

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

CRP (NPD) Nos.2018 & 2019 of 2014
and M.P.No.1 of 2014

Judgment reserved on 04.01.2018	Judgment delivered on 09.02.2018
--	---

V.Ramalingam ... Petitioner in both CRPs

Vs.

1.B.Baghiyam
 2.V.Jayasundaram ... Respondents in both CRPs

PRAYER in CRP (NPD) No.2018/2014 : Civil Revision Petitions filed under Section 115 of CPC against the fair and decretal order dated 11.12.2013 made in E.A.No.158 of 2011 in E.A.No.359 of 2005 in E.P.No.166 of 1996 in O.S.No.1232 of 1987 on the file of the learned First Additional District Munsif Court, Coimbatore.

PRAYER in CRP (NPD) No.2019/2014 : Civil Revision Petitions filed under Section 115 of CPC against the fair and decretal order dated 20.03.2014 made in E.A.No.359 of 2005 in E.P.No.166 of 1996 on the file of the learned First Additional District Munsif Court, Coimbatore.

For Petitioner : Mr.Naveen Kumar Murthi
in both CRPs

For R1 : Mrs.Chitra Sampath,
in both CRPs Senior Counsel for
Mr.S.Vinoth

For R2 : No appearance

COMMON ORDER

CRP (NPD) No.2018/2014 is filed against the fair and decretal order dated 11.12.2013 made in E.A.No.158 of 2011 in E.A.No.359 of 2005 in E.P.No.166 of 1996 in O.S.No.1232 of 1987 on the file of the learned First Additional District Munsif Court, Coimbatore.

CRP (NPD) No.2019/2014 is filed against the fair and decretal order dated 20.03.2014 made in E.A.No.359 of 2005 in E.P.No.166 of 1996 on the file of the learned First Additional District Munsif Court, Coimbatore.

2. The parties and issues involved in both the Civil Revision Petitions are one and the same and therefore, these revision petitions are disposed of by common order.

3. The petitioner is the second respondent in REA No.158 of 2011 filed by the first respondent for condoning the delay of 796 days in filing the application in E.A.No.359 of 2005 to set aside the exparte order dated 28.11.1996 made in E.P.No.166 of 1996. The petitioner is the auction purchaser. The first respondent is one of the judgment debtors and second respondent is the decree holder. The second respondent filed E.P.No.166 of 1996 to sell the property of the first respondent to realise the decreetal amounts. On 12.10.1995, notice was served on the first respondent. The first respondent entered appearance through Advocate on 23.11.1995 and was taking time to file counter. After number of adjournments, E.P was posted on 28.11.1996 finally for filing counter by the first respondent. The first respondent did not file counter and she was set exparte. E.P was proceeded with and in court auction held on 11.04.1997, the petitioner purchased the property for Rs.1,00,100/-.

3(a) On 16.06.1997, sale in favour of the petitioner was confirmed in E.P. No.166 of 1996 and sale certificate was issued and E.P was closed. The petitioner filed E.A.No.2 of 1998 in E.P.No.166 of 1996 for delivery of possession of the property purchased by him. On 11.02.1999, the said application was allowed. On 23.02.1999, the

Court Amin went to the property for taking delivery of possession and the same was obstructed by persons claiming to be the tenants. The petitioner filed E.A.Nos.91 & 92 of 1999 for police aid for taking delivery of possession of the property purchased and to break open the lock of the premises, respectively, on the ground that the respondents 2 to 6 therein locked the petition premises. At that stage, the first respondent filed application in the year 1999 to set aside the exparte order dated 28.11.1996. The said application was numbered as E.A.No.359 of 2005, only in the year 2005.

3(b) The first respondent also filed E.A.No.418 of 1999 under Section 47 of CPC challenging the sale in favour of the petitioner. The petitioner filed counter and contended that the said application is not maintainable in view of the fact that the first respondent has not filed any application to condone the delay. The first respondent, on 01.04.2011 filed E.A.No.158 of 2011 to condone the delay of 796 days in filing E.A.No.359 of 2005 in E.P.No.166 of 1996 to set aside the exparte order. Originally, the petitioner was not a party in both the applications. On his application E.A.No.164 of 2011 in E.A.No.359 of 2005, he was impleaded as second respondent, in both the applications. In E.A.No.359 of 2005 and E.A.No.158 of 2011 filed by the first respondent, she has stated that she is only a guarantor. After

receipt of notice in E.P., she engaged an Advocate and filed vakalat. She was informed by her Advocate that he will send a communication with regard to the proceedings in the E.P. She did not receive any communication from the Advocate that she has been set exparte on 28.11.1996 for not filing counter. She came to know about the exparte order only when court amin came for taking possession of the property. Thereafter, she filed application on 05.03.1999 to set aside the exparte order.

3(c) According to the first respondent, her earlier counsel did not inform her about the order setting aside her exparte and prayed for allowing the said application. Similarly, in E.A.No.158 of 2011 also, the first respondent has given the same reason for condoning the delay. The petitioner and the second respondent filed counter denying the averments made in the application. The learned Judge allowed E.A.No.158 of 2011 condoning the delay on the ground that the first respondent should not suffer for the mistake of her Advocate and awarded a cost of Rs.3,000/- for allowing the application. In view of the order passed in E.A.No.158 of 2011, the learned Judge allowed E.A.No.359 of 2005 and awarded cost of Rs.500/-.

4. Against the order dated 11.12.2013 made in E.A.No.158 of 2011 in E.A.No.359 of 2005 in E.P.No.166 of 1996 in O.S.No.1232 of 1987, the petitioner has filed CRP (NPD) No.2018 of 2014. Against the order dated 20.03.2014 made in E.A.No.359 of 2005 in E.P.No.166 of 1996, the petitioner has filed CRP (NPD) No.2019 of 2014.

5. The learned counsel for the petitioner contended that the reasons given by the first respondent is not a valid reason to condone the delay in filing the application to set aside the exparte order as well as application to set aside the exparte order. The rights of bonafide purchaser must be protected. There is collusion between the respondents. The Limitation Act is not applicable to the proceedings initiated under Order XXI. The first respondent filed application on 05.03.1999 to set aside the exparte order but the same was numbered only in the year 2005 as E.A.No.359 of 2005 and the first respondent has not taken any steps to get the application numbered at the earliest. I.A.No.359 of 2005 filed to set aside the exparte order is not maintainable as the first respondent has not filed application to condone the delay.

5(a) This Court, in the order dated 25.07.2012 in CRP (NPD) No.3096 of 2011 has held that E.A.No.359 of 2005 ought not to have been numbered without application to condone the delay and E.A.No.158 of 2011 ought not to have been numbered as the first respondent has not impleaded the petitioner who is the auction purchaser, as on 16.06.1997. This Court has held that court below has committed irregularity in numbering both the applications. The learned counsel for the petitioner relied on the following judgments in support of his contention -

(1)2007 (3) LW 1034 [G.Jayaraman v. Devarajan]

14. As rightly pointed out by the learned counsel for the Petitioner, while considering the plea relating to affording an opportunity to advance substantial justice, the right accrued to the other side ought to be kept in view. When there is deliberate delay, the respondent herein cannot be heard to plead that substantial justice deserve to be preferred as against technical consideration.

16. As stated earlier, delay cannot be excused as a matter of judicial generosity. Rendering substantial justice is not to cause prejudice to the opposite party.

(2) 2012 (1) CTC 849 [R.Jagadeesan (died) v. Santhakumari)

9. In the present case, it is evident that the judgment-debtor was aware of the *ex parte* decree on the day when he was set *ex parte*. Therefore, he cannot claim that he had no knowledge, since he has suffered an adverse order, it is incumbent on the part of the judgment-debtor to diligently pursue the matter to set aside the *ex parte* decree. Merely filing an application and leaving the matter there at, would only go to show that the judgment debtor did not show due diligence. When he has suffered an order against him, he should not have been careless and idle. The inaction on the part of the judgment-debtor is further fortified by the conduct of the judgment-debtor in the Execution proceedings. In the Execution proceedings also, the judgment-debtor after having entered appearance, kept quiet for more than 1 year and six months and thereafter, filed an application once again for condonation of delay. This shows utter callousness and irresponsible attitude.

(3) 2012 (1) L.W. 970 [Manickam & another v. Rahamath Beevi & others]

15. In the instant case, admittedly before the Executing Court, the petitioners / judgment-debtors appeared through their counsel and an *ex parte* order was passed on 17.11.2009, on account of the non-appearance of the petitioners. However, the petitioners have not filed application within 30 days to set aside the *ex parte* order for the reasons best known to them. Hence, the unnumbered application was ordered to be returned on 19.01.2010 as time barred, on the ground that the petition was not maintainable, as it was filed after the expiry of 30 days. Subsequently, on 23.02.2010, the petitioners filed a petition with an affidavit to condone the delay. The Hon'ble Apex Court has categorically held that so

far as the Execution proceeding under Order 21 CPC is concerned, application being filed under [Section 5](#) of the Limitation Act is not maintainable.

(4) 2012 (12) SCC 693 [B.Madhuri Goud v. Damodar Reddy]

13. A careful reading of the above extracted averments makes it clear that even though the respondent was very much conscious of the fact that the appeal filed by him against the order dated 20-2-2008 passed by the trial court had been dismissed by the High Court on 11.12.2008 and he had obtained certified copies of the documents which are said to have been handed over to the counsel on 10.01.2009, he did not make any effort to contact the advocate concerned till the first week of March 2010 to ascertain the fate of the appeal supposed to have been filed by him against the judgment and decree dated 18.8.2006. Not only this, the application and affidavit filed by him are conspicuously silent about the name of the advocate to whom the papers were entrusted for the purpose of preparing the grounds of appeal. The affidavit of the advocate concerned was also not filed.

(5) 2017 (2) Mh.L.J. 801 [Kausar Sultana v. City Financial Consumer Finance India Ltd., New Delhi & ors.]

15..... Taking recourse of the above observations of Division Bench of this Court, it is manifestly clear that the period of limitation to make an application under Order 21, Rule 89 of Civil Procedure Code should be reckoned from the date of sale when the property is put in auction. It would be reiterated that the date of sale in the instant case is 23.04.2012. Therefore, the application to set aside the sale on deposit of amount in the Court under Order 21, Rule 89 of Civil Procedure Code is required to be made within 60 days from the date of sale, i.e. 23.04.2012. But the petitioner moved an application

after about a delay of 3 days, which cannot be condoned at all as per mandate of the law. There is no error in the impugned order passed by the Executing Court while rejecting the application to set aside the sale being time barred.

6. Per contra, the learned Senior Counsel appearing for the first respondent contended that the first respondent is not the principal borrower and she is only a guarantor. Immediately, on receipt of the notice in the Execution proceedings, the first respondent engaged an Advocate and filed vakalat. The said advocate did not properly conduct the case and did not inform her that she was set exparte. The property worth Rs.1 Crore was sold for Rs.1,00,100/-. The procedure for conducting the auction sale was not followed and no notice was sent to the first respondent with regard to settlement of proclamation and copy of proclamation was not served on her. The courts have power to condone the delay in proceedings under Order XXI also. The first respondent should not be penalised for the failure of her advocate in conducting the case properly and not informing the first respondent about the order setting her exparte. The reason given by the first respondent is valid and the application to condone the delay must be considered liberally and must be given an opportunity to contest the case on merits. There is no error in the reasoning of the learned

Judge in allowing the application and there is no circumstances warranting interference by this Court with the said order.

6(a) The learned Senior Counsel further contended that once the Lower Court accepts the explanation for delay in filing the application and condoned the said delay, the superior court normally should not disturb the said finding. There is no presumption that delay in approaching the court is always deliberate. The learned Senior Counsel, in support of her contention, relied on the following judgments -

(1) 1998 (II) CTC 533 [Balakrishnan v. M.Krishnamurthy]

10. It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court 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 reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter

when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

*13. 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 vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 1969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749].*

(2) 2016 (5) CTC 117 [Sarasu v. Ravi]

11. It is to be borne in mind that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. At this juncture, it is useful to refer the decision of a Division Bench of this Court in [Arun Alexander Lakshman v. A.P. Vedavalli](#) (Cited supra), wherein in paragraph 17 it has been held as follows:

17. It is settled law that [Section 5](#) Application is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the Court has to go into the position of the person concerned and find out if the delay can be said to have been resulted from the cause which the petitioner had adduced and whether the cause stated in the circumstances of the case is sufficient. It is the condition precedent for the exercise of discretion that the Court must satisfy itself as to whether there was sufficient cause for exercising such discretion and condoning the delay. The expression

'sufficient cause' should be considered with pragmatism with a justice oriented approach.?

12. Even in the decision relied on by the learned counsel for the respondent/plaintiff in *Oriental Aroma Chemical Industries Ltd., v. Gujarat Industrial Development Corpn.*, (cited supra), the Hon'ble Supreme Court has held in paragraph 14 that the Courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.

13. Even though the reasons assigned by the petitioner are convincing, considering the huge delay and keeping in mind the above said legal position, this Court is of the view that if the delay is compensated by way of costs nothing will be prejudiced to the other side.

(3) Order of this Court dated 07.03.2017 made in CRP (MD) No.87 of 2013 (NPD) [C.Boopathi v. M/s.Angalaeeswari credits and Chits & others]

13..... As per Proviso to Order 21 Rule 105(3) C.P.C., introduced by the Madras High Court Amendment, an application can be filed beyond the period of 30 days and the same can be decided on merits, if the party satisfies that for sufficient reason, he could not file the same in time. The said Proviso reads as follows:

"Provided that an application may be admitted after the said period of 30 days, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period."

7. Point for consideration in this Civil Revision Petition is ***whether the order of the Executing Court condoning the delay in filing the application to set aside the exparte order and order setting aside the exparte order are proper and valid.***

7(a) It is well settled that a party must be given opportunity to put forth his / her case on merits and should not be shut out at the threshold itself. An application for condoning the delay must be liberally considered and that the 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. The reason given by the party must be valid and sufficient to condone the delay. 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. By applying the above well settled principles, I hold that the petitioner has not given sufficient reason to condone the delay and setting aside the exparte order and the intention of the petitioner is not bonafide.

7(b) The first respondent has not impleaded the petitioner in both the applications. This Court, in the order dated 25.07.2012 made in CRP No.3096 of 2011 has held that the Lower Court has committed an irregularity in numbering both the applications. In order to give an opportunity to the first respondent, this Court directed the Executing Court to consider the contention of the first respondent and pass orders on merits.

7(c) The first respondent filed application on 05.03.1999 to set aside the ex parte order dated 28.11.1996. Alongwith the said application, the first respondent has not filed any application for condoning the delay in filing the said application. She did not implead the petitioner as party in the said application even though she was aware that the petitioner is the auction purchaser.

7(d) The first respondent did not take effective steps to get the application numbered till 2005 and did not take effective steps to prosecute the said application even though the same was filed on 05.03.1999. The said application was numbered only in the year 2005.

7(e) In Application in I.A.No.158 of 2011 filed to condone the delay in filing application in I.A.No.359 of 2005, again the first respondent did not implead the petitioner.

8. The above facts shows that the intention of the first respondent is not bonafide and the first respondent has filed the applications only to drag on the proceedings. The first respondent has filed application for condoning the delay as well as to set aside the exparte order on the ground that her Advocate did not inform her about the proceedings and order setting her exparte. It is an admitted fact that the petitioner engaged an Advocate on 12.08.1995. Till 05.03.1999, the first respondent did not contact her Advocate to find out the stage of the execution proceedings. The first respondent was not vigilant enough to protect her interest as claimed by her and put forth her contention on merits. The learned Judge has allowed the application to condone the delay on the ground that the first respondent should not suffer for the mistake of her Advocate. The learned Judge failed to take note of the attitude of the first respondent and her inaction in contacting her Advocate from 12.08.1995, when vakalat was filed on her behalf. The reason given by the learned Judge to condone the delay is not valid.

9. The contention of the learned Senior Counsel for the first respondent that when the Lower Court accepted the reason for the delay and condoned the delay, the superior court normally should not interfere with the said order and judgments relied on by her in this regard are not applicable to the facts of the present case. When the order of the court below is perverse, the same can be reversed in Revision. When it is clear from the facts of the case that the first respondent was not vigilant enough to put forth her case on merits and when the order of the Lower Court condoning the delay is erroneous, definitely, this Court can set aside the said order. Similarly, the order of this Court dated 07.03.2017 made in CRP (MD) No.87 of 2013 (NPD) relied on by the learned Senior Counsel for the first respondent and judgment reported in **2016 (5) CTC 117** cited supra do not advance the case of the first respondent. The learned Judge has not properly appreciated the facts and attitude of the first respondent and committed an irregularity in allowing both the applications viz. E.A.No.158 of 2011 and E.A.No.359 of 2005 and hence the order dated 11.12.2013 made in E.A.No.158 of 2011 in E.A.No.359 of 2005 in E.P.No.166 of 1996 in O.S.No.1232 of 1987 and order dated 20.03.2014 made in E.A.No.359 of 2005 in E.P.No.166 of 1996 are liable to be set aside and are hereby set aside.

10. In the result, both these Civil Revision Petitions are allowed.
No costs. Consequently, connected Miscellaneous Petition is closed.

09.02.2018

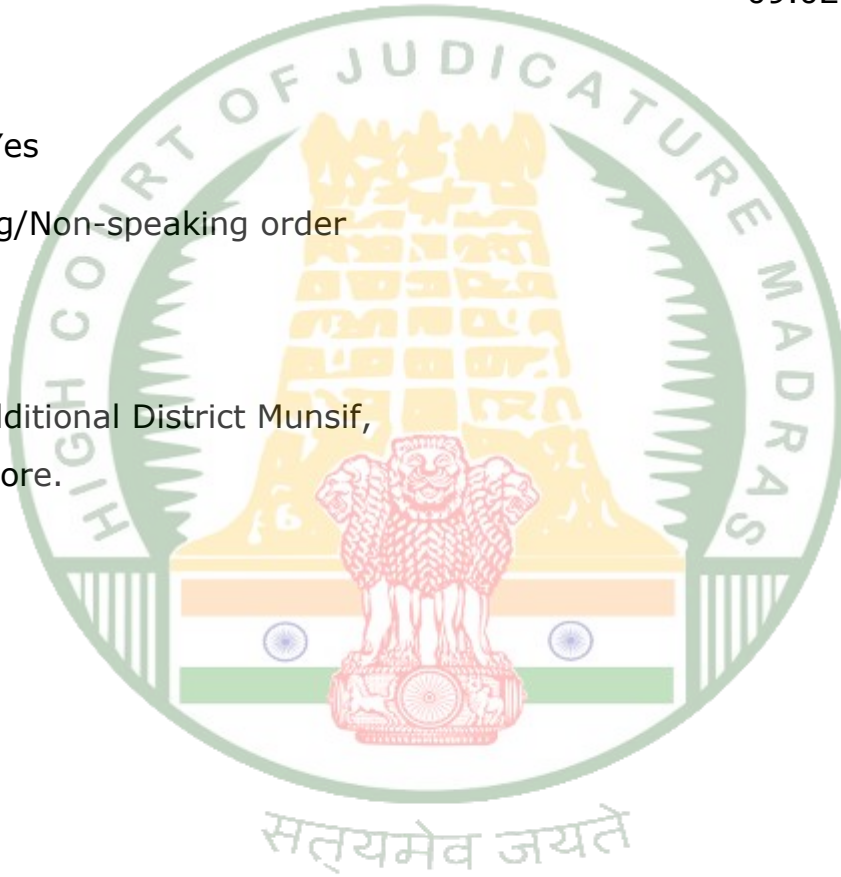
rgr

Index: Yes

Speaking/Non-speaking order

To

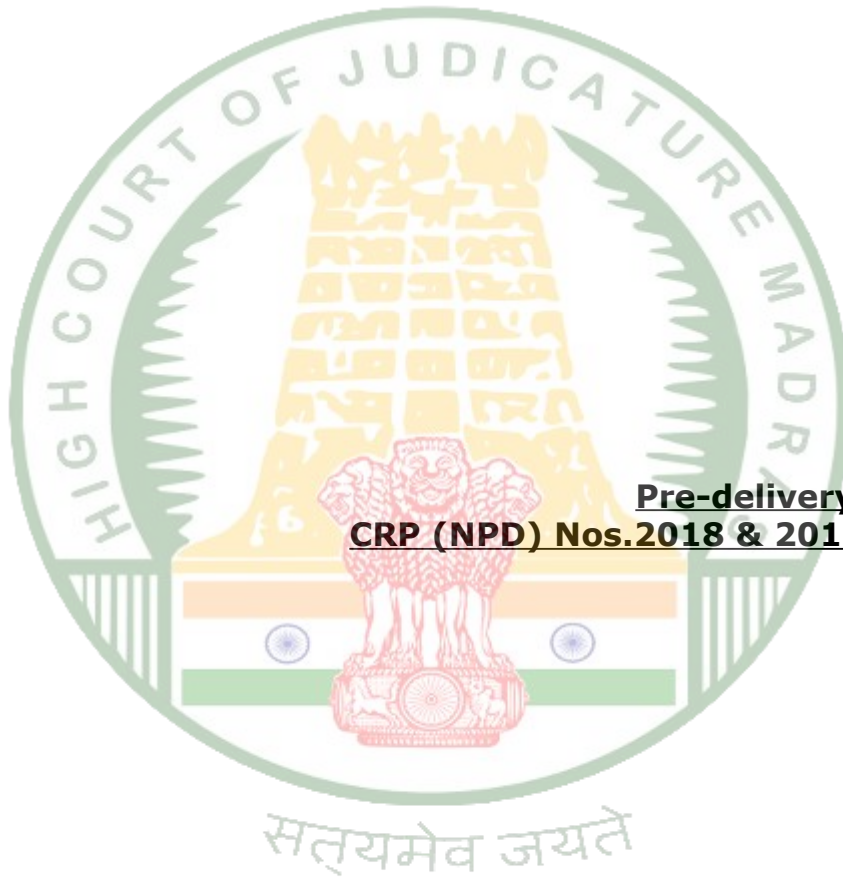
The I Additional District Munsif,
Coimbatore.



WEB COPY

V.M.VELUMANI, J.

rgr



**Pre-delivery Order in
CRP (NPD) Nos.2018 & 2019 of 2014**

WEB COPY

09.02.2018