

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2019

DELIVERED ON : 12.02.2019

CORAM

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

C.R.P. (NPD) No.3819 of 2018 &
CMP.No.21575 of 2018 and
C.M.A.No.2834 of 2018

CRP (NPD) No.3819 of 2018:

V.R.Patabiraman

.. Petitioner

R.Prabhu

.. Respondent

CMA No.2834 of 2018:

V.R.Patabiraman

.. Appellant

सत्यमेव जयते
VS

R.Prabhu

.. Respondent

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Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order dated 22.10.2018 passed in I.A.No.187 of 2016 in O.S.No.95 of 2009 on the file of the Principal District Judge, Vellore.

Civil Miscellaneous Appeal filed under Order 43, Rule 1 C.P.C. against the order dated 22.10.2018 passed in I.A.No.19 of 2017 in O.S.No.95 of 2009 on the file of the Principal District Judge, Vellore.

For Petitioner/ : Mr.N.C.Ramesh
Appellant Senior Counsel
for M/s.D.Rajagopal

For Respondent/ : Mr.P.Chandrasekar
Respondent

COMMON ORDER

The Civil Revision Petition is directed against the order dated 22.10.2018 passed in I.A.No.187 of 2016 in O.S.No.95 of 2009 on the file of the learned Principal District Judge, Vellore, dismissing the petition filed by the petitioner under Section 5 of the Limitation Act to condone the delay of 2090 days in filing the petition to set aside ex parte decree dated 03.12.2009.

2. The Civil Miscellaneous Appeal is directed against the order dated 22.10.2018 passed in I.A.No.19 of 2017 in O.S.No.95 of 2009 on the file of the learned Principal District Judge, Vellore, dismissing the petition filed by the appellant under Order 9, Rule 13 of CPC to set aside the ex parte decree dated 03.12.2009.

3. Since the parties and the issue involved in the Civil Revision Petition and Civil Miscellaneous Appeal are one and the same, both the cases were taken up together, heard and disposed of by this common order.

4. For the sake of convenience, the parties are referred as per their array in the Civil Revision Petition.

5. The petitioner is the defendant and the respondent is the plaintiff in the suit in O.S.No.95 of 2009. The respondent has filed the suit for specific performance of the agreement dated 24.7.2006 directing the respondent to execute the sale deed after receiving the balance sale consideration of Rs.60.00 lakhs and register the sale deed at the expenses of the respondent and puts the respondent in possession of the suit property and in case the petitioner refused to execute the sale deed, then the Court may execute the sale deed. The said suit came to be decreed ex parte on 03.12.2009.

6. The petitioner filed I.A.No.187 of 2016 under Section 5 of the Limitation Act to condone the delay of 2090 days in filing petition

to set aside the ex parte decree dated 03.12.2009 passed in the suit alleging that he was not served with suit summons and he came to know the ex parte decree only on 24.8.2015 when he was served with notice in E.P.No.204 of 2015 filed by the respondent. It is alleged that the respondent by fraudulent means got the decree as if the petitioner refused to receive the suit summons. With the help of the process server, the respondent obtained the ex parte decree and there was no proper and legal service of summons to the petitioner. The endorsement made by the process server in the summons would prove that there was a fraud committed by the respondent. Since no suit summons were served on the petitioner, nor the petitioner refused to receive any such summon, the petitioner had filed the petition to set aside the ex parte decree with a delay of 2090 days. The delay is neither wilful, nor wanton and prayed for condonation of the delay.

7. Resisting the petition, the respondent filed the counter stating that the way in which the petitioner put the blame on the respondent is highly illegal and non-acceptable one and the same vested to the petitioner to prove the allegations. The allegations set out in the affidavit are invented for the purpose of escaping from the legal proceedings initiated against the petitioner. It is stated that one

week prior to the filing of the suit in O.S.No.95 of 2009, the respondent contacted the petitioner personally and showed interest to perform his part of the contract, but the petitioner refused to perform his contract. Therefore, the petitioner sent a legal notice, which was replied by the petitioner and the petitioner is very well aware of initiation of legal proceedings by the respondent. It is further stated that the process server approached the respondent to identify the petitioner on 03.9.2009 and the respondent went to the office of the petitioner along with the process server and identified the petitioner while serving the summons of the suit. After read over the contents of the summons, for the reason best known to him, the petitioner refused to receive the suit summons and the process server affixed the summons and obtained the signature from the respondent and the witness Udayakumar, who was there at the spot. Thereafter, when the suit was called on 30.09.2009, the petitioner not present and remained ex parte and the Court had passed an ex parte decree on 03.12.2009 after taking the evidence of the respondent. Pursuant to the decree, the respondent deposited the balance sale consideration of Rs.60.00 lakhs on 29.7.2010. According to the respondent, there was no any foul play by the respondent on the part of service of summons in the suit and the ground taken by the petitioner for the delay is not

maintainable at any point. The delay is huge and each and every day delay has not been properly explained by the petitioner and thus, prayed for dismissal of the petition.

8. Before the trial Court, the petitioner examined himself as P.W.1 and no document was marked. On the side of the respondent, two witnesses were examined and Exs.R1 to R9 were marked.

9. Upon consideration of the oral and documentary evidence, the trial Court dismissed I.A.No.187 of 2016. Since I.A.No.187 of 2016 was dismissed, the trial Court dismissed I.A.No.19 of 2017 seeking to set aside the ex parte decree. Challenging the order passed in I.A.No.187 of 2017, the petitioner has filed C.R.P.(NPD)No.3819 of 2018. Similarly, against the order passed in I.A.No.19 of 2017, the petitioner preferred C.M.A.No.2834 of 2018.

10. I heard Mr.N.C.Ramesh, learned Senior Counsel for Mr.D.,Rajagopal, learned counsel appearing for the petitioner and Mr.P.Chandrasekar, learned counsel for the respondent in both the cases.

11. Assailing the orders of the trial Court, the learned Senior Counsel for the petitioner submitted that the trial Court ought to have condoned the delay for filing the petition to set aside the ex parte decree on the ground that the petitioner was not served with the suit summons in the suit. Without service of summons to the petitioner, the trial Court had passed the ex parte decree in the suit. The learned Senior Counsel further submitted that the trial Court failed to consider the fact that the respondent colluded with the process server and fraudulently got entry in the summons as if the petitioner refused the summons, such an endorsement cannot be counted as proper service. This aspect has not been duly examined by the trial Court before passing the ex parte decree. There was no proof to show that the petitioner refused to receive the summons. He would submit that the trial Court failed to note that in his evidence R.W.2 admitted that the so called witness viz., Udayakumar put his signature in the summons was brought by the respondent.

12. The learned Senior Counsel next submitted that in spite of bona fide explanation given by the petitioner for the delay, the trial Court failed to condone the delay and in fact, the petitioner has shown sufficient cause to condone the delay. The length of delay is no

matter, acceptability of the explanation is the only criteria and the trial Court totally ignored the explanation offered by the petitioner. Relying upon the decision of the Full Bench of this Court in *Parasurama Odayar v. Appadurai Chetty and others*, reported in AIR 1970 Madras 271, the learned Senior Counsel submitted that the non-compliance of the requirements of Order 5, Rule 19 C.P.C., would make the service of summons ineffective and in the present case, no such affidavit has been filed by the serving officer and that the trial Court failed to look into the said legal position. Stating that the trial Court has not analysed the case in a proper perspective, the learned Senior Counsel prayed for setting aside the orders of the trial Court impugned in the revision as well as appeal.

13. Per contra, reiterating the findings of the trial Court, the learned counsel for the respondent submitted that after analysing the oral and documentary evidence produced before it, the trial Court dismissed the petition as there was no sufficient cause shown by the petitioner for the inordinate delay of 2090 days in filing the petition to set aside the ex parte decree. Since the orders of the trial Court are well considered and reasoned, the learned counsel prayed for dismissal of the revision and the appeal preferred by the petitioner.

14. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

15. The point that arises for consideration is whether the trial Court was right in dismissing I.A.No.187 of 2016 seeking to condone the delay of 2090 days and consequently, dismissing I.A.No.19 of 2017 seeking to set aside the ex parte decree dated 03.12.2009.

16. The grievance of the petitioner is that he is the defendant in the suit and the respondent filed suit against him for specific performance of the agreement dated 24.7.2006 and the said suit was decreed ex parte on 03.12.2009. According to the petitioner, he was not served with suit summons and only after receiving notice in E.P.No.204 of 2015 filed by the respondent, he came to know the ex parte decree passed in the suit and immediately, he had filed petition to set aside the ex parte decree and petition to condone the delay of 2090 days in filing the petition to set aside the ex parte decree.

17. The case of the petitioner is that with the collusion of the

process server, the respondent manipulated the entry that the petitioner refused to receive the summons. Further case of the petitioner is that unless there is a specific order that service of notice is sufficient and it is due and proper, the order setting ex parte is not legal and correct.

18. On the other hand, it is the say of the respondent that on 03.9.2009 the process server approached the respondent to identify the petitioner to effect service of summons in the suit. Accordingly, the respondent went to the office of the petitioner along with the process server and identified the petitioner while serving the summons. The petitioner read over the summons and wantonly refused to receive the same. Since the petitioner refused to receive the summons, the process server affixed the same on the wall of the petitioner's officer and had obtained signature from the respondent as well as witness one Udayakumar, who was present at that time. Thus, it is the say of the respondent that knowingly the petitioner refused to receive the summons and he had knowledge about the filing of the suit way back on 03.09.2009.

19. It appears that after a lapse of six years, the petitioner

had filed petition to condone the delay of 2090 days in filing the petition to set aside the ex parte decree passed in the suit. The reason stated by the petitioner that he was not received any suit summons and he came to know the filing of the suit only after the receipt of notice in the Execution Petition filed by the respondent is not convincing for the reason that in his evidence, the petitioner himself clearly stated that he had received the suit summons in the earlier suit in O.S.No.726 of 2006 filed by the respondent in the address mentioned in the present suit. In his cross-examination the petitioner admitted that the address mentioned in the suit agreement and the suit summons in O.S.No.95 of 2009 are one and the same.

20. In the case on hand, the process server who was entrusted with the work of serving suit summons was examined as R.W.2, who had clearly deposed in his evidence that since he was not able to locate the address of the petitioner, he requested the respondent to accompany himself and identify the office of the petitioner enabling him to effect service. Accordingly, the respondent accompanied him to the office of the petitioner and identified the petitioner. He further deposed that since the petitioner refused to receive the suit summons, he had affixed the summons on the wall of

the petitioner's office and returned the summons with an endorsement on 29.9.2009. Thus, from the evidence of the P.W.1 and R.W.2-process server, it is clear that there was no manipulation of the entry made by R.W.2. The petitioner also admitted in his oral evidence that he was served with notice in E.P.No.204 of 2015 on the same office address.

21. On a perusal of the typed set of papers filed by the petitioner in the revision, it is seen that the affidavit filed in support of I.A.No.187 of 2016 was affirmed on 19.9.2016, whereas, the perusal of the typed set of papers in C.M.A.No.2834 of 2018, it is seen that the petitioner sworn the affidavit filed in support of I.A.No.19 of 2017 on 23.9.2015, however, the office seal shows that the same was filed on 10.10.2015. Thus, it is clear that without filing petition to condone the delay in filing petition to set aside the ex parte decree, the petitioner had filed the petition to set aside the ex parte decree stating that he had knowledge of the decree only on 24.8.2015. Such a knowledge attributed by the petitioner is unacceptable for the reason that the petitioner had knowledge about the suit on 03.09.2009 itself when the suit summons were served on him by the process server.

22. Since the respondent examined the process server who was entrusted with the work of serving summons as R.W.2 and as stated supra, R.W.2 had categorically deposed about the service effected in this case, the decision relied upon by the learned Senior Counsel for the petitioner in *Parasurama Odayar v. Appadurai Chetty and others*, supra, has no application in the facts and circumstances of the given case. Further, the question of filing a separate affidavit of R.W.2 does not arise in the facts and circumstances of the case and the return endorsement made by R.W.2 on the summons clearly indicates that the petitioner had refused to receive the suit summons, which was also witnessed by one Udayakumar.

23. In the instant case, admittedly, the petitioner has not explained each and every day delay. The delay to be condoned is 2090 days. No document was marked to substantiate that the delay is not wanton and only the circumstances alleged in the petition.

24. In all cases, what is to be decided is whether sufficient cause has been shown to condone the delay or not. Admittedly, in the case on hand, the cause shown by the petitioner is not convincing to condone the delay in filing the petition to set aside the ex parte

decree.

25. It is true that 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. 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. In the present case, the explanation offered by the petitioner is not satisfactory and as could be seen from the oral evidence adduced on either side, the delay is wilful/negligent.

27. In *Maniben Devaraj Shah v. Municipal Corporation of Brihan Mumbai*, reported in 2012(5) SCC 157, the Hon'ble Supreme Court held thus:

"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation.

If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

(emphasis supplied)

28. In *Maniben Devaraj Shah*, supra, the Hon'ble Supreme Court upon perusal of the application for condonation of delay and the affidavit on record came to hold that certain necessary facts were conspicuously silent and, accordingly, reversed the decision of the High Court which had condoned the delay of more than seven years. In the present case, the delay is nearly six years.

29. Since the petitioner had knowledge about the filing of the suit by the respondent way back on 03.9.2009 itself when the process server went to the business place of the petitioner for effecting service of summons and since both the suit summons and the notice in the Execution Petition had been served on the same address, the explanation offered by the petitioner for the delay is not bona fide and the trial Court was right in declining to condone the delay of 2090 days

in filing the petition to set aside the ex parte decree dated 03.12.2009.

30. Though liberal approach is to be taken in petition under Section 5 of the Limitation Act, the petitioner has not shown semblance of bona fide for the delay on his part. As rightly held by the trial Court, the reason for the delay stated by the petitioner does not have any bona fide in it.

31. This Court is in full agreement with the proposition that refusal to condone the delay would result foreclosing a suitor from putting forth his cause and there is no presumption that delay in approaching the Court is always deliberate. But at the same time the other side should not be suffered.

32. It is to be noted that if a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of law, he/she cannot say that no prejudice would be caused to the other side by the delay being condoned.

33. In the present case, the respondent having obtained decree in the suit had waited for six years and thereafter, filed

E.P.No.204 of 2015 for execution of the decree passed in the suit. The arguments of the petitioner that the respondent kept quite for a long time of nearly six years with a purpose passing of years to strengthen the decree, cannot be countenanced. Moreover, the arguments of the learned counsel for the petitioner that no notice was given to the petitioner or sent by the Court on the petition to extend the time to deposit the balance sale consideration, cannot be decided in this revision, as the extension of time to deposit the balance sale consideration is between the trial Court and the party concerned. Therefore, this Court cannot express any opinion on the merits of the said aspect. Moreover that has not been challenged by the petitioner by way of revision and/or appeal separately. This Court is only concerned with orders of the trial Court that the trial Court had committed any error while dismissing the petitions filed by the petitioner seeking to condone the delay of 2090 days in filing petition to set aside the ex parte decree and petition to set aside the ex parte decree. As stated supra, the explanation offered by the petitioner is not convincing to condone the inordinate delay of 2090 days and the trial Court was right in rejecting the prayer of the petitioner.

34. Further, in the present case, the length of the delay is a

relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed periods of limitation.

35. At the cost of repetition, it is reiterated that the petitioner has not shown the sufficient cause to condone the delay as contemplated in the decisions of the Hon'ble Supreme Court as well as this Court. The petitioner is seriously lacking to apply the provision of Section 5 of Limitation Act, as the affidavit filed by the petitioner before the trial Court is bereft of particulars without any convincing explanation for the period commencing from the date of ex parte decree passed in the suit till the date of filing of the petition to set aside the same. In the case on hand, the inordinate delay of 2090 days in filing petition to set aside the ex parte decree dated 03.12.2009 has not been properly explained by the petitioner.

36. Applying the ratio laid down by the Hon'ble Supreme Court in the decision, supra, to the facts and circumstances of the case on hand, I am of the view that the petitioner has failed to explain each and every day delay and that the trial Court was absolutely right in

dismissing I.A.No.187 of 2016. I do not find any reason and/or ground to interfere with the order passed by the trial Court. Resultantly, the Civil Revision Petition is devoid of merits and the same is liable to be dismissed.

37. Since this Court finds that C.R.P.(NPD)No.3819 of 2019 filed by the petitioner is devoid of merits and the same is liable to be dismissed, C.M.A.No.2834 of 2018 preferred against the order dated 22.10.2018 passed in I.A.No.19 of 2017 in O.S.No.95 of 2009 on the file of the learned Principal District Court, Vellore to set aside the ex parte decree dated 03.12.2009 is also liable to be dismissed.

38. In the result, both the Civil Revision Petition and the Civil Miscellaneous Petition are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

12.02.2019

vs

Index : Yes
Internet : Yes
Speaking Order

To
The Principal District Judge,
Vellore.

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M.V.MURALIDARAN, J.

VS



Pre-delivery order made in
C.R.P. (NPD) No.3819 of 2018 &
CMP.No.21575 of 2018 and
C.M.A.No.2834 of 2018

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12.02.2019