

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.2319 of 2013
and
M.P.No.1 of 2013**

N.Subramani

.. Petitioner

Vs.

1.Saroja

Nanje Gowdu (died)

2.Krishnappa

3.Venkatesh

4.N.Ramachandran

5.V.Rajagopal Reddy

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and final order passed in I.A.No.438 of 2010 in O.S.No.76 of 2005, on the file of the Sub-Court at Hosur, dated 11.01.2013.

For Petitioner : Mr.R.Jayaprakash

For Respondents : Mr.V.Nicholas (for R1)
Notice not ready (for R3 & R4)
No Appearance (for R2)

ORDER

The case of the revision petitioner is that he is the 4th defendant in the suit in O.S.No.76 of 2005, on the file of the Sub-Court, Hosur. The said partition suit came to be filed by the revision petitioner's sister namely Saroja as against their father namely Nanje Gowdu and other brothers praying for partition and separate possession claiming 1/5th share over the suit properties. The 2nd respondent is the father and the 3rd and 4th respondents are the brothers of the revision petitioner respectively. The 5th and 6th respondents are purchasers of some portion of suit schedule property. Since the defendants 1 to 4 belong to the same family, they commonly engaged a Counsel on their behalf to conduct the case. In pursuance of the above arrangement, the revision petitioner herein being the 4th defendant has signed Vakalat and handed over the same to her father/1st defendant. Therefore she was under a bonafide belief that the suit will be duly contested/ conducted by her father Nanje Gowdu. However, misfortunately the revision petitioner's father because of his old age failed to conduct their case. Thereupon a preliminary decree came to be passed ex-parte dated 10.01.2008 in the above suit and in the meanwhile the revision petitioner's father died on 19.08.2008. While so to the shock of the revision petitioner received a notice in

I.A.No.605 of 2009 filed praying to pass a final decree in consonance with that of the preliminary decree. Only on receipt of the said notice, the revision petitioner came to know that he suffers a decree of ex-parte. Immediately the revision petitioner on 10.01.2008 filed a petition under Order 9 Rule 13 to set aside the ex-parte preliminary decree. The said application was supported by an application in I.A.No.438 of 2010 under Section 5 of Limitation Act praying to condone the delay of 722 days in filing the set aside application. However, the learned trial Judge without appreciation of the facts and law, has erroneously dismissed the said I.A.No.438 of 2010. The said order is impugned herein.

2.I heard Mr.R.Jayaprakash, learned counsel appearing for the petitioner and Mr.V.Nicholas, learned counsel appearing for the 1st respondent and records are perused.

3.The learned counsel for the petitioner submitted that since the defendants 1 to 4 belong to the same family, they commonly engaged a Counsel on their behalf. In pursuance of the above arrangement, the revision petitioner herein being the 4th defendant has signed Vakalat and handed over the same to her father. Therefore she was

under a bonafide belief that the suit will be duly conducted by her father Nanje Gowdu. However, the revision petitioner's father failed to do so. Only on receipt of the notice in the final decree proceedings, the revision petitioner received the knowledge of the ex-parte decree passed against her. Furthermore an ex-parte decree in respect of the suit schedule properties containing as many as 20 items, would adversely affect all the interested parties. Therefore the order of the Trial Court made in I.A.No.438 of 2010 is liable to be set aside. Further only a full fledged trial would enable the Court to arrive at a just and correct decision.

4.The learned counsel for the respondent submitted that the above application to condone the delay was rightly rejected by the trial Court, since there was no satisfactory explanation given by the revision petitioner relating to the delay caused in filing the set aside application.

5.On perusal of the impugned order by this Court, it is noticeable that the learned trial Judge has dismissed the application on two grounds that the revision petitioner and his brother have arranged a partition deed during the pendency of the suit with an intention to defeat the preliminary decree passed by the Learned Trial

Judge. Further the Learned Trial Judge held that such intention of the parties appears to be suspicious and hence the present application cannot be entertained.

6.It is needless to say that the above view of the trial Court while sitting upon a petition under section 5 of Limitation Act is unwarranted. In fact the trial Judge certainly ought not to have touched upon the merits of the subject matter. It is suffice and settled law that the Court should always look into the reasons behind the delay and the Courts shall not look into the merits even before the conclusion of the trial.

7.In the case on hand, it is found that the revision petitioner's father/ the 1st defendant in the suit is no more and further the 4th respondent/ the 3rd defendant's whereabouts is untraceable and was not seen for the past 2½ years. Further the typed set of papers discloses that the some of the family members of the revision petitioner's family contends that a portion of suit schedule properties was been sold, such that relinquishing their respective share over the suit schedule properties. Moreover it is noticed that the suit schedule properties contains about 20 items of properties, hence this Court in

the interest of substantial justice feels that an ex-parte decree passed without touching upon and deciding the merits, may adversely affect the rights and liabilities of other parties therein.

8.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 this 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/- ”.

9.In **2016 (5) CTC 117** reported in **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 take part 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 are not a material/ relevant factor”.

10.The Hon’ble Supreme Court in a recent Judgment in Civil Appeal No.(S).3777 of 2015 it is held that there was a delay of 882 days delay in preferring an appeal suit and the said petition was dismissed by this Court by order dated 05.06.2013 in CRP(NPD)No.266 of 2011 and an appeal was filed before the Hon’ble Apex Court in Civil Appeal No.(S).3777 of 2015 in which the Hon’ble Apex Court has passed an order as follows:

“Leave granted.

This appeal arises out of an order dated 5th June, 2013, passed by the High Court of Judicature at Madras whereby CRP(NPD)No.266 of 2011 filed by the appellant has been dismissed and the order passed by the first appellate court

declining condonation of 882 days in the filing of the appeal by the appellant affirmed.

We have heard learned counsel for the parties at some length. We are satisfied that in the facts and circumstances of the case, the first appellate court could and indeed ought to have condoned the delay in the filing of the appeal. Since, however, the delay is fairly inordinate, we are inclined to direct condonation subject to payment of costs.

We accordingly allow this appeal, set aside the orders passed by the High Court and that passed by the first appellate Court with the direction that upon deposit of a sum of Rs.50,000/- (Rupees fifty thousand) towards costs before the first appellate court within six weeks from today, the delay in the filing of the appeal shall stand condoned. The first appellate court shall hear and dispose of the first appeal filed by the appellant expeditiously and as far as possible within a period of six months from the date the costs are deposited by the appellant. The amount of costs shall be paid to the respondent.

The appeal is allowed in the terms and to the extent indicated above.”

The Hon'ble Apex Court has allowed the Civil Appeal No.(S).3777 of 2015 on condition that the appellant shall pay a sum of Rs.50,000/-

as cost to the respondent in the said appeal.

11.It is my absolute view that the suit like partition should not be passed decree exparte and fair opportunities should be given to all the parties. The recent Judgment passed by the Hon'ble Apex Court in Civil No.(S).3777 of 2015 is squarely applicable in the petitioner's case and hence to give one more opportunity to this petitioner/4th defendant, I am inclined to allow this civil revision petition, but the petitioner should compensate the respondents by way of costs.

12.In the result:

(a) this Civil Revision Petition is allowed by confirming the order passed in I.A.No.438 of 2010 in O.S.No.76 of 2005, dated 11.01.2013 on the file of the Sub-Court at Hosur, on condition that the petitioner shall pay a sum of Rs.30,000/- towards cost to the respondents within a period of four weeks from the date of receipt of a copy of this order;

b) the trial Court is directed to number the set aside application and dispose of the same within one month, by giving notice to both sides;

(c) after passing the order, the trial Court is directed to take up the suit without giving any adjournment to either parties and to dispose the same within a period of two months. Both the parties are hereby directed to co-operate for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

11.01.2017

Note:Issue order copy on 24.05.2017

Internet:Yes

Index:Yes

vs

To

The Subordinate Court,
Hosur.

M.V.MURALIDARAN, J.

vs

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and
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