

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.3957 of 2010
& M.P.Nos.1 of 2010 & 1 of 2011

A.S.Joseph

.. Petitioner

Vs.

- 1.S.R.Clara @ Rosy
- 2.Rubeca Swamy (Deceased)
- 3.Dr.Premakumari (Died)
- 4.Deepak Kumar @ Chiranjeevi
- 5.Antony Louis (Died)
- 6.A.S.Rajan
- 7.A.S.Arul
- 8.Beula Jeevaratnam @ Ranjini
- 9.Victoria Jeevaratnam
- 10.Joyce Jeevarathinam
- 11.Jayasheeli Jeevarathinam
- 12.Beula Jeevarathinam
- 13.Clara Swamy (Died)
- 14.Jeniffer
- 15.James
- 16.Jesunathan
- 17.A.R.Sathish

.. Respondents

(Memo recorded with regard to
R4 as Lrs of the deceased R3 vide
Court order dated 20.02.2018 and
memo dated 20.02.2018 made in
C.R.P.No.3957/2010)

PRAYER: Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the fair and decretal order dated 14.06.2010 made in I.A.No.1624 of 2007 in O.S.No.60 of 1999 on the file of the District Munsif Court, Chengalpattu.

For Petitioners : Mr.V.Subramanian
for Mr.S.Sathish Rajan

For R3 : Mr.T.V.Sekar
for C.K.Lavanyavathi

For R7 : Mr.S.Ramesh

ORDER

This Civil Revision Petition is filed against the fair and decretal order dated 14.06.2010 made in I.A.No.1624 of 2007 in O.S.No.60 of 1999 on the file of the District Munsif Court, Chengalpattu.

2.The petitioner is first defendant, respondents 1 to 4 are the plaintiffs and respondents 5 to 17 are the defendants 2 to 13 in O.S.No.60 of 1999 on the file of the District Munsif Court, Chengalpattu. The respondents 1 to 4 filed the said suit for partition and to appoint an Advocate Commissioner to suggest the mode of division against the petitioner and respondents 5 to 17. The petitioner and respondents 5 to 17 did not appear and contest the said suit. An exparte preliminary decree was passed on 12.08.1999. The respondents 1 to 4 filed I.A.No.1012 of 2001 for passing of final decree. In the final decree application, the petitioner, respondents 5 and 6 did not appear. Against the 12th respondent, the application was dismissed. The respondents 7 to 11 and 13 to 16 contested the

application, I.A.No.1012 of 2001 filed by the respondents 1 to 4. An Advocate Commissioner was appointed in the final decree application and final decree was passed on 09.03.2006.

3.The petitioner filed I.A.No.1624 of 2007 to condone the delay of 2856 days in filing the petition to set aside the exparte preliminary decree. According to the petitioner, the suit summons were not served on him. He is the absolute owner of the suit property. The respondents have no right/title over the suit property. The petitioner sold the suit property to one Jagadish and three others by sale deed dated 11.06.2007 bearing document No.8017 of 2007. The purchasers on 29.06.2007, demolished the old building and put up construction. At that time, the respondents 5 and 6 came to the property and claimed that the property belongs to them and purchasers have no right to put up construction. The purchasers immediately lodged a compliant with Maraimalar Nagar Police Station. The police called the petitioner and respondents 5 and 6 for enquiry. At the time of enquiry, the Sub Inspector of Police produced judgment dated 09.03.2006. On verification of the records from the Court, the petitioner came to know that an exparte preliminary decree was passed in O.S.No.60 of 1999 on 12.08.1999 and final decree was passed on 09.03.2006. Immediately, he filed the

present application to condone the delay of 2856 days in filing the petition to set aside the exparte preliminary decree dated 12.08.1999.

4.The 7th respondent filed counter affidavit and denied all the averments made in the affidavit filed in support of the above application. The 7th respondent contended that the petitioner received summons and knowing fully well, he did not appear in the suit. He was set exparte on 15.03.1999 and preliminary decree was passed on 12.08.1999. The petitioner, on 11.10.2001, refused to receive the notice sent to him in I.A.No.1012 of 2001 filed by the respondents 1 to 4 for final decree. He was set exparte on 20.11.2001 and Advocate Commissioner was appointed in the said application. The Advocate Commissioner issued notice to the petitioner and others and inspected the property in the presence of all and filed his report. The petitioner did not object the said report. Further, the petitioner filed O.S.No.110 of 2007 for injunction against the respondents 6 and 7 through the same Advocate who filed the present suit O.S.No.60 of 1999 on behalf of the respondents 1 to 4 against the petitioner and other respondents. At the time of filing of the suit itself, the petitioner was aware of the preliminary decree as well as final decree. Further, the 7th

respondent filed detailed written statement and counter affidavit in the application for interim injunction, setting out all the details about O.S.No.60 of 1999, preliminary decree passed on 12.08.1999 and final decree dated 09.03.2006. Pending said suit, the petitioner sold the property to third parties on 11.06.2007. Subsequently, the petitioner withdrew the suit on 03.09.2007. The suit property was purchased by the father of the parties and his father only put up superstructure and was living along with his family till his death by obtaining Electricity Service connection and paying property tax. After their father's death, the 7th respondent was looking after his mother and was living along with her in the property. The telephone connection in the suit property stands in the name of the 7th respondent. The deceased 13th respondent also was residing along with his mother in the suit property. From the beginning, the petitioner was aware of the suit for partition, preliminary decree and final decree passed in the said suit. He received suit summons and did not contest the suit, knowing fully well that all the respondents and petitioner have share in the suit property and he refused to receive the notice sent in I.A.No.1012 of 2001 for final decree through Court Amin. The reason given by the petitioner is not a valid and sufficient reason and prayed for dismissal of the application.

5.The learned Judge considering the averments in the affidavit, counter affidavit and judgments relied on by the parties, dismissed the application, holding that the petitioner failed to establish his case of non-service of suit summons and notice in I.A.No.1012 of 2001 and the petitioner had knowledge of proceedings of the suit, preliminary decree and final decree.

6.Against the said order of dismissal dated 14.06.2010 made in I.A.No.1624 of 2007 in O.S.No.60 of 1999, the petitioner has come out with the present Civil Revision Petition.

7.The learned counsel for the petitioner contended that the petitioner has given valid reason to condone the delay of 2856 days in filing the petition to set aside the exparte preliminary decree dated 12.08.1999. The learned Judge failed to see that suit summons were not served on the petitioner and endorsement made by the bailiff cannot amount to service of notice. The petitioner came to know about the preliminary decree and final decree only on 29.06.2007. On coming to know about the preliminary decree on 29.06.2007, the petitioner filed application immediately to set aside the exparte preliminary decree along with the present petition to

condone the delay within 30 days from the date of knowledge and there is no delay in filing the application. The application to condone the delay is filed only by abundant caution. The respondents colluded together and obtained the decree against the self-acquired and absolute property of the petitioner.

8.The learned counsel for the petitioner, in support of his contentions, relied on the judgments reported in

(i)CDJ 2017 MHC 1133 (S.Nirmaladevi V. T.R.Rangasamy):

"11.No doubt, the delay of 1,202 days is huge, but in the matter of condoning the delay, there is shift in the approach of the Court. It may be a shifting jurisprudence. The attitude of the Judges differ in tune with the change in time. It must have change. If it is not, it will bar the growth of law. That is how there is march of law.

12.Earlier, the attitude of the Courts in delay condonation petitions is to view it with tinged glasses. Now it has become obsolete. Now the attitude of the Court is that really there is a case for adjudication, the Court consider it a sufficient cause or reason to given an opportunity and condone the delay. Otherwise, they throw away such petitions. Thus, now the test is not the length of delay, but it is substance of the matter. However, using this benevolent attitude of the Court, a Court bird or a seasoned litigant shall not be allowed to enter the Court to practice some legal acrobatic at the cost of the public time and public money. In such view of the matter, even in these kind of petitions, the Court can gauge the bona fides of the petitioner. These are all distilled from the current trend of the case-laws on the point."

(ii)2015 (1) CTC 811 (Ajay Kumar Gulecha V. J.Vijayakumar and another):

“15.In this case, the vast extent of the property that too situated in a National High Way Road, i.e., Chennai Bangalore Highways, along with commercial complex, which is worth about crores of rupees, is involved and it should also be taken into consideration.

16.As already stated, the Law of Limitation cannot be involved for destroying the rights of the parties. No prejudice would be caused to the Petition, if the first respondent is given an opportunity to contest the case on merits. If the petitioner is so sure about the case that he can get favourable order on merits instead of getting ex parte decree, as the first respondent has denied the petitioner's, claim and many issues are to be adjudicated after full pledged trial. While comparing the loss to the petitioner and the loss to be caused to the first respondent, namely loss of property worth about crores, the delay has to be excused and the case has to be decided on merits.”

(iii)2000 (1) L.W.547 (V.Amudha V. S.A.Arumugham and 2 others):

5. In N. Balakrishnan v. M. Krishnamoorthy , their Lordships considered this question in detail. In paragraph 13 of the judgment, it was held thus:

“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.

But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

In the earlier portion of the judgment, their Lordships held that the condonation of delay is a matter of discretion of the court and [Section 5](#) of the Limitation Act does not say that such discretion can be exercised only if the delay is within the certain limit. It has been further held thus:

"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 case, delay of a 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 revisional jurisdiction, unless the exercise of discretion was on wholly 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."

**(iv)2008 -1-L.W.494 (Ms/.T.V.Sundram Iyengar and Sons Ltd.,
Authorized dealer for Pal Peugeot Ltd., Omalur Main Road, Salem –
9. V. S.Raghunathan):**

"7.It is pertinent to point out that generally a party does not stand to benefit by filing an application late and refusing to condone the delay can result in a meritorious matter being thrown out at the nascent stage and cause of justice being defeated. As against this, the highest that can happen is that a cause would be decided on merits after hearing the litigants. A pedantic approach should not be made by the Court of law while dealing with the condonation of delay matters. On the other hand, the Courts of law are to adopt a pragmatic approach. In this connection, it is not out of place to make a mention that when substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim any vested right in injustice being done because of non deliberate delay. As a matter of fact, a party does not stand the benefit by resorting to delay. Per contra, he runs a serious risk. It cannot be again said 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."

9.Per contra, the learned counsel for respondents 4 and 7 contended that the suit property was purchased by the father of the parties in the name of the petitioner, who was the eldest son in the family. The superstructure was put up by their father and father &

mother were living in the suit property till their death by obtaining Electricity Service connection and paying property tax. After the death of their father, the 7th respondent and 13th respondent were living along with their mother in the suit property. Telephone connection stands in the name of the 7th respondent. The petitioner was aware of the suit proceedings as suit summons were served on him. In the final decree application, he refused to receive the notice. The Advocate Commissioner appointed in the application for final decree issued notice to all the parties including the petitioner and the petitioner did not object to the report of Advocate Commissioner. The petitioner filed suit O.S.No.110 of 2007 against the respondents 6 and 7 for declaration and injunction. In I.A.No.532 of 2007 in O.S.No.110 of 2007 and in the sale deed, the petitioner has given his address as the address of the suit property only. It is not correct to state that the petitioner was not residing in the suit property and he is residing in Chennai. In the suit filed by the petitioner in O.S.No.110 of 2007, the 7th respondent had filed written statement, furnishing the details of the suit O.S.No.60 of 2009, preliminary decree and final decree. Suppressing the above facts, he had filed the present application only to drag on the proceedings to prevent the respondents from enjoying the fruits of the decree. He denied the contention of the petitioner that even

before filing of the suit in the year 1999, he was residing in Chennai.

10. Heard the learned counsel for the petitioner and respondents 3 and 7 and perused the materials available on record.

11. **The point for consideration** in the present Civil Revision Petition is whether the petitioner came to know about the suit proceedings only on 29.06.2007 or he had knowledge of the suit from the beginning as contended by the respondents.

12. From the sale deed filed by the petitioner in the typed set of papers and the copy of the plaint in O.S.No.110 of 2007 and I.A.No.532 of 2007 in O.S.No.110 of 2007 filed by the petitioner, it is seen that the petitioner was residing in the suit property on 28.03.2007 and 11.06.2007. The suit was filed in the year 1999. From the records, it is seen that the learned Judge had held that suit summons were served on the petitioner. Except stating that the suit summons were not served on the petitioner and endorsement made by the bailiff is not correct, the petitioner has not produced any acceptable evidence to substantiate his case that suit summons were not served on him. Again, at the time of final decree, the

petitioner was residing only in the suit property. From the impugned order of the learned Judge, it is seen that the learned Judge has verified the records and stated that the petitioner refused to receive the notice in the final decree application on 11.10.2001 and he was set exparte on 20.11.2001. The petitioner has not produced any document to show that he was residing at Chennai during relevant time and not in the suit property. Petitioner has not approached the Court with clean hands. The petitioner has not denied the contention of the 7th respondent that Advocate Commissioner issued notice to the petitioner and Advocate Commissioner inspected the suit property and measured the same and filed his report. In addition to that, the petitioner has filed O.S.110 of 2007 against the respondents 6 and 7 for declaration and injunction through the same Advocate who filed the suit O.S.No.60 of 1999 on behalf of the respondents 1 to 4. The petitioner also has not denied that 7th respondent has filed written statement in O.S.No.110 of 2007, mentioning the suit proceedings O.S.No.60 of 1999, preliminary decree and final decree.

13. Suppressing all the above facts, the petitioner filed the application to condone the delay on the ground that he came to know about the suit proceedings only on 29.06.2007. The petitioner

sold the suit property on 11.06.2007 to the third parties and withdrew the suit O.S.No.110 of 2007 filed by him. After purchase, the purchasers demolished the building in the suit property and the petitioner filed I.A.No.1624 of 2007 to condone the delay of 2856 days in filing the petition to set aside the exparte decree. Considering all the above facts in *toto*, I hold that the petitioner was residing in the suit property during relevant time and has not given valid and sufficient reason for condoning the delay in filing the application to set aside the exparte decree. The learned Judge after verifying the Court records only concluded that the suit summons were served on the petitioner and petitioner refused to receive the notice in I.A.No.1012 of 2001 filed by the respondents 1 to 4 for final decree. From the above facts, it is clear that the intention of the petitioner is to deprive the respondents to enjoy the fruits of decree obtained by them. The learned Judge considering all the above facts, has rightly dismissed the application. Hence, the judgments relied on by the learned counsel for the petitioner do not advance the case of the petitioner. There is no illegality or irregularity warranting interference by this Court with the order of the learned Judge dated 14.06.2010 made in I.A.No.1624 of 2007 in O.S.No.60 of 1999.

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

20.02.2018

Index :: Yes/No
gsa

Note: Issue order copy on 28.02.2018

To

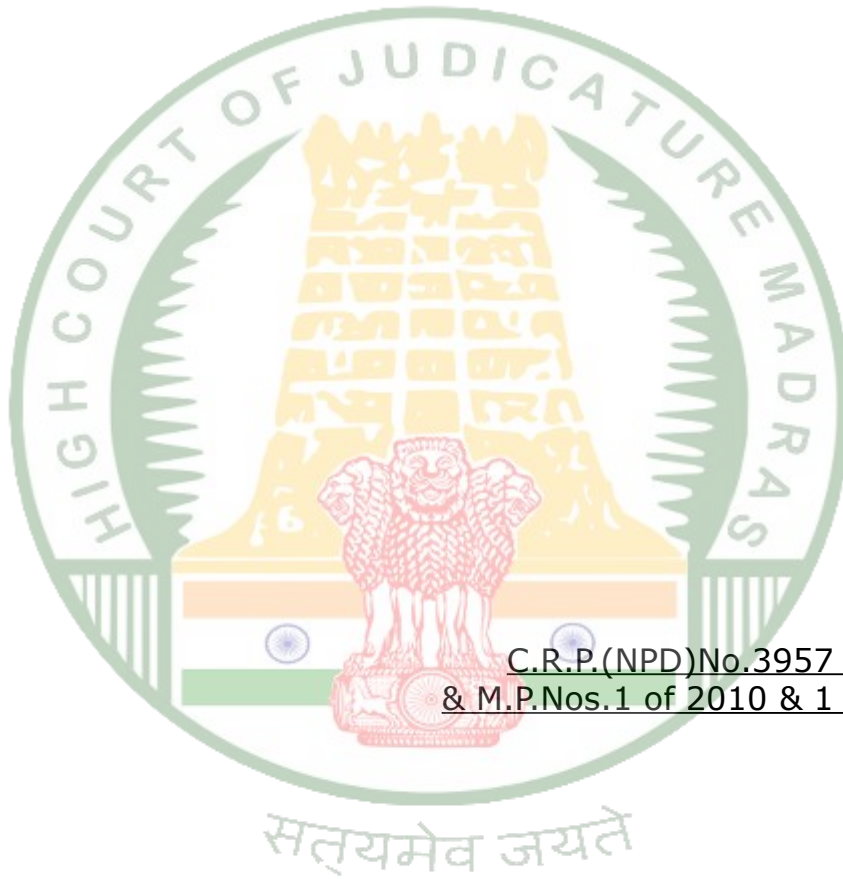
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