

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(N.P.D).No.2373 of 2015

1.Saravanakkumar
2.Dineshkumar

...Petitioners

Vs

1.Nallammal
2.Selvam

...Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 04.03.2015 passed in I.A.No.258 of 2014 in O.S.No.208 of 2009 on the file of the Subordinate Court, Namakkal.

For Petitioners : Mr.R.Kannan

For Respondents : Mr.P.Valliappan

ORDER

The present Civil Revision Petition is directed as against the fair and decretal order dated 04.03.2015 passed in I.A.No.258 of 2014 in O.S.No.208 of 2009 on the file of the Subordinate Court, Namakkal, thereby

dismissing the petition to condone the delay in filing the petition for restoration of the main suit.

2.The petitioners are the plaintiffs. They filed the suit for declaration and recovery of possession in respect of the suit property. Both the petitioners are minors, at the time of filing the suit and they were represented by their Power of Attorney. Both the petitioners are in abroad and while pending the suit, father of the 1st petitioner died and also 2nd petitioner attained majority. Therefore, he filed a petition to appoint the 2nd petitioner's father as power agent to represent the main suit and to appoint the mother of the 1st petitioner as next friend to represent the suit on behalf of the 1st petitioner along with a petition to declare that the 2nd petitioner has attained majority. The 1st two petitions in I.A.Nos.917 and 918 of 2010 were filed and both were allowed. Thereafter, the counsel who represented on behalf of the petitioners failed to carry out the amendments and as such the suit was dismissed for default on 15.12.2010. Thereafter, the petitioners and their representatives failed to approach the Advocate and after sometime, they came to understand that the suit itself dismissed for default. Further, the petitioners filed a petition to condone the delay of 1129 days in

restoring the suit and the same was dismissed. Aggrieved by the same, the present Civil Revision Petition is preferred.

3.The learned counsel for the petitioners would submit that the petitioners were in abroad at the time of filing the suit. Thereafter, the defendants were absent before the trial Court and they were set as exparte on 25.03.2010. After that, the suit was posted for exparte evidence on 29.04.2010 and a petition has been filed to appoint the mother of the 1st petitioner as next friend and also appoint Power of Attorney to represent both the petitions, viz., I.A.Nos.917 and 918 of 2010. Both the petitions were allowed and subsequently the counsel on record failed to carry out the amendment in the suit. Therefore, the suit was dismissed for default on 15.12.2010. Unfortunately, the petitioners were in abroad and as such they could not able to follow the suit and their parents also, due to inadvertence failed to contact the Advocate, and after a period of time, they came to understand that the suit was dismissed for default and as such delay of 1129 days is bonafide one and even then, the Court below without considering the same dismissed the I.A.No.258 of 2014 in O.S.No.208 of 2009 by order dated 04.03.2015. In support of his contention, he relied upon the cases of

Sarasu Vs. Ravi [2016 5 CTC 117] and Chandra and others Vs. M.Devendran [2019 (4) CTC 61].

4.Per contra, the learned counsel for the respondents would submit that the petitioners filed a suit for declaration and recovery of possession in respect of the suit property. They also filed a petition in I.A.Nos.917 and 918 of 200 and both the petitions were allowed and posted the suit to carry out amendments. But the petitioners failed to carry out the amendments and as such the suit was dismissed for default on 15.12.2010. She further submitted that no sufficient reasons were mentioned in the affidavit filed in support of the condone delay petition, that too for a huge number of days in filing the petition to restore the suit. There is absolutely no sufficient cause to condone the delay of 1129 days. Even assuming that the petitioners were in abroad, their respective parents viz., the representatives are very much available in India and they could have very well contact their counsel and they might have taken steps to carry out the amendment. Therefore, knowing fully well about the suit that it was posted for carrying out amendments, the petitioners failed to do so and as such, the Court below rightly dismissed the petition to condone the delay of 1129

days in filing the petition to restore the suit.

5.Heard the learned counsel for the petitioners and the learned counsel for the respondents and also perused the materials on record.

6.The petitioners are the plaintiffs. They filed the suit for declaration and recovery of possession in respect of the suit property. After receipt of the notice, the respondents herein failed to appear before the trial Court and as such they were set as *exparte* on 25.03.2010. When the suit was posted for recording *exparte* evidence, the petitioners filed a petitions in I.A.Nos.917 and 918 of 2010 to appoint the 1st petitioner's mother as next friend and also appoint the Power of Attorney to represent both the petitioners in the suit along with a petition to declare that the 2nd petitioner has attained majority. Only two petitions were allowed on 28.09.2010 and when the matter was posted for carry out amendments, the counsel for the petitioners failed to carry out the same and as such the suit itself dismissed for default on 15.12.2010. It is curious to note that after allowing the petitions in I.A.Nos.917 and 918 of 2010, it is the duty of the counsel to represent the petitioners to carry out the amendments. In the case on hand, unfortunately the counsel for the petitioners failed to carry out the

amendment and as such the suit was dismissed for default.

7. Admittedly, the petitioners were in abroad and even at the time of dismissal of the suit as default. Though the Power of Attorney was very much available in India, they also failed to contact the counsel, who represented on behalf of the petitioners herein, faced the dismissal order in the suit. Further, after came to knowledge, the petitioners come forward with the petition to condone the delay of 1129 days in filing the petition to restore the suit. Even till today, the respondents were set as exparte in the main suit and they did not choose to file any petition to set aside the exparte decree. That apart, the suit was dismissed for default. The counsel, who appeared on behalf of the petitioners failed to carry out the amendments. For that, the parties cannot be punished and the suit can be tried on merits and in accordance with law. Further, delay of 1129 days in filing the petition to restore the suit, though huge one, the reasons stated in the affidavit filed in support of the condone delay petition are bonafide one. In this regard, the learned counsel for the petitioners rely upon the Judgments in the case of *Sarasu Vs. Ravi [2016 5 CTC 117]*. Head note is given below:-

"Limitation Act, 1963 (36 of 1963), Section 5 -

Applications for Condoning Delay - Approach of Court - Delay of 1317 days - Whether to be condoned - Applications for condoning delay filed under Section 5 to be dealt with liberally and leniently in order to do substantial justice to parties - Length of delay not a material factor for deciding Applications under Section 5 - Allowing an Application under Section 5 only to permit a party to participate in main proceedings whether issue between parties would be decided on merits - However, if meritorious matter is thrown out on account of technical issue, cause of justice would be defeated - Delay of 1317 days in filing an Application to set aside ex parte Decree, on account of party having not received due Notice - Delay condoned by directing Defendant to pay Costs of Rs.2,500/- payable to Plaintiff - Civil Revision Petition allowed."

and in the case of ***Chandra and others Vs. M.Devendran [2019 (4) CTC***

61], relevant headnote is given below:-

"Limitation Act, 1963 (36 of 1963), Section 5 -

Code of Civil Procedure, 1908 (5 of 1908), Order 22,

Rule 4(4) - Suit for Specific Performance filed in 2000 -

Original Defendant died lis pendens and Suit dismissed as

abated - Suit later restored and LR's impleaded - Suit decreed ex parte in 2005 vide cryptic Judgment, without any reasoning - Defendants filed Application in 2013 to set aside ex parte Decree and sought condonation of delay of 2959 days at stage of taking possession - Delay not condoned, Application dismissed - Maintainability of - Held, Specific Performance being discretionary remedy ought not to be granted in routine manner, even if parties are set ex parte - Court must consider entire background of case before dismissing Application to condone delay - Length of delay not as significant as sufficient cause - If Defendants evaded Notice, Plaintiff could seek Orders under Order 22, Rule 4(4) - Lower Court could have passed Decree on merits after discussion - Failure to exercise discretion at that stage is sufficient ground to interfere - Suit restored for permitting Defendants to file Written Statement - Costs imposed for conduct of Defendant."

8. This Court has held that when the Court of law deals with an application to condone the delay in filing the petition under Section 5 of the Limitation Act, such application will have to be generally viewed in a liberal and lenient way to do substantial justice between the parties.

9.In the case of hand, the suit is filed for declaration and recovery of possession and as such it has to be tried on merits and in accordance with law. In view of the above discussion, the fair and decretal order dated 04.03.2015 passed in I.A.No.258 of 2014 in O.S.No.208 of 2009 on the file of the Subordinate Court, Namakkal, is set aside and this Civil Revision Petition is allowed, on cost of Rs.5,000/- (Rupees Five Thousand Only) payable to the respondents, directly, within a period of two weeks from the date of receipt of a copy of this order, failing which, the order stands canceled automatically. After making the payment by the petitioners and after restoring of the suit in O.S.No.208 of 2009, the trial Court is directed to dispose of the same, within a period of three months from the date of receipt of a copy of this order. No costs.

11.03.2021

Index: Yes/No

Internet: Yes/No

Speaking Order: Yes/No

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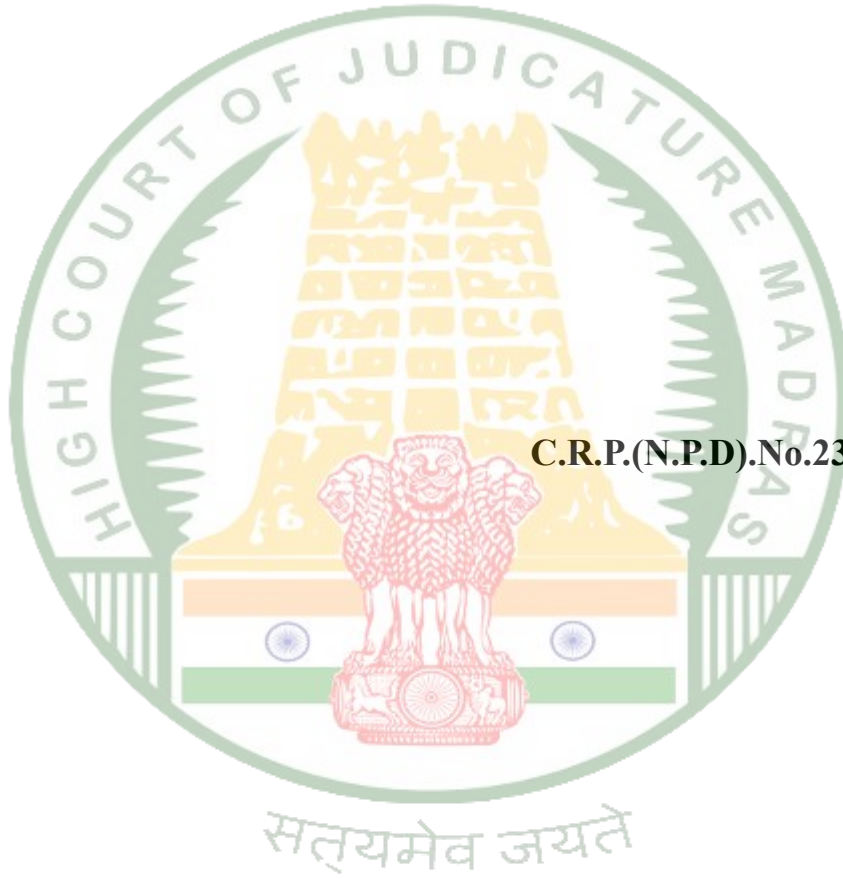
To

The Subordinate Court, Namakkal.

C.R.P.(N.P.D).No.2373 of 2015

G.K.ILANTHIRAIYAN.J,

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