

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.2802 of 2012
and M.P.No.1 of 2012

1.C.Vaiyapuri
2.Perumayee

.. Petitioners

Vs.

1.Kandayee
2.Anjalam
3.C.Thoppulan

.. Respondents

Revision filed under Article 227 of Constitution of India against the fair and decretal order in I.A.No.44 of 2012 in O.S.No.217 of 2009 on the file of Second Additional Subordinate Judge, Salem.

For Petitioners : Mr.V.Sekar

For Respondents : Mr.A.Tamilvanan (for R1 and R2)

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ORDER

This revision is directed against the order of the II Additional Subordinate Judge, Salem dated 25.04.2012 passed in I.A.No.44 of 2012 in O.S.No.217 of 2009, dismissing the petition filed under

Section 5 of Limitation Act to condone the delay of 772 days in filing petition to set aside the ex parte decree. The petitioners herein are the defendants 2 and 3 in the suit.

2. The respondents 1 and 2 herein are the plaintiffs and they have filed the suit for partition of the suit property into five equal shares and allot two such shares to them.

3. The petitioners have filed I.A.No.44 of 2012 seeking to condone the delay of 772 days in filing petition to set aside the exparte decree dated 16.11.2009 stating that immediately after the receipt of suit summons, they did not know that they have to engage advocate and file vakalat. Due to non-filing of vakalat in the suit, they were set exparte on 12.10.2009 and 02.11.2009 respectively and exparte decree was passed in the suit on 16.11.2009. It is averred that the respondents 1 and 2 have filed petition being I.A.No.583 of 2010 for passing final decree. The petition filed by the second petitioner to set aside the exparte order was dismissed for default. When the Advocate Commissioner visited the suit property only, they came to know that their advocate has not attended the case properly. Thereafter, they have engaged a new counsel and filed petition to set aside the exparte

decree along with delay condonation petition. The delay is neither wilful nor wanton.

4. Resisting the petition, the first respondent filed counter stating that the petitioners have engaged advocate and participated in the proceedings. It is stated that apart from this suit, two suits were pending before the District Munsif Court, Salem and the petitioners have also filed petition for transfer of those two suits to try along with the suit pending before the Sub Court, Salem. The present application has been filed only to protract the proceedings and prays for dismissal of the same.

5. Upon consideration of the rival submissions, the trial Court dismissed the petition holding that the petitioners did not take steps to restore the petition which was dismissed earlier and the ignorance pleaded by the petitioners was false and further delay of 772 days has not been properly explained.

6. Being aggrieved by the order of the trial Court, the petitioners have filed this revision.

7. I heard Mr.V.Sekar, learned counsel for the petitioners and Mr.A.Tamilvanan, learned counsel appearing for the respondents 1 and 2. I have also perused the materials available on record.

8. Learned counsel for the petitioners submits that the trial Court erred in dismissing the petition as a whole on the ground that the second petitioner has already approached the Court. He further submits that the trial Court erred in holding that the petitioners are lethargic in conducting the case and that the trial Court ought to have taken a liberal approach.

9. Learned counsel for the respondents 1 and 2 submitted that the order of the trial Court is reasoned one and need not be disturbed.

10. The point arise for consideration is whether the trial Court was right in dismissing the petition to condone the delay of 772 days in filing petition to set aside the exparte decree.

11. According to the petitioners, since there was no proper guidance for them, they could not able to enter appearance/file vakalat in the suit in an appropriate time and therefore, they called

absent and set *exparte*. Only when the Advocate Commissioner inspected the suit property, they came to know about the *exparte* decree passed in the suit. The delay of 772 days in filing petition to set aside the *exparte* decree is neither wilful nor wanton.

12. In catena of decisions, the Apex Court held that while considering the scope of expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, the said expression "sufficient cause" is to receive liberal construction so as to advance substantial justice.

12. It is settled law that there is no presumption that delay in approaching the Court always deliberate. Generally delays in preferring application to condone the delay in filing the application to restore the suit and/or to set aside the *exparte* decree 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.

13. In the present case, in my considered view, the respondents 1 and 2 have not shown any gross negligence or deliberate inaction on the part of the petitioners. Considering the nature of the suit and the relationship of the parties and also in the interest of justice, the delay

has to be condoned. No prejudice would be caused to the respondents if the delay is condoned. Therefore, the delay of 772 days in filing petition to set aside the exparte decree is liable to be allowed, however, subject to certain terms.

14. In the result, the order of the trial Court in I.A.No.44 of 2012 in O.S.No.217 of 2009, dated 25.04.2012 is set aside and the Civil Revision Petition is allowed on condition that the petitioners shall pay a sum of Rs.3000/- (Rupees Three Thousand only) to the respondents 1 and 2 within a period of two weeks from the date of receipt of a copy of this order. Consequently, M.P.No.1 of 2012 is closed.

Note: Issue order copy on 08.03.2018

10.01.2017

vs

Index : Yes/No
Internet : Yes/No

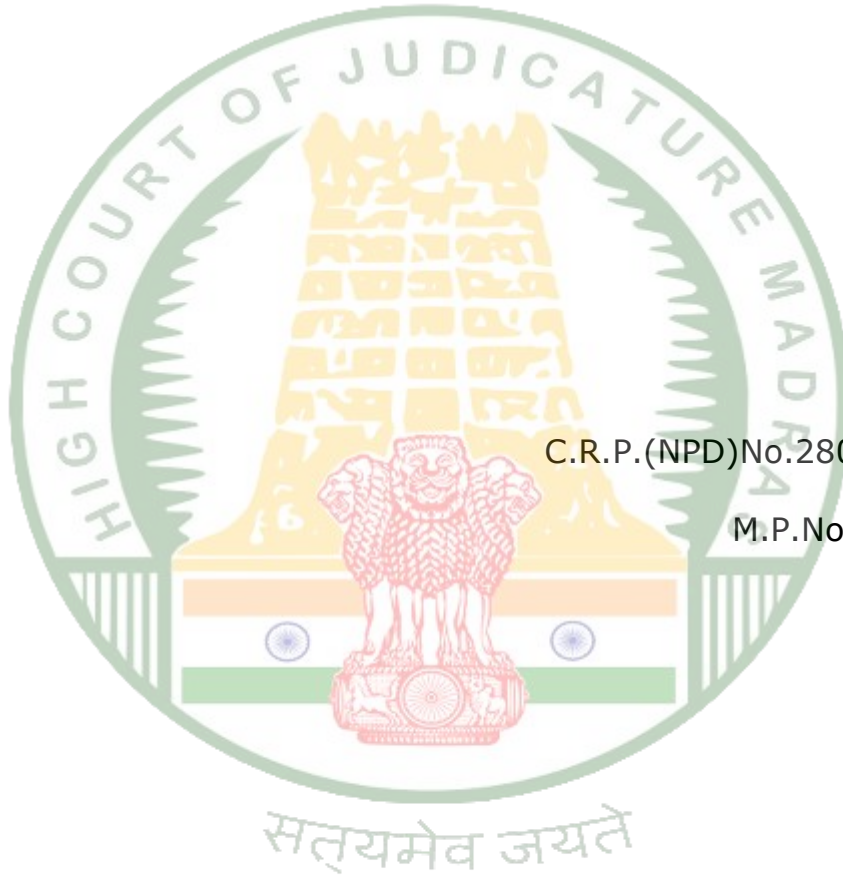
To

The II Additional Subordinate Judge,
Salem.

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M.V.MURALIDARAN,J.

VS



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