

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2017

CORAM

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

C.R.P. (NPD) No.3840 of 2011

and

M.P.No.1 of 2011

1.Erusayee

2.Ramu

3.Krishnamoorthi

4.Venkatesan

5.Kannan

.. Petitioners

vs

Kalarani

.. Respondent

Revision filed under Article 227 of Constitution of India
against the order passed in I.A.No.399 of 2011 in O.S.No.192 of 2006,
dated 23.08.2011 on the file of the Additional Sub-Court, Salem.

For Petitioners

: Ms.R.Meenal

For Respondent

: Mr.P.Jagadeesan

ORDER

This revision is directed against the order of the II Additional Subordinate Judge, Salem in I.A.No.399 of 2011 in O.S.No.192 of 2006, dated 23.08.2011, dismissing the petition filed by the petitioners under Section 5 of the Limitation Act, to condone the delay of 401 days in filing the application to set aside the exparte decree dated 12.02.2010. The deponent of the petition in I.A.No.399 of 2011 is the fourth defendant in the suit.

2. The petitioners are the defendants 2, 4 to 7 in the suit. The respondent has filed the suit for partition of the suit properties into three equal shares and to allot one such share to the plaintiff and for separate possession.

3. The third defendant, who is the elder sister of the family, after the receipt of suit summons, obtained signatures of the petitioners in the vakalat and assured that she will file vakalat for herself and on behalf of the petitioners in the suit. The petitioners were under the belief that she was looking after the case. While things stood thus, the petitioners came to know that the they were called absent on

06.09.2006 itself and an exparte preliminary decree was passed on 12.02.2010. The petitioners alleged that with an malafide intention, the third defendant did not file vakalat into the Court and allowed the petitioners remained exparte. It is alleged that there was a delay of 401 days in filing the petition to set aside the exparte decree. The petitioners are now filing application to set aside the exparte decree along with delay condonation petition. The delay is neither wilful nor wantaon. Hence, prayed for condonation of the delay of 401 days in filing the petition to set aside the exparte decree.

4. Resisting the petition, the respondent has filed the counter stating that it is false to state that the petitioners have handed over the signed vakalat to the third defendant and that the third defendant has deliberately not filed the vakalat. According to the respondent, since the petitioners did not appear on 06.09.2006, they were set exparte and therefore, the story alleged by the petitioners in the affidavit is concocted one.

5. Upon consideration of the rival submissions, the trial Court dismissed the petition. Aggrieved by the same, the petitioners, who are defendants 2, 4 to 7 have filed this revision.

6. I heard Ms.R.Meenal, learned counsel appearing for the petitioners and Mr.P.Jagadeesan, learned counsel appearing for the respondent. Perused the materials on record.

7. The learned counsel for the petitioners submitted that immediately after the receipt of suit summons, the third defendant approached the petitioners and obtained signatures in the vakalat and assured that she will look after the case. Being an elder, the petitioners believed her words and handed over the signed vakalat to her. But with a malafide intention, she did not file the vakalat and allowed the petitioners remain exparte in the suit on 06.09.2006 and subsequently, an exparte preliminary decree was passed in the suit on 12.02.2010.

8. Per contra, the learned counsel for the respondent submitted that the petitioners are well educated and they knew about the suit proceedings pending. He submitted that purposely the petitioners failed to appear before the Court. The story alleged in the affidavit was for the purpose of the filing of the petition to set aside the exparte decree. He also submitted that each and every day delay

has not been properly explained by the petitioners.

9. The point arises for consideration is whether the trial Court was right in dismissing the petition to condone the delay of 401 days in filing the petition to set aside the exparte decree.

10. It appears that the first petitioner is the mother of the petitioners 2 to 5 and the third defendant in the suit is their elder sister. According to the petitioners, after the demise of their father, the third defendant was looking after the affairs of the family and in that course, when they received suit summons, they handed over the signed vakalat to her to defend the case. But contrary to the assurance given by her, the third defendant did not file vakalat on behalf of the petitioners on 06.09.2006 and allowed the petitioners remained exparte.

11. It also appears that the third defendant entered appearance on 29.12.2006 and filed the written statement. Issues were also framed. On 12.02.2010, when the suit was taken up for trial, the third defendant failed to appear and set exparte and exparte preliminary decree was passed. The petitioners state that they knew

about the exparte decree passed in the suit only when they received notice in I.A.No.268 of 2011.

12. The trial Court dismissed the petition seeking to condone the delay of 401 days in filing the petition to set aside the exparte decree stating that the petitioners, who are well educated, kept quite from 06.09.2006 till 19.04.2011 without knowing the fact of the case and there is no merit in the petition.

13. In its order, the trial Court, referred the decision in *Poavayammal and another v. S.N.Chockalingam and others*, reported in 2009 (5) CTC 414, wherein it was held that liberal view has to be taken while dealing with the application for condonation of delay. But the trial Court observed that the facts of the case referred are different. In its order, the trial Court has also observed that the after giving vakalat, petitioners have failed to know from the third defendant as to what was the fate of the suit. Therefore, there is no merit in the petition.

14. In the affidavit filed in support of the petition, the petitioners have clearly stated that they knew about the exparte

decree only when they received notice in I.A.No.268 of 2011 and thereafter, they engaged an Advocate and filed the petition to set aside the exparte decree along with delay condonation petition.

15. The objection raised by the respondent before the trial Court was that in order to protract further proceedings in the suit, the petitioners have filed the petition. To establish the same and also to rebut the version of the petitioners, the respondent has not produced any evidence.

16. As stated supra, the respondent has filed the suit for partition and separate possession of the suit properties. When the suit is for partition and separate possession, necessarily the defendants in the suit have to be heard by giving them an opportunity to defend the suit.

17. Holding that Section 5 of Limitation Act is to be liberally construed, in *N. Balakrishnan v. M.Krishnamurthy*, reported in (1998) 7 SCC 123, the Hon'le Supreme Court held thus:

"12. 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. This 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

18. Generally delays in preferring application to condone the delay in filing the application to set aside the ex parte decree/restore the suit are required to be condoned in the interest of justice, where no gross negligence or deliberate inaction or lack of *bona fide* is imputable to the party seeking condonation of delay.

19. In the present case, as noted above, delay in filing the application to set aside the ex parte decree is 401 days. Length of delay is not the criteria. In appropriate cases, even the long range of delay could be condoned. Even if the trial Court has declined to condone the delay, the superior Court would be free to consider the cause shown for the delay afresh.

20. As stated supra, immediately after receipt of notice I.A.No.268 of 2011, the petitioners have filed application under Section 5 of the Limitation Act to condone the delay of 401 days in filing the application to set aside the ex parte decree. This Court finds that sufficient cause has been made out for condonation of delay and the

trial Court has not exercised the discretion properly.

21. It is also clear to the effect that it is not the number of days of delay that matters, but the attitude of the party which caused the delay. In other words, when the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay, the Court is satisfied that the delay occasioned not due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.

22. Having regard to the facts and circumstances of the case and that the respondent has failed to produce any rebuttal evidence to disprove the version of the petitioners in an application seeking to condone the delay in filing the set aside application and also reasoning given by the trial Court in dismissing the application is not convincing, in my considered view, the delay of 401 days in filing the application to set aside the exparte decree has to be condoned, however, on costs.

23. In the result:

(a) the Civil Revision Petition is allowed by setting aside the order passed in I.A.No.399 of 2011 in O.S.No.192 of 2006 dated 23.08.2011, on the file of the learned II Additional Subordinate Judge, Salem on condition that the petitioners pay a sum of Rs.3,000/- (Rupees Three Thousand) as costs to the respondent within a period of two weeks from the date of receipt of a copy of this order;

(b) the learned II Additional Subordinate Judge, Salem is hereby directed to number the application to set aside the exparte decree filed under Order 9, Rule 13 C.P.C. and dispose of the same within a period of three weeks by giving notice to both sides.

(c) Consequently, M.P.No.1 of 2011 is closed.

12.01.2017

Note: Issue order copy on 07.05.2018
vs

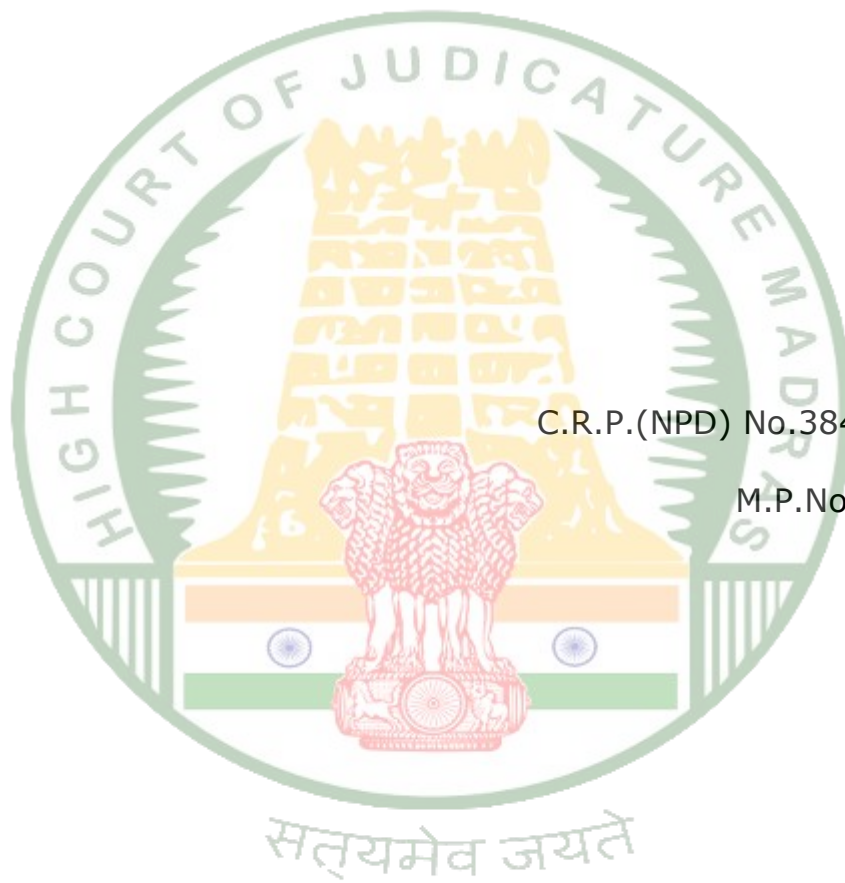
Index : Yes/No
Internet : Yes/No

To

The II Additional Subordinate Judge,
Salem.

M.V.MURALIDARAN, J.

VS



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