

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.01.2017

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(NPD).No.4098 of 2016
& C.M.P.No.20726 of 2016

V.N.Sekar

.. Petitioner

Vs.

S.Selvakumar

.. Respondent

Prayer:- Civil Revision Petition is filed under Section 115 of C.P.C., against the fair and decreetal order dated 23.01.2015 in I.A.No.534 of 2013 in O.S.No.406 of 2006 on the file of the I Additional Sub-Court, Erode.

For Petitioner : Mr.V.Balamurugane

For Respondent : Mr.V.S.Kesavan

ORDER

This civil revision arises out of the fair and decreetal order dated 23.01.2015 in I.A.No.534 of 2013 in O.S.No.406 of 2006 on the file of the I Additional Sub-Court, Erode.

2.The respondent as a plaintiff filed a suit in O.S.No.406 of 2006 for recovery of money due. The petitioner/defendant has filed a written statement and contested the same. Due to ill health, the petitioner was unable to appear before the trial Court and hence, exparte decree was passed on 05.09.2008. Therefore, the petitioner/defendant has filed an application in I.A.No.534 of 2013 for condonation of delay of 1158 days in setting aside the exparte decree, which was dismissed on 23.01.2015, against which, the present revision is preferred.

3.Learned counsel for the petitioner would submit that the petitioner was unable to appear before the trial Court, due to his ill health. That factum was not considered by the trial Court. Hence, he prays for setting aside the fair and decreetal order passed by the trial Court.

4.Resisting the same, learned counsel for the respondent would submit that the reason assigned by the petitioner is not sufficient to condone the delay. After passing of exparte decree, the respondent/plaintiff has filed an execution petition and the petitioner was also appeared in the year 2011. But he has not filed

the petition to set aside the exparte decree immediately. It clearly shows that the main aim of the petitioner is to drag on the proceedings. The trial Court considered all the aspects in proper perspective and also culled out cross-examination of P.W.1 and came to the correct conclusion. Therefore, he prays for dismissal of the revision.

5.Heard both sides and perused the typed set of papers.

6.The respondent as a plaintiff filed a suit for recovery of amount due of Rs.2,22,114/- with subsequent interest on the principal amount of Rs.1,64,529/- at the rate of 12% per annum from the date of suit till date of actual payment. The petitioner/defendant has filed the written statement and contested the suit. When the suit was posted for trial and cross-examination, neither the petitioner nor his counsel appeared. Hence, the petitioner was set exparte on 05.09.2008 and exparte decree was passed on 05.09.2008. But the petitioner has filed the application to set aside the exparte decree along with the petition to condone the delay of 1158 days in filing the petition to set aside the exparte decree, on October 2011 that too after filing of the execution petition by the respondent.

7.It is pertinent to note that the petitioner himself was examined as P.W.1 and in his examination, he has fairly conceded that he was not appeared in the suit proceedings and that exparte decree was passed on 05.09.2008. He also stated that in E.P.No.76 of 2011, he appeared through his counsel and contested the same. It is also stated that his sister and mother had filed the application under Section 47 of Civil Procedure Code stating that they are claiming right over the property, which is attached.

8.As per the dictum of the Apex Court reported in **AIR 1998 SC 3222 (N.Balakrishnan v. M.Krishnamurthy)**, it was specifically held that if the length of delay is immaterial, sufficient cause for condonation of delay has to be explained. It is appropriate to extract para-9 to 11, which read as follows:

"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. "

9. In the judgment of the Apex Court reported in **2011 (4) SCC 363 (Lanka Venkateswarlu (Dead), rep. by legal heirs) Vs. State of Andhra Pradesh and others**), in para-19, 23, 28 and 29, it was held as follows:

"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."

It is well settled dictum of the Apex Court that for condonation of delay, the discretion has to be exercised in a systematic manner informed by reason and justice must be done to both parties. Further, the condonation of delay is only a discretion that too judicial discretion and while exercising the judicial discretion, the Court should consider the loss caused to the opposite party.

10. Considering the aforesaid circumstances of the case, I am of the view that the petitioner kept quite all along and after filing of execution petition only, he has come forward with the application with the delay of 1158 days in filing the petition to set aside the exparte decree. So it is clear that the petitioner has malafide intention to drag on the proceedings and also to prevent

the decree holder to enjoy the fruits of the decree. Furthermore, even though the petitioner appeared in other cases, he did not appear in the suit proceedings. He had also instigated his mother and sister to file the application under Section 47 of CPC that too after the property has been attached. Moreover, the reason assigned by the petitioner in para-2 of the affidavit filed in support of the application is also not sufficient to condone the delay. Therefore, applying the dictum laid down in Balakrishnan and Lanka Venkateshwarlu cases, I am of the view that the delay of 1158 days has not been properly explained by the petitioner and hence, I am not inclined to condone the delay. So I do not find any illegality or irregularity in the fair and decreetal order passed by the trial Court and therefore, it is hereby confirmed. Consequently, the Civil Revision Petition stands dismissed.

11.In the result, this Civil Revision Petition shall stand dismissed by confirming the fair and decreetal order passed by the trial Court in I.A.No.534 of 2013 in O.S.No.406 of 2006.

12.At request of the learned counsel for the respondent/plaintiff, the Executing Court is directed to dispose of

E.P.No.76 of 2011 within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

12.01.2017

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To

I Additional Sub-Court, Erode.

R.MALA,J.

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