

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2017

C O R A M

THE HONOURABLE Mr.JUSTICE **D.KRISHNAKUMAR**

C.R.P.(N.P.D.). No.4787 of 2014
and M.P.No.1 of 2014

Nagarajan

.. Petitioner

-Vs.-

Govindan

.. Respondent

Civil Revision Petition filed under Section 115 of C.P.C against the fair and decretal order dated 10.07.2014 in I.A.No.263 of 2009 in O.S.No.43 of 2008 on the file of the Additional Sub Judge, Thiruvannamalai.

For petitioner ... Mr.G.Rajan

For Respondent ... Mr.M.Ravi

O R D E R

The revision petition is preferred against the order dated 10.07.2014 passed in I.A.No.263 of 2009 in O.S.No.43 of 2008 on the file of the Additional Sub Judge, Thiruvannamalai.

2. According to the learned counsel for the petitioner, the respondent-plaintiff has filed the suit in O.S.No.43 of 2008 before the

Principal Subordinate Court, Thiruvannamalai for specific performance and permanent injunction. The aforesaid suit was posted for enquiry on 25.03.2009. The petitioner/first defendant and the second defendant were not able to appear before the Court on that date. Hence, ex-parte decree was passed.

3. It is stated that the petitioner and the second defendant went to Bangalore to attend a death ceremony on 26.03.2009 and returned to the native place only on 28.03.2009. Thereafter, the petitioner was suffering from Jaudince and was bedridden. Thereafter, the petitioner filed the interlocutory Application in I.A.No.263 of 2009 in the aforesaid suit for condoning the delay of 121 days to set aside the ex-parte decree. But, without considering the bona-fide reasons stated by the petitioner, the said application was dismissed by the Court, Hence, the petitioner has preferred the present revision petition before this Court.

4. Learned counsel for the petitioner submitted that the petitioner has filed the written statement in the suit and denied the averments made in the plaint. Therefore, in the interest of justice, an opportunity may be given to the petitioner to contest the suit on merits. On the contrary, learned counsel for the respondent/plaintiff

would submit that the petitioner has not produced any certificate before the Court below to prove the averments made in the affidavit. Therefore, the Court below has rightly dismissed the said application.

5. Heard the rival submissions made by the learned counsel for the parties and perused the material available on record.

6. The point for consideration before this Court is that the delay of 121 days has to be condoned or not. It is admitted that the ex-parte decree was passed on 26.03.2009. Thereafter, the petitioner has filed the application before the Additional Sub-Court, Thiruvannamalai to set aside the ex-parte decree. Along with the said application, the petitioner has filed the application to condone the delay of 121 days in filing the application to set aside the ex-parte decree. The petitioner has not produced any materials before the Court to substantiate his contentions. The contention of the petitioner is that the reasons explained in the affidavit for the delay in filing the application under Order 9 Rule 13 CPC is only with the bonafide reasons. As stated in the affidavit, the ex-parte decree was passed against the petitioner for the first time and the petitioner is regularly appearing before the trial Court and also filed the written statement. The case was taken up for evidence and it was posted for cross

examination. At that stage, he was set-exparte. He did not appear before the Court below due to the aforesaid reasons. But, it seems that the petitioner has not appeared for more than seven hearings for cross examination of P.W.1. Therefore, the Court has passed an ex-parte decree.

7. Considering the relief prayed for in the suit filed by the respondent/plaintiff for specific performance and permanent injunction, the suit has to be decided on merits, instead of passing an ex-parte decree. As far as the delay of 121 days is concerned, even though the reasons have been stated in the affidavit, no material has been placed before the Court. In the decision of the Hon'ble Supreme Court reported in 2013 (5) CTC 547 (SC) (**Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others**), in para 15, the Supreme Court has given some guidelines, which is extracted as follows:

".....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) Th 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) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*
- 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.*
- 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) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*
- 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.*
- xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude..."*

The above said decision has been followed by this Court in the decision reported in 2015 (2) CTC Page 811 in **Ajay Kumar Gulecha vs J Vijayakumar**, wherein, this Court has held as follows:

16. As already stated, the Law of Limitation cannot be invoked for destroying the rights of the parties. No prejudice would be caused to the petitioner, if the first respondent is given an opportunity to contest the case on merits. If the petitioner is so sure about the case that he can get favourable order on merits instead of getting exparte Decree, as the First Respondent has denied the petitioner's claim and many issues are to be adjudicated after full pledged trial. While comparing the loss to the petitioner and the loss to be

caused to the first respondent, namely loss of property worth about crores, the delay has to be excused and the case has to be decided on merits.

8. In the above said decision of this Court wherein, in a similar occasion, this Court condoned the delay. As far as the present case is concerned, for the delay in filing the petition to set aside decree, the reasons were given, but the materials have not been placed before this Court to substantiate the contention of the affidavit.

9. Further, in the light of the decision of the Hon'ble Supreme Court, this Court has taken a liberal approach to condone the delay in the facts of the present case and in the nature of the prayer sought for in the suit, the parties should not be defeated for the reasons on the ground of technicalities and ultimately, justice will have to be rendered to the parties after the full-fledged trial which may be conducted by the Court below. Therefore, there is no hesitation for this Court to set aside the impugned order passed in I.A.No.263 of 2009. However, the respondent/plaintiff has to be compensated for the aforesaid delay by way of payment of costs. On instructions, both the learned counsel undertakes that they will co-operate for the disposal of the suit within a time frame that would be fixed by this Court.

10. In the light of the above facts and circumstances, and taking note of the dictum laid down in the decisions cited supra, this Court is inclined to pass the following order:

i) the order passed by the Additional Sub Judge, Thiruvannamalai in I.A.No.263 of 2009 in O.S.No.43 of 2008 dated 10.07.2014 is set aside, on payment of costs of Rs.7,500/-. Out of Rs.7,500/-, Rs.5,000/- shall be paid to the respondent/plaintiff and Rs.2,500/- to the Tamil Nadu Mediation and Conciliation Centre, High Court, Chennai, within a period of two weeks from the date of receipt of a copy of this order.

ii. If the said condition has been complied with by the petitioner, the trial Court is directed to number the interlocutory application filed under Order 9 Rule 13 of Civil Procedure Code to set aside the ex-parte decree, within a period of two weeks therefrom.

iii. In view of the undertaking made by the learned counsel appearing for both the parties, in the event of application under Order 9 Rule 13 being allowed, the Trial Court is directed to dispose

of the suit as expeditiously as possible, preferably within a period of three months therefrom.

11. The Civil Revision Petition is allowed on above terms. No costs. Consequently, connected miscellaneous petition is closed.

10.03.2017

srn

To

The Additional Sub Judge,
Thiruvannamalai.

D.KRISHNAKUMAR.J
srn

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and M.P.No.1 of 2014

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