

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) Nos.3640 and 4151 of 2013 and
M.P.Nos.1 and 1 of 2013

C.R.P.(NPD) No.3640 of 2013:

N.R.Chandrasekaran

.. Petitioner

vs

1.S.Sivakumar

2.N.Omana Dass

3.K.G.Prakash

4.Tamil Nadu Industrial Investment
Corporation Limited,
rep. by its Branch Manager,
Hosur.

.. Respondents

C.R.P.(NPD) No.4151 of 2013:

K.G.Prakash

सत्यमेव जयते.. Petitioner

vs

1.S.Sivakumar

2.N.Omana Dass

3.N.R.Chandrasekaran

4.Tamil Nadu Industrial Investment
Corporation Limited,
rep. by its Branch Manager,
Hosur.

.. Respondents

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Revision No.3640 of 2013 filed under Article 227 of Constitution of India against the order passed in I.A.No.758 of 2011 in O.S.No.47 of 1997 dated 18.12.2012 on the file of the District Munsif-cum-Judicial Magistrate No.1, Hosur.

Revision No.4151 of 2013 filed under Article 227 of Constitution of India against the order passed in I.A.No.759 of 2011 in O.S.No.47 of 1997 dated 18.12.2012 on the file of the District Munsif-cum-Judicial Magistrate No.1, Hosur.

For Petitioner in : Mr.S.Annamalai
CRP.No.3640/2013

For Petitioner in : Mrs.T.Sundaravadam
CRP.No.4151/2013

For Respondents : Mrs.Hema Sampath
Senior Counsel
for M/s.R.Meenal for
R1 in both CRPs

M/s.K.Magesh for R4
in both CRPs

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COMMON ORDER

These Civil Revision Petitions are filed against the order dated 18.12.2012 made in I.A.No.758 and 759 of 2011 in O.S.No.47 of 1997 by the learned District Munsif-cum-Judicial Magistrate No.1, Hosur, dismissing the petitions filed under Section 5 of the Limitation Act, to condone the delay of 2527 days in filing the application to set aside the exparte decree dated 07.10.2004.

2.The petitioners in both the revision petitions are defendant 1 and 3 respectively in the above suit. Since all the parties in both the civil revision petitions are the same and also arise out of same suit and also for identical relief, both the Civil Revision Petitions are heard together.

3.The first respondent herein has filed the suit in O.S.No.47 of 1997 on the file of the learned District Munsif Court, Hosur, seeking for the relief of declaration, and also for permanent injunction.

4.The said suit came to be dismissed for default by the first respondent as early as on 28.03.2000 and the first respondent, having

filed an application in I.A.No.804 of 2000 to condone the delay thereon in filing application to set aside the order of dismissal dated 28.03.2000. The said application was dismissed by the learned District Munsif, Hosur. Challenging the said order, the first respondent has preferred a Civil Revision Petition in C.R.P.No.1416 of 2002 before this Court and the same came to be disposed of, by condoning the delay.

5.After disposal of the said Civil Revision Petition by this Court, the application in I.A.No.1 of 2003, to set aside the order of dismissal and to restore the suit has been numbered by the learned District Munsif, Hosur. Later the said application was also came to be allowed later by the learned District Munsif, Hosur and the suit in O.S.No.47 of 1997 has been restored.

6.After restoration, the suit has been posted for filing written statement on the side of the defendants namely, the petitioners herein. Since they had not filed any written statement, they were set exparte and later a decree came to be passed in the suit on 07.10.2004.

7.The petitioners, having getting knowledge of the exparte

decree only through a friend, who is also friend to the plaintiff, immediately had filed an application in I.A.Nos.758 and 759 of 2011 in the above suit, seeking to condone the delay of 2527 days in filing application. The said applications were contested by the first respondent, who is the plaintiff in the above suit.

8.After enquiry, the learned District Munsif, Hosur, has dismissed both the applications filed under Section 5 of the Limitation Act, seeking to condone the delay of 2527 days in filing application to set aside the exparte decree. Challenging the same, the petitioners filed the above Civil Revision Petitions before this Court.

9.The point arises for consideration in the above civil revision petitions is whether the trial Court was right in dismissing the petitions to condone the delay of 2527 days in filing the petitions to set aside the exparte decree.

10.But, before deciding the said issue, it is very much necessary to analyze whether the petitioners in the above civil revision petitions, who are the defendants 1 and 3 in the above suit, were put to knowledge of the restoration petition filed by the first respondent/

plaintiff.

11.The learned counsels appearing on behalf of the respective petitioners submitted that the petitioners, who are defendants in the suit, made their appearance through respective counsel to contest the suit. But after the dismissal of suit for default on 28.03.2000, they had not received any notice or summons either from the first respondent /plaintiff or from the trial Court. The respective counsel for the petitioner has also submitted that the petitioners are not even aware of the restoration of the suit and also the exparte decree granted in favour of the first respondent/plaintiff. The trial Court should have exercised its jurisdiction liberally in condoning the delay in the suit for declaration and for permanent injunction and ought not to have shut the doors of justice, without giving credence to the plea of the petitioner, was not issued any notice from the Court.

12.On the other hand, the learned counsel for the first respondent stated that in the application to restore the suit in O.S.No.47 of 1997, notice has been duly served on the learned counsel for the defendants 1 and 3, who represented them in the said suit. The learned counsel for the first respondent also added that the

delay is not meager but as much as that of 2527 days. To support his contention he read over the contents of the affidavits filed in support of the applications in I.A.Nos.758 and 759 of 2011 in the said suit, and exhibited that no reason for each and every day is explained. He added that the present applications are only to defeat the rights of the first respondent plaintiff and also to defeat the decree granted in the name of the first respondent/plaintiff. Since the application has been filed after nearly 7 years, for which no explanation has been given, he sought for dismissal of the applications with exemplary costs.

13.The learned counsels for the respective petitioners answered that the petitioners are unaware of the restoration itself as they have not received any notice either from the first respondent/plaintiff or from the trial Court. When no notice has been issued, there cannot be any reason for the delay. He also contended that on getting knowledge of the exparte decree, immediately the petitioners rushed to the Court to file application to set aside the same. The petitioners had been deprived of opportunity in contesting the application.

14.Though the learned counsels for respective petitioners admitted that the petitioners later were put to knowledge that the

learned counsel who represented them in the said suit, had received the copy of the restoration application, the learned counsels submitted that the petitioners were not intimated by the said learned counsel and for that act the petitioners had lodged complaint with the Bar Council of Tamilnadu also. Hence, he again contended that an opportunity has to be given to the petitioners to defend the suit.

15. The learned counsel for the first respondent/plaintiff though repeatedly contended that the petitioners were put to knowledge of the restoration petition as the copies were served on the learned counsel for the petitioners, but not shown any proof that the petitioners were put to notice of the restoration petition filed by the first respondent/plaintiff. The objection raised by the respondent before the trial Court was that in order to protract further proceedings in the suit, the petitioners have filed the petition. To establish the same and also to rebut the version of the petitioners, the respondent has not produced any evidence.

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16. The specific plea of the first respondent is that the petitioners were put to knowledge of the factum of filing of restoration petition, through their learned counsels appeared in the said suit, as

the copies of the restoration petition was served on the respective counsels.

17.The learned counsel for the petitioners further added that it is true that the petitioners' counsel before the trial Court was in receipt of the restoration application copy filed by the first respondent/plaintiff. But he has not intimated the same to the petitioners before a decade. For the act of professional misconduct, the petitioners have lodged a complaint with the Bar Council of Tamilnadu.

18.Contrary to that, the specific case of the petitioner is that their learned counsels, whether received the copies of the restoration petition or not, has not informed the petitioner and hence the petitioners, after getting knowledge of the exparte decree, initiated proceedings before the Bar Council against the said learned counsel.

19.Of course, both the parties to the proceedings have not filed any documents to support their contention to prove/disprove the factum of knowledge of the restoration petition.

20.It is the duty of the person who affirms a particular fact to

prove it and he cannot call upon the other side to prove the negative aspect. So, when the first respondent affirms that the petitioners were put to notice of the restoration petition and the petitioners were put to knowledge of all subsequent proceedings. At the first instance, it has to be seen as to whether on whom the onus of proof lies to prove the knowledge of restoration petition. Hence, the burden of proving lies on the first respondent.

21.No one can expect the petitioners to prove, the negative aspect as to no knowledge of restoration petition through their counsel. The onus of proof lies on the first respondent that the learned counsel, to whom the restoration petition has been served, has informed duly the petitioners. But, the first respondent is not able to show even a single piece of evidence in this regard. Hence it has to be presumed that the petitioners were unaware of the proceedings, right from the filing of restoration petition by the first respondent as they have not received any notice from the first respondent or from the Court.

22.The Hon'ble Supreme Court, time and again, held that the power to condone delay by enacting Section 5 of the Limitation Act,

1963 is to enable the Courts to do substantial justice to parties by disposing of matters on merits; that the expression "sufficient cause" employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which serves the ends of justice which is the life purpose for the existence of the institution of Courts; substantial justice deserves to be preferred as against technical considerations; and the Courts should prefer to deliver justice on merits in preference to the approach which scuttles a decision on merits.

23. It is the specific case of the petitioners is that they were not put to any notice after the dismissal of suit as early as on 28.03.2000 and they came to know the subsequent decree only through a common friend of the plaintiff and defendants 1 and 3. It is the case of the petitioners that, together with the said application to condone the delay of 2527 days, applications to set aside the ex parte decree and respective written statements were also filed by the petitioners.

24. The Courts are empowered to allow the application for condonation of delay, on sufficient cause being shown or reject such

an application in exercise of its judicious discretion. However, such judicious discretion to condone the delay by adopting a liberal approach has to be exercised only in deserving cases, and not in cases where the delay is on account of lethargic attitude and negligence on the part of the applicant. It is not as if each application for condonation of delay has to be allowed as a matter of right, no matter whether any "sufficient cause" for the delay is shown or not. Each case is to be decided on facts and circumstances. The length of delay is no matter. All that matters is the acceptability of explanation.

25. The above said view of this Court is fortified by the following decisions of this Court:

(a) In Mohammed Aslam and others v. C.N.A. Gowdhaman, (2005) 2 CTC 766, the delay was of 1251 days. In the said judgment, a Division Bench of this Court observed as under:

"12. In the impugned order, as said earlier, the learned Judge has not considered the explanation offered by the applicant for the delay of 1251 days. Though the learned Judge was conscious of the fact that by condoning the inordinate delay, the respondents therein (appellants herein) will be put to great hardship, instead of compensating them, directed for the payment of Rs.10,000/- to the State Legal Services Authority,

Chennai, admittedly, which is not a party in this proceedings. We are unable to share the above view. Having found that by condoning the inordinate delay only on the ground that the applicant should be given an opportunity and having found that the said act will cause great hardship to other side, viz., respondents therein, it is but proper to compensate them by awarding reasonable costs to them. The learned Judge has not resorted to such recourse. It is not in dispute that the Courts are here to render justice to both parties. We are unable to understand how the respondents will be compensated by payment of Rs.10,000/- to the State Legal Services Authority, Chennai. Equally, we are conscious of the fact that the length of delay is no matter, and acceptability of the explanation is the only criterion. Sometimes the delay of shortest range may be uncondonable due to want of acceptable explanation, whereas in certain other cases, delay of a very long range can be condoned as the explanation therefor is satisfactory. In every case of delay, there may be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. If the explanation does not smack the 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 not lean towards acceptance of the explanation. We are also aware that refusal to condone the 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. Now, even the higher Court of this land have interpreted that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. Accordingly, in order to give one opportunity to the respondent/applicant and at the same time, to compensate the appellants/respondents, we intend to modify the order of the learned Judge dated 10.03.2005. Though it is stated that the applicant had paid a sum of Rs.10,000/- to the State Legal Services Authority, Chennai as ordered, in addition to the said amount, the applicant/respondent is directed to pay a further sum of Rs.20,000/- (Rupees twenty thousand only) to the appellants/respondents within 15 days from today, failing which the order of the learned Judge dated 10.03.2005 shall stand set aside. OSA.No.44 of 2005 is disposed of accordingly."

(b) In yet another decision of this Court in Pavayammal and another v. S.N.Chockalingam and others, (2009) 5 CTC 414, a learned Single Judge of this Court held as under:

"7. The word "sufficient cause" under Section 5 of

the Limitation Act will have to be interpreted in a purposeful and meaning way. As a matter of fact, the Court of law is not supposed to adopt a pedantic approach instead it has to take a liberal view while dealing with the Application of condonation of delay. Ordinarily a party does not stand to gain by loding in Appeal belatedly. Refusing to condone a delay will result in meritorious matter being thrown out at the nascent stage and thereby the cause of justice being defeated. On the other hand, if a party is allowed to enter into the scene of main proceedings, then the matter can be decided on merits. Of course a Court of law providing due opportunities to the parties to prove their case. The judiciary is respected not on account of its power to legalise injustice on technical grounds but it is capable of removing injustice and is expected to do so. This Court is of the considered view that substantial justice will have to be delivered to the parties overriding technicalities."

(c) In the case of N.Balakrishnan v. M.Krishnamurthy, (1998) 7 SCC 123, the Hon'ble Supreme Court held that the rules of limitation are not meant to destroy the right of the parties and they are meant to see that parties do not resort to dilatory tactics. The Hon'ble Supreme Court further held that it must be remembered that in every case of delay there can be some lapse on the

part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him. The Hon'ble Supreme Court further held that 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."

26. Generally, delays in preferring application to condone the delay in filing the application to set aside the exparte decree/restore the suit are required to be condoned in the interest of justice, where no gross negligence or deliberate inaction or lack of bona fide is imputable to the party seeking condonation of delay.

27. In the present case, as noted above, delay in filing the application to set aside the exparte decree is 2527 days. Length of delay is not the criteria. In appropriate cases, even the long range of delay could be condoned. Even if the trial Court has declined to condone the delay, the superior Court would be free to consider the cause shown for the delay afresh.

28. As stated supra, immediately on getting the knowledge of

the exparte decree, the petitioners have filed application under Section 5 of the Limitation Act to condone the delay of 2527 days in filing the application to set aside the exparte decree. This Court finds that sufficient cause has been made out for condonation of delay and the trial Court has not exercised the discretion properly.

29.It is also clear to the effect that it is not the number of days of delay that matters, but the attitude of the party which caused the delay. In other words, when the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay, the Court is satisfied that the delay occasioned not due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.

30.Having regard to the facts and circumstances of the case and that the respondent has failed to produce any rebuttal evidence to disprove the version of the petitioners in an application seeking to condone the delay in filing the set aside application and also reasoning given by the trial Court in dismissing the application is not convincing,

in my considered view, the delay of 2527 days in filing the application to set aside the exparte decree has to be condoned, however, on costs.

31. Since it is a suit for declaration and for permanent injunction, substantial rights of the parties are involved and having regard to the reasons recorded supra, this Court is of the considered opinion that the ends of justice would be served, if the petitioners are permitted to prosecute the suit on merits, however, subject to certain terms.

32. For the foregoing reasons, the following order is passed:

(a) both the Civil Revision Petitions are allowed by setting aside the order dated 18.12.2012 passed by the learned District Munsif, Hosur, in I.A.Nos.758 and 759 of 2011 in O.S.No.47 of 1997, subject to payment of costs of Rs.75,000/- in each case to the 1st respondent or his counsel within a period of four weeks from the date of receipt of a copy of this order;

(b) on compliance of the said direction, the Court below is directed to number the set aside application and to pass orders on merits within a period of two months, of course, after giving notice to

both sides;

(c) after passing orders in the set aside application, the Court below is directed to dispose of the suit within a period of three months thereafter. Consequently, connected miscellaneous petitions are closed.

09.07.2018

vs

Note: Issue order copy on 23.11.2018

Index : Yes

Internet : Yes

Speaking order

To

The District Munsif-cum-Judicial Magistrate No.I,
Hosur.



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M.V.MURALIDARAN, J.

VS



Pre-delivery order made in
C.R.P.(NPD)Nos.3640 and 4151 of 2013
and
M.P.Nos.1 and 1 of 2013

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