

CRP. (NPD) No.3116 of 2018
and CMP No.17952 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 06.08.2020	Delivered on 18.08.2020
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CRP. (NPD) No.3116 of 2018
and CMP No.17952 of 2018

Meenatchi

.. Petitioner

Vs.

Andal

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decreetal order dated 12.07.2018 in I.A.No.750 of 2008 in I.A.No.783 of 2007 in O.S.No.393 of 2005 on the file of the Principal Sub Court at Pondicherry.

For Petitioner : Mr.R.Rajaram,
for M/s.G.Rajan

For Respondent : Mr. T.M.Naveen,
for M/s.K.P.Jotheeswaran,

CRP. (NPD) No.3116 of 2018
and CMP No.17952 of 2018



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ORDER

This matter is taken up for hearing through Video-Conferencing.

Aggrieved by the dismissal of the application seeking to condone the delay of 124 days in filing an application for restoration of IA No.783 of 2007 filed by her under Order 9 Rule 13 of the Code of the Civil Procedure, seeking to set aside the *ex parte* decree in the suit in OS No.393 of 2005, the defendant therein has come up with this Civil Revision Petition.

2. The suit in OS No.393 of 2005 was laid by the plaintiff respondent herein seeking specific performance of an agreement of sale dated 19.03.2003. According to the plaintiff, the defendant had entered into an agreement of sale agreeing to sell the suit property to her for a consideration of Rs.3,00,000/- and had received an advance of Rs.2,00,000/- on the date of the agreement i.e., 19.03.2003. A period of two years was fixed for the payment of balance of Rs.1,00,000/-. Since the defendant did not come forward to execute the Sale Deed as per the agreed terms, the plaintiff issued a notice on 14.06.2005 and the suit was filed on 11.11.2005.

3. The suit was resisted by the defendant contending that the suit transaction is not an agreement of sale at all, she only wanted to borrow a sum of Rs.2,00,000/- by mortgaging the property, the plaintiff appears to have cheated her and fabricated the sale agreement. It was claimed that the suit property is worth more than Rs.10,00,000/-, even on the date of the agreement and therefore, there is no possibility of her having agreed to sell the same for Rs.3,00,000/-. An *ex parte* decree came to be passed on 09.08.2007. Soon thereafter i.e., on 17.08.2007, the defendant filed an Application in IA No.783 of 2007 seeking to set aside the *ex parte* decree. Unfortunately the said application in IA No.783 of 2007 came to be dismissed for default on 22.04.2008 for not taking steps for service of notice.

4. Claiming that she had fallen ill for a considerable time due to jaundice and she could not contact the counsel and take steps for service, an Application was filed for condonation of delay of 124 days in seeking to restore IA No.783 of 2007 which was dismissed for non prosecution. This IA No.750 of 2008 was pending for nearly 3 years and eventually the respondent therein/decreed holder was served through publication and after such service this application came to be allowed *ex parte* on 07.04.2011. The respondent decreed holder filed

IA No.777 of 2011 seeking to set aside the *ex parte* order. That IA No.777 of 2011 came to be allowed on 19.02.2014, thereafter, IA No.750 of 2008 was taken up for disposal again. By an order dated 15.11.2016, the Trial Court condoned the delay. However an error crept in, the learned Principal Sub Judge, Puducherry, while allowing the application for condonation of delay of 124 days directed restoration of IA No.783 of 2007. The respondent decree holder took advantage of that error, made a mountain of a molehill, and challenged the said order by way of Revision before this Court.

5. The primary contention that was urged in the said Civil Revision Petition which was numbered as CRP No.4043 of 2017 was that upon condonation of delay, the application for restoration of IA No.783 of 2007, which was pending, unnumbered, should have been taken up for disposal separately. The learned Sub Judge was therefore not right in restoring IA No.783 of 2007 without passing orders in the unnumbered interlocutory application filed for restoration of the IA. As there was a procedural violation, this Court set aside the order dated 15.11.2016 on 18.01.2018 and directed the Trial Court to rehear IA No.750 of 2008. Upon such rehearing, the learned Trial Judge had dismissed IA No.750 of 2008. Aggrieved the defendant has come up

with this Civil Revision Petition.

6. I have heard Mr.R.Rajarajan, learned counsel appearing for M/s.G.Rajan, for the petitioner and Mr.T.M.Naveen, learned counsel appearing for M/s.K.P.Jotheeswaran, for the respondent.

7. Mr.R.Rajarajan, learned counsel appearing for the petitioner would vehemently contend that the Trial Court was not right in dismissing the application for condonation of delay. He would submit that the Trial Court lost sight of the fact that the Execution proceedings and proceedings in these IAs were being carried on simultaneously side by side and the delay is also partially due to the respondent herein, evading service in IA No.750 of 2008 for nearly 3 years and forcing the Court to order publication and allowing the Application in IA No.750 of 2008 to be decided *ex parte* on 07.04.2011. He would also point out that IA No.777 of 2011 which was filed to set aside the *ex parte* order dated 07.04.2011 was pending almost 3 years till 19.02.2014. Therefore, according to Mr.R.Rajarajan, if it all, there is a delay, the delay between 2008 and 2014 is attributable to the respondent, he would also add that CRP No.4043 of 2017 was pending for nearly a year before this Court.

8. Mr.R.Rajaraman would also point that the learned Trial Judge had taken note of the fact that even after the delay in filing an application to restore IA No.783 of 2007 having been condoned the decree holder proceeded with the execution and went on to deposit the balance of sale consideration and also obtained a Sale Deed. According to the learned counsel for the petitioner this was a calculated risk taken by the decree holder and therefore, the Trial Court was not right in attributing negligence on the part of the judgment debtor. He would also contend that the learned Trial Judge had lost sight of the fact that as a petitioner in an application for condonation of delay, the petitioner is expected to show sufficient cause only for the period between the date of dismissal for default i.e. 22.04.2008 and the date of filing of the application in IA No.750 of 2008 i.e., 23.09.2008. Any delay that occurs thereafter, cannot be attributed to the judgment debtor. He would also draw my attention to the decree in the original suit for specific performance which has been passed on 09.08.2007 pointing out that the decree does not even consider the evidence on record, Mr.R.Rajaraman, would submit that the decree itself is a nullity.

9. Mr.R.Rajaraman, learned counsel would also invite my attention to the

judgment of the Division Bench of this Court in ***M/s.Meenakshisundaram Textiles v. Valliammal Textiles Ltd.***, reported in **2011 (3) CTC 168**, wherein the Division Bench has pointed out even if the defendant/s remained ex parte the Court is duty bound to consider the evidence and the judgment will have to be in conformity with the requirements of Section 2(9) and 33 of the Code of Civil Procedure. The absence of such consideration and a minimum requirement of application of mind, the judgment cannot be said to be in conformity with the provisions of the Civil Procedure Code and that by itself could be a reason for setting aside the said judgment.

10. Mr. Rajarajan, would also invite my attention to the judgment of the Hon'ble Supreme Court in ***Collector, Land Acquisition, Anantnag and another v. Katiji and others***, reported in **(1987) 2 SCC 107**, wherein the Hon'ble Supreme Court had held that Courts should adopt a liberal and justice-oriented approach in considering applications under Section 5 of the Limitation Act, 1963. Further reliance is also placed by the learned counsel for the petitioner on the recent judgment of the Hon'ble Supreme Court in ***University of Delhi v. Union of India and others***, reported in **2019 SCC online SC 1634**, wherein the Hon'ble Supreme Court has broadly laid down the principles that

should be followed by the Courts in the matters for condonation of delay.

11. Contending contra, Mr.T.M.Naveen, learned counsel appearing for the respondent would vehemently argue that the Trial Court was justified in dismissing the application. He would also point out that the judgment debtor had wantonly delayed service in IA No.750 of 2008, though the execution proceedings were also parallelly conducted in the same Court. He would also submit that the decree holder has deposited the balance of sale consideration and the Sale Deed has also been engrossed on stamp papers and registered. Therefore, according to him, if the delay is condoned at this stage, the decree holder will be highly prejudiced.

12. I have considered the rival submissions.

13. The suit is one for specific performance of a contract which fixes a period of two years for performance. It is also seen from the plaint allegations itself that the plaintiff had not issued any demand for performance within the period of 2 years as contemplated under the agreement. The notice seeking specific performance itself was issued only on 14.06.2005, after the expiry of

the period of 2 years. As rightly pointed out by the learned counsel for the petitioner even an *ex parte* judgment must contain certain reasons and it must reflect application of mind by the Court. The *ex parte* Judgment in this case which was rendered on 09.08.2007, reads as follows:

“JUDGMENT

This is a suit for specific performance directing the defendant to execute a sale deed convey the suit property in favour of the plaintiff in accordance with the terms of the suit agreement after receiving the balance sale consideration and in default this court may be pleased to execute a sale deed in favour of the plaintiff after directing the deposit of the balance sale consideration or in the alternative if this court for any reason finds that a decree for specific performance could not be granted, direct the defendant to pay to the plaintiff the sum of Rs.2,50,000/- with interest at 18% per annum from the date of the suit agreement i.e.19.03.2003 till realisation; permanent injunction restraining the defendant, her men and agents from in any manner dealing with the suit property except

in accordance with the terms of the suit agreement and for costs.

2. Today the suit came up for hearing. Judgment is pronounced. The suit is decreed with costs as prayed for. The plaintiff is directed to deposit the balance amount within a week from this date.”

(emphasis supplied)

14. A bare perusal of the above judgment would show that there was total non application of mind on the part of the learned Subordinate Judge, when the suit was decreed *ex parte*. Even the statutory requirement regarding readiness and willingness of the plaintiff has not been gone into and there is no finding recorded. It is fundamental principle of law that a Court cannot decree a suit merely because the defendants remain *ex parte*. The Division Bench of this Court in *M/s.Meenakshisundaram Textiles v. Valliammal Textiles Ltd.*, reported in **2011 (3) CTC 168**, referred to *supra*, after discussing the law relating to *ex parte* judgments and decrees has observed as follows:

“21. From the above discussions, it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, is appellable. In case that judgment and decree become final without there being any appeal, the decree is executable. In that sense, there is no difference between a judgment and decree and an ex parte judgment and decree. In view of the above, in the event the defendant is set ex parte, the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment.

22. If the above law is kept in mind, in our opinion, the judgment and decree dated 8.7.2009 passed by the Court below in O.S.No.16 of 2005 are not in conformity with the provisions of the Code Civil Procedure and are liable to be set aside. For the same reason, the order and decretal order dated 26.8.2010 in I.A.No.1776 of 2009 in O.S.No.16 of 2005 passed by the Court below are also liable to be set aside.”

15. The Division Bench had even gone to the extent of concluding that an *ex parte* judgment can be set aside, if it is shown that there is total non application of mind and that would itself constitute a sufficient cause under Order 9 Rule 13 of the Code of Civil Procedure. I do not propose to travel that far since what is now before me is only a Revision against an order refusing to condone the delay in seeking restoration of an application to set aside the *ex parte* decree. A perusal of the order of the Trial Court impugned in this Revision would show that the learned Trial Judge was totally influenced by the subsequent events that had taken place. No doubt the plaintiff upon a decree being passed had launched execution proceedings and a Sale Deed has also been executed in her favour.

16. The Trial Judge had not discussed the reason assigned by the petitioner for the delay of 124 days. The learned Trial Judge had chosen to point out that the execution proceedings have gone ahead after the *ex parte* decree was passed during the pendency of the proceedings in the various interlocutory applications, referred to above, and the Sale Deed has also been executed. The decree holder has spent a sum of Rs.10,197/- as Registration Fee.

All these have occurred only after the dismissal of the application in IA No.750 of 2008 for default. The application for condonation of delay was filed on 23.09.2008 and it came to be allowed *ex parte* on 07.04.2011. This speaks volumes about the conduct of both the parties as well as the counsels appearing for the parties in the Courts below. It is rather painful to note that the Trial Court has also unmindful of its obligations mechanically proceeded to order service by publication to the plaintiff in an application seeking condonation of delay of 124 days in filing an application for restoration of an Order 9 Rule 13 of the Code of Civil Procedure, petition which was dismissed for default.

17. The Court must have applied its mind and directed notice to the counsel who appeared in the Suit. In the event of his refusal, notice could have been issued to the counsel who appeared in the execution proceedings for the decree holder. After all both the cases were pending in the Same Court. But unfortunately neither the counsel for the parties nor the Court applied their mind in finding out the ways and means to shorten the litigation. They went about mechanically ordering publication by which time 3 years was lost. Again when an application was filed to set aside the *ex parte* order dated 07.04.2011 allowing Application No.750 of 2008 that application was kept pending for

nearly 3 years till 19.02.2014. Eventually when an order was passed allowing IA No.750 of 2008 on 15.11.2016, a *bona fide* error crept in and that was taken advantage of by the decree holder to delay the proceedings further by another 2 years by approaching this Court by way of CRP No.4043 of 2017. Having done all these, the decree holder now raises the boogie of delay and prejudice. I am unable to concur with the submissions of Mr.T.M.Naveen, learned counsel appearing for the respondent when he says that his client will be prejudiced.

18. In ***Collector, Land Acquisition, Anantnag and another v. Katiji and others***, reported in (1987)2 SCC 107, the Hon'ble Supreme Court has observed as follows:

“3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably

liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

- 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
- 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
- 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
- 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
- 5. There is no presumption that delay is occasioned*

deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”*

19. In ***University of Delhi v. Union of India and others***, reported in **2019 SCC online SC 1634**, a three judge bench of the the Hon’ble Supreme Court has after referring to the judgment in ***Collector, Land Acquisition, Anantnag***’s case has held as follows:

“20. From a consideration of the view taken by this Court through the decisions cited supra the position is clear that, by and large, a liberal approach is to be taken in the matter of condonation of delay. The consideration for condonation of delay would not depend on the status of the party namely the Government or the public bodies so as to apply a different yardstick but the ultimate consideration should be to render even handed justice to

the parties. Even in such case the condonation of long delay should not be automatic since the accrued right or the adverse consequence to the opposite party is also to be kept in perspective. In that background while considering condonation of delay, the routine explanation would not be enough but it should be in the nature of indicating “sufficient cause” to justify the delay which will depend on the backdrop of each case and will have to be weighed carefully by the Courts based on the fact situation.”

20. If we are to consider the explanation offered for the delay of 124 days in the case on hand, the petitioner has averred that she was affected by various illness like jaundice and heart ailments and she could not take steps to pay batta in time. Considering the length of the delay and the nature of the explanation offered, I am of the considered opinion that this would amount to a sufficient cause for condonation of delay.

21. I do not think that the argument of prejudice advanced by the learned counsel for the decree holder in the case on hand could be accepted. The *ex*

parte decree came to be passed on 09.08.2007. An application to set aside the *ex parte* decree was filed almost immediately on 17.08.2007. Unfortunately that came to be dismissed on 22.04.2008. On 23.09.2008, an application was filed to restore the application filed under Order 9 Rule 13 of the code of Civil Procedure, which came to be dismissed for default on 22.04.2008. Of course there was a delay of 124 days in filing the said application. In the said delay petition, the plaintiff/decreed holder evaded service and finally she was served by publication and an *ex parte* order came to be passed on 07.04.2011, after a gap of 3 years. **All these while, the decreed holder was prosecuting the Execution Petition.**(emphasis supplied)

22. The application in IA No.750 of 2008 came to be allowed on 07.04.2011. The decreed holder filed an application in IA No.777 of 2011 after 6 months on 10.10.2011 claiming that she came to know about the *ex parte* order only on 23.09.2011. That application was pending for nearly 3 years and finally it was allowed on 19.02.2014. This conduct of the decreed holder would show that she was aware of the fact that the proceedings to set aside the *ex parte* decree were going on one side and despite such knowledge, she proceeded with the Execution Petition and obtained a Sale Deed also. I am not for a moment

saying that such a conduct is bad, but such a conduct, in my considered opinion, leaves more room for doubt.

23. As already pointed out the Trial Court has not adverted to the actual reason for the delay of 124 days in filing the application to restore IA No.783 of 2007. It had only adverted to the subsequent events viz., the proceedings in execution without adverted to its own proceedings viz., the manner in which the service was effected in IA No.750 of 2008, the fact that the proceedings in IA No.777 of 2011 were pending for nearly 3 years etc. I therefore find that both the petitioner as well as the respondent are equally guilty of dragging on the proceedings. Therefore considering the fact that the decree is one for specific performance and the decree does not reflect any application on mind and does not satisfy the legal requirements of a judgment under the code of Civil Procedure, I am constrained to conclude that the petitioner deserves a chance for contesting the proceeding on merits.

24. Hence this Civil Revision Petition is **allowed** the order of the Trial Court is set aside. Consequently the connected miscellaneous petition is closed. However considering the fact that the respondent has spent for stamp duty etc.,

the petitioner shall pay a cost of Rs.25,000/- to the respondent on or before 18.09.2020. Upon such payment and production of receipt, the Trial Court is directed to number the unnumbered application for restoration of IA No.783 of 2007 and proceed with the same in accordance with law.

18.08.2020

jv
Index: Yes/No
Internet: Yes/No
speaking order/Non speaking order

To

The Principal Sub Judge,
Puducherry.



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R.SUBRAMANIAN

jv



Pre Delivery Order

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