

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE. N.SATHISH KUMAR

**CRP NPD No.3158 of 2011 and
M.P.No.1 of 2011**

Kandasamy

... Revision petitioner

Vs.

Ramalingam

... Respondent

PRAYER Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the orders dated 25.04.2011 passed in I.A.No.510 of 2010 in O.S.No.665 of 2001 by the Principal Subordinate Judge, Salem.

For Revision Petitioner : Mr.S.Gopalaratnam

For respondent : Mr.A.Nagarathinam

ORDER

This revision petition has been filed as against the order of dismissal passed by the trial court in I.A.No.510 of 2010 in O.S.No.665 of 2001 filed to condone the delay of 788 days in filing a petition to set aside the exparte decree passed on 26.10.2006.

2.The brief facts leading to file this revision petition are as follows. The revision petitioner is the defendant in the original suit. The suit has been filed by the plaintiff for specific performance and to contest the same, the defendant has also filed his written statement. During the pendency of the suit, the suit was dismissed for default on 20.04.2005 and on application filed by the plaintiff, the suit was restored to file. According to the revision petitioner, no notice was served on him in the restoration petition, since he changed his address and thereafter, by effecting paper publication, exparte decree was passed on 26.10.2006 and he has no knowledge about the same. Only on 16.01.2009, he came to know about the exparte decree and also Execution proceedings. Immediately, he filed an application under Section 5 of the Limitation Act to condone the delay 788 days in filing the set aside petition.

3. The respondent interalia resisted the contentions of the petitioner and contended that the petitioner has evaded from receiving suit notice and hence he was set exparte and exparte decree was passed on 26.10.2006.

4. The trial court dismissed the application on the ground that though the petitioner came to know about the exparte decree on 16.01.2009, he filed set aside petition only on 19.10.2010 and such conduct of the petitioner is only an inaction on the part of him and hence there is no sufficient cause showed to allow the petition and the petition is not maintainable. Against which, this revision has been filed.

5. The learned counsel appearing for the revision petitioner would contend that the petitioner came to know about the exparte decree only on 16.01.2009 and immediately he filed the set aside petition in I.A.No.510 of 2010 on 21.01.2009 itself. However, the trial court has wrongly noted that the application had been filed only on 19.10.2010. He would further contend that the said application which was filed on 21.01.2009, was returned for some defect and thereafter, the petitioner represented the same with some delay, however, the delay in representing the said application was condoned by the trial court on 21.10.2010. But these facts have not been taken note by the trial court. The learned counsel further would contend that earlier, the suit was dismissed for default on 20.04.2005 and thereafter, while restoring the suit, no notice was served on him and only on the basis of effecting publication, exparte decree was passed on 26.10.2006 and he has no knowledge about the

same. Only on 16.01.2009, he came to know about the exparte decree and he has valuable defence in the suit and hence the revision has to be allowed.

6. The learned counsel appearing for the respondent would contend that even after the petitioner came to know about the exparte decree on 16.01.2009, he filed a petition only on 19.10.2010 and that each and every delay has not been explained and even in the execution petition also, he had not contested and hence prayed for dismissal of the petition.

7. I have perused the materials on record. Originally, the application to condone the delay of 788 days in filing set aside petition was filed on 21.01.2009 and not as recorded by the trial court on 19.10.2010. The said application was returned for some defect and the same was represented with a delay of 598 days and the the trial court, in fact condoned the said delay. Having condoned the delay in representing the said application, the trial court noted the date of presentation of the application as 19.10.2010, which appears to be factually incorrect. In any event, the facts clearly indicated that the suit filed by the plaintiff was originally dismissed for default on 20.04.2005. Before dismissal, the defendant has taken defence and filed written statement disputing the oral

agreement. It is contended by the revision petitioner that, after dismissal of the suit, he moved to some other place and he has not received any notice, while restoring the suit. The factum of non service of notice is not disputed and it is the admitted fact that only by effecting publication, the suit was also restored to file. Therefore, it is the contention of the revision petitioner that only on 10.01.009, in the execution proceedings, he came to know about the exparte decree and immediately he filed the application on 21.01.2009 with delay. Hence, this situation clearly indicates that the judgment debtor was not properly served notice while restoring the suit. Admittedly, in the suit, he filed written statement disputing the very nature of the agreement. Hence this court is of the view that liberal approach has to be adopted and one more chance has to be given to the parties to advance substantial right on merit. No doubt, each and every day delay has to be explained. But the court cannot adopt pedantic approach in every matter and liberal approach has to be adopted, considering the facts and circumstances of the particular case. On perusal of the nature of sequences, I am of the view that one more opportunity has to be given to the revision petitioner to contest the suit on merits and hence the order of the trial court warrants interference by this court.

8. In the result,

(i) The civil revision petition is allowed. No costs. The connected miscellaneous petition is closed.

(ii) The order of the trial court is set aside.

(iii) The trial court is directed to dispose the suit within four months from the date of receipt of a copy of this order.

01.03.2019

Index : Yes / No
Internet : Yes / No
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To

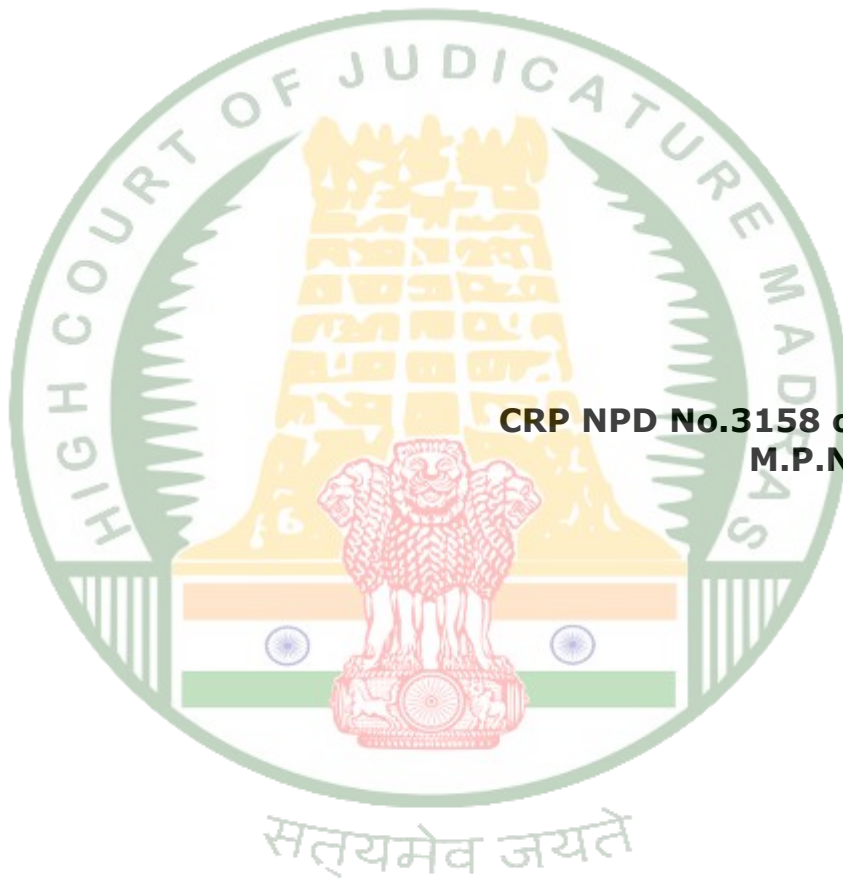
The Principal Subordinate Judge, Salem.



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N.SATHISH KUMAR, J.,

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