



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.06.2018

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THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (NPD) No.526 of 2018

and

CMP (MD) No.2302 of 2018

Mr.K.Subbiah

... Petitioner/Petitioner/Defendant

-vs-

Pon.Gangadharan

... Respondent/Respondent/Plaintiff

PRAYER: Civil Revision Petition filed under Section 115 of C.P.C., against the fair and decretal order passed in I.A.No.206 of 2016 in O.S.No.47 of 2012 dated 18.12.2017 on the file of the III Additional District Court, Tirunelveli.

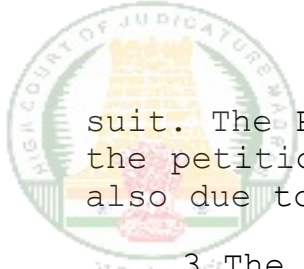
For Petitioner : Mr.H.Arumugam

For Respondent : Mr.K.Samidurai

O R D E R

The Petitioner is the defendant in the suit in O.S.No.47 of 2012 on the file of the learned III Additional District Court, Tirunelveli filed by the respondent herein for specific performance stating that the petitioner and respondent entered into an agreement of sale in respect to suit property and paid Rs.17,75,000 out of sale consideration of Rs.20,00,000, however the defendant did not come forward to execute the sale deed. The Petitioner has filed written statement through an Advocate Mr.R.M.Suresh admitting the amount received but pleading that the said amount was received as a loan for interest, to settle the bank loan and the agreement of sale was executed only a security for the above loan amount.

2.As the petitioner did not appear in the trail of the suit ex-parte decree was passed and he filed the petition to set-aside the ex-parte decree along with a petition in I.A.No.206 of 2016 to condone the delay of 835 days in filing the petition to set-aside the ex-parte decree stating that after receipt of notice in the EP he contacted the counsel Mr.R.M.Suresh, who received Vakalat but did not appear in the same. But later on came to know that in the E.P. also he was set ex-parte as the Counsel did not file Vakalat and ex-parte order passed. At that juncture he got the bundle and engaged another advocate and also filed a petition to set aside ex-parte order passed in the EP and as well as ex-parte decree passed in the



suit. The Petitioner has stated that the delay of 835 days in filing the petition was due to the earlier counsel's failure to inform and also due to his illness of jaundice.

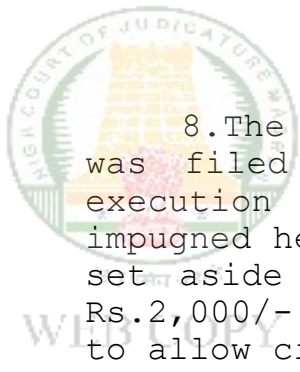
3.The respondent contested the said application stating that the suit agreement was true and since the execution of agreement was admitted the petitioner/defendant directed to however he did not appear. Hence the evidence was closed. Thereafter the respondent/plaintiff examined himself and ex-parte decree was passed on 25.10.2013. After filing the execution petition, also the petitioner/defendant appeared through the Counsel but did not file counter. Hence executed petition dismissed as ex-parte but there is no acceptable reason for condoning the delay of 835 days. The Learned Judge after considering that dismissed the petition.

4.The Trial Court dismissed the petition with a finding that even though the petitioner admitted that he was working as a watchman in Airtel Cell phone Tower and attended duty every day he has committed default in not defending the suit property. The Trial Court further found that the same advocate has appeared in the suit as well as in the present petition for condone the delay hence there is no sufficient reason for non-appearance. The said order is challenged in this revision.

5.I heard Mr.H.Arumugam, learned counsel for the petitioner and Mr.K.Samidurai, learned counsel for the respondent and perused the records.

6.The learned Counsel for the petitioner submitted that finding of the Court below that the advocate appeared in the suit alone filed the present petition to condone the delay is not correct and he submitted that in the suit, one Mr.R.M.Suresh, Advocate appeared and vakalath was given to him in execution petition also but he did not file vakalath and ex-parte order was passed in the EP. Thereafter the present petition was filed by one Mr.M.Krishnan, Advocate. The same is not seriously dispatched by the respondent also and it is evident that the said Advocate Mr.R.M.Suresh did not file the present petition to condone the delay but Advocate Mr.M.Krishnan has filed the petition. Therefore the said finding is wrong.

7.The Learned Counsel for the petitioner submitted that the petitioner has no malafide intention as he has filed the written statement and admitted the receipt of amount mentioned in the plaint however disputed that the transaction was a loan transaction and the agreement was executed as security for the loan. There is no malafide intention on the part of the petitioner in allowing the suit as ex-parte and the petitioner being a watchman in Airtel cell phone tower and the suit property is his residential house and considering the defence taken, which is a meritorious matter of issue, an opportunity may be given to defend the suit by condoning the delay.



8. The learned counsel further submitted that the same affidavit was filed in the petition to set aside ex-parte order in the execution petition and as well as to condone the delay, which is impugned herein. Even though the Court below allowed the petition to set aside the ex-parte order in the E.P. on payment of cost of Rs.2,000/- wrong in dismissing the present petition and thus prayed to allow civil revision petition.

9. On the other hand, the Learned Counsel for respondent submitted that the executing court even after holding that there is no valuable reason allowed the petition in order to give an opportunity to contest the execution petition and the same cannot be applied to the present petition to condone the delay of 845 days. He further submitted that the petitioner admitted in his evidence that he was working as watchman in Airtel cell phone tower and gone duty and as such the reason alleged is not correct and the court below has rightly dismissed the petition. Thus prayed for dismissal of revision.

10. This Court considered the arguments and perused the documents. The suit for specific performance and there is no dispute in respect of execution of agreement and the amount received. The Petitioner/defendant has also filed written statement within time, admitting the agreement but disputing the nature and character of document as sale agreement. According to him he executed the document as security for loan only and not with an intention to sell the property. No doubt there is a delay on the part of the petitioner and according to him the same is on account of the mistake of earlier counsel. But the same cannot be put against by throwing away the merits of matter by not considering the delay.

11. The property involved is the residential house and admittedly the petitioner is a watchman in the Airtel cell phone tower. On reading the written statement filed, this Court considers there is no malafide on part of the petitioner, with intention to protect the litigation and as such this Court feels an opportunity to be given to the petitioner/defendant to contest the suit on merits. There is one more reason to give such a relief as admittedly the petition to set-aside the ex-parte order in the EP was allowed on payment of cost of Rs.2,000/- and the same was confirmed in revision by this Hon'ble Court also. Though the petition filed within time to set-aside the ex-parte order cannot be equated when here there is a delay of 845 days in filing the petition the affidavit filed in both petitions are one and the same. While so denying him the opportunity to contest suit on merits would be improper. At the same time the hardship caused to the respondent/plaintiff cannot be taken into in a lighter way.

12. The Hon'ble Supreme Court in "B.S. Sheshagiri settee and others -Vs- State of Karnataka and others" case reported in 2016 (2) SCC 123 has held that when justice is at stake, technical or pedantic approach should not be adopted by courts to do justice when there is miscarriage of justice caused to public litigant. In



Para No.21 of the judgment, the Hon'ble Supreme Court has reiterated the earlier judgment which read as follows:

"21. The learned counsel appearing on behalf of the appellants, Mr H. Chandra Shekhar, on the other hand, contends that the High Court erred in setting aside the order of the Minister of Cooperation, Government of Karnataka in the revision petition on the ground that it was barred by limitation. The learned counsel places reliance upon the case of Collector (LA) v. Katiji⁶, wherein this Court has laid down the following principles to be applied while condoning delay: (SCC p. 108, para 3)

"(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

(3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) It must be grasped 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."

22. The learned counsel appearing on behalf of the appellants further contends that Section 108 of the KCS Act empowers the State Government to examine the legality of the order under revision and also to prevent miscarriage of justice. The scope of revisional jurisdiction depends on the language of the statute providing revision.

23. We have heard the learned counsel for both the parties. We are unable to agree with the contentions advanced by the learned counsel appearing on behalf of Respondent 6.

24. This case is a classic example to demonstrate the gross miscarriage of justice that occurs when the principles of natural justice are ignored for technical considerations. The appellants in this case are poor farmers, who have been made to litigate for nearly three decades for their land, which was their only source of income and livelihood, which right is guaranteed

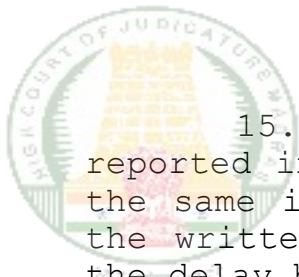


to them under Article 21 of the Constitution of India. The award of the arbitrator dated 31-5-1975 was passed ex parte against the appellants. The Circular dated 2-3-1984 issued by Karnataka State Cooperative Land Development Bank on the basis of the government order, stated that the farmers who had become defaulters as on 30-6-1982 to the Taluk Cooperative Land Development Banks in the State, and continued being defaulters up to 30-6-1983 could repay the principal amount to such banks, then in such cases, the State Government would bear the burden of the entire portion of the interest on such loans on behalf of the farmers and reimburse the same to such respective banks. As is evident from the letter "Annexure P-3", the appellants had repaid the entire principal amount within the date specified in the circular, which fact has not been contested by the respondents. The auction-sale of the property in question was conducted on 27-5-1981, and the confirmation of the sale was ordered on 10-12-1985 without considering the relevant fact of repayment of principal amount due to the Bank within the time stipulated in the notification issued by the Bank referred to supra. The appellants had informed the Bank regarding the repayment of loan on 29-6-1983.

25. The appellate authority has not considered the claim of the appellants on merit. The High Court of Karnataka in Writ Petition No. 6642 of 1984 set aside the order of the Karnataka Appellate Tribunal dated 27-12-1983 on the ground that the appeal before the Tribunal was barred by limitation. The writ appeals filed by the appellants were also dismissed. The confirmation of sale of the property in question was done on the basis of the order in the abovementioned writ petition. The same was challenged by the appellants before the Deputy Registrar of Cooperative Societies, who dismissed it on the ground that the appellants have not proved how the confirmation of sale is contrary to the provisions of the KCS Act, despite the fact of the repayment of the loan amount to the Bank being brought to his notice. The order of the Minister of Cooperation, Government of Karnataka in the revision petition setting aside the confirmation of sale was set aside by the learned Single Judge of the Karnataka High Court on the ground that it was barred by limitation. The same was upheld by the Division Bench in the writ appeals.

13. The Petitioner herein also a poor man, working as watchman fairly pleaded about the receipt of amount in the written statement but stated that the transaction is not an agreement of sale and only loan transaction. Thus in order to decide the substantial right the delay has to be condoned.

14. The learned counsel for the petitioner cited a judgment of this Court, which has also in "Jayakani and others -Vs- M.Sivasami" case reported in 2017 (1) MWN (Civil) 393 considered the case of delay of 1155 days in a suit for specific performance and considering the issues arose for adjudication raised in the written statement condoned the delay by imposing on cost of Rs.3,000/-.



15. In yet another case in K.Viswanathan -Vs- A.Ramesh reported in 2017 (1) MWN (Civil) 310 this Hon'ble Court considering the same issue arising of the suit for specific performance, where the written statement was filed pleading loan transaction condoned the delay by imposing cost in Rs.5000/-.

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16. The learned counsel for the petitioner also submitted that the judgment of the Hon'ble Supreme Court in Improvement Trsut, Ludhiana - vs- Ujagar Singh and others reported in 2010 (6) SCC 786, wherein the Hon'ble Supreme Court has held unless malafide is writ large on conduct of party, as a normal rule delay should be condoned and the attempt should always be made to allow the matter to be decided on merits rather than through it out on technicalities.

17. Considering all the above judgments this Court is of the view that the meritorious issue raised in the written statement cannot be thrown away on the ground of delay alone. The Court has to consider the plight of the petitioner/defendant who is working as a watchman in Airtel cell phone tower and the subject matter property is his residential house. Thus It is appropriate to condone the delay in order to render substantial justice on payment of cost of Rs.5000/- to be paid to the respondents. Considering the fact, that the suit was filed in the year 2012, it is just and necessary that an appropriate direction to be given.

18. In the result, this Civil Revision Petition is allowed on the following terms:-

a) The Impugned Order passed in I.A.No.206 of 2016 in O.S.No.47 of 2012 dated 18.12.2017 on the file of the learned III Additional District Court, Tirunelveli, is set aside and the civil revision petition is allowed, condoning the delay of 845 days on payment of cost Rs.10,000/- to be paid to the respondents within a period of two weeks from the date of receipt of a copy of this order;

b) On production of acknowledgment of payment of cost, the Trial Court is directed to number the petition to set aside the ex-parte decree and dispose the same within a period of one month thereafter;

c) Thereafter, the Trial Court is directed to dispose the suit on merits, after affording opportunity to both parties and dispose the same within a period of six months. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/



To

The III Additional District Judge,
Tirunelveli.

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COPY TO:

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. **(Two Copies)**

+1cc to M/S.H.Arumugam, Advocate SR.No. 68500

+1cc to M/S.K.Samidurai, Advocate SR.No. 68396

order made in
C.R.P. (MD) (NPD) No.526 of 2018
and
CMP (MD) No.2302 of 2018
14.06.2018

vsv

JM/SB/SAR 1/10.07.2018/7P/6C