

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.02.2017

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P.(NPD).No.3554 of 2016

1.P.Samiappa Gounder

2.Duraisamy

3.Chinnasamy Gounder

4.C.Viswanathan

..Petitioners/Petitioners/Respondents/
Defendants 1, 2, 3 & 5

-Vs.-

P.Velusamy

..Respondent/Respondent/Petitioner/Plaintiff

Prayer:

Civil Revision Petition is filed under Section 115 of Code of Civil Procedure against the fair and decreetal order passed in I.A.No.1324 of 2015 in I.A.No.377 of 2013 in O.S.No.102 of 2009, dated 12.07.2016 on the file of the learned District Munsif Court, Kangayam.

For Petitioners : Mr.M.Devaraj

ORDER

The present Civil Revision Petition has been filed challenging the fair and decreetal order dated 12.07.2016 made in I.A.No.1324 of 2015 in I.A.No.377 of 2013 in O.S.No.102 of 2009 on the file of the learned District Munsif Court, Kangayam.

2.The learned counsel for the revision petitioners would submit that the respondent herein as plaintiff has filed the suit for partition and separate possession of $\frac{1}{2}$ share in the suit properties. The defendants therein filed written statement and contested the suit. The Trial Court after considering the oral and documentary evidences passed an exparte preliminary decree on 08.10.2012. Thereafter, the final decree application was filed in which the defendants received the summons on 18.09.2013. However, only on 03.08.2015, the defendants filed an application in I.A.No.1324/2015 to set aside the exparte preliminary decree along with the application in I.A.No.1323/2015 for condonation of delay of 1000 days. However, both the applications were dismissed. As against the dismissal of the application filed under Section 5 of the Limitation Act, the defendants preferred a revision in C.R.P.No.3592/2016. But the said revision was dismissed by this Court on 23.11.2016 by confirming

the fair and decreetal order dated 12.07.2016. Now the learned counsel for the revision petitioner would submit that though an advocate commissioner was appointed and he had filed his report, those factum were not considered by the Trial Court and hence, he prayed for setting aside the order passed by the Trial court.

3.At the time of admission, the argument of the learned counsel appearing on behalf of the revision petitioners was heard in length.

4.Admittedly, a perusal of the records would show that the suit properties were originally owned by one Palanisamy Gounder, who is none other than the father of the plaintiff, first defendant and third defendant. The plaintiff got the 1/4 share in the property by way of a Will and another 1/4 share by way of inheritance. Hence, the plaintiff claims right over 2/4 share of the suit property. After filing of the written statement, the suit was decreed and the preliminary decree was passed on 08.10.2012. Thereafter, the respondent/plaintiff filed an application in I.A.No.377/2013 for passing of the final decree. Pursuant to the same, an Advocate Commissioner was appointed and he had also filed his report. Only thereafter, the application for condonation of delay of 1000 days in filing the petition to set aside the exparte

decree and the application to set aside the exparte decree came to be filed. But, as already stated, the dismissal of the application for condonation of delay was confirmed by this Court in C.R.P.No.3592/2016 on 23.11.2016. It is pertinent to note that the plaintiff, first defendant and third defendant are brothers. The second defendant is the son of the first defendant. The 4th and 5th defendants are the sons of the 3rd defendant. In such circumstances, they would have been very well aware of all the facts. However, they had kept quiet all along and had now come forward with the application to set aside the exparte order after an inordinate delay of 1000 days.

5.As per the dictum of the Hon'ble Apex Court reported in **AIR 1998 SC 3222 (N.Balakrishnan v. M.Krishnamurthy)**, it was specifically held that length of delay is immaterial, but the acceptability of the explanation is the only criterion. It is appropriate to incorporate para-9 to 11 of the said decision:

"9. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the

superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

10.The reason for such a different stance is thus:The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11.Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. ""

In the instant case, no such acceptable reason has been given.

6.At this juncture, it would also be appropriate to consider the dictum laid down in **2011 (4) SCC 363 (Lanka Venkateswarlu (Dead), rep. by**

legal heirs) Vs. State of Andhra Pradesh and others), wherein it was held that while considering the applications for condonation of delay under [Section 5](#) of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. It would be appropriate to incorporate paragraphs 19, 23, 28 and 29 of the said decision:

“19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. This principle is well settled and has been set out succinctly in Collector, Land Acquisition v. Katiji (1987) 2 SCC 107.

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23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in Balwant Singh v. Jagdish Singh (2010) 8 SCC 685 as follows:- (SCC p.696, paras 25-26)

“25. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within

the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise (sic a lis). These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly"

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28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as

"liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers."

7. Considering the facts of the present case in the light of the above decision, no reason has been assigned as to why the revision petitioners had not filed the petition to set aside the exparte decree, within the stipulated time.

Further, no reason has been assigned for condoning the delay. Applying the dictum laid down in ***Lanka Venkateswarlu*** case, since it is a suit for partition between the brothers, the respondent/plaintiff is entitled to $\frac{1}{2}$ share in the property. So, the first and third defendants are each entitled to $\frac{1}{4}$ share and in such event, no prejudice will be caused to the petitioners. Only with a view to drag on the proceedings, the present application has been filed after 1000 days. Hence, I do not find any reason to interfere with the order passed by the Trial Court in I.A.No.1324 of 2015 in I.A.No.377 of 2013 in O.S.No.102 of 2009 and the same is hereby confirmed. In fine, the Civil Revision Petition is dismissed as devoid of merits. No costs.

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