

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2017

CORAM

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

C.R.P.(NPD) No.3435 of 2013

and

M.P.No.1 of 2013

J.Prathab Singh

.. Petitioner

vs

National Missionary Society of India,
rep. By its General Secretary
Rev.Samuel Prabhakar,
126, Peters Road,
Royapettah, Madras – 14.

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India against the Judgment and decree passed in I.A.No.131 of 2012 in O.S.No.158 of 2008, dated 31.10.2012 on the file of Subordinate Judge, Thirupathur.

For Petitioner

: Mr.V.Raghavachari

For Respondent

: Mr.M.K.Kabir
Senior Counsel
for M/s.T.Jayaraman

* * * * *

ORDER

This revision is directed against the order of the Subordinate Judge, Thirupathur in I.A.No.131 of 2012 in O.S.No.158 of 2008 dated 31.10.2012, dismissing the application filed by the petitioner-first defendant under Section 5 of the Limitation Act, to condone the delay of 683 days in filing the application to set aside the *ex parte* decree dated 09.07.2010. The petitioner is the first defendant and the respondent is the plaintiff in the suit. The petitioner/first defendant and the defendants 2 and 3 are brother and sisters.

2. The respondent/plaintiff has filed the suit against the defendants for delivery of possession of the suit properties and for damages alleging that defendants 1 to 3 and the fourth defendant are in illegal occupation of the suit properties.

3. The case of the petitioner/first defendant is that he has not received any summon in the suit and when he received notice in the Execution Petition, he came to know that an *ex parte* decree was passed in the suit on 09.07.2010. Immediately, he approached a lawyer and filed an application to set aside the *ex parte* decree along

with application in I.A.No.131 of 2012 to condone delay of 683 days in filing the application to set aside the *ex parte* decree pleading that the delay of 683 days in filing the application to set aside the *ex parte* decree is neither wilfull nor wanton. Hence, the petitioner prayed for condonation of the delay of 683 days in filing the application to set aside the *ex parte* decree.

4. Resisting the application, the respondent-plaintiff has filed a counter stating that the respondent has taken suit summon to the petitioner for the hearing on 18.06.2010. The suit summon was served on the petitioner well before the hearing date. Despite receipt of the suit summon, the petitioner has failed to appear before the Court and he was called absent and set *ex parte* on 18.06.2010. Thereafter, on 09.07.2010, the respondent was examined and *ex parte* decree was passed. The defendants 2 and 3 are sisters of the first defendant and they were residing jointly. Application to set aside *ex parte* decree has been filed by the first defendant alone. It is averred in the counter that the respondent has filed Execution Petition on 30.09.2011 and in the Execution Petition, the petitioner has entered appearance through his lawyer and the matter got adjourned till 22.06.2012 for filing counter. Defendants 2 and 3 have also filed an application to set aside

the ex parte order in the Execution Petition and the same was allowed. Since the petitioner has not filed the counter in the Execution Petition, on 22.06.2012 the Court ordered delivery of possession. The allegation that the petitioner had knowledge of the decree only when he received the notice in the Execution Petition is totally false. There is no proper explanation for the delay and prayed for dismissal of the application.

5. Upon consideration of the submissions of both sides, the trial Court dismissed the application. Aggrieved by the order of the trial Court, the petitioner has filed the present Civil Revision Petition.

6. I heard Mr.V.Raghavachari, learned counsel for the petitioner and Mr.M.K.Kabir, learned Senior Counsel for Mr.T.Jayaraman, for the respondent and perused the entire records.

7. Learned counsel for the petitioner submitted that the trial Court ought to have appreciated that the petitioner had not been arrayed as a party at the first instance and the cause title had been amended later on and the same is evident from I.A.No.227 of 2009 to amend the cause title of the parties. He further submitted that the trial Court failed to consider the evidence of the petitioner recorded in

I.A.No.131 of 2012 and that the trial Court without giving any reason, whatsoever, had dismissed the application by a cryptic and non-speaking order.

8. Learned Senior Counsel for the respondent submitted that after the receipt of the suit summon, the petitioner kept quite and allowed the suit to be decreed *ex parte*. Only during execution proceedings, the petitioner has filed the application to set aside the *ex parte* decree with delay condonation application. Learned Senior Counsel further submitted that in order to drag on the proceedings, the petitioner has filed the application to set aside the *ex parte* decree along with condonation of delay. He would submit that each and every day's delay has not been properly explained by the petitioner and that the trial Court has rightly dismissed the application.

9. On a perusal of the order, this Court finds that the trial Court has dismissed the application without assigning any reason. The order of the trial Court reads as follows:

"ORDER

This is the petition filed under section 5 of Limitation Act to condone the delay of 683 days in filing petition under Order 9 Rule 13 CPC.

The petition is dismissed."

10. On further perusal of the typed set of papers, this Court finds that the petitioner examined himself as P.W.1 in I.A.No.131 of 2012 and he was also cross-examined by the respondent. Nothing has been noted by the trial Court in its order. In his chief examination, P.W.1 has stated that he and his sisters are residing in the same house. He was working in Bangalore and he used to visit his native only once in a month. Only after receipt of last notice on 15.04.2012, he came to know about the suit.

11. The point arises for consideration in this revision is whether the trial Court was right in dismissing the application to condone the delay of 683 days delay in filing the set aside application.

12. The petitioner, in the affidavit filed in support of the application as well as in his evidence, stated that only after the receipt of notice in the Execution Petition, he came to know about the suit and thereafter, he filed the application to set aside the *ex parte* decree along with delay condonation application.

13. The objection raised by the respondent before the trial Court is that in order to protract the execution proceedings, the petitioner has filed the application to set aside the *ex parte* decree. Further, each and every day's delay has not been properly explained. According to respondent, the petitioner alone has filed the application and the other defendants have not filed the application. Therefore, the petition is not maintainable, as the other defendants were aware of the hearing date.

14. It is pertinent to note that in the present case, the respondent has failed to show the service of summon on the first defendant for the hearing on 18.06.2010. No oral evidence has been adduced on the side of the respondent. As noted earlier, the plaintiff has filed the suit for delivery of possession and for damages alleging that the defendants are in illegal possession of the suit properties.

15. When a suit is filed by the plaintiff for delivery of possession and for damages alleging that the defendant is in unlawful possession, necessarily, the defendant in the suit has to be heard by giving him an opportunity to defend. In this case, the plaintiff has filed the suit for

delivery of possession and for damages to the tune of Rs.1,08,000/- with future interest at the rate of 12%. On perusal of the copy of the plaint, this Court finds that allegation of illegal occupation of the suit properties by the father of the defendants 1 to 3 has been stated. It is also stated in the plaint that the father of the defendants 1 to 3 has allotted a portion of the property to the fourth defendant. After the demise of the father of defendants 1 to 3, the defendants are in illegal possession of the same. When that being the allegation levelled against the defendants, in the interest of justice, it would be necessary to give an opportunity to the defendants, particularly, the first defendant to defend the case.

16. 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'ble 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

....."

17. Generally delays in preferring application to condone the delay in filing the application to set aside the ex parte decree/restore the suit 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.

18. In the present case, as noted above, delay in filing the application to set aside the ex parte decree is 683 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.

19. Immediately after receipt of notice in the Execution Proceedings, the petitioner has filed the Application under Section 5 of the Limitation Act to condone the delay 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. The trial Court has not given any

reasoning for dismissal of the application, when counter of the respondent and the deposition of the petitioner was very much available on record.

20. It is also clear to the effect that it is not the number of days of delay that matters, but the attitude of the party which caused the delay. In other words, when the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay and the Court is satisfied that the delay occasioned not due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.

21. Having regard to the facts and circumstances of the case and that the respondent has failed to produce any rebuttal evidence to disprove the case of the petitioner in an application seeking to condone the delay in filing the set aside application and also the trial Court has not given reasoning in dismissing the application, in my considered view, the delay of 683 days in filing the application to set aside the ex parte decree has to be condoned, however, on costs.

22. In the result:

(a) the Civil Revision Petition is allowed by setting aside the order passed in I.A.No.131 of 2012 in O.S.No.158 of 2008, dated 31.10.2012, on the file of the Subordinate Judge, Thirupathur, on condition that the petitioner should pay a sum of Rs.5,000/- (Rupees Five Thousand) as costs to the respondent within a period of two weeks from the date of receipt of a copy of this order;

(b) the learned Subordinate Judge, Thirupathur is hereby directed to number the application to set aside the ex parte decree filed under Order 9, Rule 13 C.P.C. and dispose of the same within one month, on producing the cost receipt by the petitioner;

(c) on passing the order in the set aside application and on filing the written statement by the first defendant, the learned Subordinate Judge, Thirupathur is hereby directed to dispose of the suit in O.S.No.158 of 2008, within a period of two months, without giving any adjournment to either parties and both the parties are hereby directed to give their fullest co-operation for early

disposal of the suit. Consequently, M.P.No.1 of 2013 is closed.

15.02.2017

Note: Issue order copy on 04.01.2018
vs

Index : Yes/No
Internet: Yes/No

To

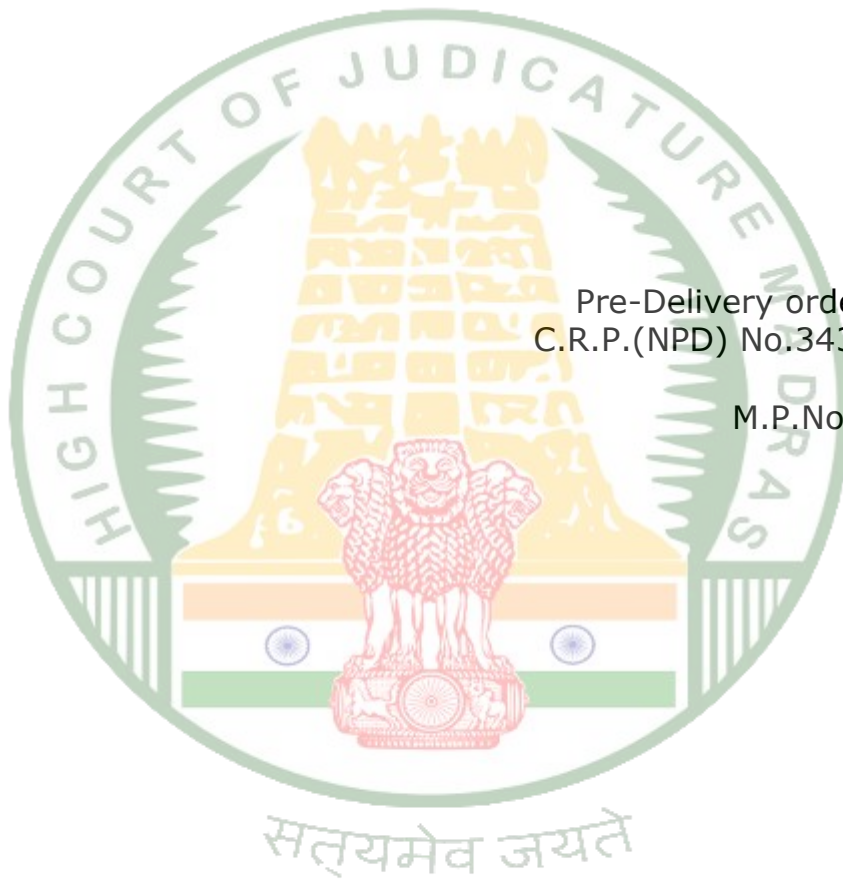
The Subordinate Judge, Thirupathur.



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M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
C.R.P.(NPD) No.3435 of 2013
and
M.P.No.1 of 2013

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