

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2017

CORAM

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

C.R.P. (NPD) No.2916 of 2012

Moorthy

.. Petitioner

VS

Elumalai

.. Respondent

Revision filed under Article 227 of Constitution of India against the order passed in I.A.No.575 of 2011 in O.S.No.168 of 2008 dated 8.3.2012 on the file of the Principal District Munsif, Ulundurpet.

For Petitioner : Mr.Pa.Sudesh Kumar

For Respondent : Mr.V.Raghavachari

* * * * *

ORDER

This revision has been filed by the petitioner challenging the order passed in I.A.No.575 of 2011 in O.S.No.168 of 2008, dated 08.03.2012 on the file of the Principal District Munsif Court, Ulundurpet. The petitioner is the defendant in the suit.

2. The plaintiff has filed the suit for recovery of a sum of

Rs.56,137.50 with interest and for costs. The suit was decreed ex parte on 11.12.2008.

3. The petitioner herein has filed I.A.No.575 of 2011 to condone the delay of 821 days in filing petition to set aside the ex parte decree. In the affidavit filed in support of the petition, it is stated that when the suit was posted on 01.12.2008 for filing written statement, the petitioner was suffering from jaundice and he was not in a position to meet his advocate to give instructions to file the written statement. It is also stated that due to family circumstances, he went to Bangalore for coolie job and one month back only he returned to Tamil Nadu. The petitioner has stated that he received notice in the Execution Petition for the appearance on 30.03.2011. Immediately, when the petitioner contacted the advocate, he was informed that due to non-filing of the written statement, the suit was decreed on 11.12.2008 and the respondent has filed Execution Petition for arrest of the petitioner in realising the decree amount. According to the petitioner, he filed the petition to set aside the ex parte decree along with petition to condone the delay of 821 days in filing the petition to set aside the ex parte decree. The petitioner has stated that he has good case on merits. Hence, prayed for condonation of

delay of 821 days in filing the petition to set aside the ex parte decree.

4. Resisting the petition, the respondent filed the counter stating that on 01.12.2008, the petitioner was very well available in the village and the petitioner has not filed any document to prove that he was suffering from jaundice and was taken treatment. The petitioner has not given the details when he left for Bangalore and where he was stayed at Bangalore. The reasons given by the petitioner for the delay are not correct. Hence, prayed for dismissal of the petition.

5. Before the trial Court, the petitioner examined himself as P.W.1 and no document has been marked. On the side of the respondent, nobody was examined and Ex.R1 alone marked.

6. Upon considering the oral and documentary evidence, the trial Court dismissed the petition. Aggrieved by the same, the petitioner has filed the present revision.

7. I heard Mr.Pa.Sudesh Kumar, learned counsel for the petitioner and Mr.V.Raghavachari, learned counsel for the respondent

and perused the entire records.

8. The learned counsel for the petitioner submitted that the trial Court erred in holding that the petitioner has not proved his ill-health by sufficient document without looking into the fact that the petitioner had taken some country treatment, which cannot be proved with documents. He submitted that the trial Court erred in holding that the petitioner has not approached his counsel frequently to know about his case, despite his ill-health. He argued that the trial Court erred in holding that the reasons assigned by the petitioner are not sufficient and not proved.

9. The learned counsel for the respondent submitted that the trial Court has rightly dismissed the petition to condone the delay of 821 days in filing the petition to set aside the exparte decree. He submitted that the petitioner has not proved each and every day delay and the reasons given by the petitioner are concocted for filing the petition.

10. It appears that while dismissing the petition, the trial Court observed that the petitioner has not filed any document to prove

that he was suffering from jaundice and had taken country treatment. The trial Court has also held that the petitioner has failed to produce any document to show that he was working as coolie in Bangalore. In its order, the trial Court observed that earlier the petitioner has filed petitions on 12.01.2009 and 18.12.2008 to set aside the ex parte order and the same were omitted to be mentioned in the present petition. Further, the trial Court held that the petitioner has failed to contact his advocate to know about the state of the case and he has not taken care to proceed with the suit.

11. Admittedly, the petitioner has not produced any documents to show his ill-health. But in his evidence as P.W.1, the petitioner has categorically stated that he was suffering from jaundice and he had taken country treatment. Generally, in the case of country treatment, it is difficult to prove the same with documents. No rebuttal evidence was produced by the respondent to show that the petitioner was hale and healthy and he was very well available in the village. Therefore, the trial Court was not right in holding that the petitioner has not proved his ill-health by documentary evidence.

12. The next reason stated by the petitioner for the delay is

he had gone to Bangalore for coolie job for his livelihood. To disprove the same, the respondent has not filed any document. In his evidence, the petitioner has clearly stated that for his family circumstances, he went to Bangalore for coolie job. In the facts and circumstances of the case on hand and in the absence of any rebuttal evidence, it is to be presumed that the petitioner has established his case. Therefore, I find that the trial Court erred in dismissing the petition, which requires pragmatic and liberal approach.

13. In *Pavayammal and another v. S.N.Chockalingam and others*, reported in 2009 (5) CTC 414, it was held that liberal view has to be taken while dealing with the application for condonation of delay.

14. As stated *supra*, the respondent has filed the suit for recovery of money. When the suit is for recovery of money, necessarily the defendant in the suit has to be heard by giving him an opportunity to defend the suit.

15. Holding that Section 5 of Limitation Act is to be liberally construed, in *N. Balakrishnan v. M.Krishnamurthy*, reported in (1998) 7 SCC 123, 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"

16. Generally delays in preferring application to condone the delay in filing the application to set aside the ex parte 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.

17. In the present case, as noted above, delay in filing the application to set aside the ex parte decree is 821 days. Length of delay is not the criteria. In appropriate cases, even the long range of delay could be condoned. 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.

18. As stated supra, immediately after receipt of notice in the Execution Petition, the petitioner has filed application under Section 5 of the Limitation Act to condone the delay of 821 days in filing the

application to set aside the ex parte decree. This Court finds that sufficient cause has been made out for condonation of delay and the trial Court has not exercised the discretion properly.

19. Having regard to the facts and circumstances of the case and as stated supra, the respondent has failed to produce any rebuttal evidence to disprove the version of the petitioner in an application seeking to condone the delay in filing the set aside application and also reasoning given by the trial Court in dismissing the application is not convincing, in my considered view, the delay of 821 days in filing the application to set aside the ex parte decree has to be condoned.

20. In the result:

(a) The Civil Revision Petition is allowed by setting aside the order passed in I.A.No.575 of 2011 in O.S.No.168 of 2008 dated 08.03.2012, on the file of the learned Principal District Munsif, Ulundurpet;

(b) The learned Principal District Munsif, Ulundurpet is hereby directed to number the application to set aside the exparte decree filed under Order 9, Rule 13 C.P.C. and dispose of the

same within a period of three weeks by giving notice
to both sides. No costs.

23.01.2017

Note: Issue order copy on 09.05.2018
vs

Index : Yes
Internet : Yes

To

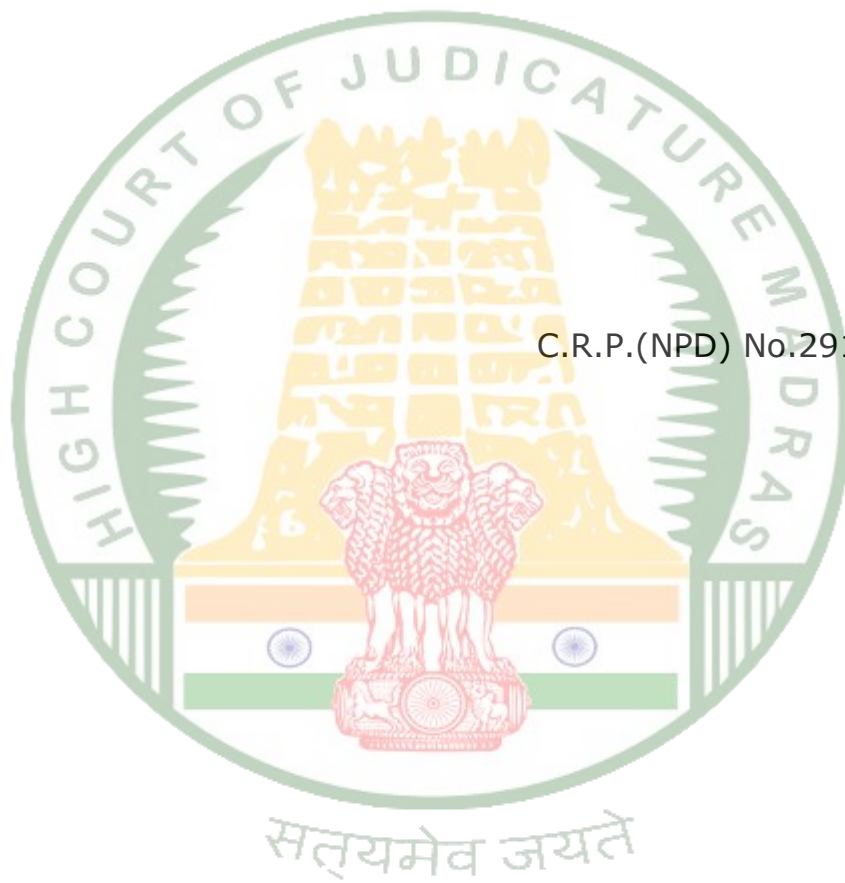
The Principal District Munsif,
Ulundurpet.



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M.V.MURALIDARAN, J.

VS



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