IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.11.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P. NPD No.515 of 2013
and M.P.No.1 of 2013

Judgment reserved on 20.11.2017	**Judgment pronounced on 27.11.2017**

Vijayalakshmi ... Petitioner

Vs

1.Nachimuthu Gounder
2.Kalamani
3.Priya @ Tamilselvi
4.Minor Manikandan
Rep.by his Guardian/mother
Kalamani ... Respondents

Civil Revision Petition is filed under Section 115 of Civil Procedure Code against the fair and final order dated 05.01.2013 passed by the learned Principal District Judge of Tiruppur in I.A.No.52 of 2012 in A.S.CFR No.15226 of 2007.

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For Petitioner : Mr.L.Mouli

For Respondents : Mr.S.V.Jayaraman,
Senior Counsel for
Mr.Su.Srinivasan for R1

No appearance for R2 & R3

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O R D E R

This Civil Revision Petition is filed against the fair and decreetal order dated 05.01.2013 passed by the learned Principal District Judge of Tiruppur in I.A.No.52 of 2012 in A.S.CFR No.15226 of 2007.

2. The petitioner and one Kumarasamy, the husband of second respondent and father of respondents 3 and 4 are the legal heirs of plaintiff Karuppathal. The first respondent is the defendant. The said Karuppathal filed suit in O.S.No.527 of 1995 on the file of Sub Court, Tirupur for partition against the first respondent herein. An exparte preliminary decree was passed on 11.03.1997. The first respondent, on coming to know about the same, immediately filed I.A.No.66 of 2000 for condoning the delay in filing the petition to set aside the exparte decree. The said application was allowed on 28.09.2001 on condition that the first respondent shall pay a sum of Rs.1,000/- as costs to the petitioner on or before 15.10.2001 failing which the application shall stand dismissed and posted the I.A.No.66 of 2000 on 16.10.2001. However, on 16.10.2001, the erstwhile counsel for the first respondent informed the first respondent that the counsel for the petitioner refused to receive the costs and directed the first

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respondent to deposit the said amount in the Treasury and informed that he will get a pass over till such time. The first respondent deposited the said cost of Rs.1,000/- and handed over the receipt to his counsel. The Advocate informed the first respondent that he will file the receipt and asked him to come after one month. Subsequently, the learned counsel for the first respondent informed the first respondent that the application was allowed.

2(a) In the meantime, deceased Karuppathal filed an application before Sub Court, Tirupur for passing final decree in O.S.No.527 of 1995. An Advocate Commissioner was appointed in the said application to inspect the suit property. On 01.04.2000, when the Advocate Commissioner inspected the suit property, the first respondent informed the Advocate Commissioner that he has filed application for setting aside the exparte preliminary decree. Hence, the Advocate Commissioner did not inspect the suit property. In the year 2004, when he contacted his Advocate, he was informed that the application filed by the first respondent for setting aside the exparte preliminary decree was dismissed for non-compliance of the conditional order. The Advocate of the first respondent did not inform the further proceedings and did not conduct the case properly. According to the first respondent, with

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great difficulty, he got back the case bundle and engaged another advocate. The first respondent filed O.S.No.188 of 2006 on the file of Sub Court, Tirupur to set aside the exparte preliminary decree passed in O.S.No.527 of 1995. Initially the said suit was taken on file and subsequently returned stating that the remedy available to the first respondent is either to file application to set aside the exparte preliminary decree or to file appeal.

2(b) The first respondent filed appeal alongwith I.A.No.52 of 2012 to condone the delay of 3658 days in filing the appeal against the preliminary decree passed in O.S.No.527 of 1995. The petitioner filed counter and opposed the said application. The learned Judge, considering the averments in the affidavit, counter affidavit and judgments relied on by the learned counsel for the first respondent, allowed the application holding that the length of delay is not a criteria but the intention must be bonafide and imposed a cost Rs.3,000/- payable by the first respondent to the petitioner.

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3. Against the said order dated 05.01.2013 made I.A.No.52 of 2012 in A.S.CFR No.15226 of 2007, the present Civil Revision Petition has been filed.

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4. The learned counsel appearing for the petitioner submitted that the reason given by the first respondent that his earlier Advocate misguided and cheated him, is not valid for condoning the delay. The learned Judge failed to see that final decree has already been passed after hearing both the parties by allotting 1/5th share to the petitioner alongwith the first respondent. The learned counsel for the petitioner further contended that the first respondent contested the final decree proceedings and final decree was passed on 11.03.1997. After passing of final decree, the petitioner took possession of the property allotted to her in the final decree and sold the same to third party. The petitioner did not challenge the final decree.

4 (a) The first respondent has filed application to condone the delay in filing application to set aside the final decree and did not press the same and the said application was dismissed. After five years of passing of preliminary decree and after passing of final decree, the first respondent has filed appeal alongwith condonation of delay. The learned Appellate Authority, without properly appreciating the facts and law, erroneously allowed the application. The learned counsel for the petitioner relied on the following judgments in support of his contention -

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(1) 2015 (1) SCC 680 [H.Dohil Constructions Company Private Limited v. Nahar Exports Limited and another]

20. ..... As a matter of fact, the appeal papers were filed without payment of any court fee. This only affirms the stand of the appellant(s) that there was no bonafide in the respondents'claim and that they were seriously interested in challenging the judgment of the trial court as against the non-grant of relief of specific performance. We also fail to see as to how Respondent 1 which is a limited company involved in the business of exports, which would certainly have its own legal department, can plea that after entrusting the papers to some counsel whose name was not disclosed even before this Court did not even bother to take any follow-up action to ensure that its appeals were duly registered in the High Court. In this context, the maxim vigilantibus non dormientibus jura subveniunt (law assists those who are vigilant and not those who sleep over their rights aptly applies to the case on hand. The respondents simply by throwing the blame on the previous counsel whose identity was not disclosed claimed that irrespective of the enormous delay of 1727 days in refiling the same should be condoned as a matter of course as there was only 9 days' delay involved in filing the appeals.

24. When we apply those principles of Bhattacharjee case to the case on hand, it has to be stated that the failure of the respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the respondents. Further, when the respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the respondents from not paying the

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court fee alongwith the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bona fides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without without proper reasons. As has been laid down by this Court, courts are required to weigh the scale of balance of justice in respect of both the parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the respondents not deserving any indulgence by the court in the matter of condonation of delay.

(2) 2005 (4) CTC 489 [Popat and Kotecha Property v. State Bank of India Staff Assocation]

8. *The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e. Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal. (Also See France B. Martins v. Mafalda Maria(1996 (6) SCC 627).*

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10. *Rules of limitation are not meant to destroy the rights 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. The law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a life-span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time. (See N. Balakrishanan v. M. Krishna Murthy (1998 (7) SCC 123).*

(3) 2013 (12) SCC 649 [Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others]

21.4 (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.8 (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

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> *21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant facts to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

5. Per contra, the learned Senior Counsel appearing for the first respondent contended that the first respondent has given valid reason for condoning the delay and he must be given opportunity to put forth his case on merits. The learned Senior Counsel further contended that the first respondent has given details as to how his previous counsel failed to properly conduct the case and as to how misguided him and orders passed therein. The learned Judge has considered the reasons given by the first respondent and allowed the application.

5 (a) The learned Senior Counsel appearing for the first respondent relied on the following judgments, in support of his contention.

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(1) 2016 (II) MCC 673 [Mrs.A.Abitha Nachi & Another v. Tmt. K.S.Saroja & Others]

12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of +the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

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(2) Order of this Court dated 19.01.2017 made *in CRP (NPD) No.1787 of 2014 [K.Desingu v. S.Mathiyazhagan]*

> *8. ..... In the above decision, it is specifically held that once the Courts 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.*

6. Heard the learned counsel appearing for the petitioner as well as the learned Senior Counsel appearing for the first respondent and perused the materials available on record.

7. The Civil Revision Petition is filed against the order dated 05.01.2013 made I.A.No.52 of 2012 in A.S.CFR No.15226 of 2007 allowing the application to condone the delay in filing the appeal. The delay is 3658 days. The main reason given by the first respondent is that his Advocate did not properly conduct his case and has given false information and misguided him. He has furnished details as to how false information was given and how he was misguided. The contention of the learned counsel for the petitioner is that the reasons given by the first respondent are not

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valid and sufficient to condone the delay. The judgments relied on by both the learned counsel for the petitioner as well as first respondent has settled the following criteria to be considered by the Court in the application to condone the delay.

(i) Length of delay is not a criteria or reason to reject the application In a given circumstances, the application to condone the delay of longer period can be allowed while application to condone the delay of shorter period may be rejected.

(ii) An application for condoning the delay must be liberally considered.

(iii) The party must be given opportunity to put forth his case on merit and should not be shutdown at the threshold.

(iv) The reason given by the party must be valid and sufficient to condone the delay.

(v) The intention of the party should not be malafide or to drag on the proceedings. If prejudice or grave injustice would be caused to other party or right already accrued to other party may be affected, court must be cautious in condoning the delay. If the other party can be compensated monetarily, the court can condone the delay by awarding cost to other party.

(vi) When a Lower Court has exercised discretion and condoned the delay, the Appellate Court or Revisional Court can interfere with the said order, only if the order of the Lower Court was on wholly on untenable ground or arbitrary or perverse.

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7 (a) In the present case, the first respondent was diligently pursuing his remedy at all stage of the proceedings and he has established it by documentary evidence to show that his Advocate misguided him and has given false informations. The first respondent has produced the challan for having paid cost of Rs.1,000/- in the treasury. He has also produced docket sheet of bundle wherein his Advocate has made endorsement to the effect that application was allowed. The learned Judge, considering all the above facts, allowed the application holding that first respondent was misguided or cheated by his Advocate. The order of the learned Judge is not arbitrary or perverse and is not passed on untenable grounds. The learned Judge has awarded cost of Rs.3,000/- to be paid to the petitioner by the first respondent. The petitioner is sufficiently compensated by order of the learned Judge.

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7(b) In view of the above, the judgment relied on by the learned Senior Counsel for the first respondent in ***K.Desingu's case*** cited supra, is squarely applicable to the facts of the present case and there is no reason or circumstances warranting interference by this Court in the order dated 05.01.2013 made in I.A.No.52 of 2012 in A.S.CFR No.15226 of 2007.

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8. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Speaking/Non-speaking

To

The Principal District Judge,
Tiruppur.

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V.M.VELUMANI, J.

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