



A.Nos.314 and 969 of 2022 in CS.No.330 of 2012

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in CS.No.330 of 2012

A.A.NAKKIRAN, J.

1. A.No.314 of 2022 has been filed, by the 1st Defendant in the suit, to condone the delay of 1081 days in filing the application to set aside the exparte decree, dated 20.07.2018, passed against the Applicant / 1st Defendant in the above suit.
2. A.No.969 of 2022 has been filed, by the Defendants 2 to 5 in the suit, to condone the delay of 1070 days in filing the application to set aside the exparte decree, dated 20.07.2018, passed against the Applicants/ Defendants 2 to 5 in the above suit.
3. The above Civil Suit was filed, by the Respondents 1 and 2 herein, seeking a judgement and decree, for the following:-
 - a) For a preliminary decree for partition and separate possession of the 4/6th (1/6 + 3/6) share in the scheduled mentioned properties by metes and bounds taking into account all the facts pertaining to the location and value of the schedule mentioned properties by appointing Advocate Commissioner.
 - b) For a direction, directing the 1st Defendant to render true and proper accounts of the rental income from the plaint items (3) and (4) properties and also from the joint family business plaint item (1), M/s.Balaji Finance.
 - c) For declaration, declaring that the 1st Plaintiff is the legally wedded wife of Ramesh Nahar pursuant to the marriage dated 02.03.1991 held at Sri Lord Ayyappan Temple at Mahalingapuram, Chennai.
 - d) For declaration of the document, dated 22.05.2006 as null and void not binding on the Plaintiffs.
 - e) For mesne profit in respect of the schedule mentioned item (1), (3) and (4) of the plaint.



f) For costs.

4. The suit was contested by the 1st Defendant, by filing a written statement. On the pleadings of the parties and the materials on record, as many as six issues and five additional issues were framed by this Court. On the side of the Plaintiffs, PW.1 and PW.2 were examined and Ex.P1 to P34 were marked. Even though the 1st Defendant had filed a written statement and contested the suit, since there was no representation for the Defendants, in spite of service of notice, the Defendants were set exparte on 30.04.2014 and observing so, an exparte decree was passed on 20.07.2018 against all the Defendants. Hence, the above applications have been filed, by the 1st Defendant and the Defendants 2 to 5, respectively, seeking the reliefs, as stated above. In both the applications, separate counter and additional counter affidavits have been filed by the Respondents 1 and 2 herein.

5. This Court heard the learned counsel on either side.

6. The learned counsel for the Applicant in A.No.314 of 2022 has submitted that the suit was filed by the Plaintiffs for partition. The Defendants 1 to 5 engaged the erstwhile counsel. The Applicant is not in a good health condition to look after the family affairs. He was informed by his counsel that they had been declared exparte for non filing of the written statement on 30.04.2014. Then, the Applicant filed a petition to set aside the exparte order. That petition was dismissed. Because of his age and ill health, the Applicant could not able to meet the erstwhile counsel frequently. He believed the words of the erstwhile counsel that they would take care of the



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suit, but they have not received any communication. Further, he received a notice on 29.04.2021. Immediately, he contacted his erstwhile counsel and he informed that they reported 'no instructions' before the Court. Because the erstwhile counsel could not contact the Applicant due to lock down, he could not meet anyone. It was informed by the present counsel that he was set exparte and the case was posted and an exparte decree was passed on 20.07.2018. He came to know about the passing of the preliminary decree only after receipt of the notice dated 29.04.2021 and immediately, he filed this application. His valuable rights are involved in the above suit. The suit has to be decided only after full trial. He may be given an opportunity to conduct the suit. If this application is allowed, the Plaintiffs would not be prejudiced. If the delay is not condoned, he will be put to irreparable loss and untold hardship. Hence, the learned counsel prays for allowing this application.

7. The learned counsel for the Applicants in A.No.969 of 2022 has submitted that the 1st Respondent/ Plaintiff has filed the partition suit and it was contested by her grand father, Shanthilal Nahar and he only engaged the erstwhile counsel. In the suit, they were set exparte on 30.04.2014. He filed a petition to set aside the exparte order. That application was dismissed and a preliminary decree was passed on 20.07.2018. Now, they came to know the above facts only on receipt of the private notice dated 03.05.2021. Her grand father had not taken effective steps for conducting the case. They



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could not engage a counsel due to Covid lock down. Hence, there was a delay in filing the condone delay application. Due to old age and restricted movements, her grandfather could not conduct the case properly. They were under the impression that the suit was properly looked after by the grandfather. The non appearance was neither wilful nor wanton. If the delay is not condoned, they will be put to great hardship and irreparable loss. They have got substantial case to contest. If the applications are allowed, it would not be prejudice to the Plaintiffs. Hence, the learned counsel prays for allowing these applications.

8. The learned counsel for the Applicants has relied on the following decisions:-

- (a) Unreported judgement, dated 27.07.2010, made in Civil Appeal No.5875 of 2005, by the Honourable Supreme Court, wherein it was held as under:-

“7. ...It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants/defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants/defendants for making the Order IX Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order IX Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the



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hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

8.... The Court was considering Article 123 of the Limitation Act. In our opinion, in this case, the limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.6.1988. An application under Order IX Rule 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any."

(b) 1864 AIR 993 (Arjun Singh Vs. Mohindra Kumar), wherein it was held as under:-

"This application was rejected by the Court. Thereafter, after an ex parte decree was passed, they again filed another application under S.108 under the then code, corresponding to the present O. IX, R. 13. The ground put forward was again the same, namely that the summons was not properly served. The District Judge having dismissed the application under s. 108 (O. IX, R. 13), the defendants preferred an appeal to the High Court. On behalf of the plaintiffs-respondents the contention was raised by Mr. Bhashyam Ayyangar-learned Counsel-that the application to set aside the ex parte decree under s. 108 was incompetent because the same question has already been decided against the defendant when he filed the application under s. 101. The Court composed of Subramania Iyer & Benson JJ. said, "the contention at first sight may seem to be reasonable, but having regard to the very wide words 'in any case' used in s. 108 we are unable to hold that the defendant was not entitled to make an application under section 108." There have been other decisions in which a similar view has been held and though the



provisions of the Code corresponding to O. IX, r. 7 and O. IX, r. 13 have been in force for over a century from 1859, there has not been a single case in which the plea of res judicata such as has been urged in the appeal before us has been upheld. On the other hand, we might point out that an exactly similar objection of res judicata was expressly raised and repelled in *Bhaoo Patel v. Naroo*(1) in a decision rendered in 1896 in which reliance was placed on a case reported in 8 Cal. 272.

In the circumstances we consider that a decision or direction in an interlocutory proceeding of the type provided for by O. IX, r. 7, is not of the kind which can operate as resjudicata so as to bar the bearing on the merits of an application under O. IX, r. 13.

So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O. IX, r. 7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O. IX, r. 13. This is because it is not disputed that in order to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. ”

(c) AIR 1987 SC 1353 (*Collector, Land Acquisition Vs. Katiji*), wherein it was held as under:-

“3. The legislature has conferred the power to condone delay by enacting Section 5 [Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.] 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. But 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:



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“1. Ordinarily a litigant does not stand to 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 condoned 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 technical grounds but because it is capable of removing injustice and is expected to do so.”

(d) AIR 1993 SC 1182 (Tahil Ram Issardas Sadrangani and Ramchand Issardas Sadrangani), wherein it was held as under:-

“... “This Motion disclosed a sorry state of affairs in regard to which, unfortunately, I have had my suspicions in several matters while sitting in chambers on the original side. It appears that there are certain firms of attorneys who enter into arrangements with advocates under which they file appearances for persons who are the direct clients of these advocates. In such cases, the entire carriage of the proceedings is left to the advocate, and he is briefed at the hearing by the attorney merely as a matter of form, even the fees being recovered directly by the advocate from his client. From the point of view of professional ethics, it is, in my opinion, not proper for an attorney to lend his name in that manner and such practices amount to an abuse of the dual system prevailing on the original side of this court. Once an attorney files his appearance on the original side of this court on behalf of a party, it is his duty and his obligation



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to attend to the matter, both on the clients as well as the court. It is not difficult for everybody concerned with the original side to realise which particular firms of attorneys indulge in these practices frequently, and some of them even regularly.”

4. It is not disputed in the present case that on March 15, 1974 when Mr Adhia, advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer.”

(e) AIR 1998 SC 258 (Malkiat Singh Vs. Joginder Singh), wherein it was held as under:-

“6. There is no denying the fact that the appellants had engaged a counsel to defend them in the civil suit. The counsel for the appellants pleaded “no instructions” but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions in the court. It is nobody's case that the counsel informed them after he had reported no instructions to the court. The appellants only came to know about the order dated 18-11-1991 and the ex parte decree dated 8-2-1992 when they approached their counsel on 6-6-1992. It was within four days thereafter that the appellants filed an application under Order 9 Rule 13 CPC for setting aside the order dated 18-11-1991 and the decree dated 8-12-1992.

7. The appellants in their application clearly pleaded that they were neither careless nor negligent and as soon as they learnt about the ex parte decree dated 8-2-1992 and the order dated 18-11-1991, they filed the application to set aside the order and ex parte decree. A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. ”



- (f) 1998 7 SCC 123(N.Balakrishnan Vs. M.Krishnamurthy) wherein it was held as under:-

“9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion...

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.

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.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. ”

- (g) 2017 12 SCC 840 () wherein it was held as under:-

“11. The term “sufficient cause” is to receive liberal construction so as to advance substantial justice ...

..... “15. Equities can be balanced by denying the appellants' interest for the period for which they did not approach the Court. The substantive rights of the appellants should not be allowed to be defeated on technical grounds by taking hyper technical view of self-imposed limitations. In the matter of compensation for land acquisition, we are of the view that approach of the court has to be pragmatic and not pedantic.”

- (h) 2014 4 SCC 163 (Manoharan Vs. Sivarajan and others) wherein it was held as under:-

“13. Length of delay is no matter, acceptability of the explanation is the only criterion”

- (i) 2019 6 SCC 387 (Bhivchandra Shankar More Vs. Balu Gangaram More) wherein it was held as under:-

... “The expression “sufficient cause” used in Section 5 of the



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Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay.”

- (j) 2008 2 LW 330 (B.Ganesan Vs. State Bank of India and others) wherein it was held as under:-

“16. As a matter of fact, the term “sufficient cause” should receive a liberal interpretation in the hands of law courts. A pedantic approach should not be made and on the other hand, a pragmatic approach should be made by the courts of law in the justice delivery system. Admittedly, refusing to condone the delay will certainly result in a good case being thrown out at the early stage and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the litigants. After all a party does not stand to benefit by resorting to delay. Per contra he runs a serious risk. It is to be noted that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, in our considered opinion. Furthermore, it must be borne in mind that judiciary is respected because it is capable of removing injustice on technical grounds.”

9. The learned counsel for the Respondents 1 and 2 in both the applications has submitted that they got knowledge of the order dated, 30.04.2014. They filed applications to set aside the exparte order. All the applications were dismissed. The exparte decree was passed on 20.07.2018. The present applications are barred by resjudicata and the Applicants are estopped from filing the applications. The allegation that they came to know about the exparte preliminary decree only on 29.04.2021 and 30.05.2021 is false and an after thought and made for the purpose of the case, taking shelter under Covid lock down contrary to the memo filed by the erstwhile counsel, stating



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that change of vakalat was given as early as on 18.01.2016. The claim of depression and ailments are all false. The claim of alleged hardship and loss is imaginary. The Applicants have not made out a case for condoning the delay. These applications have been filed to deprive her rights. If the delay is condoned, she will be put to irreparable loss and injury. The rights accrued to her from 30.04.2014 cannot be taken away at this point of time. The absence of the Applicants is deliberate and wilful. The application is an deliberate attempt to harass them. Her entire life is ruined. If the claim of the Applicants is allowed, he will be put to loss, damage and injury. Hence, the learned counsel prays for dismissal of these applications.

10.The learned counsel for the Respondents in both the applications has relied on the following decisions:-

(a) 2007 2 CTC 643 (Jayaraman Vs. Devarajan), wherein it was held as under:-

“ 10. At the same time, the discretion must not be exercised in any arbitrary or vague or fanciful manner; but must be exercised like any other judicial discretion with vigilance and circumspection. Delay cannot be condoned as a matter of judicial generosity. Where delay could have been avoided by due care and caution, the Court may not exercise the discretion to condone the delay.

14. As rightly pointed out by the learned counsel for the Petitioner, while considering the plea relating to affording an opportunity to advance substantial justice, the right accrued to the other side ought to be kept in view. When there is deliberate delay, the Respondent herein cannot be heard to plead that substantial justice deserve to be preferred as against technical consideration.”

(b) 2013 12 SCC 649 (Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy) wherein it was held as under:-



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“21.1. (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.

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

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

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.”

(c) 2019 SCC Online Mad 27474(Balakrishnan Vs. Shanmugadurai) wherein it was held as under:-

“39. ... It is well settled that while considering an application for condonation of delay, the length of delay is not a criteria, but the reasons given thereof would alone stand. Further, the application for condonation of delay has to be liberally construed so as to enable the litigant to get an opportunity to put-forth his defence. However, if the delay is not properly explained and there is no bona-fides in the person who approaches the Court with an application for delay, such application has to be rejected summarily.

40. .. The reasons assigned by the first Defendant in his two affidavits stated above, are not sufficient enough to condone the huge delay of 675 days. The reasons assigned for condonation of delay, in our opinion, lacks credibility and exposes the intention of the first Defendant to circumvent the legal process.”

(d) 2020 SCC Online Mad 423 (S.R.Vediappan Vs. S.P.Ramalingam) wherein it was held as under:-

“... Hence, to view a matter of condonation of delay, with a presupposition that no prejudice will be caused by the condonation of delay to the respondent in that application will be fallacious. In our view, each has to be decided on the facts and circumstances of the



case. Length of the delay is a relevant matter to be taken into account, while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed periods of limitation.

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 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....

17. .. Rules of limitation are based on principles of sound public policy and principles of equity. Is a litigant liable to have a Damocles' sword hanging over his head indefinitely for a period to be determined at the whims and fancies of the opponent?

.... . On a conspectus reading of the above principles set out in the various judgements, it is well settled that a liberal approach should be extended while considering the application for condonation of delay. Sufficient caution has been exhibited to note that wherever there is lack of bona fides or attempt to hood-wink the Court by the party concerned who has come forward with an application for condonation of delay, in such cases, no indulgence should be shown by condoning the delay applied for.

..“substantial justice” can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

“..... The concepts such as “liberal approach”, “justice oriented approach”, “substantial justice” cannot be employed in jettison the substantial law of limitation. The law of limitation is substantial and therefore the principles laid down is to be scrupulously followed while condoning the delay under the law of limitation. The limitation has got a specific purpose and object and more specifically to avoid prejudice



to the respective parties. In the event of prolongation or protraction of the litigation, undoubtedly and for an unspecified period when the specific law of limitation has got a specific purpose and object, then the power of discretion is to be exercised cautiously. Power of discretion cannot be exercised in the absence of any valid reason. In other words, powers can be exercised for the purpose of passing orders only by recording reasons which must be candid and convincing and must be passed on certain sound legal principles. Therefore, recording of reasons for exercising discretionary powers is one of the elementary principles of law. In the event of exercising discretionary powers without recording reasons, undoubtedly the same would cause not only prejudice and will set a bad principle and therefore, the Courts must be cautious while exercising power of discretion more specifically in such matters where the law of Limitation is substantial.”

(e) 2021 SCC Online 1260 (Majji Sannemma Vs. Reddy Sridevi) wherein it was held as under:-

20..... It is further observed that the expression “sufficient cause” cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions.”

11.This Court considered the submissions of the learned counsel on either side and also perused the materials placed on record.

12.The contention of the Applicants is that the exparte order was passed on 30.04.2014. After that, they filed petitions to set aside the exparte order and in both the petitions, conditional orders were passed. The said petitions were dismissed for non compliance of the conditional orders. From that day onwards, they kept quiet for so many years and the case proceeded and a preliminary decree was passed on 20.07.2018.

13.Perusal of the memo dated 18.1.2016 clearly reveals that they got change of



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vakalat and also received the bundle. After that, they have not taken any step to proceed further in this case. It is the duty of the parties to take care of the case with due diligence, but the Applicants failed to do so. The reasons for the delay stated in the affidavits are not convincing and acceptable. To prove the ill health of the 1st Defendant, he has not filed any document. Hence, these applications are deserved to be dismissed.

14.In fine, these applications are dismissed. No costs.

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Speaking/Non Speaking

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Pre-Delivery Order in
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