

A.Nos.8873 and 8874 of 2019
and E.P.No.58 of 2019
and E.P.No.307 of 2013

P.T. ASHA, J,

The Decree Holder is the applicant herein and the application is filed challenging the order passed by the Hon'ble Master dated 13.09.2019 in A.No.6528 of 2019 in and by which the Hon'ble Master had condoned the delay in filing the application to set aside the order of attachment in E.P.No.58 of 2019.

2.The brief facts which are necessary for disposing of the above application are as follows:

The applicant/decreed holder had filed a suit C.S.No.1002 of 2001 against the Judgment Debtor for recovery of amounts due under a Contract . The Judgment Debtor had entered into a Contract with one M/s.Asbhil Engineering and Construction SDN BHD for the desilting of Adayar River. The Judgment Debtor had permitted the Principal Contractor to enter into a Sub-Contract and accordingly, M/s.Asbhil Engineering and Construction

had entered into a Sub-Contract with the Decree Holder for the supply of hiring bulldozers.

3.The Principal Contractor had committed defaults and therefore, the Contract was terminated by the respondent herein. Since the amounts were due to the Decree Holder from the respondent Department, the Decree holder arrayed the respondent as a Garnishee. By an order dated 10.03.2004 in A.No.660 of 2004 in C.S.No.1002 of 2001, the respondent was directed to retain an earmarked sum of Rs.3,00,064/- towards securities for the suit claim. Ultimately, the suit was decreed and the applicant Company sought to execute the said decree by filing E.P.No.307 of 2013.

4.It is the contention of the applicant decree holder that prior to filing the said execution petition, the applicant had confirmed with the respondent that a sum of Rs.2.5 crores due by the respondent to the Judgment Debtor was lying with them. A sum of Rs.13,55,965/- was paid to the applicant. Thereafter pending the execution proceedings, the respondent has deposited a further sum of Rs.56,56,495/-. Since the Decree holder was entitled to the

decree amount with interest the Decree Holder has filed the said execution petition for a direction to deposit the balance amount of Rs.56,56,330/-. In fact, in a Memo dated -08-2018, the Superintending Engineer of the respondent Department had admitted that the Department was processing for sanction a sum of Rs.31,57,930/-. However, the said amount as stated in the memo has not been deposited. The learned Master by order dated 11.01.2019 directed the respondent to deposit Rs.56,56,313/- within a period of two weeks.

5.Since the respondent department failed to comply with the said order E.P.No.58 of 2019 was filed by the applicant for attachment. The order of attachment was granted. Thereafter, the applicant would state that the attachment was ordered thrice. Ultimately, the respondent has filed A.No.6528 of 2019 to condone the delay in filing E.P.No.58 of 2019. This application came to be allowed on 13.09.2019. Challenging the same, the present application is filed with the delay of 13 days.

6.Mr.K.K. Murraltharan, learned counsel had made elaborate submissions on the merits of this case stating that the order in E.P.No.307 of 2013 was passed only on the basis of the Memo filed by the respondent/Department. He would further contend that only an appeal would lie against the order passed in E.P.No.307 of 2013 and the learned Judge had also committed an error by condoning the delay in filing the application to set aside the order. He would also contend that the respondent Department without challenging the order in E.P.No.307 of 2013 has challenged only the order of attachment in E.P.No.58 of 2019. He would therefore contend that the order dated 13.09.2019 for condoning the delay of 13 days in filing the application for setting aside the attachment requires to be dismissed.

7.Although the arguments on the merits of the case was submitted, ultimately, the learned counsel for the petitioner has confined their arguments only to the challenge to the order passed in A.No.6528 of 2019.

8.Mr.Sricharan Rangarajan, learned Special Government Pleader appearing on behalf of the respondent/Department would submit that the first argument of the applicant that the Executing Court did not have the Power to condone the delay is *per se* erroneous in the light of the amendment to the provisions of Order 21 Rule 5 Sub Rule 3 by the insertion of the proviso to the said Sub-Rule. He has relied upon the Judgment of this Court reported in **Manu/TN/6718/2019 (Pushparaj v. Rajayyan and others)**, wherein this Court relying upon the above provisions had held that the Executing Court can entertain an application for condoning the delay in filing a petition to set aside the *ex parte* order in the Execution Proceedings. He also relied on the Judgment of this Court reported in **(2011) 6 CTC 268 (N. Rajendran v. Shriram Chitrs Tamil Nadu Private Limited rep.by its Branch Manager/Foreman, Tiruvarur)**, which in turn had relied upon the Full Bench of the Andhra Pradesh High Court reported in **2010 (2) CTC 225 (Ch.Krishnaiah v. Ch.Prasada Rao)**. He would submit that in the light of the above pronouncement, the learned Master was competent to

condone the delay in filing the application to set aside the *ex parte* decree in the execution proceedings. Therefore, the argument on limitation should fail.

9.The learned counsel would further argue that the respondent Department had deposited all the amounts which were due and payable to the Principal Contractor and no further amounts were available with the Department. It was also contended that there is a Memo dated 22.01.2018 had been filed setting forth the true facts about the availability of funds. He has also pointed out that under the Order dated 13.09.2019, the learned Master had directed the respondent Department to pay costs of Rs.2,000/- to the applicant herein and the said costs has also been received by the applicant which clearly indicates that he acquiesced to the order passed by the learned Master.

10.Heard the learned counsels on either side and perused the records.

This Court is restricting its Order only to the argument regarding the

competence of the Executing Court to entertain an application for setting aside an ex parte order with a delay.

11.The argument of the Decree holder/applicant that the Executing Court did not have the jurisdiction to condone the delay is no longer *res integra* after the insertion of the proviso to the Order 21 Rule 105 Sub Rule 3. The Judgment in **Pushparaj v. Rajayyan** supra applies to the facts of this case and therefore, the Order of the learned Master cannot be called in question. Further, having accepted the costs of Rs.2,000/- which has been ordered as a condition precedent for allowing the condone delay application, the applicant is estopped from questioning the order. It is well open to the applicant to canvass all his points with reference to the merits of the challenge to the order of attachment in E.P.No.58 of 2019. As regards the applicants arguments that without challenging the order passed in E.P.No.307 of 2013, the order in E.P.No.58 of 2019 cannot be challenged, the learned counsel for the respondent has stated that the necessary applications have been filed challenging the order in E.P.No.307 of 2013.

12.Be that as it may, having received the costs, the applicant is estopped from questioning the order passed in A.No.6528 of 2019. In the result, Application No.8873 of 2019 stands dismissed.

A.No.8874 is filed for Stay of the order dated 13.09.2019, in the light of the order passed in A.No.8873 of 2019, nothing further survives for consideration in this application and consequently, this Application is also dismissed.

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