

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 08.06.2017

Orders Pronounced on : 19.07.2017

CORAM:

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P. (NPD) No.538 of 2017
and
C.M.P No.6707 of 2017

Bhavani

... Petitioner

VS.

1. Mustafa
rep. by his Power Agent
Naseema
2. The President
TVN Udalpayirchi Kazhagam
Chettikulam Theru
Thiruvalluvar Nagar
Pondicherry

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 09.12.2016 made in I.A. No. 604 of 2012 in O.S. No. 59 of 2007 on the file of Principal Subordinate Judge, Puducherry.

For Petitioner : Mr. R. Thiagarajan
For respondents : Mr. K.S. Ilangovan for R1
M/s. Achari & Antony Associates

ORDER

This Civil Revision Petition arises against the order dated 09.12.2016 made in I.A. No. 604 of 2012 in O.S. No. 59 of 2007 on the file of Principal Subordinate Judge, Puducherry.

2. The facts of the case is as follows :

The revision petitioner is the 1st defendant in the suit in O.S. No. 59/2007, Sub Court, Puducherry. The 1st respondent herein, filed the suit, for declaration and recovery of possession of the suit schedule mentioned property. According to the petitioner, the suit schedule property is a Government Poramboke land. Upon continuous possession and enjoyment of the petitioner along with her husband, the Government has issued L.G.R patta in her favour. The trial court framed issues in the suit and subsequently the petitioner was called absent, on 19.04.2010 the trial court passed an ex-parte decree, against the revision petitioner. Hence, the petitioner filed an Interlocutory Application,

under Section 5 of the Limitation Act, to condone the delay of 882 days, in filing the application to set aside the ex-parte decree. The reasons stated in the affidavit filed in support of the petition is that the petitioner was suffering from viral fever and old age diseases, due to above disablement she could not attend the court on the hearing date, resulting ex-parte decree passed by the trial Court. She was unable to attend the Court for cross examination of the plaintiff/ 1st respondent, due to the abovesaid bonafide reasons. It has been further stated that the plaintiff/ 1st defendant, without disclosing true material facts, has filed the said suit, claiming the right of ownership of the schedule mentioned property.

3. The learned counsel for the petitioner would submit that this Court as well as the Hon'ble Supreme Court has held that there should be a liberal, pragmatic, justice-oriented, non- pedantic approach, while dealing with an application for condonation of delay. Eventhough the petitioner has stated sufficient causes for condoning the delay, the lower court did not consider the facts as well as the catena of decisions, has erroneously dismissed the said application. Challenging the order

passed by the Court below, the present Revision has been filed before this Court.

4. Per contra, learned counsel appearing for the 1st respondent would submit that the said application filed by the petitioner is false and fictitious. Learned counsel for the 1st respondent would invite the attention of this Court, the counter affidavit filed by the 1st respondent/ plaintiff, before the Court below in the I.A.No.604 of 2012, pointing out that the petitioner/ 1st defendant has not shown any sufficient cause for the absence on the date of hearings and also the conduct of the petitioner, uninterested to prosecute the case but only with an intention to adopt the dilatory practice and drag on the suit proceedings. The only motive of the petitioner was to deprive the 1st respondent/ plaintiff from enjoying the fruits of the decree in the suit. The learned counsel for the respondent has also produced the factual matrix of the suit proceedings, to show the dilatory tactics of the petitioner/ 1st defendant to drag on the proceedings by filing fictitious petitions in the suit. Therefore, there is no sufficient reasons in the affidavit to condone the inordinate delay and seeks dismissal of the Civil Revision Petition.

5. Heard learned counsel for the petitioner and the learned counsel for the 1st respondent and perused the material available on record.

6. The point for consideration before this Court is that, whether the delay of 882 days in filing the application to set aside the ex-parte decree can be allowed or not. The details and the particulars furnished in the counter affidavit filed by the 1st respondent before the trial court in the I.A. No. 604/2012, is as follows :-

The written statement was filed by the petitioner/ 1st defendant therein, was on 27.09.2007. The 1st respondent/ plaintiff PW-1 filed her chief examination affidavit on 02.03.2010 and exhibits 1 to 5 were marked. The aforesaid suit was adjourned on several hearings, from 09.03.2010 to 19.04.2010, at the instance of the petitioner/ 1st defendant for reporting settlement. Thereafter, an ex-parte decree was passed on 19.04.2010. Pursuant to the ex-parte decree, the 1st respondent/ plaintiff filed an Execution Petition on 07.04.2011 and in the execution proceedings, notice was served on petitioner/ 1st respondent and the 2nd respondent, for their appearance in the court. On 06.09.2011

both the respondents were called absent. One Mr. Mohan Ilayaraja, learned counsel filed vakalat for the petitioner/ 1st respondent on 10.10.2011 and the case was posted to 02.11.2011. Again, at the request of the petitioner/ 1st respondent, for filing counter affidavit in the above said execution petition, the petition was adjourned from 15.12.2011 to 08.08.2012. Despite counter affidavit not filed, the execution petition was posted to 29.08.2012 as a last chance and again posted to 26.09.2012. On that date, the petitioner/ 1st respondent in the Execution Petition was called absent and hence posted to 30.10.2012 for delivery of orders. In the meanwhile, a condone delay application in I.A. No. 604/2012 was filed on 17.10.2012, by the petitioner/ 1st respondent with an inordinate delay filed in support of the petition.

7. It is seen from the records, when the execution proceedings were initiated, there was obstruction by the proposed party. Therefore, the 1st respondent/ plaintiff filed applications in E.A. Nos. 221, 222 and 223 of 2012, for police assistance, break open and surveyor assistance. The petitioner/ 1st defendant had also filed E.A. Nos. 226 and 227 of 2012 to set aside the order dated 26.09.2012 and to stay the

operation of the execution petition. The above said applications are pending before the lower court. Subsequently, the petitioner/ 1st defendant filed I.A. Nos 603 & 604 of 2012, to set aside the ex-parte decree and for condoning the delay in preferring the said application. Challenging the dismissal of the condone delay application, this instant application is filed in the suit.

8. The learned counsel for the petitioner relies on the judgement of this Court, in the case of **Vijaya vs. M. Selvaraj**, **reported in 2010-3-LW 658**, wherein it is held as follows :-

“ 10. It appears, the lower Court took a strict view and dismissed the petition for getting the delay condoned in filing the application to get set aside the ex-parte decree. Hence, in these circumstances, the revision is allowed, setting aside the order of the lower Court and consequently allowing the said I.A. for getting the delay of 728 days condoned, subject to the condition that on or before 23.6.2010, a sum of Rs.3,000/- (rupees three thousand only) should paid by the petitioner herein to the respondent/plaintiff,

whereupon alone the said I.A.No.873 of 2010 shall stand allowed, as otherwise, this revision shall stand dismissed and this order will not enure to the benefit of the petitioner.

9. Another decision relied by the learned counsel for the petitioner is the case of ***M.K. Prasad vs. P. Arumugam, reported in (2001) 6 SCC 176***, wherein Hon'ble Supreme Court has held as follows, in paragraphs 10 & 11 :-

“10 In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex-parte decree as is evident from his application filed under [Section 5](#) of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the court should have kept in mind the judgment

impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order impugned and condone the delay in filing the application for setting aside ex-parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex-parte decree as well.

11. *Consequently, the appeal is allowed by setting aside the orders impugned. The appellant's application for condoning the delay and for setting aside the ex-parte decree shall stand allowed subject to payment of exemplary costs of Rs.50,000 to be paid to the opposite side within a period of 30 days. If the costs are not paid within the time specified this appeal shall be deemed to have been dismissed and the exparte decree passed against the appellant revived. We may clarify that the costs awarded by this order are in addition to the amount of Rs.10,000 deposited in this Court for payment to*

the respondent vide order dated 3.11.2000."

10. The Hon'ble Supreme Court in the case of *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Ors.*, reported in (2013) 12 SCC 649, after culling out from the decision of *B.Madhuri Goud v. .B.Damodar Reddy reported in (2012) 12 SCC 693*), has set out how the details have to be furnished by way of an affidavit supporting the cause. The relevant paragraphs are extracted hereunder:-

"15. From the aforesaid authorities the principles that can broadly be culled out are:

i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

iii)

iv)

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

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

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.

xi)

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.”

11. This Court while deciding the question of condone delay in similar cases, had followed the judgments of the Apex Court cited supra. By considering the facts and circumstances of the case, by keeping in mind the period of pendency of the case and the age of the parties, and the decisions of the Hon'ble Apex Court in ***Esha Bhattacharjee*** and ***H. Dohil Constructions Company Private Limited*** (cited supra). Further in the case of ***N. Balasubramanian***, reported in ***1998 (7) SC 123***, in paragraph 9, it is held that 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 reversional jurisdiction, unless the exercise of discretion was on whole 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.

12. Even on facts of the present case, the petitioner had appeared in the execution proceedings, through her counsel on 10.10.2011 and after several adjournments, the petitioner has not chosen to file her counter affidavit till 26.09.2012. Thereafter only, the instant application I.A. No. 604 of 2012 has been filed before the court below. Hence, the contention of the learned counsel for the petitioner that the petitioner was suffering from viral fever and old age disablement, she was unable to attend the Court for cross examination of PW-1 is liable to be rejected. The petitioner has not placed any material to substantiate his contention for the inordinate delay in filing the application to set aside the ex-parte decree. Hence, the court below has rightly come to a conclusion that the petitioner has not shown any sufficient cause to explain the inordinate delay, in filing the application to set aside the ex-parte decree. The conduct of the petitioner as stated above would clearly establish that the intention of the petitioner is to drag on the proceedings as held by the Hon'ble

Supreme Court in the cases of *Esha Bhattacharjee* and *H. Dohil Constructions, as cited supra*. Hence, this Court does not consider any justification in condoning the inordinate delay, even by imposing heavy cost on the petitioner. Hence, there is no error or illegality in the order passed by the Court below.

13. In the light of the facts and circumstances of the case and in view of the above submissions, this Court does not warrant to interfere with the order passed by the court below. Therefore, the Civil Revision Petition fails and the same is dismissed. Consequently, the Connected Miscellaneous Petition is closed. No order as to costs.

19.07.2017

Index : yes

Speaking order/ Non-speaking order

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To

The Principal Subordinate Judge,
Puducherry.

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D.KRISHNAKUMAR, J.

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C.R.P. (NPD) No.538 of 2017
and
C.M.P No.6707 of 2017

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19.07.2017

To

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Judgement in

C.R.P.(NPD) No.538 of 2017

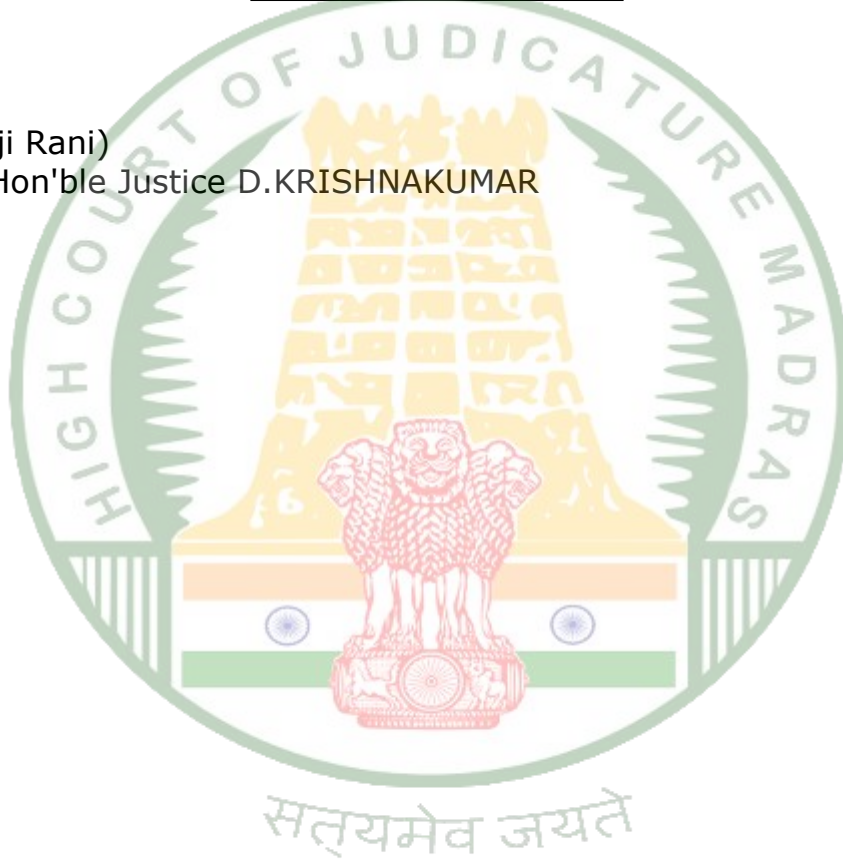
and

C.M.P No.6707 of 2017

From

(Asha Viji Rani)

P.A. To Hon'ble Justice D.KRISHNAKUMAR



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Unaware of the passing of the decree against him, the appellant could not take any proceeding in the form of an appeal or for setting it aside. He came to know about the passing of the decree in 1997 only when he received the notice for execution proceedings initiated by the respondent in Execution Petition No.118 of 1997. The appellant thereafter filed an application for setting aside the ex-parte decree along with an application for condoning the delay. The trial court rejected the prayer of the appellant for condoning the delay of 554 days in filing the application for setting aside ex-parte decree. Aggrieved by the order of the trial court, the appellant filed a revision petition in the High Court which was dismissed vide the order impugned in the present appeal.

In any case in which a decree is passed ex-parte, the defendant can apply to the court by which the decree was passed for an order to set it aside and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit. Such an application can be filed within 30 days as provided under [Article 123](#) of the [Limitation Act](#). In case of delay, the defendant can avail of the benefit of [Section 5](#) of the Limitation Act and seek its condonation by satisfying the court regarding the existence of circumstances which prevented him from approaching the court within the limitation prescribed by the statute.

In construing [Section 5](#) of the Limitation act, the court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. The court has a discretion to condone or refuse to condone the delay as is evident from the words "may be admitted" used in the section. While dealing with the scope of [Section 5](#) of the Limitation Act, this Court in [Ramlal & Ors. v. Rewa Coalfields Ltd.](#) [AIR 1962 SC 361] held:

"[Section 5](#) of the Limitation Act provides for extension of period in certain cases. It lays down, inter alia, that any appeal may be admitted after the period of limitation prescribed therefor when the appellant satisfies the court that he had sufficient cause for not preferring the appeal within such period. This section raises two questions for consideration. First is, what is sufficient cause; and the second, what is the meaning of the clause "within such period"? With the first question we are not concerned in the present appeal. It is the second question which has been decided by the Judicial Commissioner against the appellant. He has held that "within such period" in substance means during the period prescribed for making the appeal. In other words, according to him, when an appellant prefers an appeal beyond the period of limitation prescribed he must show that he acted diligently and that there was some reason which prevented him from preferring the appeal during the period of limitation prescribed. If the Judicial Commissioner has held that "within such period" means "the period of the delay between the last day for filing the appeal & the date on which the appeal was actually filed" he would undoubtedly have come to the conclusion that the illness of Ramlal on February 16 was a sufficient cause. That clearly appears to be the effect of his judgment. That is why it is unnecessary for us to consider what is "a sufficient cause" in the present appeal. It has been urged before us by Mr. Andley, for the appellant, that the construction placed by the Judicial Commissioner on the words "within such period" is erroneous.

In construing S.5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of

limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan*, ILR 3 Mad 269, "Section 5 gives the court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafide is imputable to the appellant."

Again in *The State of West Bengal v. The Administrator, Howrah Municipality & Ors.* [1972 (1) SCC 366 and *G.Ramegowda, Major & Ors. v. Special Land Acquisition Officer, Bangalore* [1988 (2) SCC 142 this Court observed that the expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice where gross negligence or deliberate inaction or lack of bonafide is not imputable to the party seeking condonation of delay. Law of limitation has been enacted to serve the interests of justice and not to defeat it. Again in *N. Balakrishnan v. M. Krishnamurthy* [1998 (7) SCC 123] this Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing malafide or deliberate delay as a dilatory tactics, the court should normally condone the delay. However, in such a case the court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. In that context the court observed:

"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 no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of

a 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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