

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 05.10.2018

**CORAM:
THE HONOURABLE MR. JUSTICE M.S. RAMESH**

**C.R.P. (NPD) No. 2887 of 2018
and C.M.P. No. 16934 of 2018**

RameshPetitioner

Vs

Sadhasivamoorthy ...Respondent

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India to set aside the Fair and Final order dated 16.02.2018 made in I.A.No.873 of 2017 in O.S.No.235 of 2012 on the file of the learned III Additional District and Sessions Judge, Erode District at Gobichettipalaiyam.

For Petitioner : Mr.S.Partha Sarathy, Sr. Counsel
for Mr.S.Lakshmanasamy

For Respondent : Mr.S.Senthil

ORDER

In the suit for specific performance, the petitioner herein is the third defendant. The challenge in the present revision is against the order of rejection of the interlocutory application viz., I.A.873 of 2017 in O.S.No.235 of 2012 on the file of the learned III Additional District and Sessions Judge, Gobichettipalayam filed under Section

5 of the Limitation Act, 1963 seeking for condoning the delay of 1379 days in filing the application to set aside the ex-parte decree dated 07.08.2013.

2.Heard Mr.S.Partha Sarathy, learned Senior counsel appearing on behalf of the petitioner and Mr.S.Senthil, learned counsel for the respondent.

3.The learned Senior counsel for the petitioner submitted that the petitioner herein had properly assigned the reasons for the delay caused in filing the application to set aside the ex-parte decree and that the plaintiff, having admitted about the sale deed dated 28.11.2011, executed in favour of the petitioner herein, had preferred to file the suit for specific performance without seeking for setting aside the said sale deed. As such, he submitted that since he has meritorious and arguable issues in his favour and in view of the fact that each and every day's delay has been explained, the trial Court ought not to have rejected the petitioner's application. In support of his contention, he had relied upon various judgments of this Court as well as the Hon'ble Apex Court.

4.The learned counsel for the respondent on the other hand submitted that there was a lack of bona-fides in the application filed

by the petitioner under Section 5 of the Limitation Act. By relying upon the judgments of this Court as well as the Hon'ble Apex Court, the learned counsel submitted that the delay has not been properly explained and that the delay being inordinate in nature, the trial Court had properly held that the application deserves to be rejected in view of sufficient cause not being ascertained for each and every day's delay. He would further submit that though the ex-parte judgment and decree was passed on 07.08.2013, the petitioner herein had preferred to file the Section 5 application only after the execution proceedings have been initiated and hence, no indulgence should be extended to the petitioner herein.

5.I have given careful consideration to the submissions made by the respective counsels.

6.Before analysing the reasons assigned for rejecting the petitioner's request for condoning the delay, I deem it appropriate to have a cursory glance on the bare facts of the case. As per the plaint, the suit has been filed on the basis of the sale agreement dated 24.12.2009, the plaintiff has referred to the sale deed dated 28.11.2011 executed by the defendants 1 and 2 in favour of the third defendant conveying the suit properties. The said sale deed dated 28.11.2011 has not been challenged. Pursuant to the sale

deed, the third defendant was also put in possession of the suit properties. After almost one year, the suit has been initiated for the relief of specific performance.

7. Considering the nature of the relief claimed and the defence of this petitioner which could be taken in this suit and in order to extend substantial justice to the parties, I am of the view that the petitioner may have valid defence to substantiate his right before the trial Court. By applying the well laid down ratio in various judgments of the Hon'ble Apex Court that the expression "sufficient cause" in Section 5 of the Limitation Act should be given liberal consideration so as to advance substantial justice.

8. I shall now deal with the reasons assigned by the petitioner herein before the trial Court seeking for condoning the delay of 1379 days in filing the application to set aside the ex-parte decree. Before the trial Court, it is the petitioner's case that he had purchased the suit property on 28.11.2011, by a valid sale deed from the defendants 1 and 2 herein. At the time of purchase, there was no encumbrance in the suit properties. He has also submitted that when the sale deed came to be executed in his favour, the defendants 1 and 2 had assured him to sort out any disputes that may arise with regard to any claim or right over the suit properties

by any third party.

9. It is in this background that the suit for specific performance came to be filed by the respondent herein. The defendants 1 and 2 had assured the petitioner/third defendant that they would effectively defend the case on his behalf also. It is on this promise that the responsibility of conducting the case was handed over by the petitioner herein to the defendants 1 and 2. The petitioner had also in many words, indicated that he had been regularly monitoring the case through the defendants 1 and 2 over the phone since he was residing outside the station. It is only after there was callousness and irresponsible replies given by the defendants 1 and 2, the petitioner herein had contacted his lawyer and passing of the ex-parte decree came to his knowledge. Consequently, he had filed an application for condoning the delay of 1379 days to set aside the ex-parte decree.

10. The trial Court had gone into all these reasons and had observed that each and every day's delay had not been explained properly and the reasons will not be a sufficient cause for condoning the delay. The trial Court had also expressed its views that such reasons cannot be a justification for a delay about three years. Such findings of the trial Court cannot be ex-facie termed to be an

unjustifiable finding. Nevertheless, by comprehensive consideration of the entire facts of the case, vis-a-vis., the probable defence of the petitioner herein/third defendant, it is my endeavor to advance substantial justice to the parties. As observed earlier, the petitioner herein/third defendant, having purchased the property prior to the suit and also have been put in possession, is now facing the possibility of being deprived of his property. It cannot be totally disbelieved about the circumstances under which the defendants 1 and 2 had assured the third defendant to defend the case on his behalf also. It is the specific plea of the petitioner herein that he was made aware of the dispute, when the suit property was purchased by him. The defendants 1 and 2 had assured to clear all encumbrances and disputes over the suit property, which may arise at the later stage and in consequence of with such an assurance, the petitioner herein also seems to have handed over the responsibility of defending his case to the lawyers of the defendants 1 and 2. He had also stated that he had been regularly following the stage of the case with the first defendant and in view of the illness of the first defendant, whereby he was bedridden, he had no information about the stage of the case for about some time and subsequently when he had contacted the lawyers of the defendants 1 and 2, he was made aware of the fact that he has been set ex-parte for non filing of the written statement and thereby, the suit

came to be decreed. All these reasonings can be termed as a cause assigned for each and every day's delay and in taking into account the manner in which the petitioner herein had handed over the responsibility of defending his case to the defendants 1 and 2, such a cause can be termed as a "sufficient cause" as defined under Section 5 of the Limitation Act. As such, it is my considered view that the petitioner herein should be given an opportunity to put forth his defence in the trial Court in order to render substantial justice to the parties.

11. The learned Senior counsel for the petitioner had relied upon the following judgments reported in **2001 (6) SCC 176 [M.K.Prasad V. P.Arumogam]** and **2002 (3) SCC 195 [Ram Nath Sao @ Ram Nath Sahu and others V. Gobardhan Sao and others]** and submitted that the expression "sufficient cause" within the manner of Section 5 of the Limitation Act or under Order 22 Rule 9 of the Civil Procedure Code should be given liberal construction so as to advance substantial justice. The aforesaid two judgments came to be considered by a learned Single Judge in a judgment in **Rajangam and others V. Senthamaraj and others** reported in **2016 (2) CTC 714** and this Court, while analysing the scope and Section 5 of the Limitation Act, had taken into consideration various judgments of the Hon'ble Apex Court and held

as follows:-

"8. The learned counsel for the Revision Petitioners would submit that the length of delay alone is not a criteria to dismiss the petition and the Court is expected to consider the nature of the claim made in the suit, the nature of defence taken by the defendants, the stake involved in the matter and the possibility of rendering substantial justice to the parties. It is also represented that the inconvenience caused to the other side can be compensated by costs and the defendants are ready to pay the costs, if imposed by this Court.

8.1. The learned counsel for the Revision petitioners relied upon the following decisions, in order to support the contention that the grounds, which are required to be considered by the Court, (which passed the impugned order), were not considered and if that had been done, the petition would not have resulted in dismissal:-

(i) CDJ 2014 MHC 3671 (M/S. Bharat Petroleum vs C.S.Prakasa Rao):-

14. While deciding, whether the delay has to be condoned or not, the nature of the relief claimed in the plaint, the nature of the defence taken and the benefits, that could be sought under Section 9 of the City Tenants Protection Act or in the alternative, to make a claim of compensation under

Section 3 of the City Tenants' Protection Act, have to be kept in mind".

(ii) CDJ 2001 SC 404 (M.K.Prasad v. P.Arumugam):-

While deciding the application for setting aside the ex-parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs.

(iii) CDJ 2002 SC 190 (Ram Nath Sao @ Ram Nath Sahu And ... vs Gobardhan Sao And Others):-

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor.

(iv) Order of this Court, dated 31.07.2015 in CRP No.662 of 2005 (Manimegalai : vs Panaian):-

6. The Supreme Court in *M.K.Prasad v. P.Arumugam* [2001 (6) SCC 176], while considering the question regarding delay in applying for setting aside the *exparte* decree, observed that the Court ought to keep in mind the judgment impugned in the matter, the extent of property involved and the stake of the parties, while deciding an application to set aside the *exparte* decree.

7. The Supreme Court in *Ram Nath Sao v. Gobardhan Sao* [2002(3) SCC 195], explained the expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963. The Supreme Court very clearly observed that explanation for the delay should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case.

(v) Order of this Court, dated 07.01.2016 (*Shri. Srijith C vs The Customs*):-

(iv) *Standard Treads v. Collector*, reported in 1996 (83) ELT 30 (Ker):-

4. It has to be kept in the forefront that ordinarily a litigant does not stand to benefit by lodging an appeal late. He has no interest in wasting time. It has also to be borne in mind that the great possibility of disastrous results creating a situation that a meritorious matter being thrown out

at the threshold causing a heavy burden to the cause of justice has to be defeated at the very start.

5. Judiciary gets its respect in the legal order not on account of its power to legalize injustice on technical grounds. But, it has the capacity and purpose to remove injustice wherever it is in sight and this is what is understood and pointed out by the Apex Court as justice-oriented approach in regard to the matters being thrown out at the threshold of the concerned proceedings."

8.2. Considering the dictum laid down in the above cases, it is for this Court to consider the cumulative circumstances available in this case as to the nature of the relief claimed, the stake involved and the possibility of doing substantial justice to the parties, while compensating the party who suffered inconvenience.

8.3. The delay involved even after entering appearance in the final decree cannot be appreciated, but, at the same time, the predicament involved in not permitting the second Revision Petitioner (8th defendant) to contest the case on merits should be taken into account, while deciding whether to condone the delay or not.

By adopting the ratio laid down by the Hon'ble Apex Court in all the aforesaid decisions which came to be relied by the learned Single Judge of this Court, I am of the view that the reasons for the delay assigned in the application can be deemed to be a sufficient cause for condoning the delay.

12. The learned counsel for the respondent on the other hand had relied upon the judgment of this Court in **Ayyanar V. Arumugam and another** reported in **2014 (3) CTC 399**, wherein it was held that when the defendants were watching the execution proceedings and had filed the application to condone the delay after the second sale proclamation was made, such a delay cannot be considered to be a sufficient cause. Likewise, in a judgment of this Court in **R. Jagadeesan (died), 2. Sakunthala, 3. Magendran and 4. Parthipan V. Santhakumari** reported in **2012 (1) CTC 849**, a learned Judge of this Court held that merely filing of an application to set aside the ex-parte decree will not show due diligence, if the applicant had not taken due steps even after entering appearance in the execution proceedings, but only callousness and irresponsible attitude and therefore justified the dismissal of condonation delay application.

13. The powers vested with the trial Court, while dealing with an application under Section 5 of the Limitation Act is a discretionary power. The said discretion is exercised based on the peculiar facts of each and every case. When the power itself is discretionary, it cannot be said that the findings on a different set of facts in some other decision taken while dealing with an order passed under Section 5 of the Limitation Act would be a precedent for rejecting the present case also, since the facts and the cause assigned in all these cases are totally distinct from each other.

14. In a catena of well laid down judgments, the Hon'ble Apex Court had also held that while giving a liberal approach to an application made under Section 5 of the Limitation Act, the merits of the case should also be looked into. While that being so, when this Court had taken a view that the petitioner herein may have an arguable defence before the trial Court and the reasons assigned also seems to be a sufficient cause for condoning the delay, the observations in the decisions cited by the respondent may not be of much help to him.

15. The learned counsel by relying upon the decision of the

Hon'ble Apex Court in ***Esha Bhattacharjee V. Managing Committee of Raghunathpur Nafar Academy and others in 2013 (12) SCC 649*** submitted that the present revision requires to be rejected since the application before the trial Court under Section 5 of the Limitation Act lacks bona-fide which is a relevant factor for considering the condonation of delay application. In the aforesaid judgments, the Hon'ble Apex Court had relied upon the various authorities on the principles of condoning the delay and had broadly set forth the principles, one such principle is that the lack of bona-fide imputable to a party seeking condonation of delay is a significant and relevant fact. In view of my aforesaid findings that the reasons assigned by the petitioner could be an explanation for each and every day's delay and also a sufficient cause and the possibilities of the petitioner herein/third defendant having valid defence before the trial Court, it cannot be said that the application filed by the petitioner herein lacks bona-fide. As such, this decision relied by the respondent may not be of assistance to him.

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16. Though I am inclined to condone the delay, I am also conscious of the fact that some prejudice would have been caused to the respondent herein in defending the present revision as well as the steps to initiate the execution proceedings. The Hon'ble Apex Court in the judgment in ***M.K.Prasad V. P.Arumogam*** reported in

2001 (6) SCC 176 had observed that such an inconvenience caused to the respondent can be compensated by awarding appropriate and exemplary cost.

17. In the light of the above observations, the fair and final order passed in I.A.No.873 of 2017 in O.S.No.235 of 2012 on the file of the learned III Additional District and Sessions Judge, Erode District at Gobichettipalayam dated 16.02.2018 is set aside. Consequently, the petitioner's application in I.A.No.873 of 2017, to condone the delay of 1379 days in filing the application to set aside the ex-parte decree as against the third defendant/petitioner herein, is condoned.

18. Accordingly, the Civil Revision Petition stands allowed. The petitioner shall pay a sum of Rs.50,000/- towards exemplary cost to the respondent within 10 days from the date of receipt of copy of this order. Consequently, connected Miscellaneous Petition is closed.

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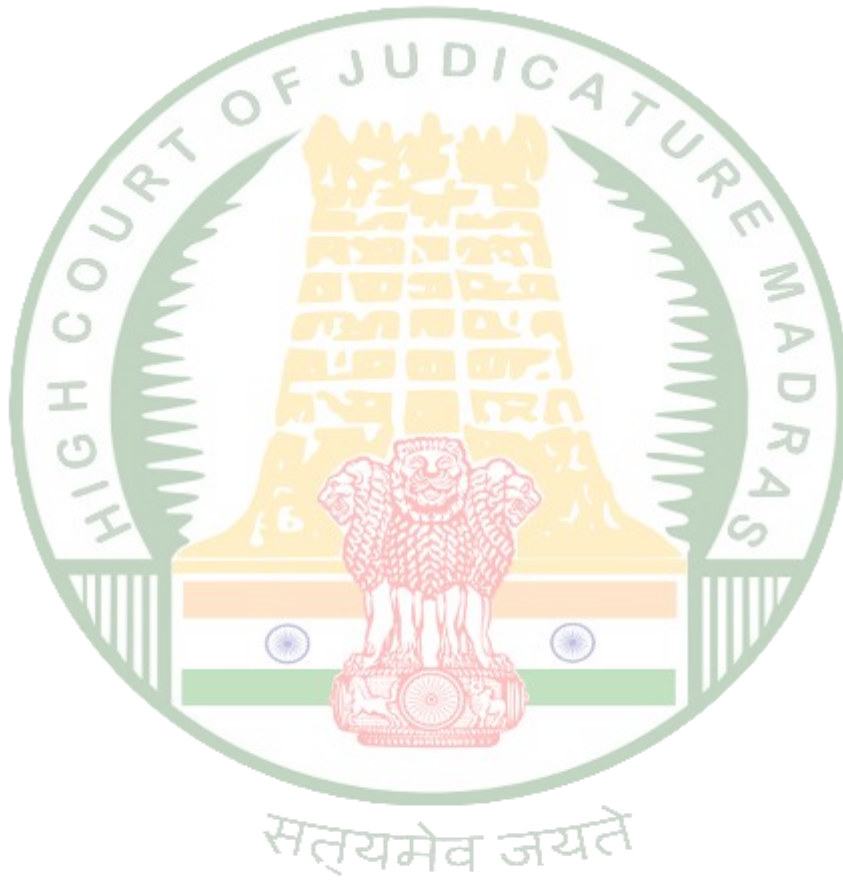
Index:Yes

Order:Speaking/non speaking

hvk/DP

To

The III Additional District and Sessions Court,
Gobichettipalaiyam,
Erode District.



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M.S.RAMESH.J,

DP/hvk



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