

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE. N.SATHISH KUMAR

**CRP NPD No.3862 OF 2013 and
M.P.No.1 of 2013**

Vayali

... Revision petitioner

Vs.

Pappammal

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the orders dated 23.09.2013 passed in I.A.No.335 of 2012 in O.S.No.308 of 1994 by the Principal District Munsif, Vandavasi.

For Revision Petitioner : Mr.S.Sankaran

For respondent : Mr.A.E.Ravichandran

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ORDER

This revision petition has been filed against the order of dismissal passed by the trial court in a petition in I.A.No.335 of 2012 in

O.S.No.308 of 1994 filed under Section 5 of the Limitation Act to condone the delay of 6264 days in filing a petition to set aside the exparte decree passed against the revision petitioner.

2. The revision petitioner is the defendant in the original suit. the brief facts leading to file the said application for condoning the delay is as follows. The petitioner has engaged an advocate in the above suit after paying fees. However, when ever she enquired about the case, the advocate informed her that she need not be worried about the case. Only on 30.05.2000, when the counsel for the plaintiff sent notice stating that the above suit was decreed in favour of the plaintiff, she came to know about the exparte decreed and immediately, she rushed to her advocate. At that time also, the advocate said that he would appeal or file an application to set aside the exparte decree, however, no application whatsoever filed. Subsequently, on 10.11.2011, the court bailiff came to the residence of the petitioner and demanded to vacate the premises. Her attempt to contact her earlier advocate also become vain and she came to know that the advocate, who was engaged by her had not taken any steps in the above suit. In the meanwhile, E.P.No.48 of 2006 was filed by the decree holder and the earlier counsel filed vakalath in the execution proceedings. Hence, there occurred a delay of 6264 days in filing the set aside petition and the delay is neither

willful nor wanton.

3. The respondent resisted the petition contending that the petitioner had evaded from serving summons and she was set exparte. After effecting substituted service by publication, exparte decree was passed. In the execution proceedings, the petitioner appeared and also filed a petition under Section 47 of the Code of Civil Procedure. Therefore, the contention of the petitioner that she had no knowledge about the exparte decree is not correct.

4. Based on the above pleadings and submission made by both counsels, the learned trial judge dismissed the application holding that there is no sufficient cause to allow the petition. Against which, the revision petitioner came up with this revision.

5. The learned counsel appearing for the revision petitioner would submit that the petitioner is a rustic village woman and she has no knowledge about the legal proceedings and she believed the words of the advocated engaged by her. He would further submit that even during the execution proceedings also, without challenging the exparte decree, the counsel simply appeared in the E.P. proceedings and did not conduct the case of the petitioner properly. Further he submit that based on the

complaint registered by the petitioner against the said advocate, the Bar Counsel of Tamil Nadu passed an order, against which an appeal is pending before the Bar Counsel of India. Therefore, a party should not suffer for no fault on her and since the petitioner is from rural back ground, she may be given a chance to contest her case on merits and the discretion of the court ought to have exercised liberally. To support his contention, he relied on a judgment in **M/s Concord of India Insurance Company Limited Vs. Nirmala Devi and others reported in (1979) 4 Supreme Court Cases 365** and contended that the mistake of counsel to be taken into consideration by the court and hence he prayed for allowing the revision petition.

6. Per contra, the learned counsel appearing for the respondent contended that absolutely there is no evidence to prove the allegations of the petitioner against the advocate and to condone the huge delay. He further contended that the petitioner was all along party in the Execution proceedings as well as in the petition filed under Section 47 of the Code of Civil Procedure, which has been dismissed and only thereafter, the present revision petition made to be filed, which is not bonafide one and hence, he prayed for dismissal of the revision petition.

7. I have perused the entire order as well as the submissions made by both side counsels. The application under Section 5 of the Limitation Act to condone the delay of 6264 days in filing the petition to set aside the exparte decree was filed on the main ground that the counsel for the petitioner had not properly prosecuted her case and that the petitioner was kept in dark, as she is from village back ground and not known about the legal proceedings and therefore, the delay has to be condoned.

8. It is to be noted that when the affidavit contains serious allegations against the counsel that he was not informed about the exparte decree to the petitioner, such allegations has to be proved before the court of law for condoning the huge delay. Merely on the basis of such allegations made against the counsel, the court is not suppose to accept the contention of the petitioner as **gospel truth**. It is curious to note that the petitioner had participated in all execution proceedings and she engaged a lawyer and filed petition under Section 47 of the Code of Civil Procedure. All these were matter of record, which cannot be disputed. When the judgment-debtor/petitioner was aware of the exparte decree passed earlier in the year 1994 and all along took part in the execution proceedings before trial court, which were pending for many years, now it is unfair to contend that she has no knowledge about the exparte decree passed in the year 1994. The

moment, when the notice of execution proceedings was served, at least, at that point of time, the petitioner ought to have filed an application to set aside the exparte decree. Without doing so, mere blaming of earlier counsel will not serve any purpose. To establish the allegations against the counsel, the petitioner ought to have summoned the counsel before the trial court, since her allegation is only made against the counsel on record that he has not informed about the exparte decree to her and she has to examine the witnesses on her side to establish the negligence on the part of lawyer. But the petitioner has not done anything before the trial court. Therefore, without proving the allegations, one cannot pray that particular allegations found in the affidavit is nothing but truth. When such allegations are established or if there are some materials to presume that such allegations are proved, then the court can extend leniency and exercise its discretion by adopting liberal approach. Without doing any such things, the petitioner cannot hold upon in her allegations against the counsel to condone the huge delay of 6264 days, especially in the back ground of the facts that she was all along participated in the execution proceedings and in fact she had filed an application under Section 47 of the Code of Civil Procedure, by watching entire proceedings meticulously. Therefore, this court of the view that the contention of the revision petitioner that she has no knowledge about the exparte decree cannot be countenanced.

9. In the said judgment in **M/s Concord of India Insurance Company Limited Vs. Nirmala Devi and others reported in (1979) 4 Supreme Court Cases 365**, the Honourable Supreme Court held that the mistake committed by the counsel to be taken into consideration. There is no dispute with regard to the above procedure. But the facts remains that the allegation of negligence attributed to the counsel is need to be proved. Except by filing application, no such evidence is available to prove the said allegations. Therefore, the above allegations cannot be taken as a mistake on the side of the advocates.

10. No doubt, in the petition under Section 5 of limitation Act, if sufficient cause is shown, normally the court will adopt liberal approach to advance substantial justice. To exercise the discretion of court by giving liberal approach, there must be materials, which are in the nature of proof and facts before the court of law. Absolutely, there is no evidence to substantiate the allegations of the petitioner before this court. Having participated in the execution proceedings, this court can safely conclude that the petitioner had knowledge about the exparte decree passed in the year 1994. Hence, the trial court has rightly held that there is no sufficient cause to condone the delay of the huge delay of 6264 days. This court also found that there is no sufficient cause to condone the delay of 6264 days and

hence the same cannot be condoned, on the basis of mere throwing or levelling some allegations against the counsel. It is the duty of the petitioner to follow the court proceedings. Of-course, may be true, the persons from village background may not be in a position to know the legal proceedings. But that may not be the ground to hold that they can file an application at any point of time, after knowing that the exparte decree reached finality and execution proceedings taken out. Therefore, I do not find any illegality or infirmity on the orders passed by the trial court.

11. In the result,

- (i) The Civil Revision petition is dismissed. No costs.
- (ii) The order of the trial court is confirmed.

Index:Yes/No
Internet:Yes/No
speaking/non speaking order
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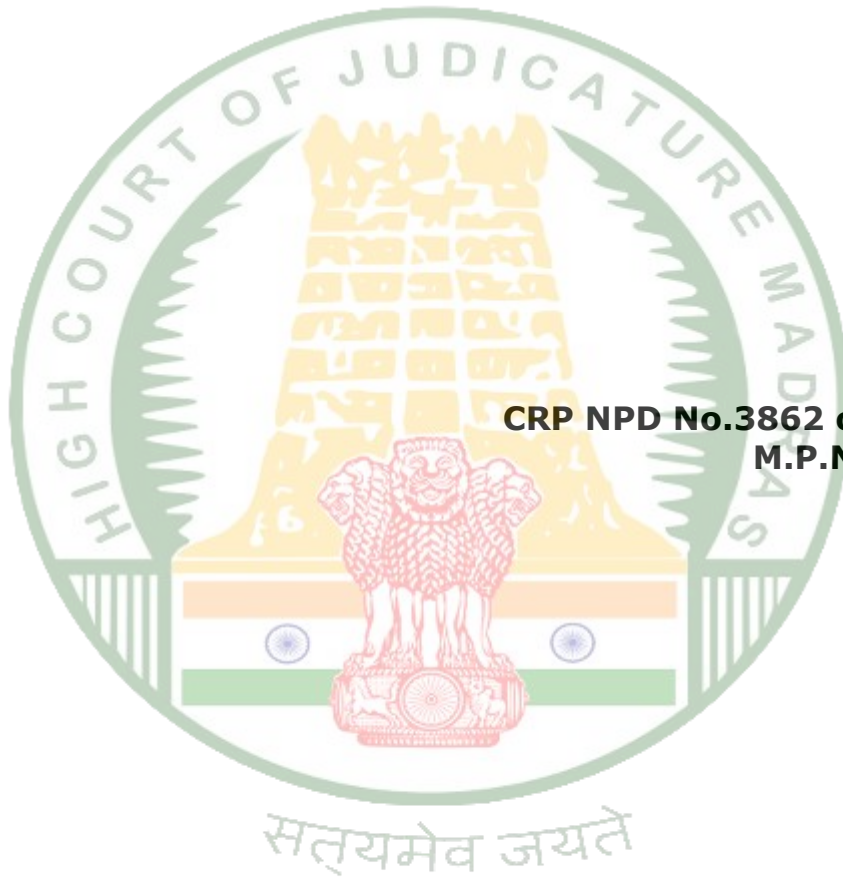
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