

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.10.2019

CORAM :

THE HON'BLE MR. JUSTICE M.DURAI SWAMY

**C.R.P.(NPD) Nos. 1801 and 1802 of 2013
and M.P.No.1 of 2013 in
C.R.P.(NPD) No.1801 of 2013**

1. N. Rangasamy
2. Velusamy ... Petitioners in both C.R.Ps

Vs.

Arumugam ... Respondent in both C.R.Ps

C.R.P.(NPD)No.1801/2013 : Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the order dated 21.12.2012 passed in I.A.No.853 of 2012 in I.A.No.217 of 2007 in O.S.No.1282 of 1995 on the file of District Munsif-cum-Judicial Magistrate Court at Mettupalayam.

C.R.P.(NPD)No.1802/2013 : Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the order dated 05.02.2013 passed in I.A.No.854 of 2012 in I.A.No.217 of 2007 in O.S.No.1282 of 1995 on the file of District Munsif-cum-Judicial Magistrate Court at Mettupalayam.

For Petitioners : Mr.K.P.Chandrasekar
(in both C.R.Ps)

For Respondent : Mr.S.Gunalan
(in both C.R.Ps)

COMMON ORDER

Challenging the order dated 21.12.2012 passed in I.A.No.853 of 2012 in I.A.No.217 of 2007 in O.S.No.1282 of 1995 on the file of District Munsif-cum-Judicial Magistrate Court, Mettupalayam, the plaintiffs have filed the Civil Revision Petition in C.R.P. No.1801 of 2013.

2. Civil Revision Petition No.1802 of 2013 has been filed by the plaintiffs in O.S.No.1282 of 1995 challenging the order dated 05.02.2013 passed in I.A.No.854 of 2012 in I.A.No.217 of 2007.

3.1 The plaintiffs filed the suit in O.S.No.1282 of 1995 on the file of District Munsif-cum-Judicial Magistrate Court, Mettupalayam, for partition and other reliefs. The Trial Court passed a preliminary decree.

3.2 Aggrieved over the preliminary decree, the defendant filed an appeal in A.S.No.215 of 2003 on the file of the Subordinate Court, Coimbatore and the Lower Appellate Court also confirmed the preliminary decree passed by

the Trial Court and dismissed the appeal.

3.3 Thereafter, the plaintiffs filed a final decree application in I.A.No.217 of 2007 before the Trial Court. Since the defendant failed to appear before the Trial Court in the final decree application, he was set *ex parte* and an *ex parte* final decree was passed on 14.12.2009.

3.4 Subsequently, the plaintiffs filed an Execution Petition in E.P.No.20 of 2010 on the file of the District Munsif-cum-Judicial Magistrate Court, Mettupalayam and the defendant appeared in the Execution Petition and filed his counter. However, the Execution Petition was allowed in favour of the plaintiffs/decree holders.

3.5 Pursuant to the order passed in the Execution Petition, the plaintiffs took possession of their share in the property on 09.08.2011.

3.6 Aggrieved over the same, the defendant filed an application in I.A.No.853 of 2012 to condone the delay of 940 days in filing the application to set aside the *ex parte* final decree passed in I.A.No.217 of 2007 on 14.12.2009 and I.A.No.854 of 2012 to set aside the *ex parte* final decree.

4. In the affidavit filed in support of the applications, the defendant

has stated that the plaintiffs omitted to include the other co-sharers and therefore, the *ex parte* final decree should be set aside. Further, the defendant has questioned the correctness of the final decree passed by the Trial Court in the application to set aside the *ex parte* final decree.

5. On a reading of the affidavit filed by the defendant to condone the delay of 940 days, it is clear that he has not given a single reason to condone the inordinate delay of 940 days and to set aside the *ex parte* final decree, dated 14.12.2009.

6. The plaintiffs filed their counter stating that they have already taken possession of the property and the defendant contested the Execution Petition in E.P.No.20 of 2010 vehemently before the Executing Court. Further, the plaintiffs have stated that all the parties were impleaded in the final decree application in I.A.No.217 of 2007 and the defendant has made an incorrect statement. The plaintiffs have also stated that the defendant deliberately did not appear before the Trial Court in the final decree application.

7. Even in the absence of any reason shown by the defendant, the Trial Court erroneously condoned the inordinate delay of 940 days on payment of cost of Rs.5,000/-. In paragraph No.9, the Trial court observed that the

defendant deliberately did not appear in the final decree proceedings in spite of receiving summons in the final decree application. The preliminary decree was passed in the year 2003. When the Trial Court has observed that the defendant has deliberately remained *ex parte* before the Trial Court in the final decree proceedings, the Trial Court, should not have condoned the inordinate delay of 940 days. In the absence of any reasons given by the defendant to condone the delay of 940 days, the application is liable to be rejected.

8. The learned counsel appearing for the respondent submitted that the trial Court has rightly condoned the delay by taking a liberal approach and therefore, the Civil Revision Petitions are liable to be dismissed.

8.1. The learned counsel appearing for the respondent, in support of his contention, relied upon a judgment reported in **CDJ 2019 SC 612 [Bhivchandra Shankar More Vs. Balu Gangaram More & others]** wherein the Hon'ble Supreme Court held as follows:

"...

11. It is to be pointed out that the scope of Order IX Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing

when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex-parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In *Bhanu Kumar Jain v. Archana Kumar and Another* (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

"36. A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. [See (2004) 5 SCC 385, *Deepal Girishbhai Soni and Others v. United India Insurance Co. Ltd., Boaroda and Chandravathi P.K. and*

Others v. C.K. Saji and Others (2004) 3 SCC 734].

..

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhury v. Lt.-Col. Suraj Jit Choudhary (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar and Others (2002) 5 SCC 161 and Shyam Sundar Sarma v. Pannalal Jaiswal and Others (2005) 1 SCC 436."

....

19. In the facts and circumstances of the present case, the time spent in pursuing the application under Order IX Rule 13 CPC is to be taken as sufficient cause for condoning the delay in filing the first appeal. The impugned judgment of the High Court cannot be sustained and is liable to be set aside."

9. In the judgment reported in **(2015) 1 Supreme Court Cases 680 [H.Dohil Constructions Company Private Limited v. Nahar Exports Limited and another]** the Hon'ble Supreme Court held as follows:-

" ... 24. When we apply those principles of *Bhattacharjee case* [*Esha Bhattacharjee v. Raghunathpur Nafar Academy*, (2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450 : (2014) 2 SCC (L&S) 595] to the case on hand, it has to be stated that the failure of the respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the respondents. Further, when the respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the court fee at the time of the filing of appeal papers on 6-9-2007, the reasons which prevented the respondents from not paying the court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively

considered, disclose that there was total lack of bona fides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, courts are required to weigh the scale of balance of justice in respect of both the parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the respondents not deserving any indulgence by the court in the matter of condonation of delay. The respondents had filed the suit for specific performance and when the trial court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered.

25. We, therefore, find total lack of bona fides in its approach and the impugned order [*Nahar Exports Ltd. v. Hardeep Kaur*, Civil Misc. Nos. 11354-55 of 2012 in RFA No.

268 of 2012, order dated 16-12-2013 (Del)] of the High Court in having condoned the delay in filing as well as refiling, of 9 days and 1727 days respectively, in a casual manner without giving any reason, much less acceptable reasons, cannot therefore be sustained. The appeals are allowed and the impugned order is set aside. Direction to admit the appeals of the respondents in RFAs Nos. 268-88 of 2012 and 319 of 2012 is also set aside and shall stand dismissed. No costs."

10. In the above Judgment, the Hon'ble Supreme Court held that a party seeking for condonation of the delay should give sufficient reason for the delay and in the absence of sufficient cause shown by the party, the delay should not be condoned.

11. The ratio laid down by the Hon'ble Supreme Court squarely applies to the facts and circumstances of the present case.

12. In the case on hand, though the defendant failed to give sufficient reason for condoning the delay of 940 days, the Trial Court has erroneously condoned the delay of 940 days in filing the application in I.A.No.853 of 2012 to set aside the *ex parte* final decree. The Trial Court also erroneously passed a consequential order by setting aside the *ex parte* final decree in I.A.No.854 of 2012.

13. For the reasons stated above, the fair and final orders passed in I.A.Nos.853 and 854 of 2012 are liable to be set aside. Accordingly, the same are set aside. The applications in I.A.Nos.853 and 854 of 2012 in I.A.No.217 of 2007 in O.S.No.1282 of 1995 are dismissed. The Civil Revision Petitions are allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

14.10.2019

Index : Yes / No
Speaking order / Non Speaking Order

Rj/va

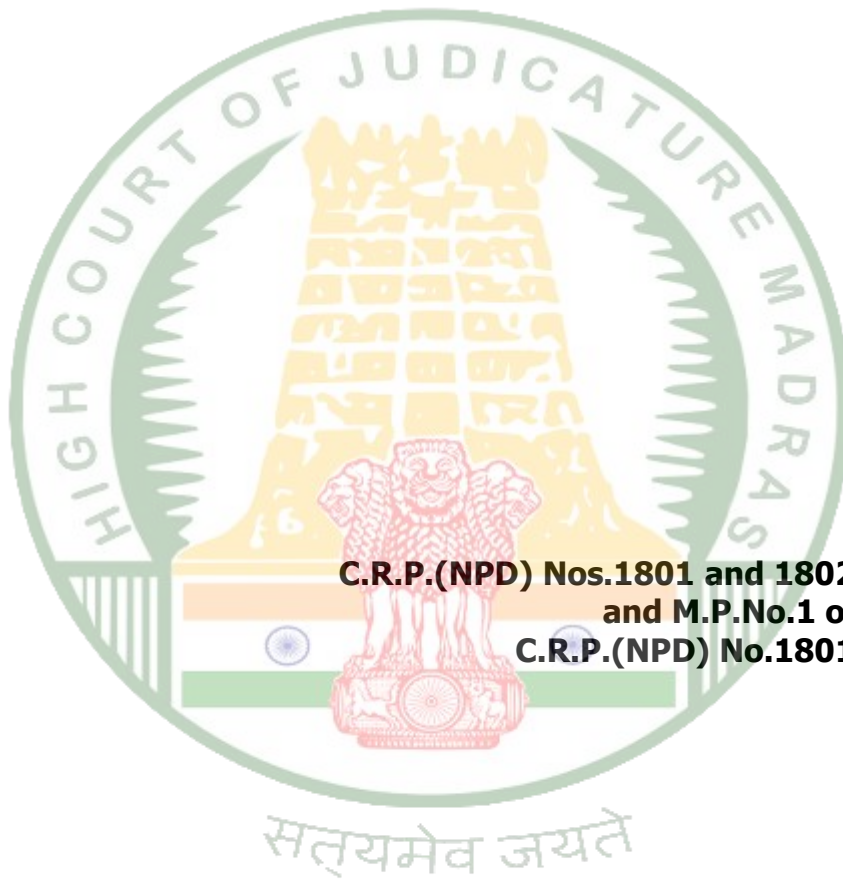
To

The District Munsif-cum-Judicial Magistrate Court,
Mettupalayam.

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M.DURAI SWAMY, J.

Rj/va



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