

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.03.2021

CORAM

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

CRP (NPD) Nos.3742 & 3743 of 2017  
and CMP No.17416 of 2017

Anand's  
represented by its partner  
S.Venkatachalapathy ..... Petitioner in both CRPs

Vs

Nirmal Kumar  
Proprietor Texco International  
No.88, Godown Street,  
Chennai – 1. .... Respondent in both CRPs

**Common Prayer:** Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 13.02.2017 made in CMP. Nos.220 & 221 of 2016 in A.S.No.351 of 2008 on the file of the IV Additional Judge, City Civil Court, Chennai.

For Petitioner in both CRPs : Mr.R.Ravi  
For Respondent in both CRPs : No appearance

**ORDER**

CRP (PD) No. 3742 of 2017 is filed against the fair and decreetal order dated 13.02.2017 made in CMP. No.220 of 2016 in A.S.No.351 of 2008 on the file of the IV Additional Judge, City Civil Court, Chennai,

thereby allowing the petition to condone the delay in filing the petition to set aside the ex-parte decree dated 21.10.2021 in A.S.No.351 of 2008.

2. CRP (PD) No. 3743 of 2017 is filed against the fair and decreetal order dated 13.02.2017 made in CMP. No.221 of 2016 in A.S.No.351 of 2008 on the file of the IV Additional Judge, City Civil Court, Chennai, thereby allowing the petition to set aside the ex-parte decree dated 21.10.2021 in A.S.No.351 of 2008.

3. The petitioner is the defendant and the respondent is the plaintiff. The respondent filed a suit in O.S.No.6392 of 2005 for recovery of money. It was duly contested and was decreed in favour of the respondent by a Judgment and Decree dated 28.09.2007. Aggrieved by the same, the petitioner preferred an appeal suit in A.S.No.351 of 2008. The Appellate Court has ordered notice to the respondent and also permitted to take private notice in A.S.No.351 of 2008. Accordingly, the petitioner took private notice to the respondent on 05.12.2008 to the address mentioned in the suit as well as in his residential address. The same was duly served on 13.12.2008. The acknowledgment along with affidavit of service has been filed by the

petitioner before the First Appellate Court on 09.02.2009. The Court notice also served to the respondent by the Bailiff and affixed the notice on the door step of the respondent's office premises. The said report also duly endorsed by the First Appellate Court. Even then, the First Appellate Court did not satisfy the service of the notice and ordered paper publication. Accordingly, the petitioner effected paper publication on the hearing date 14.08.2009 and it was duly effected in the daily news paper called "Malai Malar". Therefore, the petitioner complied with all the mode of services by private notice, Court notice and also paper publication. Even then, the respondent failed to appear before the First Appellate Court and the Court below heard the appeal on merits and passed detailed judgment and decree on merits and in accordance with law by a judgement and decree dated 21.10.2011. While being so, after a period of 1495 days, the respondent came forward with the petition to set aside the ex-parte decree with a delay of 244 days in filing the petition to set aside the ex-parte decree.

4. On perusal of the affidavit filed in support of the condone delay petition revealed that the respondent was not served with notice in the appeal. The appeal was disposed in his absence. He further

submitted that he was regularly coming to the Court campus and he had so many cases both personal and business related. Therefore, if he had knowledge of the appeal, he would not have allowed it to go ex-parte. He further stated that after the decree, the petitioner did not settle the amount and as such, he issued a letter dated 01.01.2015, thereby called upon the petitioner to pay the decree amount. On receipt of the same, the petitioner sent a reply dated 27.01.2015, which was received on 14.02.2015. Only thereafter, he came to understand about the ex-parte judgement and decree passed in A.S.No.351 of 2008 dated 21.10.2011.

5. The learned counsel for the petitioner would submit that the entire particulars stated in the affidavit are false and frivolous. On the basis of the false affidavit, the Court below allowed the application to condone the delay and also setting aside the ex-parte decree passed on merits and in accordance with law. In support of his contention, he relied upon the Judgment reported in *AIR 2007 SC 1114* in the case of ***Indu Bhushan V. Munna Lal and Anr.***

6. Heard Mr.R.Ravi, learned counsel appearing for the petitioner and though notice was served on behalf of the respondent, no one appeared before this Court in person or through pleader.

7. The suit was filed on 01.09.2005. The petitioner filed his written statement on 05.06.2006. Thereafter, the suit was decreed on 28.09.2007. On the strength of the decree, the respondent without filing any execution petition, simply issued letter dated 01.01.2015 demanding the payment in accordance with the decree. No prudent man would wait for nearly 8 years to demand the decree amount from the date of decree for recovery of money.

8. On perusal of the records revealed that the respondent was duly served on three notice viz., private notice, Court notice and also substituted by paper publication. Whereas, the respondent filed affidavit in support of his petition to condone the delay with false averments that he was not served in the appeal suit filed by the petitioner herein. That apart, the respondent calculated the delay of 244 days in filing the petition to set aside the ex-parte decree. The petitioner was duly served notice in the appeal and as such, the delay has to be calculated only from the date of decree viz., 21.10.2011, therefore, the delay is 1495 days in filing the petition to set aside the ex-parte decree. Therefore, the delay is not calculated properly and the Court below failed to note the same.

9. On perusal of the Judgment and Decree passed in A.S.No.351 of 2008, the Court below considered all the issues once again and recasted the issues framed by the Trial Court and passed detailed judgment and decree. Though, the respondent failed to appear before the Appellate Court and it cannot be construed as ex-parte decree, since the Appellate Court was passed judgment and decree on merits and in accordance with law.

10. In this regard, the learned counsel for the petitioner relied upon the Judgment reported in **AIR 2007 SC 1114** in the case of **Indu Bhushan V. Munna Lal and Anr**, in which, this Court held as follows :

*“Civil P.C. (5 of 1908), O.41 R.21, O.5 R.9 – Ex parte order in appeal – Application for rehearing appeal – Ground tht there was no service of notice through process server or by registered post – Not one but several process servers report shown to have given notice relating to service – Their endorsements were sufficient to show service of notice relating to appeal – No material placed before court to show that endorsements made by process servers were false or erroneous – Rejection of application – No interference.”*

11. He also relied upon the judgment of the this Court reported in **2015 (5) CTC 67** in the case of **Visalakshi Vs. Umapathy**, as follows :-

*“Code of Civil Procedure, 1908 (5 of 1908), Order 9, Rule 7 – Limitation Act, 1963 (36 of 1963), Article 137 – Ex parte Order – Application filed to set aside ex parte Order - Defendant set ex parte for non appearance – Whether limitation of three years as prescribed under Article 137 of Limitation Act would apply – Defendant set ex parte in year 2009 and Application to set aside ex parte Order filed in year 2013 – Limitation prescribed under Article 137 would apply to all applications filed before Civil Court under Civil Procedure Code – Article 137 would apply to petition filed under Order 9, Rule 7 of CPC – Application filed to set aside ex parte Order after lapse of three years is bared by limitation.”*

12. The Hon'ble Supreme Court of India held that while dismissing the appeal as against the dismissal of the petition to condone the delay in filing the petition to set aside the ex-parte decree observed that the endorsements were sufficient to show service of notice relating to appeal. No materials placed to show that endorsements made by process servers were false and erroneous.

13. In the case on hand, admittedly, the notice was duly served by three modes as stated supra. The respondent also did not produce any documents to show that he was not duly served the notice in the appeal suit and no material placed before the Court below to dispute the endorsements made by the Bailiff in respect of notice which was affixed in the door steps of the respondent herein. In view of the above discussion, the Court below ought not to have allowed the petition to condone the delay in setting aside the ex-parte decree. As such, the order passed by the trial Court is perverse and illegal.

14. Accordingly, the order dated 13.02.2017 made in CMP. Nos.220 & 221 of 2016 in A.S.No.351 of 2008 on the file of the IV Additional Judge, City Civil Court, Chennai, is hereby set aside and the Civil Revision Petition is allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

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Speaking/Non-speaking order

Index : Yes/No

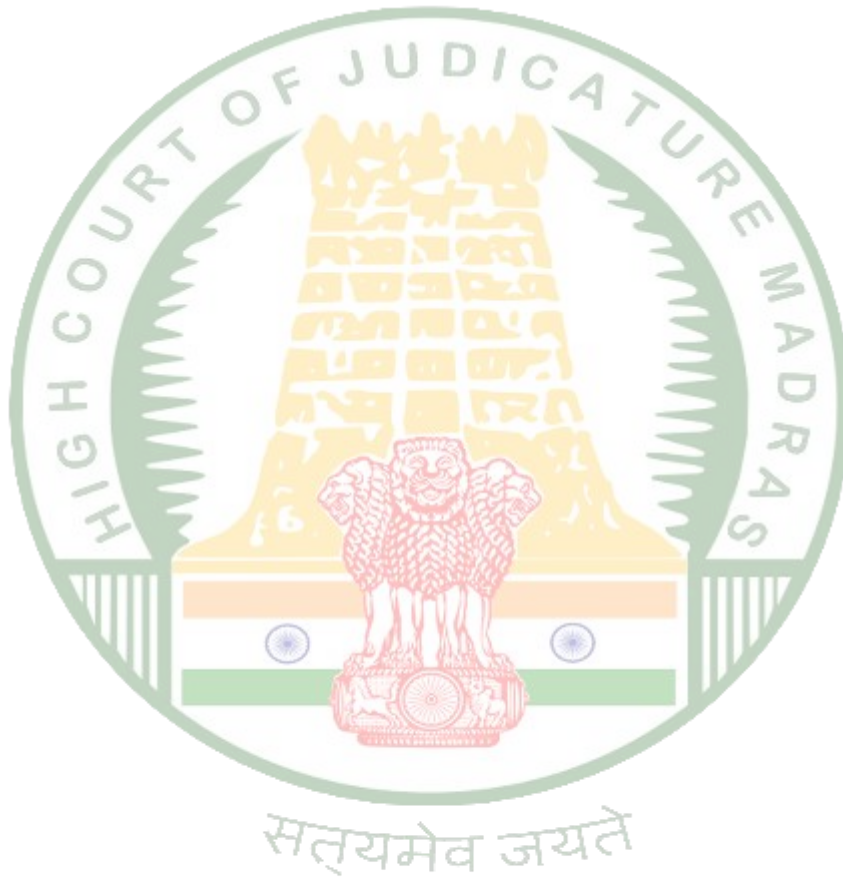
Internet : Yes/No

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To

1. The IV Additional Judge,  
City Civil Court, Chennai.

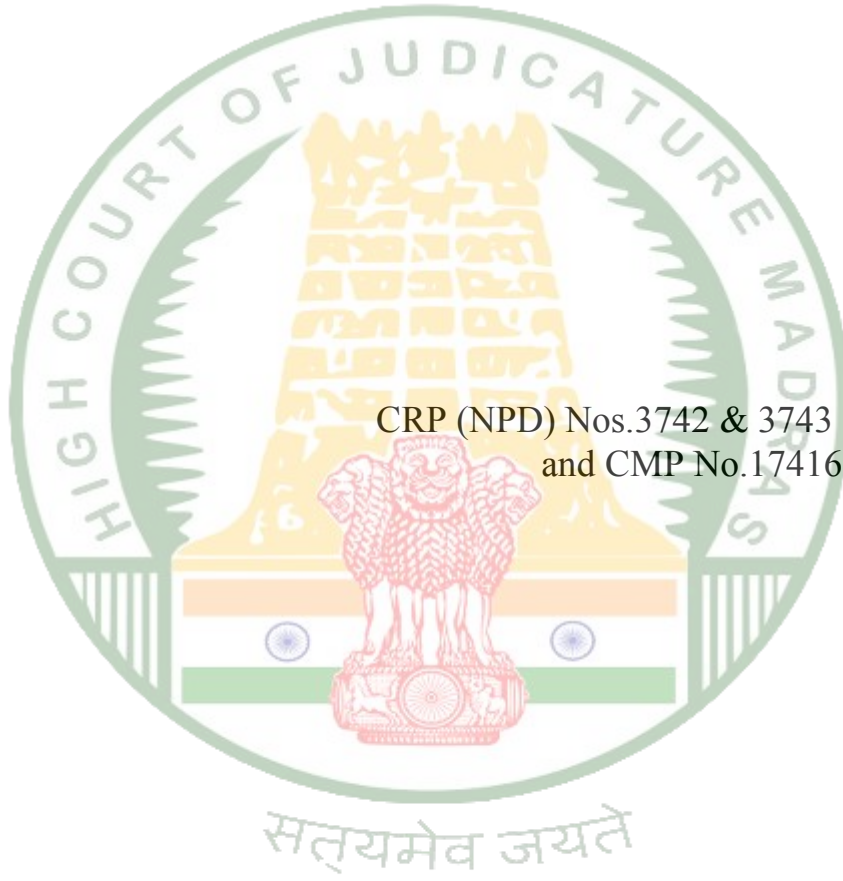
2. The Section Officer,  
V.R.Section,  
High Court, Madras.



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**G.K.ILANTHIRAIYAN,J.**

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