

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2017

CORAM:

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

**CRP(NPD)No.4944 of 2011
and
M.P.No.1 of 2011**

Maruchamy ... Petitioner

Vs.

K.B.Pasupathi ... Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the Order dated 12.02.2010 passed by the learned II Additional District Munsif Court, Bhavani in I.A.No.262 of 2009 in O.S.No.67 of 2008.

For Petitioner : M/s.P.Anil mathi

For Respondent : Mr.V.Anandha Moorthy

ORDER

The petitioner has filed this Civil Revision Petition to set aside the

fair and decreetal order of the II Additional District Munsif Court, Bhavani, dated 12.02.2010, in I.A.No.262 of 2009 in O.S.NO.67 of 2008.

2.The case of the revision petitioner is that he is the defendant in the suit and the said suit in O.S.No.67 of 2008 for Mandatory Injunction to execute a rectification deed in respect of the schedule of property in the revision petitioner's deed, by mutating the new Kaalai Number 316/2, 3, 4 with old Kaalai No. 425/1 in the said deed, so as to effect a sale in favour of the respondent.

3.When the suit stood posted for further proceeding on 04.09.2008, the revision petitioner/defendant was not in a position to appear before the Trial Court. He was called absent and set Ex-parte. The absence of the revision petitioner on that day was neither willful nor wanton. His absence was because of his serious illness of Jaundice coupled with other health ailments. Thereupon he filed an application to set aside the Ex-parte Decree dated 04.09.2008, however since the application was not made in time, an Interlocutory Application under Section 5 of the Limitation Act in I.A.No:262 of 2009 was filed by the revision petitioner to condone the delay of 171 days caused in filing

the application to set aside Ex-parte Decree. Whereas, the learned trial Judge without appreciation of the bonofide reasons behind the delay caused, the revision petitioner's application in I.A.No.262 of 2009 came to be dismissed. The said order is impugned herein.

4.I heard M/s.P.Anil mathi, learned counsel appearing for the petitioner and Mr.V.Anandha Moorthy, learned counsel appearing for the respondent and perused the entire records.

5.The learned counsel for the petitioner would contend that non appearance of revision petitioner on 04.09.2008 was neither willful nor wanton, but the same was due to his serious illness of Jaundice coupled with other health ailments. Immediately on recovery he filed an application under Section 5 of Limitation Act in I.A.No.262 of 2009 to condone the delay of 171 days caused in filing the application to set aside Ex-parte Decree. But without appreciation of the bonafide reasons behind the delay caused, mechanically the application came to be dismissed and the same is warranted interference by this Court.

6.The learned counsel for the petitioner made reliance upon the decisions of Hon'ble Apex Court in the matter of ***Sakuntala Devi Jain***

v. Kuntal Kumari reported in **AIR 1969 SC 575** and **State of West Bengal v. Administrator, Howrah Municipality**, wherein to ensure substantial justice, the Hon'ble Apex Court had condoned the delay caused in filing an application, by holding that the rules of limitation are not meant to destroy the rights of the parties.

7.Per Contra, the learned counsel for the respondent would contend that the reason put forth by the revision petitioner is untrue and baseless. The revision petitioner has purposely absented himself, so as to protract the suit endless.

8.On perusal of the typed set of papers it is seen that the reason stated by the revision petitioner is sickness. It is further noticed that the revision petitioner's application was rejected by the Learned Trial Judge that the reasons assigned by the revision petitioner is not satisfactory.

9.Whereas admittedly the Decree on hand is an Ex- parte one, at this juncture this Court likes to emphasis some of the decisions of the Hon'ble Apex Court and this Court holding as follows:

1. **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

2. 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.

3. It is needless to say that Section 5 application is required to be dealt in a pragmatic way, whereas not in a pedantic way in this regard it is useful to refer the following Judgments of our High Court in **2014 (2) CTC 649** in the case of **Nagarathinammal and others v. Madhammal**, wherein it is held that

“Through the other averments that the petitioners were misled by the assurance made by the Respondent / Plaintiff to withdraw the case and that the 4th Revision Petitioner had gone to outstations for the treatment of his ailing mother could be construed to be averments not

substantiated and insufficient for condoning the delay, the other reason, namely the suspension of the Advocate by the Bar Council of Tamil Nadu, which was not known to the Revision Petitioners previously, can be held to be a valid reason for seeking an order condoning delay in filing the Application to set aside the ex-parte Preliminary Decree. This Court is of the considered view that, when such is the contention of the Revision petitioner and such is the reason assigned by them, the interest of Justice requires passing of an Order giving the Revision Petitioners one more opportunity to contest the case and get a contested verdict and at the same time, direct the Revision Petitioners to compensate the Respondent/ Plaintiff by a cost of Rs.10,000/- ”.

4. In 2016 (5) CTC 117 in the case of **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".

10.It is noteworthy that the suit is for a Mandatory Injunction to execute a rectification deed in respect of schedule of the property in the revision petitioner's deed, by mutating the new Kaalai Number 316/2, 3, 4 with old Kaalai No 425/1 in the said deed, so as to effect a sale in favor of the respondent. Thus it is palpable that the respondent

has sought a relief of Mandatory Injunction against the revision petitioner, to execute a rectification deed.

11. In this context it is needless to say that admittedly the decree is an Ex-parte one which came to be passed without touching upon the merits. This Court feels that in a suit for Mandatory Injunction like the suit on hand and in the light of the facts involved in the case, besides considering the relief sought in the suit, substantial justice would be done, only if the matter after keen contest is decided upon merits.

12. In view of the above dictum laid down by the Hon'ble Apex Court and this Court that the rules of limitation are not meant to destroy the rights of the parties and in the light of the discussion made above, this Civil Revision Petition is liable to be allowed.

13. In the result:

(a) this Civil Revision Petition is allowed with a condition that the revision petitioner shall pay a cost of Rs. 5000/- to the respondent within a period of three weeks from the date of receipt of a copy of this order. The trial Court is directed to number the set aside application and to

pass orders within a period of two months, thereafter, by giving notice to either parties;

(b) on passing the order by the trial Court in the set aside petition, the trial Court is further directed to take up the suit on day to day basis, without giving any adjournments to either parties and dispose the same within a period of two months thereafter. Consequently, connected miscellaneous petition is closed.

21.02.2017

Note: Issue order copy on 10.08.2017

vs

Index: Yes
Internet: Yes

To

The X Assistant City Civil Court,
Chennai.

WEB COPY

M.V.MURALIDARAN,J.

VS



**CRP(NPD)No.4944 of 2011
and
M.P.No.1 of 2011**

WEB COPY

21.02.2017