

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.10.2018

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P.(NPD).Nos.531 and 532 of 2012

Thirupal

... Petitioner
in both petitions

Vs

1.Chinna Akulaiah

2.The Tamil Nadu Slum Clearance Board
rep. by its Chairman,
Kamarajar Salai,
Chennai – 5.

3.The Estate Officer,
Tamil Nadu Slum Clearance Board,
Sivalingapuram,
K.K. Nagar,
Chennai – 5.

... Respondents
in both petitions

Prayer in C.R.P.(NPD).532 of 2012 : Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order passed in I.A.No.9730 of 2011 in O.S.No.9356 of 1994 dated 04.08.2011 by the learned III Assistant Judge, City Civil Court, Chennai.

PRAYER in C.R.P.(NPD).533 of 2012 : Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order passed in I.A.No.9731 of 2011 in O.S.No.9356 of 1994 dated 16.11.2011 by the learned III Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.P. Vijendran
in both petitions

For Respondents : Not ready in notice regarding R1
Mr.S. Prabha for R2 and R3
in both petitions

COMMON ORDER

The above Civil Revision Petitions are filed challenging the orders passed by the learned III Assistant Judge, City Civil Court, Chennai, in I.A.Nos.9730 and 9731 of 2011 in O.S.No.9356 of 1994 filed to condone the delay of 3557 days in filing the application for restoration of I.A.No.16463 of 1998 and to restore I.A.No.16463 of 1998 which was dismissed for default on 17.06.2001, respectively, in O.S.No.9356 of 1994.

2.The facts which are necessary for disposing of the Civil Revision Petition are as follows:

The 1st respondent herein, who is the plaintiff, had filed the suit O.S.No.9356 of 1994 on the file of the learned III Assistant Judge, City Civil Court, Chennai, against the revision petitioner and the respondents 2 and 3 for a mandatory injunction restraining the respondents 2 and 3 from transferring the allotment in favour of the revision petitioner in respect of the property Door No.13-B, Zakir Hussain Street, Chennai-78 from the name of P.Soloman. The 1st respondent had pleaded that the said Soloman was his younger paternal uncle and he was employed as Scavenger in Pallavan Transport Corporation, Vadapalani Depot. It was his case that since the said Soloman had no issue, he adopted the plaintiff, who was born on 01.06.1960 as his son on the third month of his age and performed the customary functions. It was his further case that the said Soloman was allotted a vacant site measuring an extent

of 40 x 25 sq.ft. by the respondents 2 and 3 herein and that he had put up a construction in the vacant land and he has paid necessary instalments to the 2nd defendant after his father's death. He would further contend that his father Soloman had nominated him as his adopted son for all his service benefits. It was his further case that the revision petitioner, who is the son of another paternal uncle is also staying along with the said Solomon and after the death of Soloman with a view to grabbing the property, he had started creating documents in his name. He had contended that on the death of the said Soloman, he had tried to transfer the said property in his name. In view of the fact that the revision petitioner was manipulating the respondents 2 and 3, he was unable to get the transfer in his name, thereby constraining him to file the suit.

3.The revision petitioner herein had filed a Written Statement *inter alia* contending that it was the revision petitioner, who had taken care of the said Soloman all along from

the year 1982 even prior to the allotment of the vacant land in the name of the said Solomon. He had further contended that though the said allotment stands in the name of Soloman, the cost for the land as well as the construction is entirely paid by the revision petitioner out of his funds. He had also contended that the 1st respondent was in no way connected with the suit property and not living in the suit property. The said Soloman was bringing up the revision petitioner as a son and he had categorically denied the claim of the 1st respondent that he is the adopted son of Soloman and he had sought for dismissal of the suit.

4.The Written Statement was filed on 15.04.1997. Thereafter, on 07.10.1998, the 1st respondent came forward with the petition I.A.No.16463 of 1998 to amend the plaint to include the prayer for declaration that he is the adopted son of Late Saloman and consequently entitled as a legal heir to the transfer of allotment in respect of the suit property. In the affidavit filed

in support of the petition, he had contended that the revision petitioner in his written statement had taken a defence that he is the adopted son of Late Soloman and this constrained him to amend the petition.

5.The revision petitioner has filed his counter stating that the petition itself is not maintainable as the Court did not have jurisdiction to grant the relief as claimed. The 2nd respondent has filed a counter in which they have contended that the plot in question was in the possession and enjoyment of the revision petitioner and that the payments have been made by the revision petitioner. They had also contended that the 1st respondent is not entitled to the suit property and he had already been allotted a house at E/12B in K.K.Nagar, Madras – 78. From the records, it is seen that the suit was dismissed for default on 11.10.2002 and the same was restored to file and after restoration, an *ex parte* decree was passed on 08.12.2006. The application to set aside the *ex parte* decree was moved by the revision petitioner.

Thereafter, in the year 2011, the 1st respondent has come forward with two applications which are the subject matter of these revisions. In the affidavit filed in support of the said applications which are common to both the petitions, the 1st respondent had stated that he was under the belief that when the suit was restored I.A.No.16463 of 1998 also stands automatically allowed and it was for this reason that even in the proof affidavit, they have included the relief for declaration which he had claimed by way of an amendment. It was only when he cross examined the 1st respondent that he has realised omission and come forward with the impugned applications. The revision petitioner had filed a detailed counter in which she would contend that even before the suit was dismissed for default the application I.A.No.16463 of 1998 was dismissed and thereafter, the *ex parte* decree came to be passed in the year 2006. A reading of the *ex parte* decree clearly shows that the decree was only with reference to the relief of permanent injunction and the relief of declaration was not considered in the earlier order. The revision

petitioner would further contend that there was no other reason put forward by the 1st respondent for condoning the delay of over ten years. The counter was common in both the applications. The said applications were allowed by the learned III Assistant Judge, City Civil Court, Chennai, on the ground that though the delay is inordinate, the contentions of the petitioner in his affidavit appears bonafide and this is manifest by a reading of the proof affidavit where the relief of mandatory injunction also be included. With this view, the learned Judge has allowed these applications and condoned the delay and restored the suit. Aggrieved by the said order, the revision petitioner is before this Court.

6. Since the issue involved in both the applications are common, this Court is passing a Common Order in both the revisions.

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7. Heard Mr.P. Vijendran, learned counsel appearing for the petitioners and Ms.S. Prabha learned counsel appearing for the respondents 2 and 3 and perused the material available on record.

8. Notice taken to the 1st respondent to the address given for service in the Plaint has been returned by the Bailiff stating that there is no such person and since the service has been taken to the 1st respondent to the last known address, the service to the respondent to be sufficient.

9. The learned counsel for the petitioner would argue that there is no explanation whatsoever for the delay and the reason given in the affidavit is totally false, since in the ex parte decree that was passed in the year 2006, the suit was decreed only with reference to the relief of permanent injunction. Even prior to that, the suit was dismissed for default and even prior to that the

amendment application was dismissed. Therefore, when the suit was restored there was no question of the amendment application being restored as the same was dismissed earlier. The 1st respondent who had filed the application to restore the petition, is very much aware of this fact. The learned counsel would argue that not only is a false reason given but the delay is also inordinate. He would cite the Judgment of the Hon'ble Supreme Court reported in **(2012) 5 Supreme Court Cases 157 [Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai]** in support of his arguments that the condonation of delay can be allowed only if there is sufficient cause and that liberal and justice-oriented approach while dealing with the petition for condoning the delay should be extended to the bonafide applicants.

10. The learned counsel appearing on behalf of the respondents 2 and 3 has adopted the arguments of the learned counsel appearing for the 1st respondent. The learned counsel

would argue that in cases of condonation of delay the Hon'ble Supreme Court has held that a liberal approach has to be taken and it is this that the learned Judge has done by allowing the application and no exception can be taken to the same.

11. Heard the learned counsel appearing on either side.

12. The suit is filed for a mandatory injunction for transferring the allotment in favour of the 3rd defendant. The suit has been filed as early in the year 1994. The applications for amending the relief including the prayer of declaration has been taken in the year 1998 on the ground that the revision petitioner has denied the fact that the 1st respondent has adopted him as the son of Soloman. The plaintiff has originally claimed his right only on the basis that he is an adopted son.

13. Be that as it may, after the application was dismissed for default in the year 2001, no steps have been taken by the 1st

respondent to restore the said applications. Although he had taken steps to restore the suit O.S.No.9356 of 1994. This application was dismissed for default in the year 2001 and thereafter the suit was dismissed for default on 11.10.2002. The 1st respondent had filed the application to restore the suit and even at that point of time, he was aware that the suit which was dismissed for default only had the prayer for mandatory injunction and did not include the relief of declaration. Thereafter, the suit was decreed *ex parte* and when the 1st respondent was getting into the box as P.W.1, the Judgment dated 08.12.2006 clearly shows that the suit is one for permanent injunction and does not include the relief of declaration which implies that the 1st respondent had not produced any evidence with reference to the relief of declaration. After the *ex parte* order was set aside and the suit was posted for trial, particularly, after the cross examination of PW1, these two applications are came to be filed and the reason given is that the 1st respondent was under the impression that interlocutory

application for amendment was got restored. Such a reason cannot be believed in the light of the dismissal order dated 11.10.2002 as well as the *ex parte* decree dated 08.12.2006. The Hon'ble Supreme Court in the Judgment cited by the petitioner reported in **(2012) 5 Supreme Court Cases 157 [Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai]** has elaborately dealt with the expression "sufficient cause" as contemplated under Section 5 of the Limitation Act in Paragraph 15 of the Judgment which reads as follows:

"15.The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of

the parties are not defeated merely because of delay.”

14.The Bench has further relied on the Judgment reported in **(1998) 7 SCC 123 [N.Balakrishnan v. M. Krishnamurthy]** wherein the Hon'ble Supreme Court had cited that the rules of limitation are not meant to destroy the rights of parties and it is meant to ensure that the parties do not resort to dilatory tactics, but seek their remedy promptly. New and subsequent events would come into play. Ultimately, the Bench has observed as follows:

“23.What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment

under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

15. The other factum that has to be determined is the counter of the respondents 2 and 3 wherein they have clearly stated that the revision petitioner is in possession of the property and had paid the instalments. In the counter of the 2nd respondent in I.A.No.16463 of 1998, the 2nd respondent has

submitted that the revision petitioner is in possession of the property and that he had paid the land costs as well as the construction costs and that the 1st respondent has been allotted another tenement. In these circumstances, the order of the learned III Assistant Judge, in condoning the inordinate delay of 10 years by simply stating that the affidavit filed by the 1st respondent stating that he had filed the proof affidavit showing additional relief would prove his bonafides is to say the least inappropriate the learned Judge has failed to take note of all various facts and circumstances of this case.

In the result, these Civil Revision Petitions are allowed and the orders passed by the learned III Assistant Judge, City Civil Court, Chennai, in I.A.Nos.9730 and 9731 of 2011 in O.S.No.9356 of 1994, is set aside. There shall be no order as to costs.

30.10.2018

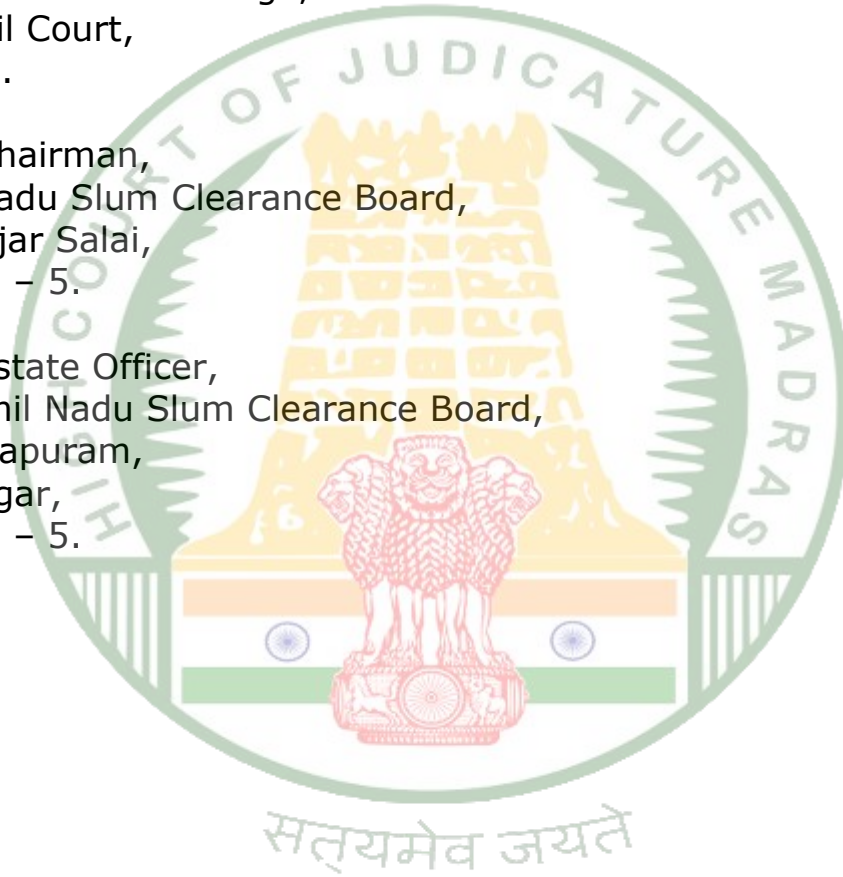
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To

1.The III Assistant Judge,
City Civil Court,
Chennai.

2.The Chairman,
Tamil Nadu Slum Clearance Board,
Kamarajar Salai,
Chennai – 5.

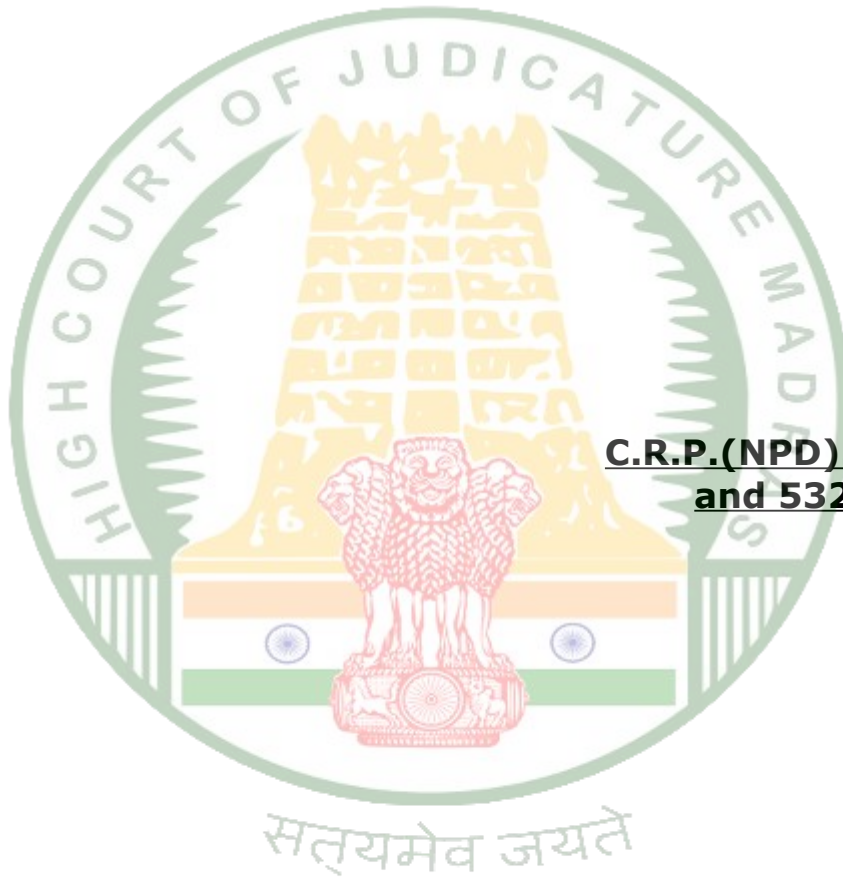
3.The Estate Officer,
The Tamil Nadu Slum Clearance Board,
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P.T. ASHA, J,

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