

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2017

CORAM :

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

Civil Revision Petition (NPD) No.2143 of 2012
and
M.P.No.1 of 2012

S.Kandasamy (died)
1.Maragatham
2.Kavitha
3.Sethuraman

.. Petitioners

Vs.

Ayyappan (died)
1.Pusha
2.Minor Sree Vidhin
Rep. by her Guardian/Mother Pushpha
3.Jayamani
4.Pushpakala
5.Sasikala

.. Respondents

Revision filed under Article 227 of Constitution of India against the fair and decretal order in I.A.No.414 of 2008 in O.S.No.127 of 1987 on the file of Subordinate Judge, Udumalpet.

For Petitioners : Mr.N.Balakrishnan

For Respondents : Mr.S.Arjun (for R3 to R5)
For M/s.D.Muthuselvam

ORDER

This revision has been filed by the petitioners against the order dated 19.1.2011 made in I.A.No.414 of 2008 in O.S.No.127 of 1987 on the file of the Subordinate Judge, Udumalpet. The revision petitioners are the legal heirs of the third defendant.

2. The original plaintiff Iyyappan had filed the suit for partition of the suit property into two shares and to allot one such share to him. Resisting the suit, the deceased third defendant, who is the alleged purchaser of portion of the suit property filed the written statement. Likewise, the first defendant, who is the father of the plaintiff has filed the written statement.

3. In the affidavit in support of the petition being I.A.No.414 of 2008, it is stated that when the suit was listed for trial on 13.8.2003, due to ill-health the third defendant was not in a position to appear before the Court and ex parte decree was passed. It is further stated that their father filed petition to set aside the ex parte decree and the same was returned by the office for certain reasons. There was a delay of 1513 days in representing the petition. Therefore, the third defendant filed I.A.No.414 of 2008 to condone the delay of 1513 days

in representing the petition to set aside the ex parte decree. Pending I.A.No.414 of 2008, third defendant died leaving the petitioners herein as his heirs. It is also stated in the affidavit that the original plaintiff also passed away and his legal heirs were impleaded as parties in the suit.

4. Resisting I.A.No.414 of 2008, the respondents have not filed any counter.

5. The trial Court dismissed the petition by observing that the reasons stated in the petition seem to be unacceptable, no prudent man would keep quiet for such a long time without verifying his case and, therefore, on that score, the petition is liable to be dismissed.

6. On a perusal of the plaint, it is seen that pending suit, the third defendant purchased portion of the suit property from the defendants 1 and 4. It is alleged in the plaint that since the fourth defendant claiming right over a portion of the suit property, she has been impleaded as party defendant.

7. On perusal of the affidavit filed in support of the petition, I find that the petitioners have set out reason for the delay in

representing the petition. In the affidavit, it is stated that since the third defendant was suffering jaundice and was taking treatment at Palakad, Kerala, he could not contact his counsel and delay of 1513 days occurred in representing the petition. In the affidavit, it is further stated that the counsel who appeared for the third defendant was also died. After recovery from jaundice, the third defendant contacted the Advocate Clerk and filed the petition.

8. As stated above, to rebut the averments in the affidavit, the respondents have not filed counter. In its order, the trial Court held that the reason for the delay is not convincing. In my view, the said finding of the trial Court is unacceptable for the reason that there is no rebuttal evidence on the side of the respondents. The length of delay is not the criteria. Moreover, the delay is only in representing the petition to set aside the ex parte decree.

9. In *N. Balakrishnan v. M.Krishnamurthy*, reported in (1998) 7 SCC 123, the Hon'le Supreme Court held Section 5 of Limitation Act is to be liberally construed. In paragraph 12, 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

10. 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.

11. In the present case, as stated above, delay is only in re-presenting the petition to set aside the ex parte decree and the length of delay is not the criteria. In appropriate cases, even the long range of delay could be condoned. It is well settled that 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.

12. This Court finds that sufficient cause has been made out for condonation of delay of 1513 days in re-presenting the petition to set aside the ex parte decree and the trial Court has not exercised the discretion properly. The reasoning given by the trial Court in dismissing the petition is not convincing.

13. 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, if 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. In this case, as stated above, I am convincing the reason assigned for the delay.

14. Having regard to the facts and circumstances of the case, nature of the suit and the respondents have failed to produce any rebuttal evidence to disprove the allegations set out in the affidavit seeking to condone the delay in representing, in my considered view, the delay of 1513 days in re-presenting the application to set aside the ex parte decree has to be condoned, however, on costs.

15. In the result: सत्यमेव जयते

(a) the Civil Revision Petition is allowed by setting aside the order passed in I.A.No.414 of 2008 in O.S.No.127 of 1987, dated 19.1.2011, on the file of the Subordinate Judge, Udumalpet, on condition that the petitioners pay a sum of Rs.5,000/- (Rupees Five Thousand) as costs to the respondents within a period of three weeks

from the date of receipt of a copy of this order;

(b) the learned Subordinate Judge, Udumalpet is hereby directed to number the application to set aside the ex parte decree filed under Or.9, Rule 13 C.P.C. and dispose of the same within a period of two months thereafter.

(c) Consequently, M.P.No.1 of 2012 is closed.

10.01.2017

Note: Issue order copy on 20.03.2018

vs

Index : Yes/No

Internet : Yes/No

To

The Subordinate Judge,
Udumalpet.



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M.V.MURALIDARAN,J.

VS



C.R.P.(NPD) No,2143 of 2012
and
M.P.No.1 of 2012

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