

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.02.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.NPD.No.1909 of 2015 and
MP.Nos.1 of 2015

1.Malarvizhi
2.Anitha

..Petitioners

Vs.

1.Sampoornam(died)
2.V.Rajamani
3.Rathinam

(RR2 and 3 are LR's of the deceased
R1 viz., Sampoornam vide court order
dated 18.12.2020 made in CMP.No.
13803 of 2020 in CRP.No.1909 of 2015

..Respondents

PRAYER:

The Civil Revision Petition is filed under Section 115 of Code of Civil Procedure against the fair and decretal order of the Principal District Judge's Court at Namakkal dated 23.12.2014 in IA.No.71 of 2014 in unnumbered IA.No.in AS.No.44 of 2010.

For Petitioners : Mr.C.Ramesh

For Respondents

R1 : died (steps taken)
R2 & 3 : Mr.N.Manokaran

ORDER

This civil revision petition is filed as against the fair and decretal order of the Principal District Judge's Court at Namakkal dated 23.12.2014 in IA.No.71 of 2014 in unnumbered IA.No.in AS.No.44 of 2010 thereby dismissing the petition to condone the delay in re-presenting the petition to restore the appeal suit.

2. The first respondent filed suit for partition as against the petitioners and others. In the said suit, the petitioners are the third and fourth defendants. They are none other than daughter in law of the plaintiff and grand daughter of the plaintiff. The suit was first decreed and aggrieved by the same, the petitioners preferred appeal suit in AS.No.44 of 2010. The said appeal suit was dismissed for default by an order dated 01.02.2012. Immediately, the petitioners filed application to restore the appeal suit. The said application was returned for the reason that the notice has to be served to the counsel who appeared on behalf of the respondents in appeal suit. Thereafter the petitioners fell ill and as such they could not able to contact their counsel and only on receipt of notice from the final decree proceedings, came to understand that their petition to restore the appeal suit was returned and the same was not re-presented in time. Thereafter on their instruction, their counsel on record re-presented the petition with delay of 732 days. The court below dismissed the same on the ground that the delay of 732 days not been explained by the petitioners since the suit is of

the year 2008 and the preliminary decree passed in the year 2012. Further the petitioners failed to explain the every day delay.

3. The learned counsel for the petitioners submitted that the delay caused due to the counsel on record who appeared on behalf of the petitioners herein before the appellate court. Further their restoration petition to restore the appeal suit was returned only for the reason that the notice has to be served in the restoration petition to the counsel who appeared on behalf of the respondents in the appeal suit. He further submitted that the appellate court ought not to have returned the papers since the petitioners can serve notice only after order from the court or permission from the court since the appeal suit was already dismissed for default and probably counsel who appeared on behalf of the respondents would have returned the bundle to the respective parties. Therefore, the return itself was wrong and the first appellate court ought to have ordered notice in the petition for restoration of the appeal suit. However, after returning the said application, the counsel who appeared on behalf of the petitioners failed to re-present the same and for which the petitioners should not be punished. He further submitted that the petitioners have very good case to succeed in the appeal suit since the suit is filed for partition by the mother. The petitioners are daughter in law and grand daughter of the plaintiff. The suit property was already bequeathed by way of Will in favour of the second petitioner herein and already there was partition in respect of the suit property

between the family members. Those factors were not considered by the trial court and as such the petitioners have got very good case to succeed in the appeal suit. In support of his contention, he relied upon the following judgments.

- (i) ***Rafiq and another Vs. Munshilal and another*** reported in ***1981 (2) SCC 788***
- (ii) ***S.Mohan Vs. Cruz Mary*** reported in ***2006 (1) CTC 191***
- (iii) ***P.Venkata Rao rep. by his General Power of Attorney, A.K.K.Elangovan Vs. Secretary to Government and another*** reported in ***2018 SCC Online Mad 2057***
- (iv) ***Robin Thapa Vs. Rohit Dora*** reported in ***(2019) 7 SCC 359***

4. Per contra, the learned counsel for the respondents contended that the petitioners failed to state any reason for the delay of 732 days in re-presenting the petition for restoration of the appeal suit. In the affidavit they simply stated that they fell ill and therefore they could not able to contact their counsel on record. Admittedly the petition for restoring the appeal suit was returned for the reason that the petitioners failed to serve notice on other side. Therefore, the first appellate court rightly returned the paper for service of notice to the other side counsel. Thereafter, it was not served and not re-presented in time. When the mistake committed on the part of the counsel on record who appeared on behalf of the petitioners herein, they also failed to file any supporting affidavit, in support of the petition to condone delay in

re-presenting the petition for restoration. In support of his contention, he relied upon the following judgments:

(i) ***Lalliammal Vs. Thulasi and others*** reported in **(2001) 3 MLJ 407**

(ii) ***A.Muthusamy Vs. Muniammal and others***

reported in **2006 (1) CTC 187**

5. Heard Mr.C.Ramesh, the learned counsel for the petitioners and Mr.N.Manokaran, the learned counsel for the respondents 2 and 3.

6. The petitioners are the defendants 3 and 4 in the suit filed by the first respondent herein for partition. The said suit was decreed and aggrieved by the same, the petitioners preferred appeal suit. The said suit was dismissed for default on 01.02.2012. Immediately, the petitioners filed petition to restore the appeal suit. The said application was returned by the appellate court for want of service of notice to the counsel who appeared for the respondents in the appeal suit. Admittedly, the appeal suit was dismissed for default on 01.02.2012. Therefore, the appellate court ought not to have returned the paper for the reason to serve notice on other side counsel, since probably the counsel who appeared for the respondents would have returned the entire bundle to the parties. Therefore, the appellate court ought to have ordered notice either to the respondents or to the counsel who appeared on behalf of the respondents herein. However, the appellate court returned the application and the same was re-presented with delay of 732 days.

7. On perusal of the affidavit filed in support of the condone delay petition, the petitioners stated that after filing petition to restore the appeal suit, they fell ill and thereafter they could not contact their counsel. Only after receipt of notice from the final decree application, they came to understand that their petition was returned for want of service of notice to the counsel who appeared on behalf of the respondents in the appeal suit.

8. The learned counsel for the petitioners relied upon the judgment in the case of ***P.Venkata Rao rep. by his General Power of Attorney, A.K.K.Elangovan Vs. Secretary to Government and another*** reported in ***2018 SCC Online Mad 2057***, in which the Hon'ble Division Bench of this Court relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***The Collector, Land Acquisition Vs. Master Katiji*** reported in ***100 LW 676***, wherein it is held as follows:

21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms sufficient cause should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

21.3. iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

9. This Court while considering the condone delay petition, the above principles laid down by the Hon'ble Supreme Court of India were relied upon, in which it is held that the terms sufficient cause should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation. Further held that it is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice. The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot

be given a total go by in the name of liberal approach.

10. In the case on hand, the petitioners rightly filed application to restore the appeal suit immediately without any delay. The same was returned for want of serve notice to the other side. As stated supra, the counsel who appeared for the petitioners failed to re-present the petition for restoration and as such the petitioners herein should not be punished. Though they did not contact their counsel, the counsel who appeared ought to have re-presented the petition after serving notice to the other side.

11. The learned counsel for the petitioners also cited the judgment in the case of **Robin Thapa Vs. Rohit Dora** reported in **(2019) 7 SCC 359**, wherein it is held as follows:

Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits.

Therefore, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated for default.

12. In the case on hand, as pointed by the learned counsel for the petitioners, the suit is for partition. According to the petitioners, already suit properties were bequeathed in favour of the second petitioner herein and also the entire suit property was partitioned between family members. Therefore, the appeal suit has to be adjudicated on merits.

13. The learned counsel for the respondents relied upon the judgment in the case of **Lalliammal Vs. Thulasi and others** reported in **(2001) 3 MLJ 407**, wherein it is held as follows:

4. When it is the duty of the counsel to comply with the defects pointed out by the registry, the non-representation of the papers within the time is nothing but the negligence on the part of the counsel. Even for representation of the papers if the party has to ask the counsel and thereafter the counsel has to make the search and trace out the papers in order to represent the same, I am of the view, that the interests of the 'pay master' have not been taken care of properly, since this is nothing short of a negligence on the part of the counsel in not representing the papers within the time. Whatever the right accrued because of this delay to the respondents cannot be lightly treated. Further, the counsel did not even care to file a supporting affidavit as to how the delay has occurred in the representation. Hence, I do not find any reason to condone the delay in representation.

This court held that the negligence on the part of the counsel cannot be pardoned since the interests of the pay master have not been taken care of properly. The negligence on the part of the counsel in not re-presenting the papers within the time and it cannot be likely treated.

14. In the case on hand, though mistake committed by the counsel on record of the petitioners herein, the reason for the return of restoration petition

is that directed the counsel to serve copies to the other side as stated above. After dismissing the appeal for default, without order from the court or without permission from the court, it cannot be served any notice either to the parties or to the counsel who appeared on behalf of the respondents. Therefore, the above judgment is not applicable to the case on hand. The other judgment cited by the learned counsel for the respondents in respect of the condone delay in re-presentation also not helpful to the case on hand.

15. In view of the above discussion, the order dated 23.12.2014 passed in IA.No.71 of 2014 in unnumbered IA.No.in AS.No.44 of 2010 is set aside and the said petition is allowed on condition that the petitioners shall pay a sum of Rs.5,000/- (Rupees Five Thousand only) to the respondents directly within a period of two weeks from the date of receipt of copy of this order. After restoration of appeal suit, the appellate court is directed to dispose of the appeal within a period of three months from the date of receipt of copy of this order. Consequently, connected miscellaneous petition is closed. No order as to costs.

10.02.2021

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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G.K.ILANTHIRAIYAN,J.

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To

The Principal District Judge's Court
at Namakkal



CRP.NPD.No.1909 of 2015

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