

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.02.2017

CORAM :

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.1205 of 2007

K.N.Muthumanicakam

.. Petitioner

Vs.

C.Deivasigamani

.. Respondent

PRAYER: Petition filed under Section 115 of the Code of Civil Procedure against the decreetal and fair order passed on 31.1.2007 in I.A.No.576 of 2005 in O.S.No.21 of 2001 on the file of the Sub Court, Tiruppur.

For Petitioner : Mr.S.Doraisamy

For Respondent : Mr.K.Govi Ganesan

सत्यमेव जयते
ORDER

The unsuccessful petitioner before the Court below has filed this civil revision petition assailing the order dated 31.1.2007 made in I.A.No.576 of 2005 in O.S.No.21 of 2001 by the Sub Court, Tiruppur.

2. The facts of the case, insofar as they are relevant for the disposal of this petition, are stated thus: The respondent herein filed a

suit for specific performance in O.S.No.21 of 2001 on the file of the Sub Court, Tiruppur, on the basis of an agreement dated 24.2.2000. The said suit was decreed ex parte on 12.8.2003. For execution of the decree, the respondent filed E.P.No.46 of 2004.

3. It is stated that, in the meanwhile, the petitioner filed I.A.No.576 of 2005 under Section 5 of the Limitation Act seeking to condone the delay of 529 days in filing the application to set aside the ex parte decree. When the said interlocutory application was pending, the Executing Court passed an order on 8.7.2005, directing execution of the sale deed.

4. Assailing the said order dated 8.7.2005 passed in E.P.No.46 of 2004, the petitioner filed C.R.P. (NPD) No.1585 of 2005, wherein this Court, by order dated 13.11.2006, while observing as under:

“4. When the Judgment Debtor has decided to challenge the decree by filing the application under Order 9 Rule 13 of C.P.C. along with the application to condone the delay in filing that application an opportunity ought to have been granted to the Revision Petitioner/Defendant. The Court was not right in ignoring the application in I.A.No.576 of 2004 and ordering execution of the sale deed and further proceedings in E.P.No.46 of 2004. In that view of the matter the impugned order has to be set aside”,

set aside the order dated 8.7.2005 and directed disposal of I.A.No.576 of 2005 within a period of three weeks.

5. It is stated that thereafter the Court below took up the interlocutory application and dismissed the same finding no justification to condone the delay and observed that the petitioner having entered appearance in the execution petition ought not to have filed interlocutory application seeking to set aside the ex parte order.

6. Assailing the said order, the present revision is filed for the relief stated supra.

7. The learned counsel for the petitioner contends that merely because the petitioner failed to file written statement, the Court below set him ex parte and, without giving him an opportunity of hearing, decreed the suit in favour of the respondent.

8. He further contended that the counsel on record for the petitioner before the Court below passed away and, therefore, the petitioner could not get instructions as to the status of his case and in any event, the petitioner was unaware of the ex parte order passed against him.

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9. Per contra, the learned counsel for the respondent reiterating the reasons that found favour with the trial Court while dismissing the application of the petitioner, submitted that each day's delay is to be explained by the petitioner and since the petitioner failed to do so, the order passed by the trial Court does not warrant interference.

10. I heard Mr.S.Doraisamy, learned counsel for the petitioner and Mr.K.Govi Ganesan, learned counsel for the respondent, perused the documents and gave my anxious consideration to the issue raised.

11. The delay in filing the appeal in the case on hand is 529 days and the application for condonation of delay filed under Section 5 of the Limitation Act has been dismissed by the trial Court.

12. The Supreme Court, time and again, held that the power to condone delay by enacting Section 5 of the Limitation Act, 1963 is to enable the courts to do substantial justice to parties by disposing of matters on merits; that the expression "*sufficient cause*" employed by the Legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which serves the ends of justice which is the life purpose for the existence of the institution of courts; substantial justice deserves to be preferred as against technical considerations; and the courts should prefer to deliver justice on

merits in preference to the approach which scuttles a decision on merits.

13. Let us now analyze the scope of revision under Section 115 of the Code of Civil Procedure. It is trite that the powers of a High Court to entertain a revision are circumscribed by Section 115 of the Code of Civil Procedure. Section 115 of the Code of Civil Procedure empowers the High Court to entertain a revision against the decision of the Subordinate Court, only where the Subordinate Court appears to have—

- i. exercised jurisdiction not vested in it by law;
- ii. failed to exercise jurisdiction so vested; or
- iii. acted in exercise of its jurisdiction illegally or with material irregularity.

14. The petitioner to justify the delay has specifically pleaded that the counsel on record appearing on his behalf passed away during the delay period. The said factor is not disputed by the respondent or by the trial Court. The petitioner repeatedly pleaded that he was unaware of the ex parte order, and it is borne out by records that such ex parte order was passed only on account of non filing of written statement by the petitioner. That apart, the petitioner pleads that only on the instructions of his advocate, without knowing the court procedure, he appeared in the execution proceedings and solely on

that ground he should not be deprived the right to challenge the ex parte order passed against him.

15. In this factual backdrop, let us analyse whether the petitioner has shown sufficient cause for condonation of delay. The Courts are empowered to allow the application for condonation of delay, on sufficient cause being shown or reject such an application in exercise of its judicious discretion. However, such judicious discretion to condone the delay by adopting a liberal approach has to be exercised only in deserving cases, and not in cases where the delay is on account of lethargic attitude and negligence on the part of the applicant. It is not as if each application for condonation of delay has to be allowed as a matter of right, no matter whether any "sufficient cause" for the delay is shown or not. Each case is to be decided on facts and circumstances. The length of delay is no matter. All that matters is the acceptability of explanation.

16. The above said view of this Court is fortified by the following decisions of this Court:

(a) In *Mohammed Aslam and others v. C.N.A.Gowdhaman*, 2005

(2) CTC 766, the delay was of 1251 days. In the said judgment, a Division Bench of this Court observed as under:

"12. In the impugned order, as said earlier, the learned Judge has not considered the explanation offered by the applicant for the delay of 1251 days. Though the

learned Judge was conscious of the fact that by condoning the inordinate delay, the respondents therein (appellants herein) will be put to great hardship, instead of compensating them, directed for the payment of Rs. 10,000/- to the State Legal Services Authority, Chennai, admittedly, which is not a party in this proceedings. We are unable to share the above view. Having found that by condoning the inordinate delay only on the ground that the applicant should be given an opportunity and having found that the said act will cause great hardship to other side, viz., respondents therein, it is but proper to compensate them by awarding reasonable costs to them. The learned Judge has not resorted to such recourse. It is not in dispute that the Courts are here to render justice to both parties. We are unable to understand how the respondents will be compensated by payment of Rs. 10,000/- to the State Legal Services Authority, Chennai. Equally, we are conscious of the fact that the length of delay is no matter, and acceptability of the explanation is the only criterion. Sometimes the delay of shortest range may be uncondonable due to want of acceptable explanation, whereas in certain other cases, delay of a very long range can be condoned as the explanation therefor is satisfactory. In every case of delay, there may be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. If the explanation does not smack the mala fides or it is not 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 not lean towards acceptance of the explanation. We are also aware that refusal to condone the 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. Now, even the higher court of this land have interpreted that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. Accordingly, in order to give one opportunity to the respondent/applicant and at the same time, to compensate the

appellants/respondents, we intend to modify the order of the learned Judge dated 10.03.2005. Though it is stated that the applicant had paid a sum of Rs. 10,000/- to the State Legal Services Authority, Chennai as ordered, in addition to the said amount, the applicant/respondent is directed to pay a further sum of Rs. 20,000/- (Rupees twenty thousand only) to the appellants/respondents within 15 days from today, failing which the order of the learned Judge dated 10.03.2005 shall stand set aside. OSA. No. 44 of 2005 is disposed of accordingly."

(emphasis supplied)

(b) In yet another decision of this Court in *Pavayammal and another v. S.N.Chockalingam and others*, 2009 (5) CTC 414, a learned Single Judge of this Court held as under:

"7.The word 'sufficient cause' under Section 5 of the Limitation Act will have to be interpreted in a purposeful and meaning way. As a matter of fact, the Court of law is not supposed to adopt a pedantic approach instead it has to take a liberal view while dealing with the Application of condonation of delay. Ordinarily a party does not stand to gain by lodging in Appeal belatedly. Refusing to condone a delay will result in meritorious matter being thrown out at the nascent stage and thereby the cause of justice being defeated. On the other hand, if a party is allowed to enter into the scene of main proceedings, then the matter can be decided on merits. Of course a Court of law providing due opportunities to the parties to prove their case. The judiciary is respected not on account of its power to legalise injustice on technical grounds but it is capable of removing injustice and is expected to do so. This Court is of the considered view that substantial justice will have to be delivered to the parties overriding technicalities."

(emphasis supplied)

(c) The proposition of law laid down in the above said two

decisions was also reiterated in the subsequent decision of a learned Single Judge of this Court in *P.Subramanian (dead) and others v. S.Viswasam*, 2011-1-LW 53.

17. In the instant case, a bare perusal of the typed set of documents shows that only on account of non-filing of written statement, the petitioner was set *ex parte* and a decree was passed in favour of the respondent. The petitioner, though has taken steps to set aside the *ex parte* decree, it was with a delay of 529 days. It is evident from the narration of events above that the counsel on record appearing for the petitioner passed away and the petitioner was not having instructions regarding the passing of *ex parte* order. In any event, it is not the case of the respondent that the delay was deliberate.

18. For the foregoing reasons, I am of the firm view that the trial Court has not given substantial credence to the plea of delay on account of death of the counsel on record for the petitioner. This Court is of the considered opinion that this is a fit case where the petitioner should be given an opportunity to put forth his case by way of appeal, rather than curtailing his rights by sticking on technicalities.

19. In the result:

a) The civil revision petition is allowed by setting aside the order passed on 31.01.2007 in I.A.No.576 of 2005 in O.S.No.21 of 2001 by the Sub Court, Tiruppur, on condition that the petitioner pays a sum of Rs.10,000/- as costs to the respondent within a period of one month from the date of receipt of a copy of this order;

b) The trial Court is hereby directed to number the set aside application filed by the petitioner and dispose of the same within two months, on merits and in accordance with law, of course after giving notice to both sides.

c) No costs. Consequently, M.P.No.1 of 2007 is closed.

17.02.2017

Note: Issue order copy on 08.02.2018

vs

Index : Yes

Internet : Yes

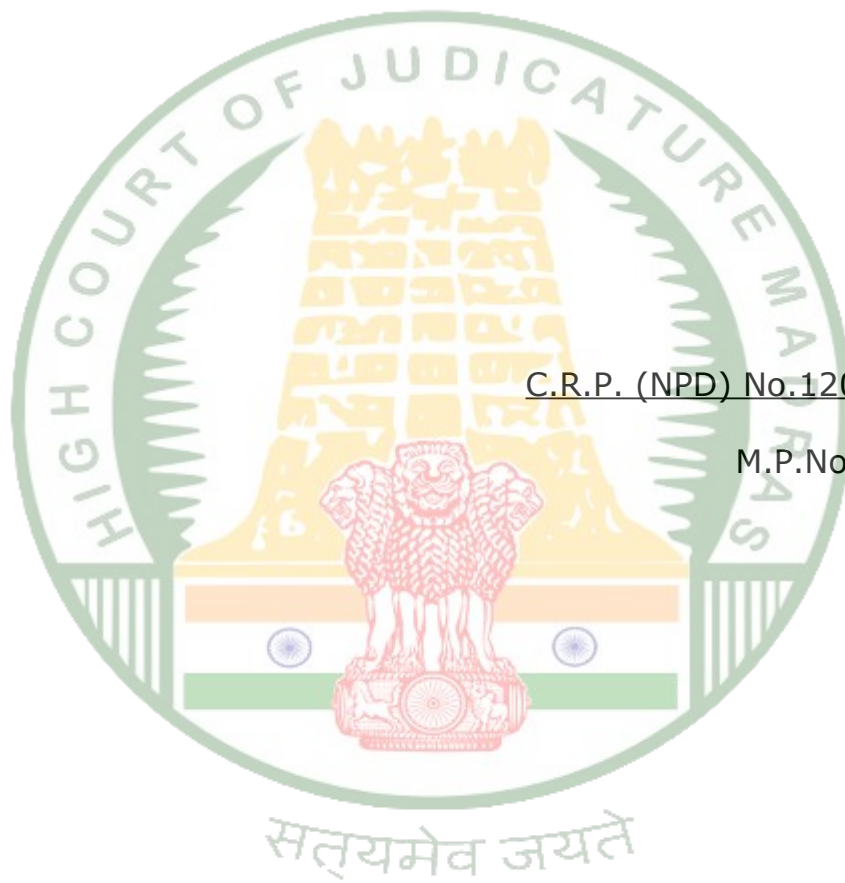
To

The Sub Court,
Tiruppur.

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M.V.MURALIDARAN,J.

vs



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and
M.P.No.1 of 2007

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