.I have heard Mr.A.Palaniappan, learned counsel appearing for the petitioner and Mr.T.Dhanasekaran, learned counsel appearing for the respondents 2 to 5 and perused the records.

6.Upon considering the rival submission, this Court has to see whether the order dismissing the application to condone the delay in seeking to set aside the ex-parte decree is warranted interference by this Court or not?

7.In this case, the petitioner herein has assigned reason to condone the delay of 2406 days in filing the application to set aside the ex-parte decree passed against them is that the revision petitioner having left Tamilnadu and stayed in Kerala and Andhra for business, was under a bonafide belief that the suit is ongoing and his counsel would inform him the status of the suit and the days for his appearance. The revision petitioner was not in a position to receive any communication from his counsel, since he was in Kerala, his brother Venkatraman neither conducted the suit nor chose to communicate the status of the suit, despite that he was entrusted to conduct the suit. The learned counsel for the petitioner contended

that the suit is for declaration and injunction and, if the ex-parte decree is allowed to be executed, the petitioners herein will be up to great hardship. Therefore the learned counsel pleaded that the petitioner herein may be permitted to prosecute the case and to get a decree on merits and they are prepared to pay sufficient cost to the plaintiff for the delay caused.

8. Whereas, the learned counsel for the respondents herein strongly opposed to allow the revision petition saying there is no sufficient reason assigned to condone the huge delay of 2407 days in setting aside the ex-parte decree. The explanation given by the revision petitioner to condone the delay of 2407 days is false and the same can't be accepted.

9. It is true that the revision petitioner has not given proper explanation for the delay of 2407 days in setting up the ex-parte decree passed against them. Further the petitioner herein should always be vigilant and cautious.

10. This Court on perusal of the records find that the said suit is for a relief to declare that the suit property is a joint property of the

respondents herein and the 3rd defendant namely late Varadharajan. It is relevant to note here that the said late Varadharaju is none other than the father of the revision petitioner and Venkatraman. Therefore it is obvious for this Court to find that a declaration is sought in favor of the revision petitioner's father, whereas an injunction with regard to his sons. In this context this Court accepts the contention made by the learned counsel for the revision petitioners, that it is an ex-parte decree for declaration and injunction and no one shall be suffered with an ex-parte decree. The right of the parties shall not be curtailed and they should be given one more opportunity to put forth their case to get a decree after full-fledged trial. At the same time for the unnecessary delay caused by the defendants, they should compensate the plaintiffs by paying cost to the plaintiffs which would meet the ends of justice.

11. At this juncture it is useful to refer the following Judgments dealing with the issue of condone delay application:

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”.

- i) **2007(4) TLNJ 565 (Civil)** in the matter of ***Ramakrishnan v. The AEEO, Tiruvarur & Ors.***, wherein it was held that The term every day’s delay should be explained, should not be viewed in pedantic way and the approach of the

Court must be in common pragmatic manner.

- ii) **2000-1 L.W.547**, in the matter of **Amudha v. S.A.Arumugham & Ors.**, wherein it was held that condonation of delay is a matter of discretion of the Court and section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within certain time. The Court has to take into consideration that interests of justice require that the delay must be condoned.

12. Apart from this, the learned counsel for the petitioner also states that the recent judgment passed by the Supreme Court in Civil Appeal No.(S).3777 of 2015 it is held that there was a delay of 882 days delay in preferring an appeal suit and the said petition was dismissed by this Court by order dated 05.06.2013 in CRP(NPD)No.266 of 2011 and an appeal was filed before the Hon'ble Apex Court in Civil Appeal No.(S).3777 of 2015 in which the Hon'ble Apex Court has passed an order as follows:

“Leave granted.

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.”

The Hon'ble Apex Court has allowed the Civil Appeal No.(S).3777 of 2015 on condition that the appellant shall pay a sum of Rs.50,000/- as cost to the respondent in the said appeal.

13.In view of the settled legal propositions, I am of the considered opinion, in the interest of justice and to meet the ends of justice the delay can be condoned on payment of cost of Rs.50,000/- to be paid by the petitioner herein/ 2nd defendant directly to the respondents / plaintiffs. For the foregoing reasons, the order and decree passed by the trial Court is liable to be set aside.

14.In the result:

(a) this Civil Revision Petition is allowed and the order and decree dated 09.07.2010 passed by the learned Principal District Munsif, Gingee in I.A.No.1090 of 2006 in O.S.No.297 of 1984 is hereby set aside, on condition that the revision petitioner shall pay a sum of Rs.50,000/- to the respondents herein as costs within a period of four weeks from the date of receipt of copy of this order;

(b) the learned Principal District Munsif, Gingee, is hereby directed to number the set aside petition and to

dispose of the same within a period of one month from the date of production of the payment receipt within the time limit fixed by this Court;

(c) the learned Principal District Munsif, Gingee, is hereby directed to take up the suit on day to day basis, without giving any adjournment to either parties and to dispose of the same within a period of two months from the date of passing the orders in the set aside petition, since the suit is for the year 1984. Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

24.02.2016

Note: Issue order copy on 26.07.2017

Internet: Yes

Index: Yes

vs

To

The Principal District Munsif Court,
Gingee.

M.V.MURALIDARAN, J.

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Today this case is listed under the caption “ for being mentioned.”

2. By the order dated 24.02.2017, this Court directed the petitioner to pay a sum of Rs.50,000/- as cost to the respondent, the learned counsel for the petitioner would submit that a sum of Rs.50,000/- as cost was received by the respondent and his lower court counsel has also informed to the petitioner. Therefore, the petitioner seeks a direction of this Court to the respondent deposit the said amount in the said suit proceedings.

Considering the submission made by the learned counsel for the petitioner, the petitioner is permitted to deposit a cost of Rs.50,000/- to the credit of O.S.No.297 of 1984 on the file of the Principal District Munsif Court, Gingee, within a period of one week from the date of receipt of a copy of this order and all other conditions remain unaltered.

17.08.2017

kkd

Note: Issue Order copy on 18.08.2017

M.V.MURALIDARAN,J

kkd

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and M.P.No.1 of 2011

17.08.2017