

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2018

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD) No.183 of 2010

1.Gopalakrishnan
2.P.Anbalagan
3.T.Chandran
4.A.Gunasekaran
5.A.Viswanathan
6.A.Palanisamy

...

Petitioners

Vs

1.P.Viswanathan
2.P.Kalyanasundaram
3.V.Kamala
4.S.Sujatha
5.v.Suresh
6.S.Suganthi
7.V.Sudhakar
8.V.Prema
9.P.Sarala
10.K.Badrinathan
(Name of the 10th respondent is changed
and petition amended as per order in
I.A.No.159/2006 dated 20.12.2006)
11.K.Saravanan
12.The Urban Coop. Bank Ltd.,
Salem, Salem - 1.

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Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India to call for the entire records in so far as it relates to the order passed in I.A.No.74/2006 in unnumbered O.S.No.Nil /2006 on the file of the Principal District Judge, Salem

For Petitioners : Mr.C.Prakasam

For Respondents : Dr.C.Ravichandran
for R5 & R10

Mr.V.C.Selvasekaran
for R7

No appearance for
RR1 to 4, 6, 8, 9, 11 & 12

ORDER

This Civil Revision Petition is filed to call for the entire records in so far as it relates to the order passed in I.A.No.74/2006 in unnumbered O.S.No.Nil/2006 on the file of the Principal District Judge, Salem and set aside the same.

2. The petitioners are the plaintiffs and the respondents are the defendants in unnumbered O.S.No.Nil/2006 on the file of the Sub Court, Salem. The petitioners filed the above suit for specific performance of agreement of sale dated 24.01.2001 against the respondents directing the respondents to execute and register sale deed in favour of petitioners at the cost of petitioners failing which the court may execute and register sale deed in favour of the petitioners by permitting the petitioners to deposit the balance sale consideration and creating a charge over the property. They filed the suit by affixing court fee of Rs.1/-. The plaint was returned on

03.06.2002 granting one month's time to comply with the defects pointed out. The petitioners re-presented the plaint with application in I.A.No.74 of 2006 to condone the delay of 1472 days in re-presenting the plaint. According to the petitioners, the delay in re-presentation occurred for the following reasons -

(i) An insolvency petition was pending before Sub Court, Salem in respect of the suit property. It has caused mental shock and harassment to the petitioners. The respondents have filed the said insolvency proceedings to harass the petitioners and to prolong the matter.

(ii) the respondents tried to interfere with the possession of the suit property of the petitioners. The petitioners filed O.S.No.767 of 2001 on the file of Principal District Munsif Court, Salem. The said suit was decreed by judgment and decree dated 10.01.2003 in favour of the petitioners. The petitioners were wrongly agitating the issue before another court and the said period has to be excluded under Section 14 of the Indian Limitation Act, as agreement of sale is also the subject matter of the suit in O.S.No.767 of 2001.

(iii) The first petitioner who is conducting the

case became seriously ill during July 2003 till October 2005. After giving evidence in O.S.No.767 of 2001, he was inflicted with skin disease and other ailments and therefore he could not contact his counsel.

(iv) When he contacted his counsel, he was informed that the plaint was returned and it was mixed up with other bundles. After thorough verification, the bundle has been traced during last week of May 2006.

(v) Original agreement was directed to be filed and hence the petitioners applied for certified copies of the same as the original was filed in O.S.No.767 of 2001.

(vi) The petitioners have sufficient capacity to pay the court fee and could not re-present the plaint for bonafide reasons, as stated above. Delay is neither wilful nor wanton.

3. The second respondent filed counter and the same was adopted by respondents 1 and 3 to 11. According to the respondents, the plaint was not re-presented for 3 ½ years. The petitioners are parties in O.S.No.767 of 2001. The first petitioner deposed as PW1 in O.S.No.767 of 2001 on 13.08.2002 on the file of Principal District Munsif Court, Salem and his evidence was over only on 20.09.2002. No bonafide reason is given and hence the delay cannot be condoned. The alleged agreement of sale is dated

24.01.2001. The petitioners issued notice through their counsel on 08.06.2001. There is no proof for payment of advance amount of Rs.17,50,000/-. They have not paid balance amount of Rs..32,00,000/- or deposited the same into court. The respondents are totally denying the agreement of sale. O.S.No.767 of 2001 was disposed of long back. The first petitioner is not suffering from any ailments and also submitted that petitioners have no capacity to pay the court fee and they have no capacity to purchase the property. The petitioners are involved in criminal case in respect of the suit property.

3 (a) The petitioners have filed writ petition against the respondents and Salem Urban Co-operative Bank Limited for which the first petitioner's health was permitted. Insolvency proceedings has nothing to do with the re-presentation of the plaint. The averments that bundle got mixed up with other bundles is an invented story. They have not filed original agreement of sale alongwith the plaint. The respondents also denied that the petitioners were wrongly prosecuting the case in another court and submitted that Article 14 of the Indian Limitation Act will not help them. There is no agreement of sale. Even if there is any agreement of sale, it has been terminated or rescinded. The delay is not properly explained and prayed for dismissal of the application.

3(b) The learned Judge, considering the averments in the affidavit and counter affidavit, dismissed the application.

4. Against the said order of dismissal made in I.A.No.74/2006 in unnumbered O.S.No.Nil /2006, the present Civil Revision Petition is filed by the petitioners.

5. The learned counsel for the petitioners contended that the learned Judge failed to consider the reasons given by the petitioners for the delay in re-presentation. The respondents have admitted the pendency of insolvency proceedings and the suit filed by the petitioners in O.S No.767 of 2001 and decree passed in their favour. The learned Judge, erroneously rejected the contention of the petitioners with regard to ailments suffered by the first petitioner. The learned Judge, for erroneous reasons, dismissed the application. The reasoning of the learned Judge that petitioners have paid court fee without obtaining extension of time is contrary to the fact. The petitioners have filed application for extension of time for payment of court fee and the same was allowed. The petitioners obtained challan from the court and paid the deficit court fee.

5(a) The learned counsel for the petitioners referred to application for extension of time for payment of court fee, docket order and challan filed in the additional typedset of papers. The learned counsel for the petitioners further contended that for payment of deficit court fee, there is no necessity to file application under Section 149 of CPC. The said application is not mandatory. In the present case, the court has extended the time for payment of deficit court fee and petitioners have paid the deficit court fee. The learned Judge dismissed the application on misconception that the petitioners have paid the court fee without order of the court extending the time for payment of deficit court fee.

5(b) The learned counsel for the petitioners, in support of his contention, relied on the following judgments -

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(i) 2008 (6) CTC 59 [A.Gurunathan @ Sivaji v. J.Muthulakshmi]

33. In the considered opinion of this Court, an application to receive the deficit Court Fee is not a mandatory one and the same is only optional and in the absence of an application the act of Court in accepting or receiving the deficit Court Fee cannot be found fault with and the exercise of judicial discretion by the trial Court in this regard in favour of the plaintiffs in order to do justice is a prudent and equitable one, since the said discretion in its breath is coextensive with necessity and the resultant position is the plaint stands good from the original date of filing and the same is not time barred. Moreover, the duty of Court is to see that its acts injures no party.

34. In the up-short of detailed discussions mentioned supra and on assessment of cumulative facts and circumstances of the present case, this Court comes to the conclusion that the order of the trial Court in dismissing the I.A.No.130 of 2008 dated 11.04.2008 is correct and consequently, the Civil Revision Petition is dismissed, leaving the parties to bear their own costs. However, the observation of the trial Court in para 16 of its order to the effect that 'the acceptance of payment of deficit Court Fee without an application that it is irregular' is set aside by this Court to prevent aberration of justice. Consequently, connected miscellaneous petition is also dismissed.

(ii) 2001 (1) CTC 683 [Ratansingh v. Vijaysingh & Others]

14. Learned counsel reminded us of the observation made by this Court in *Anandilal & anr. vs. Ram Narain and ors.* (AIR 1984 SC 1383) that there is no justification for placing a rigid construction on the provisions of the *Limitation Act*. But we must remind ourselves of the other profile that in construing statutes of limitation, considerations of hardships are out of place. What is

needed is a liberal and broad based construction and not a rigid or narrow interpretation of the provisions of the [Limitation Act](#).

6. Per contra, the learned counsel for the respondents 5 & 10 contended that the suit is for specific performance of agreement of sale dated 24.01.2001. Alongwith the suit, the petitioners have filed only xerox copies of the sale agreement. The suit has been filed on 23.04.2002 by affixing court fee of Rs.1/- as against the correct court fee of Rs.3,75,000/-. It is not deficit court fee but the petitioners have deliberately affixed court fee of Rs.1/-. Hence, the plaint was returned on 03.06.2002 granting one month's time for the petitioners to comply with the defects. The petitioners have not re-presented the plaint for more than 3½ years and the same was re-presented only on 13.07.2006 alongwith application to condone the delay in re-presentation. No application has been filed by the petitioners to condone the delay for payment of deficit court fee.

6(a) Having valued the suit, the petitioners must give reasons for non-payment of correct court fee. Further, the petitioners have not filed application under Section 149 of CPC. They have filed application only for delay in re-presentation and have not filed application seeking extension of time for payment of deficit court fee. It is not the question of payment of court fee. It is a judicial order to be pronounced why the petitioners have not paid the

appropriate court fee. Having chosen to value the suit, he has chosen to pay only Rs.1/- as court fee. He further submitted that the very re-presentation of plaint without petition seeking time for extension of time is improper re-presentation and it is not re-presentation in the eye of law.

6(b) The learned counsel for the respondents further contended that the reasons adduced by the petitioners for delay in re-presentation are not valid. The suit in O.S.No.767 of 2001 filed for bare permanent injunction was disposed of on 10.01.2003. Even after disposal of the said suit, the petitioners have chosen to re-present the plaint only on 13.07.2006. The reasons given by the petitioners are vague. The petitioners have re-presented the plaint only after the period of limitation. Further no medical certificate has been produced to prove that the first petitioner was suffering from skin disease. In support of his contention, the learned counsel for the respondents 5 & 10 relied on the following judgments -

(i) 1997 (1) CTC 651 [Gomathi Ammal v. Madhusoodanan Nair and another]

7. In our case also, except the production of medical certificate, the petitioner herein has not explained the delay by examining herself. A reading of Order 9, Rule 3, C.P.C., clearly shows that the applicant must satisfy the Court that the summonses were not duly served or she was prevented by any sufficient cause from appearing when the suit was called on for hearing. In this case, as already stated, there is no averment that summons was not served on her. Failure to adduce evidence for non-appearance, the vague allegation that she was ill and mere production of medical certificate are not sufficient to prove her illness unless the party gets into the box and speaks about the same. Admittedly in our case the petitioner has not entered the box and spoken in support of the medical certificate. In those circumstance, the decision referred to in the above case as well as the other decision of the learned Chief Justice reported in *Arukkani Ammal v. Guruswamy*, 100 L.W. 707 are squarely applicable to our case. Since we are concerned with the reason or reasons for condoning the delay in filing petition to set aside the ex parte decree, I am not discussing the merits of the case as argued by the learned counsel for the petitioner.

(ii) 2003 (1) LW 585 [Sundar Gnanaolivu v. Rajendra Gnanavolivu]

Head note :

Limitation Act (1963), Section 5 – Delay of 431 days in filing the First Appeal – Suit for declaration of title and recovery of possession of property – Application has not come to court with clean hands and averments in the affidavit are totally devoid of

truth and lacking in bonafides – Held, case falls within the exception to the rule of liberal approach and does not deserve the liberal approach formula in matters relating to condonation of delay.

7. Heard the learned counsel for the petitioners, respondents 5 & 10 as well as 7th respondent . Though the respondents 1 to 4, 6, 8, 9, 11 & 12 have been served and their names are printed in the cause list, there is no representation for them either in person or through counsel.

8. The learned Judge has dismissed the application mainly on the ground that the petitioners have not obtained permission for payment of deficit court fee and without obtaining any extension of time for payment of deficit court fee. Payment of court fee which according to the learned Judge is not valid. The learned Judge has failed to consider the fact that on application filed by the petitioners, the time for payment of court fee was extended. The petitioners have paid the court fee, as per the challan issued by the court. The affidavit, petition and docket order as well as challan by which the petitioners paid the court fee are filed in the additional typed set of papers. Further, the court has discretion to extend the time for payment of deficit court fee at any stage. Even if the suit was numbered, the court has power to extend the time for payment of court fee. Once the court issued challan for payment of court fee

and accepted the court fee paid, it is deemed that petitioners have paid the court fee as per orders of the court.

9. This Court, in the judgment reported in **2008 (6) CTC 59**, relied on by the learned counsel for the petitioners, cited above, held that application under Section 149 is not mandatory. When a power is exercised by the court on application under Section 151 CPC, it is deemed to have been exercised under Section 149 CPC. The court has power under Section 149 CPC to exercise the same either with or without an application filed by the parties concerned.

10. The issue of payment of deficit court fee has been considered and decided by this Court, other High Courts and Hon'ble Supreme Court in number of cases. The following are some of reported judgments in this regard -

(i) 2012 (7) SCC 738 [A.Nawab John & Ors. v. V.N.Subramaniam]

(ii) 2014 (4) SCC 163 [Manoharan v. Sivarajan and Ors.]

(iii) 2015 (1) SCC 680 [H.Dohil Constructions Company Private Limited v. Nahar Exports Limited & anr.]

(iv) 2009 (6) CTC 92 [Mahalingam & another v. K.Krishnasamy Naidu & Another],

(v) 2015 (7) MLJ 725 [V.P.Venkatachalam v. N.Venkatachalam]

(vi) AIR 1977 Jammu & Kashmir 11 [Collector, Land Acquisition and anr. v. Dina Nath Mahajan and ors.]

(vii) MANU/DE/0010/1968 [Union of India, Delhi v. Roshan Lan and Anr.]

From the above decisions, the following principles emerge :-

(1) The Court has power to extend the time for payment of deficit court fee by exercising power under Section 149 CPC at any stage of the suit.

(2) An application under Section 149 CPC is not mandatory and is only directory. The Court has power to extend the time even without any application by the plaintiff.

(3) Once deficit court fee is paid and accepted by the Court, the payment dates back to the date of filing of the suit.

(4) The plea of limitation is not applicable on the ground of subsequent payment of court fee if plaint was initially presented within the period of limitation.

(5) Once the deficit court fee is accepted by the court, Order VII Rule 11 CPC is not available to the defendant.

This Court, in the decision reported in **2009 (6) CTC 92** **[Mahalingam & another v. K.Krishnasamy Naidu & Another]**, after considering various decisions on this issue, in Para 31 held as follows -

31.The Following principles are emerged on a consideration of the various judgments referred to above:-

1.The power exercised by a Court under Section 149 is very wide and the discretion shall be exercised in favour of the plaintiff in the normal circumstances.

2.The power under Section 149 of C.P.C. can be exercised by the Court concerned 'at any stage' of the suit.

3. When the Court exercises the power under Section 149 of C.P.C. before numbering the plaint, the Court is not required to issue notice to the proposed defendant in the suit, since it is a matter between the Court and the plaintiff.

4.Once, the Court exercise the power under Section 149 of C.P.C., the same relates back with the presentation of the plaintiff at the first instance and therefore, the question of limitation does not arise.

5.When the power is exercised by the Court on an application filed under Section 151 of the Code of Civil Procedure, it is deemed to have been in exercise under Section 149 of the Code of Civil Procedure.

6.The Court can exercise its power under Section 149 of C.P.C. either with or without an application by the party concerned.

7.An order passed or deemed to have been passed under Section 149 of the Code of Civil Procedure, cannot be challenged and decided in a revision or at the time of final hearing in the normal circumstances, until and unless mala fide is raised

and proved.

8.The onus of proving lack of bonofides or mala fides is heavily on the person who alleges the same.

9.The power exercised by the Court can also be challenged on the ground that the Court below has not followed the proviso to Order VII, Rule 11, of C.P.C.

10.The power under Order VII, Rule 11 of C.P.C. cannot be invoked when the plaintiff pays the amount as per the order of the Court as directed under Order VII, Rule 11 (b) and (c) of C.P.C.

11. A reading of the above judgments and judgments relied on by the learned counsel for the petitioners that court has extended the time to the petitioners for payment of deficit court fee by issuing challan and accepted the court fee paid under the challan issued under the seal of the court. The learned Judge has failed to consider that petitioners have paid the deficit court fee after obtaining challan from the court. The learned Judge erred in holding that the petitioners have paid the deficit court fee without any order of the Court.

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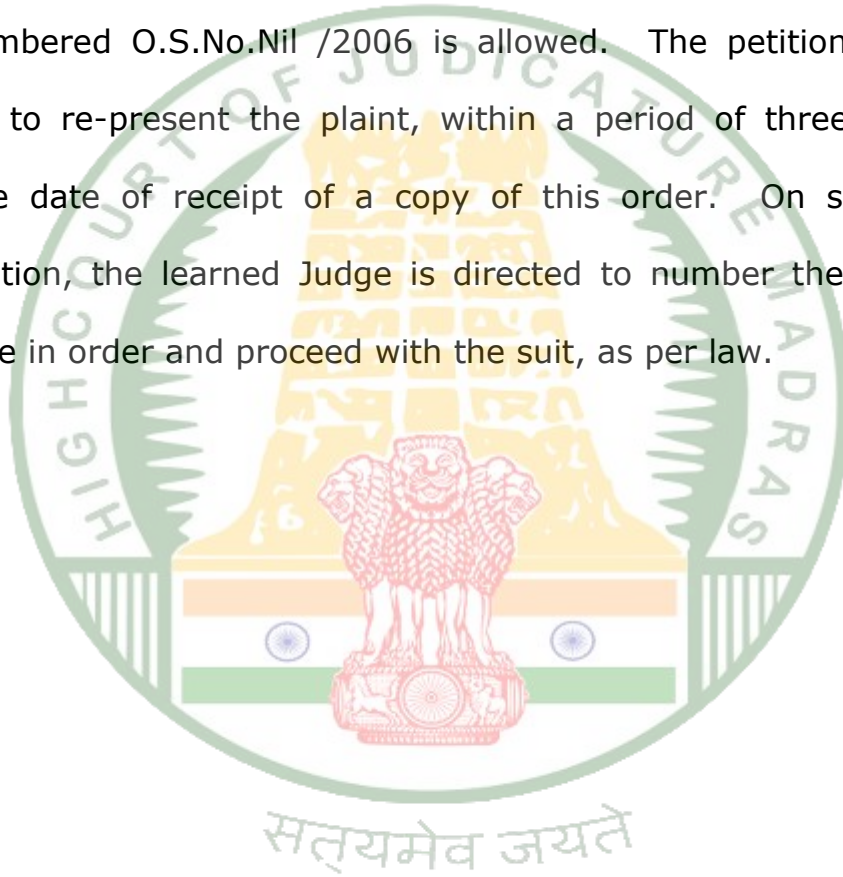
12. As far as the condonation of delay is concerned, a reading of the averments in the affidavit filed in support of the petition to condone the delay would reveal that the petitioners have given sufficient and valid reason for condoning the delay in representation. Respondents have admitted the pendency of insolvency proceedings and the suit filed by the petitioners against

them. The reasons given by the learned Judge for rejecting the said contention of the petitioners are erroneous. Further, it is pertinent to note the contention of the learned counsel for the petitioners that petitioners have paid a sum of Rs.32,00,000/- into the Bank and discharged the mortgage created by the respondents and respondents have taken steps to get the documents deposited by them and sold the property to third parties and also the contention of the learned counsel for the petitioners that the petitioners filed O.S.No.197 of 2011 to set aside the same are not disputed by the respondents. In view of the above facts, the judgments relied on by the learned counsel for the respondents 5 & 10 do not advance the case of the respondents.

13. The issue before the learned Judge in I.A.No.74 of 2006 was whether the petitioners have given valid and sufficient reason for condonation of delay in re-presenting the plaint. The learned Judge, while considering the reasons given for condoning the delay also considered the payment of deficit court fee which was not an issue before him. The learned Judge, without verifying the court records, held that the petitioners have paid the deficit court fee without obtaining permission of the court. The learned Judge committed irregularity as he failed to consider the challan by which

the petitioners paid the deficit court fee.

14. For the above reasons, the order of the learned Judge is liable to be set aside and it is hereby set aside. I.A.No.74 of 2006 in unnumbered O.S.No.Nil /2006 is allowed. The petitioners are directed to re-present the plaint, within a period of three weeks from the date of receipt of a copy of this order. On such re-presentation, the learned Judge is directed to number the suit, if otherwise in order and proceed with the suit, as per law.



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15. In the result, this Civil Revision Petition is allowed. No costs.

18.01.2018

Index : Yes

Speaking/Non-speaking order

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To

The Principal District Judge,
Salem.

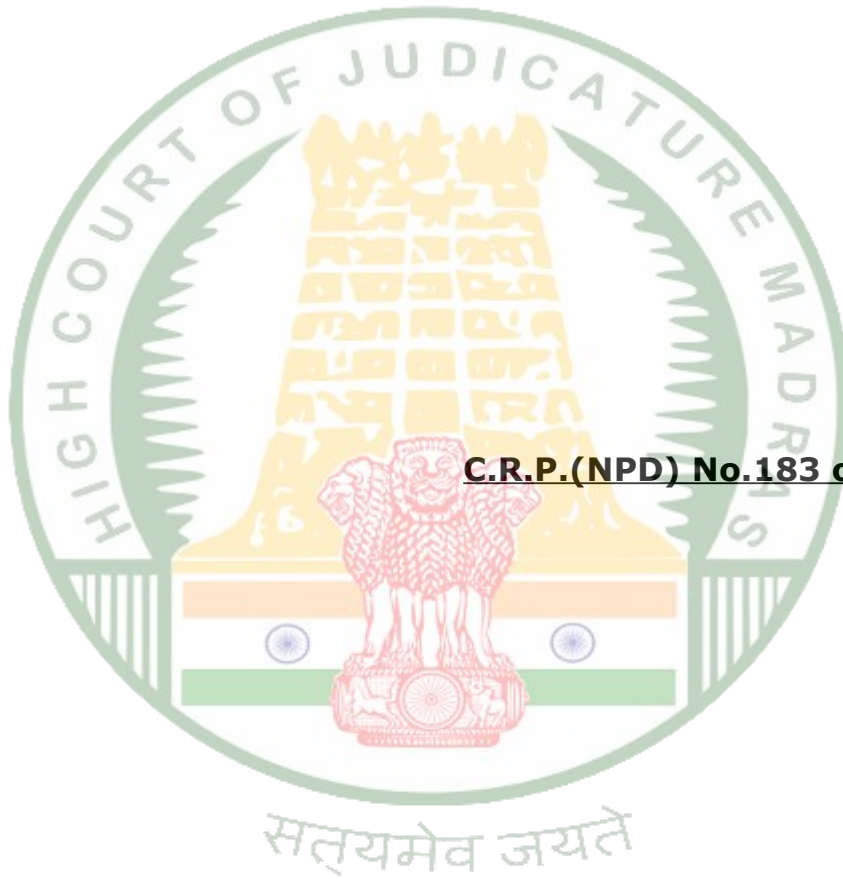
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V.M.VELUMANI, J.

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