

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.07.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.4613 of 2013
and
M.P.No.1 of 2013**

1.K.Senthil Raj

2.T.Ezhil Arasi

3.T.Prabha

.. Petitioners

Vs.

V.Arumugam

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the common fair and decretal order of the learned VIIIth Assistant Judge, City Civil Court, Chennai, passed in I.A.No.1572 of 2013 in O.S.No.4141 of 2010, dated 10.07.2013.

For Petitioners : Mr.E.P.Senniyan Giri

For Respondent : Mr.A.S.Narasimhan

ORDER

The petitioner has filed this Civil Revision Petition to set aside the fair and decreetal order of the learned VIII Assistant Judge, City Civil Court, Chennai made in I.A.No.1572 of 2013 in O.S.No.4141 of 2010 dated 10.07.2013 by allowing this revision.

2.The case of the revision petitioners is that they are the defendants in O.S.No.4141 of 2010 filed by the respondent herein as plaintiff before the VIII Assistant Judge, City Civil Court at Chennai for permanent injunction restraining the petitioners herein from putting up any construction by encroaching upon suit 'A' schedule property and for mandatory injunction to remove any construction put up over the suit 'A' schedule property.

3.According to the petitioners they purchased the property bearing No. 12/29A 3rd Street, Narasingapuram, Maduvankarai, Guindy, Chennai under a registered sale deed dated 20.06.2007. The respondent/plaintiff is the adjacent owner of the property in plot No.29. Since, the petitioners herein migrated from Cudaloor and

purchased the above said property and started construction over the same, the respondent/plaintiff herein got enmity with the petitioners herein and prevented the petitioners from putting up construction in their plot as if they have encroached upon the property of the plaintiff. In that regard the respondent herein filed the above said vexatious suit against the petitioners herein. The erstwhile counsel engaged by petitioners herein did not inform about the stage of the suit and the ex- parte decree passed against the petitioners herein on 11.07.2011. On verification the petitioners herein came to know about the ex-parte decree and enquired with the erstwhile counsel regarding the ex-parte decree passed against them, he has given change of Vakalath along with the suit papers to the petitioners herein. There after immediately they filed application to set aside the ex-parte decree through the present counsel with a delay of 487 days in I.A.no.1572 of 2013. After elaborate enquiry, the learned judge has erroneously dismissed the condone delay application by order dated 10.07.2013 which is impugned in this Civil Revision Petition.

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4.The respondent has opposed the condone delay application by filing counter affidavit and contended that the petitioners herein had filed caveat petition before filing the suit. After filing the suit, they took

time to file counter to the interim injunction application. But the defendants delayed the matter without filing counter, hence the trial court granted interim injunction and also appointed Advocate Commissioner. Thereafter the petitioners herein have not participated in the suit proceedings and therefore, they were set ex-parte on 30.11.2010. The petitioners herein filed application to set aside the ex-parte order along with written statement and the same was allowed. Thereafter the trial was commenced and P.W.1 was examined on 01.07.2011 and the suit was adjourned for cross examination of P.W.1 by the defendants on 06.07.2011 and also on 11.07.2011. Since, the defendants did not appear to cross examine P.W.1 and therefore the suit was decreed on 11.07.2011. The reason assigned by the petitioners herein to condone the delay of 487 days is not true and the absence of the petitioners herein is due to the report filed by the Advocate Commissioner which is against the defendants. The petitioners herein knowing full well about the merits and demerits of their case, allowed the suit to be decreed ex-parte. Hence, the respondent herein prayed to dismiss the condone delay application.

5.I have heard Mr.E.P.Senniyan Giri, learned counsel appearing for the petitioners and Mr.A.S.Narasimhan, learned counsel appearing

for the respondent and perused the records.

6. Upon considering the rival submission, this court has to see whether the order dismissing the application to condone the delay in seeking to set aside the ex-parte decree is warranted interference by this Court or not? In this case, the petitioners herein has assigned reason to condone the delay of 487 days in filing the application to set aside the ex-parte decree passed against them is that the erstwhile counsel did not inform about the stage of the suit and ex-parte decree passed against them. The learned counsel for the petitioners contended that the suit is for mandatory injunction and ex-parte decree is granted for mandatory injunction, if the same is allowed to be executed, the petitioners herein will be to great hardship. Therefore the learned counsel pleaded that the petitioners herein may be permitted to prosecute the case and to get a decree on merits and they are prepared to pay sufficient cost to the plaintiff for the delay caused.

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7. Whereas, the learned counsel for the respondent herein strongly opposed to allow the revision petition saying that it is the second time the revision petitioners allowed the suit to be decreed ex-

parte and therefore no leniency to be shown to the revision petitioners. Further, there is no reason assigned to condone the huge delay of 487 days in setting aside the ex-parte decree. The explanation given by the revision petitioners to condone the delay of 487 days is not sufficient.

8.It is true that the revision petitioners have not given proper explanation for the delay of 487 days in setting up the ex-parte decree passed against them. Further the petitioners herein should always in vigilant and they cannot blame their Advocate and they should contact their Advocate regularly and should know about the stage of the case. In any event as rightly contended by the learned counsel for the revision petitioners, it is an ex-parte decree for mandatory injunction and no one shall be suffered with ex-parte decree. The right of the parties shall not be curtailed and they should be given one more opportunity to put forth their case to get a decree after full-fledged trial. At the same time for the unnecessary delay caused by the defendants, they should compensate the plaintiff by paying cost to the plaintiff which would meet the ends of justice.

9.At this juncture it is useful to refer the following Judgments dealing with the issue of condone delay application.

In **2016 (5) CTC 117 in Sarasu Vs. Ravi** wherein it is held that

“When a Court of Law deals with an Application to condone the delay filed under Section 5 of the Limitation Act, such Application will have to be generally viewed in a liberal and lenient way to do substantial justice between the parties. By projecting an Application to condone the delay as per Section 5 of the Limitation Act, belatedly, no party will file the same with a mala fide intention. If a party files a Delay Condonation Application belatedly, he or she runs a serious risk.

However, if an Application filed under Section 5 of the Limitation Act is allowed by this Court, to advance the cause of substantial justice, then the maximum that can happen is that a party will be allowed to partake in the main arena of legal proceedings and the main cause can be decided on merits. Per contra, if a meritorious matter is thrown out at the threshold or at early stage the cause of justice will be certainly defeated. In a Condonation of Delay Application filed under Section 5 of the limitation Act, 1963, the length and breadth of the delay is not a material/ relevant factor”.

- i) **2007 (4) TLNJ 565 (Civil) in the matter of Ramakrishnan Vs. The AEEO, Tiruvarur & Ors.** wherein it was held that " The term every day's delay should be explained, should not be viewed in pedantic way and the approach of the court must be in common pragmatic manner.
- ii) **2000 -1- L.W. 547,** in the matter of **Amudha Vs S.A.Arumugham & Ors.,** wherein it was held that condonation of delay is a matter of discretion of the court and section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within certain time. The court has to take into consideration that interests of justice require that the delay must be condoned.

10. Apart from this, the learned counsel appearing for the petitioner has produced a judgment rendered by the Hon'ble Apex Court recently in Civil Appeal No.(S).3777 of 2015 in which the Hon'ble Apex Court has passed an order on 20.04.2015 is as follows:

"This appeal arises out of an order dated 5th June,

2013, passed by the High Court of Judicature at Madras whereby CRP(NPD)No.266 of 2011 filed by the appellant has been dismissed and the order passed by the first appellate court declining condonation of 882 days in the filing of the appeal by the appellant affirmed.

We have heard learned counsel for the parties at some length. We are satisfied that in the facts and circumstances of the case, the first appellate court could and indeed ought to have condoned the delay in the filing of the appeal. Since, however, the delay is fairly inordinate, we are inclined to direct condonation subject to payment of costs.

We accordingly allow this appeal, set aside the orders passed by the High Court and that passed by the first appellate Court with the direction that upon deposit of a sum of Rs.50,000/- (Rupees fifty thousand) towards costs before the first appellate court within six weeks from today, the delay in the filing of the appeal shall stand condoned. The first appellate court shall hear and dispose of the first appeal filed by the appellant expeditiously and as far as possible within a period of six months from the date the

costs are deposited by the appellant. The amount of costs shall be paid to the respondent.

The appeal is allowed in the terms and to the extent indicated above.”

11.The Hon’ble Apex Court clearly held that the Courts in this country, including the Supreme Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient case under Section 5 of the Limitation Act. However, the concepts such as “liberal approach”, “justice oriented approach”. “substantial justice” cannot be employed to jettison the substantial law of limitation. The Hon’ble Apex Court in the said case in Civil Appeal No.(S).3777 of 2015, dated 20.04.2015, though there was a huge delay of 882 days, but that was allowed by the Hon’ble Apex Court with the huge cost of Rs.50,000/-. The Hon’ble Apex Court very categorically held that while considering the delay application, the Court should made liberal approach in considering the Section 5 of the Limitation Act.

12.In view of the settled legal propositions, I am of the considered opinion, in the interest of justice and to meet the ends of

justice the delay can be condoned on payment of cost to be paid by the petitioners/defendants to the respondent/ plaintiff or to the counsel for the respondent/plaintiff. For the foregoing reasons, the order and decree passed by the trial court is liable to be set aside.

13.In the result:

a) the civil petition is allowed and the order and decree passed in I.A.No. 1522 of 2013 in O.S.No.4141 of 2010, dated 10.07.2013, on the file of VIII assistant Judge, City Civil Court at Chennai is hereby set aside on condition that the revision petitioners shall pay a sum of Rs.25,000/- to the respondent/plaintiff or his counsel within a period of four weeks from the date of receipt of copy of this order;

b) on production of cost memo by the revision petitioners, the learned VIII Assistant Judge, City Civil Court, Chennai is directed to number the application to set aside the ex-parte decree and dispose of the same within a period of four weeks thereafter, by giving notice to both the parties;

(c) on passing orders in the set aside petition, the trial Court is directed to dispose of the suit within a period

of three months, without giving any adjournment to either parties. Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

27.07.2017

Internet:Yes

Index:Yes

vs

To

The VIIIth Assistant Judge,
City Civil Court, Chennai.



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M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
CRP(NPD)No.4613 of 2013
and
M.P.No.1 of 2013

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