



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

C.R.P.(NPD).No.3463 of 2013
and M.P.No.1 of 2013

Mariyaselvam

... Petitioner

VS.

1.Hemasanthi

2.Alfonsa

... Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure

Code, praying to set aside the order dated 31.07.2013 made in I.A.No.76 of 2013 in O.S.No.60 of 2012, on the file of the Principal District Munsif-cum-Judicial Magistrate, Chengam by allowing this Civil Revision Petition.

For Petitioner : Mr.C.Munusamy

For Respondents : No Appearance

ORDER

Aggrieved by the dismissal of a petition to condone the delay of 167 days in seeking to set aside the ex-parte decree, the defendant has come up with this revision.



2. Though the respondents are served and their names appear in the cause list. There is no representation for the respondents. Heard the counsel for the petitioner and perused papers.

3. The respondent herein filed a suit for declaration of title and recovery of possession in O.S.No.60 of 2012, on the file of the Principal District Munsif cum Judicial Magistrate, Chengam and an *ex parte* decree was passed on 16.07.2013. The revision petitioner filed a petition to set aside the *ex parte* decree along with written statement on 28.01.2013. Since there was a delay of 167 days, in seeking to set aside the *ex parte* decree, he also filed an application to condone the delay in I.A.No.76 of 2013.

4. In support of the petition to condone the delay, the revision petitioner submitted that the suit summon was not served on him and he never refused the summons. The fact that the respondents obtained *ex parte* decree came to his knowledge only on service of notice in execution petition. Thereafter, on enquiry, he came to know that an *ex parte* decree was passed against him on 16.07.2012. Immediately, he had taken steps to set aside the *ex parte* decree and filed the application to condone delay. It



was also averred by the petitioner that he was away from his native place in order to earn livelihood. At the relevant point of time, he was in Kaddappa, Andhra Pradesh and he was not aware of the suit filed by respondents and suit summon was not served on him.

5. The Court below dismissed the application on the ground that the reasons adduced by the revision petitioner for condoning the delay were not acceptable. Further, it was observed by the Trial Court that the suit summons can be served on an adult member of defendant's family under Rule 15 of Order 5 CPC. However, the trial Court in its order has not stated, how the suit summons was served on the defendant, whether personally or an any adult member of his family. In the impugned order, it was not mentioned on whom the suit summon was served.

6. The service of summons on the defendants is dealt with by Rule 10 to 30 of Order 5 of CPC. A conjoint reading of Rules 11, 12 and 15 of Order 5 CPC makes it very clear that the summons shall be served on the defendant personally as far as possible. Where the defendant is absent from his residence at the time when service of summons was sought to be



effectuated and there is no likelihood of his being found at his residence within a reasonable time and he has no agent empowered to accept summons, the service may be effectuated on any adult member of the family, who is residing with him. In the case on hand, first of all, it was not stated on whom the suit summons was served. Secondly, it was also not mentioned whether it was served on any other competent person to receive summons as there was no likelihood of defendant returning to his residence within reasonable time. Hence, the ingredients of service of summons as enunciated in Rules 11, 12 and 15 are not complied.

7. In the affidavit filed in support of the condone delay petition, the revision petitioner had categorically averred that he was out of his native place and he was not aware of filing of suit against him. He further averred that he came to know of the suit proceedings only when he returned to his native place and served with the notice in execution application. The suit is for declaration of title and recovery of possession and hence substantial rights of the parties are involved.



8. Considering the nature of the relief sought for in the suit and the length of delay (167) days, I am of the view that an opportunity should be given to the revision petitioner/defendant to contest the suit on merits. The procedural law is only a handmaid of the substantial law and in order to advance the cause justice, if there is a conflict between the substantial justice and procedural law, the latter must give way for the former. It is appropriate to mention the decision of the Apex Court in the case of **Collector, Land Acquisition & Anr. Vs. Mst. Katiji & Ors.** reported in **[AIR 1987 SCC 1353]**, wherein the Apex Court has observed as follows:

“3. The legislature has conferred the power to condone delay be enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression “Sufficient cause” employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. Bu the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to



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benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on



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technical grounds but because it is capable of removing injustice and is expected to do so.”

9. The discretion of the Courts while exercising the jurisdiction under Section 5 of the Limitation Act had been very well explained by the Apex Court in a judgment in the case of ***N.Balakrishnan Vs. M.Krishnamurthy*** reported in ***[(1998) 7 SCC 123]***, wherein the Hon'ble Apex Court has observed that while exercising the discretion under Section 5 of the Limitation Act, 1963, the Courts are guided by following principles:

“10. The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious



and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sup sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

*12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under [Section 5](#) of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 1969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749].*

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea



and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.”

10. Therefore, it is clear when the delay is not due to the malafide intention of the petitioner, acceptance of the reasons adduced by him is the Rule and refusal is an exception. Applying the principles enunciated in the above referred decisions, I am inclined to take liberal approach in considering the petition filed by the revision petitioner to condone the delay in seeking to set aside the *ex-parte* decree.

11. Therefore, the order passed by the learned District Munsif cum Judicial Magistrate, Chengam, is set aside and the Civil Revision



Petition is allowed on condition that the petitioner shall deposit a sum of Rs.2,000/- towards cost to the respondents before the learned Principal District Munsif cum Judicial Magistrate, Chengam, within a period of four weeks from the date of receipt of a copy of this order, failing which, the Civil Revision Petition stands dismissed. The respondents are permitted to withdraw the said amount. Consequently, connected miscellaneous petition is closed.

05.04.2022

Index : Yes/No
Internet : Yes/No
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To

The Principal District Munsif
cum Judicial Magistrate, Chengam.





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12

S.SOUNTHAR, J.
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