

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.04.2021

CORAM

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

CRP.NPD.No.610 of 2018

and

CMP.No.3202 of 2018

N.Devarajan

... Petitioner

Vs.

C.Babu

... Respondent

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order passed in I.A.No.778 of 2014 in O.S.No.269 of 2009 dated 28.04.2017 pending on the file of the Subordinate Judge at Tambaram by allowing the Civil Revision Petition.

For Petitioner : Mr.B.Vijay

Respondent : Mr.N.Selvaraj

ORDER

This Civil Revision Petition is directed against the fair and decretal order passed in I.A.No.778 of 2014 in O.S.No.269 of 2009 dated 28.04.2017 on the file of the learned Subordinate Judge, Tambaram, thereby allowing the petition to condone the delay in filing the application to set aside the ex-parte decree.

2. The petitioner is the plaintiff and the respondent is the defendant. The petitioner filed a suit for recovery of money. While pending the suit, the respondent after receipt of notice, failed to appear before the trial Court and as such, he was set ex-parte on 20.01.2010. He filed a petition in I.A.No.735 of 2010 to set aside the ex-parte order and the same was allowed. The respondent also filed a written statement along with the petition to set aside the ex-parte order. Thereafter, the trial commenced and the petitioner was examined as P.W.1 and Exs.A.1 to A.3 were marked. Thereafter, the suit was posted for cross examination. The respondent did not cross examine P.W.1 on several occasions and at the request of the respondent, the suit was adjourned on so many occasions. Thereafter, he was absent before the trial Court and as such, again he was set ex-parte and the ex-parte decree was passed on 26.06.2013. Thereafter, the respondent come forward with the petition to set aside the ex-parte decree with a delay of 364 days.

3. On a perusal of the affidavit filed in support of the petition to set aside the ex-parte order in I.A.No.735 of 2010 and the affidavit filed in support of the present petition to condone the delay of 364 days in filing the

application to set aside the ex-parte decree in I.A.No.778 of 2014, the averments are one and the same. The relevant portion of both affidavits as follows:-

“4. I submit that I have receive private notice, however I have not received any application or plaint in the above suit and several times my counsel represented before this Hon'ble Court to furnish plaint copy but I could not get it and I was unable to file the written statement, moreover I am aware of the relief sought for by the plaintiff in the suit.

5. I submit that the above suit was called and I was called absent and set ex-parte and ex-parte order was passed against me. I submit that I working in Fire Service Department I was posted in North Madras and I have to attend duty in the every day morning at 6.00 a.m., therefore I could not contact my counsel and filed the written statement in time. The non-filing of written statement is neither wilful nor wanton, but due to the

reasons stated above. Hence it is just and necessary to set aside the ex-parte order passed against me and permit me to file written statement and contest the case on merits. Otherwise, I will be put to irreparable loss and hardship. No prejudice would be caused to the respondent/plaintiff in this application being allowed.

4. I submit that I have receive private notice, however I have not received any application or plaint in the above suit and several times my counsel represented before this Hon'ble Court to furnish plaint copy but I could not get it and I was unable to file the written statement, moreover I am aware of the relief sought for by the plaintiff in the suit.

5. I submit that the above suit was called on 26.06.2013 and I was called absent and set ex-parte and ex-parte order was passed against me. I submit that I working in Fire Service Department I was posted in North Madras and I have to attend duty in the every day morning at 6.00 a.m., therefore I could not contact my counsel and

filed the written statement in time.”

4. It is nothing but cut and paste act and no other reasons have been stated by the respondent to condone the delay of 364 days in filing the petition to set aside the ex-parte decree.

5. The learned counsel for the petitioner submitted that the respondent filed a false affidavit containing concocted stories and failed to state any sufficient cause to condone the delay of 364 days. The petitioner filed the suit for recovery of money in the year 2009 and the respondent simply dragged the suit for recovery of money for the past 11 years. Therefore, the respondent wilfully and wantonly allowed the Court below set him ex-parte and the ex-parte decree was passed. On the strength of the ex-parte decree, the petitioner also filed an Execution Petition in E.P.No.26 of 2014 to release the decree amount. At that juncture, the respondent filed a petition to set aside the ex-parte decree with a delay of 364 days. In support of his contentions, he relied upon the judgments reported in 1996 (1) CTC 717 (***Sri Pillaiyarpatti Karpaga Vinayagar Koil Nagarathar Trust -vs- R.M.Sevagan Chettiar***), (2013) 12 SCC 649 (***Esha Bhattacharjee -vs-***

Managing Committee of Ragunathpur Nafar Academy), (2016) 3 SCC 70
(*Sciemed Overseas Inc. -vs- BOC India Limited*) and 2017 (3) CTC 151
(*Sathyanarayana -vs- T.J.Dhanakoti @ Koti*).

6. Per contra, the learned counsel for the respondent submitted that the counsel who appeared on behalf of the respondent made a mistake by cut and paste of the earlier affidavit filed in support of the petition to set aside the ex-parte order in I.A.No.735 of 2010 and the said mistake was not deliberate one. Due to inadvertence, the mistake was committed by the counsel and as such, the respondent should not be punished, when the mistake was committed by his counsel. He further submitted that on merits he has got very good case to succeed in the suit. Normally the condone delay petition should be considered liberally. In support of his contentions, he relied upon the judgment of the Hon'ble Supreme Court of India passed in Civil Appeal No.4669 of 2019 (*Bhivchandra Shankar More -vs- Balu Gangaram More & Ors*).

7. Heard the learned counsel for the petitioner as well as the learned counsel for the respondent.

8. As stated supra, the respondent did not whisper about the reason for non appearance before the trial Court on 26.06.2013. The reasons stated in the affidavit filed in support of the petition to set aside the ex-parte order was verbatim stated in the petition to condone the delay of 364 days in filing the petition to set aside the ex-parte decree. Admittedly, the respondent filed a written statement, at the time of filing the petition to set aside the ex-parte order as early as on 20.08.2010 itself. Thereafter, the Court below posted the suit for trial and the petitioner was examined as P.W.1 and Exs.A.1 to A.3 were marked and thereafter, the suit was posted for cross examination of P.W.1. Thereafter, the respondent failed to cross examine P.W.1 and had taken adjournment on so many occasions. Finally, the respondent failed to appear on 26.06.2013 and the ex-parte decree was passed as against the respondent. The respondent not only failed to state any sufficient cause to condone the delay of 364 days and also filed false affidavit before the Court below to condone the delay of 364 days.

9. In this regard, the learned counsel for the petitioner relied upon the judgment reported in 1996 (1) CTC 717 (*Sri Pillaiyarpatti Karpaga*

Vinayagar Koil Nagarathar Trust -vs- R.M.Sevagan Chettiar), wherein it is held as follows:-

“7. It has been repeatedly held by this Court that ex parte decrees cannot be set aside on vague allegations that the defendant was ill. It is for the defendant to prove that he was so ill on the particular day that he could not attend Court. Until then, it could not be said that there was sufficient cause for his non-appearance. Without proving the sufficient cause to the satisfaction of the Court, no person can claim to have the ex parte decree set aside. In this connection, the ruling of this Court in Arukkani Ammal v. Guruswamy, 1987 (1) M.L.J.32: 100 L.W.707 can be looked into. The learned Chief Justice has laid down the proposition that ex parte decrees cannot be set aside on value allegations of illness.”

10. The learned counsel for the petitioner further relied upon the judgment reported in (2013) 12 SCC 649 (***Esha Bhattacharjee -vs- Managing Committee of Ragunathpur Nafar Academy***), wherein it is held

as follows:-

“

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.*

21.8 (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 fact such a litigation.*

22.1. (a) *An application for condonation of delay should be drafted with careful concern and not in a haphazard 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.”*

11. The learned counsel for the petitioner also relied upon the judgment reported in (2016) 3 SCC 70 (***Sciemed Overseas Inc. -vs- BOC India Limited***), wherein it is held as follows:-

“29. Similarly, in *Muthu Karuppan v.Parithi Ilamvazhuthi* (2011 5 SCC 496 : (2011) 2 SCC (Cril) 709 this Court expressed the view that the filing of a false affidavit should be effectively curbed with a strong hand. It is true that

the observation was made in the context of contempt of court proceedings, but the view expressed must be generally endorsed to preserve the purity of judicial proceedings. This is what was said: (SCC p.501, para 15)

“15. Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand, Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of 'deliberate falsehood' on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge.”

12. The learned counsel for the petitioner also relied upon the judgment reported in 2017 (3) CTC 151 (**Sathyanarayana -vs- T.J.Dhanakoti @ Koti**), wherein it is held as follows:-

“28. On fair reading of the above judgment, the Hon'ble High Court and the Hon'ble Supreme Court has categorically held that for filing of false/misleading Affidavit, imposition of

exemplary Costs fully justified and such filing to be strongly discouraged and the Hon'ble Supreme Court affirmed the Order passed by the Hon'ble High Court be means of 10 lakhs on the Petitioner for filing a false or misleading Affidavit in Court.

29. The Hon'ble Supreme Court in the above referred cases, made it clear that the Hon'ble Supreme Court hold that in this context the Maxim vigilantibus non dormientibus jura subveniunt (law assists those, who are vigilant and not those, who sleep over their rights) aptly applies to the case on hand. The Petitioner/Defendant had simply by throwing the blame on the previous Counsel by stating that he died before 2 years and therefore, the delay of 1114 days has occurred, for filing/re-presenting the Application is totally false.”

13. The Hon'ble Supreme Court of India held that an application for condonation of delay should be drafted with careful concern and not in a haphazard 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.

14. In the case on hand, admittedly, the respondent filed an affidavit in support of the condone delay petition by cut and paste of the earlier affidavit filed in support of the petition to set aside the ex-parte decree. No sufficient cause had been shown by the respondent to condone the delay. It is nothing but concocted and fanciful story.

15. The Hon'ble Supreme Court of India has also held in number of judgment that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay. In the case on hand, the respondent failed to show any sufficient cause to condone the delay of 364 days. The suit is for recovery of money filed in the year 2009 and it is pending for the past 11 years. Therefore, the above judgments are squarely applicable to the case on hand.

16. Whereas, the Court below condoned the delay only for the reasons to avoid multiplicity of proceedings in the interest of justice to decide the case on merits. Further, the Court below concluded that the

respondent failed to adduce satisfactory reasons for each and every day of delay and also filed a petition with false affidavit and even then allowed the petition. Therefore, the order passed by the Court below is perverse and illegal and it is liable to be set aside.

17. In view of the above discussion, this Civil Revision Petition is allowed and the order passed in I.A.No.778 of 2014 in O.S.No.269 of 2009 dated 28.04.2017 is set aside. Consequently, the connected Miscellaneous Petition is closed. No costs.

09.04.2021

Speaking order

Index : Yes

Internet : Yes

kv

To

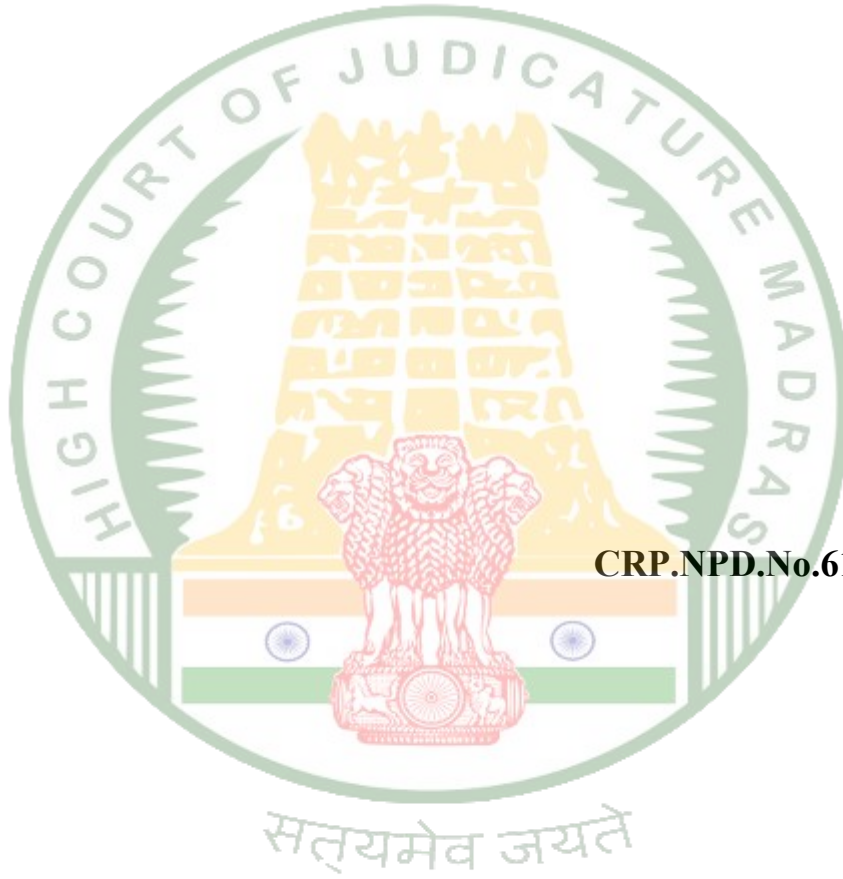
1. The Subordinate Judge, Tambaram.

2. The Section Officer,
V.R.Section, High Court of Madras.

WEB COPY

G.K.ILANTHIRAIYAN,J.

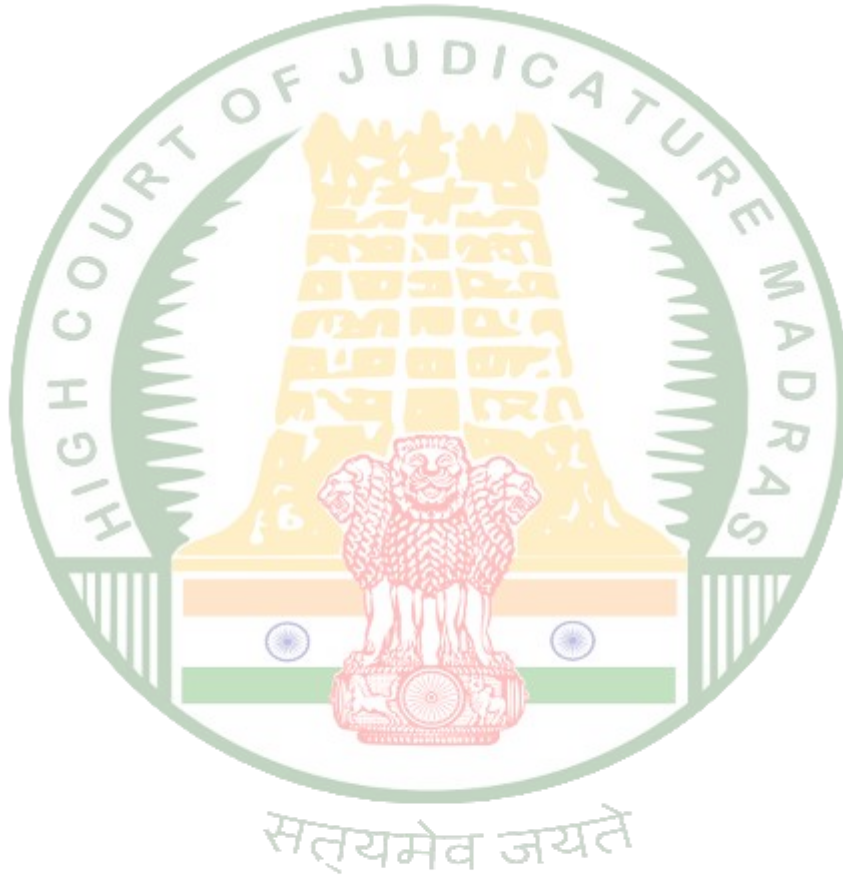
Kv



CRP.NPD.No.610 of 2018

WEB COPY

09.04.2021



WEB COPY