

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP (NPD) No.4641 of 2015

and

MP.No.1 of 2015

S.Nagarajan

Represented by his Power of Attorney

Sekar

... Petitioner / Defendant

Vs.

M.Gunaseelan

...Respondent / Plaintiff

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decreetal order dated 06.11.2015 passed in I.A.No.363 of 2015 in O.S.No.5 of 2006 on the file of the learned Subordinate Judge, Dharmapuri.

For Petitioner : Mr.L.Chandrakumar

For Mr.I.Abrar MD Abdullah

For Respondent : Mrs.Hema Sampath, Senior Counsel

For Mr.P.Valliappan

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ORDER

(This case has been heard through video conference)

The Civil Revision Petition has been filed against the order and decreetal order dated 06.11.2015 in I.A. No. 363 of 2015 in O.S. No. 5 of 2006

passed by the learned Subordinate Judge, Dharmapuri, dismissing the petition filed under Section 5 of the Limitation Act to condone the delay of 731 days in filing the petition to set aside the exparte decree dated 28.02.2013 in O.S. No. 5 of 2006.

2.The Petitioner is the defendant in O.S. No. 5 of 2006 filed by the Respondent seeking for specific performance of the sale agreement entered between the Petitioner and the Respondent and for costs. Since the Petitioner/Defendant did not appear before the Trial Court, an exparte decree had been passed by the Trial Court on 28.02.2013. Thereafter, the Petitioner/Defendant had filed an application to set aside the exparte decree along with an application in I.A. No. 363 of 2015 seeking to condone the delay of 731 days in filing the same. The affidavit in support of I.A. No. 363 of 2015 has been filed by the Power of Attorney / father of the Petitioner/Defendant, in which it had been stated that his son / revision petitioner got employment at USA and he was away from the Country and that since he did not appear before the Trial Court, an exparte decree dated 28.02.2013 had been passed passed by the Trial Court and based on that, an execution proceedings had been initiated. Further, it had been averred that the Petitioner/Defendant or his father was not aware of the exparte decree and that they did not receive any

notice with regard to the execution proceedings and since the Petitioner/Defendant and his father were not aware of the exparte decree, they were unable to file an application to set aside the exparte decree within time and thereby, there had been a delay of 731 days in filing the application to set aside the exparte decree dated 28.02.2013.

3. The Respondent/Plaintiff had filed a detailed counter wherein he had stated that the Petitioner/Defendant had appeared in the suit through a Counsel and filed his written statement and that he was earlier set exparte and an exparte decree was passed by the Trial Court on 10.11.2010 and thereafter, the Petitioner/Defendant had filed an application in I.A. No.152 of 2012 to set aside that exparte decree and that application was allowed on payment of costs. Thereafter, since the Petitioner/Defendant did not appear before the Trial Court, he was once again set exparte and an exparte decree dated 28.02.2013 was passed by the Trial Court. The Petitioner/Defendant was fully aware of the pendency of the suit and that they deliberately allowed the Court to pass exparte order in order to delay and protract the case and that the petition was filed with false averments.

4. The Trial Court finding that the Petitioner/Defendant had not satisfied the Court by showing sufficient reason for condoning the delay, had dismissed I.A.No.363 of 2015. Against which, the present Civil Revision Petition has been filed.

5. The learned Counsel for the Petitioner/Defendant would submit that the Petitioner/Defendant is represented through his Power of Attorney/his father. He would submit that the Petitioner/Defendant was studying at USA and that his father had taken loan from the Respondent/Plaintiff and a sale agreement was entered only as a security for the loan transaction. Whereas, by using the sale agreement which was executed as surety, the Respondent/Plaintiff had filed a suit. Neither the Petitioner/Defendant nor his father was aware of the exparte decree being passed against them and that they came to know about the exparte decree only pursuant to the execution proceedings being filed by the Respondent/Plaintiff. He would submit that the Petitioner/Defendant was continuously residing at USA and he had come once in a while and that he was under the genuine impression that the Advocate was following the case. On coming to know about the exparte decree, the petition had been filed at once. Meanwhile, there had been a delay of 731 days and thereby, the petition to set aside the exparte decree was filed with the petition

to condone the delay. The petitioner had shown sufficient cause for condoning the delay. The learned Counsel would further submit that the Courts while dealing with the petition to condone the delay should have liberal, pragmatic, justice oriented and non pedantic approach. Further, the Courts are not supposed to legalize injustice but are obliged to remove injustice. He would reiterate that the Petitioner/Defendant being out of the country had shown sufficient cause for condonation of delay whereas, the trial Court without properly considering the petition had dismissed the same. He would further submit that the petitioner is also prepared to pay exemplary cost and would pray that the revision may be allowed on terms and conditions.

6. Per Contra, the learned Senior Counsel appearing for the Respondent/Plaintiff would oppose stating that the Civil Revision Petition is neither maintainable on facts nor on law. She would further submit that the suit is of the year 2006 and notice was served on the Petitioner/Defendant in the suit and he entered appearance through his Counsel and filed written statement on 02.06.2006 and thereafter, he did not appear before the Trial Court and thereby, he was earlier set exparte and an exparte decree was passed by the Trial Court on 10.11.2010. Thereafter, the Petitioner/Defendant had filed an application in I.A. No. 152 of 2012 to set aside that exparte decree and that

application was allowed on payment of costs. Even thereafter, the Petitioner/Defendant did not follow up the case vigilantly and once again, he was set exparte and an exparte decree dated 28.02.2013 was passed by the Trial Court. She would further submit that the Petitioner/Defendant and his father were well aware of the pendency of the suit and the exparte decree being passed against them and that they have willfully and deliberately waited to see what was happening. She would further submit that after the exparte decree, the Respondent/Plaintiff had filed an Execution Petition in REP No. 52 of 2013 before the Subordinate Court, Dharmapuri and notice was ordered to be served on the Petitioner/Defendant in REP No. 52 of 2013 and when the bailiff attempted to serve the notice on the Petitioner/Defendant, it was informed that the Petitioner/Defendant has gone out of station and thereby, the notice was returned and thereafter, substituted service by publication of notice in a local newspaper was ordered and the paper publication was effected on 07.12.2013 and that since the Petitioner/Defendant did not appear before the Execution Court, he was set exparte. Thereafter, the Respondent/Plaintiff was directed to give a Draft Sale Deed. Later, on the direction of the Execution Court, the Draft Sale Deed was directed to be served on the Petitioner/Defendant through the bailiff and even at that time, it was informed that the Petitioner/Defendant had gone out of station and thereby, the notice

was served by affixure of notice on the door of the Petitioner/defendant. Thereafter, notices sent by registered post have also been returned. Since the draft sale deed could not be served on the Petitioner/Defendant, once again substituted service by paper publication was ordered and the paper publication was effected on 02.07.2014 and since the Petitioner/Defendant did not appear before the Court even on that day, he was set exparte. While so, the father of the Petitioner/Defendant has sworn a false affidavit stating that he was not aware of the notice. She would further submit that thereafter based on the Draft Sale Deed, the Court had executed a Sale Deed in favour of the Respondent/Plaintiff on 23.09.2014 and thereafter, the Respondent/Plaintiff had filed REA No. 61 of 2014 for taking possession of the suit property. Once again, notice was issued to the Petitioner/Defendant through the bailiff and even at that time, it was informed by Petitioner's father and the Power of Attorney that his son had gone out of station and once again, the notice was served by affixure. Thereafter, notices sent by registered post have also returned stating reason that the Petitioner/Defendant had gone out of station and thereafter, the Execution Court had once again directed the Respondent/Plaintiff to effect paper publication and the paper publication was effected on 23.03.2015. Since the Petitioner/Defendant did not appear even after the paper publication, he was set exparte. At that stage, the

Petitioner/Defendant had filed I.A. No. 363 of 2015 to set aside the exparte Decree dated 28.02.2013 in O.S. No.5 of 2006. She would further submit that the Petitioner/Defendant is well aware of the Execution Petition in REP. No. 52 of 2013 and that as early as 10.07.2014 one Mr. D.K.Devarajan, Advocate had entered appearance on behalf of the Petitioner/Defendant and thereby inferring that the Petitioner/Defendant was aware of exparte decree even prior to 10.07.2014. While so, the application to condone delay has been filed after 7 months of knowledge on 16.04.2015. Further, the application had been filed in a routine and casual manner baldly without details and particulars. The learned Senior Counsel would further submit that a perusal of the records would clearly show that the Petitioner/Defendant had been willfully evading appearance before the Court and the application has been filed belatedly only to drag on the proceedings and to cause prejudice to the Respondent/Plaintiff and to cause delay. The learned Senior Counsel would further submit that the rules of limitation are not meant to destroy the rights of parties, but they are meant to see that parties do not resort any dilatory tactics and would seek the remedy promptly. She would further submit that the object of providing a legal remedy is to repair the damage caused by reason of legal injury and that the law of limitation is thus founded on public policy and that it is for the general welfare that a period be put to litigation. She would reiterate that the rules of

limitation are not meant to destroy the rights of the parties and they are meant to see that parties do not resort to dilatory tactics only seek remedy and the idea is that every legal remedy must be kept alive for a legislatively fixed period of time. The conduct of the Petitioner/Defendant has to be seen and he had been willfully delaying the proceedings and that he has not shown bonafides to condone the delay in not filing petition to set aside the exparte decree in time. She would further submit that a duty is cast on the party seeking to condone the delay to establish sufficient cause whereas, in this case the Petitioner/Defendant has not shown sufficient cause and thereby the trial Court had rightly dismissed the petition. In support of her contention, the learned Senior Counsel relied on the following decisions;

- 1. *Shanmugam vs. Chokkalingam* reported in 2009 (5) CTC 48;**
- 2. *P.Sivaraj vs. R.Selvaraj* reported in 2016 (3) MWN (Civil) 73;**
- 3. *A.Abitha Nachi vs. K.S.Saroja* reported in 2016 (3) MWN (Civil) 404;**
- 4. *Leela vs. V.R.Asha* reported in 2019 (1) MWN (Civil) 876**
- 5. *M.S.Rathna Kumar v. Trilokchand* reported in 2019 (1) MWN (Civil) 577.**

7. Heard the counsels and perused the materials placed on record.

8. The learned Senior Counsel for the Petitioner/Defendant has relied on several decisions. This is Court does not want to burden this order by citing all the above decisions. This Court deems it apposite to refer to the following paragraphs in the Judgment in ***A.Abitha Nachi vs. K.S.Saroja*** reported in **2016 (3) MWN (Civil) 404**; which would be relevant for deciding the Civil Revision Petition.

14. The Hon'ble Supreme Court recently in *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy*, **2013 (5) CTC 547 (SC)**; **2013 (5) LW 20** held that there should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an Application for condonation of delay. The Hon'ble Supreme Court referred to its earlier judgments in *G. Ramegowda, Major v. Special Land Acquisition Officer, Bangalore*, **(1988) 2 SCC 142**; *O.P. Kathpallia v. Lakhmir Singh (dead)*, **(1984) 4 SCC 66**; *State of Nagaland v. Lipok AO*, **2005 (1) MWN (Cr.) 166 (SC)**; **(2005) 3 SCC 752**; *New India Insurance Co. Ltd. v. Shanti Misra*, **(1975) 2 SCC 840**; *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation*, **(2010) 5 SCC 459**, which declared that the Court should be liberal in dealing with Condone Delay Petition. The principles are elucidated in the said judgment and Paragraphs 15 & 16 of the Judgment are usefully extracted as follows:

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

(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.

(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.

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

(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.

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

(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.

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

(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.

(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.

(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.

(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.

(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.

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

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

(a) An Application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the Courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challan manner requires to be curbed, of course, within legal parameters.”

The Hon'ble Supreme Court also referred to some of its Judgments regarding Law of Limitation. Paragraphs 10, 11 & 12 are usefully extracted as follows:

“10. In this context, we may refer with profit to the authority in Oriental Aroma Chemical Industries Limited v. Gujarat

Industrial Development Corporation, (2010) 5 SCC 459, where a Two-Judge Bench of this Court has observed that the law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the Law of Limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the Courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. Thereafter, the learned Judges proceeded to state that this Court has justifiably advocated adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate.

11. *In Improvement Trust, Ludhiana v. Ujagar Singh, (2010) 6 SCC 786, it has been held that while considering an Application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. It has been further stated therein that each case has to be weighed from its facts and the circumstances in which the party acts and behaves.*

12. *A reference to the principle stated in Balwant Singh (dead) v. Jagdish Singh, (2010) 8 SCC 685 would be quite fruitful. In the said case the Court referred to the pronouncements in Union of India v. Ram Charan, AIR 1964 SC 215; P.K. Ramachandran v. State of Kerala, 1997 (2) CTC 663 (SC): (1997) 7 SCC 556; and Katari Suryanarayana v. Koppiseti Subba Rao, 2009 (4) CTC 286 (SC): (2009) 11 SCC 183 and stated thus:*

25. We may state that even if the term sufficient cause has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of reasonableness as it is understood in its general connotation.

26. The Law of Limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the Applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

9. This Court perused the impugned order as well as the affidavit filed in support of the I.A.No.363 of 2015 in O.S.No.5 of 2006 filed by the Petitioner / Defendant seeking to condone the delay of 731 days in filing the petition to set aside the exparte decree dated 28.02.2013. The suit is of the year 2006. Notice had been served on the petitioner/Defendant in the suit and he had entered appearance through a Counsel and filed return statement on 02.06.2006. Thereafter, since he did not appear before the trial Court, he had been set exparte on 10.11.2010. Thereafter, the petitioner/Defendant had filed an application in I.A.No.152 of 2012 to set aside the exparte decree and it had been allowed on payment of cost. Even thereafter, the petitioner had not

followed up the case vigilantly and he had once again been set exparte and an exparte decree was passed on 28.02.2013. Thereafter, the petitioner/Defendant had not taken any steps. Meanwhile, the Respondent/Plaintiff had filed an execution petition in REP No.52 of 2013 and notice was ordered to be served on the Petitioner/Defendant. When the Bailiff had attempted to serve notice, it had been informed that the Petitioner/Defendant had gone out of station and thereby, the notice was returned and thereafter, the Court had ordered substituted service of notice by publication in a local newspaper. The paper publication had been effected on 07.12.2013 and since, the petitioner did not appear before the Execution Court, he was set exparte and thereafter, the Respondent/Plaintiff had been directed to give a draft sale deed and the Court had once again directed him to serve the draft sale deed on the Petitioner/Defendant through Bailiff. Even at that time, it had been informed that the petitioner had gone out of station and thereby, notice was served by affixure. Further, the subsequent notice that had been sent to the address of the Petitioner/Defendant by registered post, has also been returned. Since, the draft sale deed could not be served on the Petitioner/Defendant, once again substituted service was ordered and the paper publication was effected on 02.07.2014. Even then, the Petitioner/Defendant did not appear before the Court and thereby, he was set exparte in the Execution Petition. Further, it is

seen that the Petitioner/Defendant had entered appearance in the Execution Petition through one D.K.Devarajan, Advocate on 10.07.2014 and thereby, inferring that the Petitioner/Defendant was well aware of the exparte decree even prior to 10.07.2014 whereas, the petition to set aside the exparte order along with the petition to condone the delay, had been filed only on 16.04.2015. The only reason stated in the affidavit seeking to condone the delay is that the petitioner had gone out of the Country and that a fraudulent decree had been obtained on 28.02.2013. Further, after the Execution Petition had been allowed and the Sale deed had been executed based on the order of the Court dated 23.09.2014, the Petitioner/Defendant had applied for certified copies of the applications filed in REP No.52 of 2013 and REA No.61 of 2014 on 07.01.2015 and he had also obtained the copies on 08.01.2015. Even thereafter, the Petitioner/Defendant did not file any application to set aside the exparte decree dated 28.02.2013 in O.S. No. 5 of 2006 and that he had filed the application to set aside the exparte decree dated 28.02.2013 only on 16.04.2015.

10. It is seen that at every point of time, the Petitioner/Defendant had been delaying or protracting the process of trial. The conduct of the petitioner does not seems to be bonafide. The delay is an inordinate delay and no proper

explanation had been given by the petitioner for condonation of such inordinate delay and thereby, the trial Court rightly finding that the petitioner had not shown sufficient cause, has dismissed the petition seeking to condone the delay of 731 days. This Court is of the considered opinion that there is no infirmity in the order passed by the trial Court.

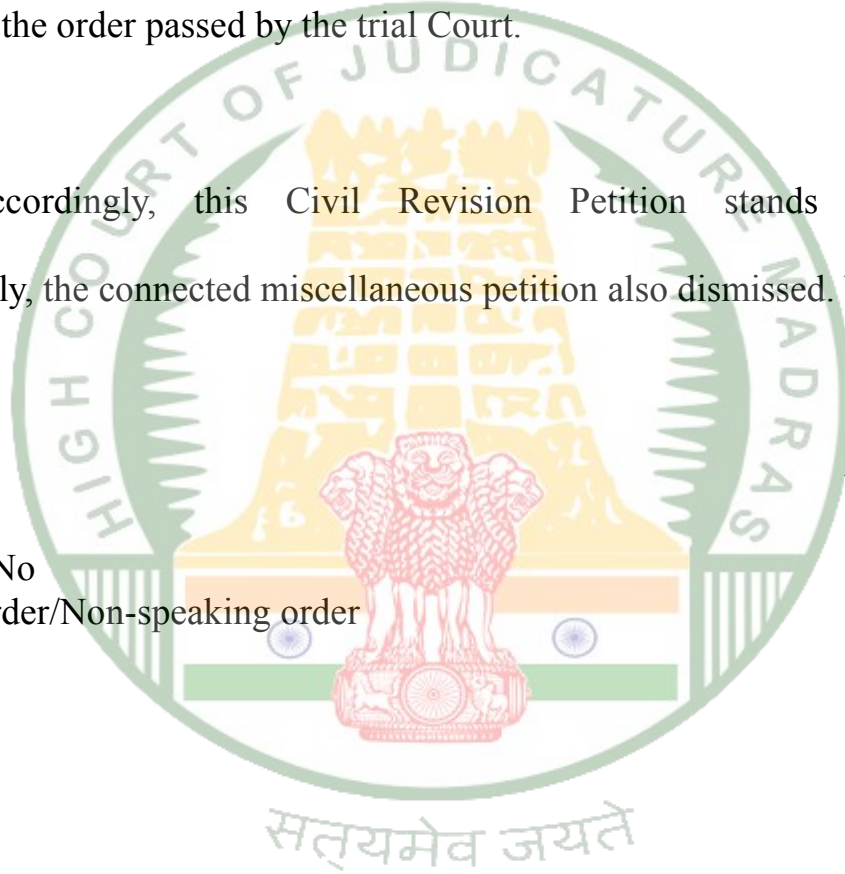
11. Accordingly, this Civil Revision Petition stands dismissed. Consequently, the connected miscellaneous petition also dismissed. No cost.

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Index: Yes/No

Speaking order/Non-speaking order



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A.D.JAGADISH CHANDIRA,J.

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To

1.The Subordinate Judge, Dharmapuri.



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