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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.04.2018

DELIVERED ON : 29.08.2018

CORAM

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

C.R.P. (MD) (NPD) No.465 and 741 of 2018

and

CMP(MD)No.3222 of 2018

C.R.P. (NPD) No.465 of 2018:

Krishnan

.. Petitioner

vs

1.Muthusamy Chettiar

2.Karuppusamy Chettiar

.. Respondents

C.R.P. (NPD) No.741 of 2018:

Krishnan

.. Petitioner

vs

1.Muthusamy Chettiar

2.Karuppusamy Chettiar

3.Murugesha Gounder

.. Respondents

Civil Revision Petition No.465 of 2018 filed under Article 227 of Constitution of India against the order dated 24.1.2018 passed in I.A.No.382 of 2017 in O.S.No.100 of 2011 on the file of the District Munsif Court, Palani, Dindigul District.

Civil Revision Petition No.741 of 2018 filed under Article 227 of Constitution of India against the order dated 30.1.2018 passed in E.P.No.9 of 2017 in O.S.No.100 of 2011 on the file of the District Munsif Court, Palani.



For Petitioners : Mr. Alagu sundar
For Respondents : Mr. D. Venkatesh (for R1)
No Appearance : For R2 in CRP.465/18
For R2 & 3 in CRP.741/18

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COMMON ORDER

C.R.P.(MD) (NPD) No.465 of 2018 is directed against the order dated 24.1.2018 passed in I.A.No.382 of 2017 in O.S.No.100 of 2011 and C.R.P.(MD) (NPD) No.741 of 2018 is directed against the order dated 30.1.2018 passed in E.P.No.9 of 2017 in O.S.No.100 of 2011 on the file of the learned District Munsif Court, Palani.

2. Since the parties and the suit property are one and the same, both the revisions were taken up together and disposed of by this common order.

3. The petitioner herein is the 2nd defendant and the respondents in C.R.P.No.465 of 2018 are the plaintiffs in the suit. The plaintiff filed the suit against the petitioner and the 3rd respondent in C.R.P.No.741 of 2018 for declaration that the suit property belongs to them and for possession of the same. Resisting the suit, the petitioner herein has filed the written statement. The said suit was decreed ex parte on 29.10.2014.

4. For the sake of convenience the parties are referred to as per their array in the suit.

5. The 2nd defendant filed I.A.No.382 of 2017 under Section 5 of the Limitation Act seeking to condone the delay of 930 days in filing petition to set aside the ex parte decree dated 29.10.2014 alleging that he was a retired employee of the Tamil Nadu State Transport Corporation and he retired from service in 2012. After retirement he was not informed his residence address to his advocate and his advocate was also unable to inform the date of hearing to him. Further during 2014, the 2nd defendant was suffering from jaundice and he had taken treatment and was unable to contact his counsel. Now when the 2nd defendant met his counsel, he informed that the suit was decreed ex parte on 29.10.2014. According to the 2nd defendant, the petition to set aside the ex parte decree ought to have been filed on or before 28.11.2014. However, since he was unable to contact his counsel and he knew the ex parte decree now only, he was filing petition seeking to condone the delay of 930 days in filing the petition to set aside the ex parte decree. The delay is neither wilful nor wanton.



6. Resisting the petition, the plaintiffs have filed counter stating that there was no bona fide in the petition. The petitioner has filed the petition to set ex parte decree after delay of three years that too with false allegations. In fact, the plaintiffs have taken delivery of possession of the suit property in O.S.N.492 of 1983. The 1st plaintiff was aged 80 years old and in order to drag on the proceedings, the 2nd defendant has filed the petition.

7. Pursuant to the ex parte decree passed in O.S.No.100 of 2011, the plaintiffs have filed Execution Petition against the defendants in E.P.No.9 of 2017 for delivery of the suit property.

8. Resisting the Execution Petition, the 2nd defendant filed counter stating that the 2nd defendant had filed I.A.No.382 of 2017 to set aside the ex parte decree and the said petition was adjourned to 3.8.2017 for filing counter of the plaintiffs and if any order was passed in the Execution Petition, it would seriously prejudice to the 2nd defendant and prayed for dismissal of the Execution Petition.

9. Upon consideration of the rival submissions, by an order dated 24.1.2018, the trial Court dismissed I.A.No.382 of 2017. Thereafter, by an order dated 30.1.2018, the Executing Court ordered delivery of the suit property. Aggrieved by the order of the dismissal of I.A.No.382 of 2017 and also ordering delivery of the suit property, the 2nd defendant had preferred these Civil Revision Petitions.

10. I heard Mr. Alagusundar, learned counsel for the petitioners and Mr. D. Venkatesh, learned counsel for the 1st respondent in both the Civil Revision Petitions and perused the entire records.

11. Assailing the order passed in I.A.No.382 of 2017, the learned counsel for the 2nd defendant submitted that the trial Court ought to have allowed the application by giving opportunity to the 2nd defendant to contest the suit for the reason that he had no knowledge about the ex parte decree passed against him and he was attained superannuation in the year 2012 and thereby his counsel who conducted the case could not inform the 2nd defendant about the stage of the suit. Moreover, at the relevant point of time, the 2nd defendant was suffering from jaundice and he could not contact his counsel. He would submit that the trial Court ought to have allowed the application by imposing heavy cost on the 2nd defendant to compensate the plaintiffs as there was no serious objection by the plaintiffs except stating that the 1st plaintiff was aged 80 years and filed the petition to protract the proceedings and therefore, prayed for setting aside the order of the trial Court.



12. The learned counsel for the 2nd defendant further submitted that the Executing Court failed to see that as against the order passed in I.A.No.382 of 2017, the 2nd defendant had preferred Civil Revision Petition, which was pending adjudication. He would submit that the Executing Court failed to note that if this Court allowed the condonation of delay along with application to set aside the ex parte decree, it would lead to great injustice to the 2nd defendant and therefore, prayed for setting aside the order dated 30.1.2018 passed in E.P.No.9 of 2017.

13. Per contra, the learned counsel for the plaintiffs submitted that there was no bona fide in the petition being I.A.No.382 of 2017 filed by the 2nd defendant and no sufficient cause was shown for the inordinate delay of 930 days. He would submit that each and every day delay has not been properly explained. Therefore, the trial Court was right in dismissing the delay condonation petition.

14. As far as the order passed in E.P.No.9 of 2017 is concerned, the learned counsel for the plaintiffs submitted that as against the order passed in I.A.No.382 of 2017, the 2nd defendant had preferred revision only in February 2018 and there was no stay in effecting delivery of the property. Therefore, the Executing Court was right in ordering delivery of the property.

15. The point that arises for consideration is whether the trial Court was right in dismissing I.A.No.382 of 2017 and also right in ordering delivery of the suit property in E.P.No.9 of 2017.

16. The grievance of the 2nd defendant is that he was not aware of the ex parte decree passed in the suit on 29.10.2014 as he was retired from service in the year 2012 itself. According to the 2nd defendant he had not informed his residence address to his counsel enabling him to inform the stage of the suit. Further, at the relevant point of time, the 2nd defendant was suffering from jaundice and was taking treatment and therefore, he could not contact his counsel.

17. On a perusal of the plaint, it is seen that in the long cause title, the 2nd defendant address has been stated as follows: "*Krishnan, aged about 54 years, Hindu, working at Tamil Nadu Transport Corporation, Palani Depot, Dindigul Division, R.F.Road, Palani Town*". The plaintiffs have not given his residence address or even his father name in the long cause title of the plaint.

18. In the counter filed in I.A.No.382 of 2017, the 1st plaintiff has not denied the fact that the 2nd defendant was retired



from service in 2012 and also his whereabouts was not known to him. More over, no serious objection has been raised by the 1st plaintiff except stating that he was aged about 80 years old.

19. On a perusal of the plaint, it is seen that the plaintiffs have filed the suit for declaration and for possession of the suit property against the defendants alleging that they are the owners of the suit property based on the delivery taken by them in the Court auction sale in E.P.No.1018 of 1996 in O.S.No.492 of 1983 filed by them against Mariammal and others. It was also alleged in the plaint that since the defendants were trying to interfere with the possession of the plaintiffs, they filed the present suit for declaration and pending suit, the defendants have also encroached upon the suit property. Hence, they sought possession of the suit property.

20. Observing that the 2nd defendant had not explained the delay of 930 days to the satisfaction of the Court and finding that the petitioner had come with unclean hands, the trial Court dismissed the petition filed under Section 5 of the Limitation Act.

21. As stated supra, the 2nd defendant has shown sufficient cause for the delay. It is settled law that "sufficient cause" must receive a liberal construction so as to advance substantial justice when no negligence, or inaction, or want of bona fide, is imputable to the applicant, the over-riding consideration being doing substantial justice. The Court should not lightly condone the delay in filing the application to set aside the ex parte decree. Discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The true test is whether the petitioner had acted with due diligence.

22. In *N.Balakrishnan v. M.Krishnamurthy*, reported in 1998 (2) CTC 533: 1998 (7) SCC 123, the Hon'ble Supreme Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing mala fide or deliberate delay as a dilatory tactic, the Court should normally condone the delay. However, in such a case the Court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. In that context the Hon'ble Supreme Court observed as follows :

"9.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



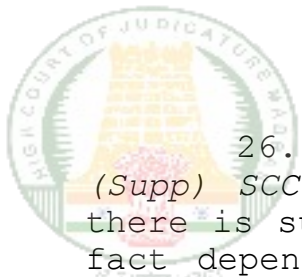
range may be condonable due to want of acceptable explanation whereas in certain other case, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the 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".

23. Court has to see whether sufficient cause is shown for the delay. What is or what is not 'sufficient cause' would depend upon varied and special circumstances of each case. To decide whether sufficient cause is shown or not, it is very undesirable to act upon precedents as every Judge has to deal with particular facts of each case.

24. In *State of Haryana v. Chandra Mani and others*, reported in 1996(II) CTC 109, the Hon'ble Supreme Court held thus:

"11. The expression "sufficient cause" should therefore, be considered with pragmatism in injustice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. it must be held that the delay of 109 days in this case has been explained and that it is a fit case for condonation of the delay."

25. Under Section 5 of the Limitation Act, it is only sufficiency of the cause that matters and not the length and breadth of the delay. While dealing with the Section 5 application, the question of diligence or bona fides are to be considered.



26. In *State of Kerala v. E.K.Kuriyipe*, reported in 1981 (Supp) SCC 72, the Hon'ble Supreme Court held that whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case.

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27. As stated supra, the plaintiffs have filed the suit for declaration and possession of the suit property based on the Court auction sale, followed with the delivery of the property by the Court. On a perusal of the written statement filed in the suit, this Court finds that the 2nd defendant pleaded that the suit property belong to himself, Mariammal and Muthukarupayee and in the capacity of the lessee, the 2nd defendant was enjoying the suit property.

28. In so far as the reason for non-appearance when the suit was listed on 16.10.2014 is concerned, the 2nd defendant alleged that since he was suffering from jaundice and was taking treatment, he could not contact his counsel and get on with the trial of the suit. As a whole, the petitioner cannot be castigated as irresponsible litigant.

29. The learned counsel for the plaintiffs submitted that when the trial Court has exercised the discretion declining to condone the delay, unless it is shown to be manifestly perverse, the revisional Court would not interfere with the impugned order. The learned counsel would submit that there is no bona fide in the application and therefore, the delay cannot be condoned and hence, the trial Court has rightly declined to condone the delay and the same cannot be interfered with.

30. It is not possible to lay down as to what cause or matters would constitute sufficient cause under Section 5 of the Limitation Act. Those words should be liberally construed so as to advance substantial justice, when no negligence or inaction or want of bona fides is imputable to a party. The 2nd defendant alleged that he was suffering from jaundice and that he could not attend the Court on 16.10.2014. The trial Court ought to have seen the claim made by the plaintiffs in the suit and the 2nd defendant had filed the written statement defending the suit.

31. No presumption could be made in an application filed under Section 5 of the Limitation Act that the delay was occasioned deliberately, or on account of culpable negligence, or on account of malafides. Therefore, in my considered view, there is no proper exercise of discretion by the trial Court.



32. It is settled law that 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.

33. Generally delays in preferring application to condone the delay in filing the petition to set aside the ex parte decree 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. In the case on hand, as stated supra, the plaintiffs have failed to prove that only with a view to drag on the proceedings and in order to give trouble to them, the 2nd defendant had filed the petition. Moreover, the reasons for delay given by the 2nd defendant are satisfactory.

34. 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, if 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. In fact in the grounds of appeal, the 2nd defendant stated that the trial Court ought to have allowed the application by imposing heavy cost on the 2nd defendant.

35. The trial Court, instead taking note of the sufficient cause explained by the 2nd defendant, it has arrived at a conclusion that the 2nd defendant had failed to prove each and every day delay. As observed above, the 2nd defendant had shown sufficient cause for the delay in filing petition to set aside the ex parte decree dated 29.10.2014. Therefore, in the interest of justice and in the facts and circumstances of the case on hand, the order of the trial Court is liable to be set aside and petition seeking to condone the delay of 930 days in filing petition to set aside the ex parte decree stands allowed, however, subject to payment of cost to the Government Hobart Muslim Higher Secondary School for Girls, Royapettah, Chennai

36. In view of the order passed in C.R.P.(NPD) No.465 of 2018 setting aside the order of the trial Court in I.A.No.382 of 2017, the order passed by the Executing Court in E.P.No.9 of 2017 dated 30.1.2018 is liable to be set aside.

37. In the result:

(a) the Civil Revision Petition in C.R.P.(MD) (NPD) No.465 of 2018 is allowed by setting aside the order



passed in I.A.No.382 of 2017 in O.S.No.100 of 2011 dated 24.01.2018 on the file of the learned District Munsif Court, Palani, on condition that the petitioner/2nd defendant should pay a sum of Rs.50,000/- as cost to the Headmistress, Government Hobart Muslim Higher Secondary School for Girls, Whites Road, Royapettah, Chennai-600 014 within a period of four weeks from the date of receipt of a copy of this order;

(b) On production of payment receipt, the District Munsif, Palani is directed to number the set aside application within a period of one week from the date of production of the payment receipt and to dispose of the set aside application, by giving notice to both the parties within a period of four weeks thereafter;

(c) The Civil Revision Petition in C.R.P.(MD) (NPD) No.741 of 2018 is allowed and the order in E.P.No.9 of 2017 in O.S.No.100 of 2011 dated 30.1.2018 on the file of the District Munsif Court, Palani is set aside;

(d) Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AS)

// True Copy //

Sub Assistant Registrar(CS-I)

To

The District Munsif,
Palani.

Copy to

The Headmistress,
Government Hobart Muslim Higher Secondary School for Girls,
Whites Road, Royapettah, Chennai-600 014

+2 CC To MR.D.Venkatesh, Advocate SR. NO. 81402 & 81403

order made in
C.R.P. (MD) (NPD) No.465 and 741 of 2018
and
CMP(MD) No.3222 of 2018
29.08.2018

VSV

TR/RP/SAR-I (09.11.2018) 9P 5C