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O.S.A.No.240 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 12.10.2022

Judgment Pronounced on : **19.10.2022**

CORAM :

**THE HON'BLE MR.JUSTICE PARESH UPADHYAY
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

O.S.A.No.240 of 2022
and C.M.P.No.15329 of 2022

M/s. Operating Lease & Hire Purchase Company Limited
Rep. by its Authorised Signatory,
A.Hema Jothi .. Appellant

Versus

1. M/s.Boomi Bottling Gas Co. Pvt. Ltd.,
No.648, Anna Salai,
Thousand Lights,
Chennai - 600 006.
Presently at
No.10, Thiruvalluvar Salai,
R.V.Nagar,
Kodungaiyur,
Chennai - 600 118.

2. K.V.P.Boominathan .. Respondents

Prayer : Original Side Appeal filed under clause 15 of the Madras High Court Letters Patent read with Order XXXVI Rule 9 of the Madras High Court Original Side Rules and Order XLI Rule 1 of Code of Civil Procedure, 1908, to allow the appeal and set aside the judgment and decree, dated 05.08.2022 passed in A.No.1707 of 2022 in C.S.No.607 of 2008.



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For Appellant : Mr.V.P.Raman

For Respondents : Mr.R.Thiagarajan
for M/s.S.Sasikala

JUDGMENT

D.BHARATHA CHAKRAVARTHY, J.

The plaintiff in C.S.No.607 of 2008 is the appellant. The appeal is filed aggrieved by the order of the learned Single Judge, dated 05.08.2022 in A.No.1707 of 2022 in C.S.No.607 of 2008, whereby, a delay of 4245 days in filing the application to set aside the *ex parte* decree, dated 07.07.2010 was condoned on condition that the respondents/defendants shall deposit a sum of Rs.20,00,000/- before the Court within a period of four weeks.

2. Heard *Mr.V.P.Raman*, learned Counsel appearing on behalf of the appellant and *Mr.R.Thiagarajan*, learned Counsel appearing on behalf of the respondents.

3. The learned Counsel for the appellant submitted that such a huge delay of 11 years and six months was condoned in a routine manner that too



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on condition of payment of a meager amount of Rs.20,00,000/- while suit itself is decreed for a sum of Rs.1,61,50,610.87 p. According to him, as on the date, total arrears are more than Rs.4,00,00,000/-. The learned Counsel, taking this Court through the affidavit filed in support of the application, would submit that in paragraph No.3, it is categorically admitted by the respondents/defendants that they came to know about they being set *ex parte* in the suit on 24.06.2010 itself. But, however, no reason whatsoever is stated in the affidavit, when the application was filed only on 21.03.2022 much after the Execution Petition was filed before this Court and the decree was transmitted to the District Court, *Thiruvallur*. Even the said transmitted Execution Petition was taken on file as E.P.No.108 of 2019 and in the said Execution Petition, a counter statement was filed on 10.03.2021. More than one year after the said counter affidavit, casually and leisurely, the present application was filed. He would therefore submit that there was no reason at all for the learned Single Judge to condone such a humongous delay to the complete detriment of the decree holder. He would submit that atleast the entire amount, due as on date of the application, ought to have been ordered to be paid. He would submit that the setting aside the *ex parte* decree, at this belated point of time, causes irreparable grave prejudice to



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the plaintiff, who, after getting the decree, has been running pillar to post all these years and is unable to realise even a single penny.

4. He would further submit that a perusal of the cause list of this Court would clearly show that the summons were refused by the defendants and accordingly, were affixed on 06.10.2009 and thereafter, they were set *ex parte* on 08.06.2010. Therefore, when the respondents/defendants have unreasonably, willfully and wantonly left the matter *ex parte* and are filing set aside application by way of gross abuse of process of law after lapse of more than a decade, he would submit that the instant case is not a case for condonation of delay. In support of his contention, the learned Counsel would rely upon the judgment of the Hon'ble Supreme Court of India in ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors.***¹.

5. Per contra, *Mr.R.Thiagarajan*, learned Counsel appearing on behalf of the respondents/defendants, taking this Court to the averments made in the plaint, firstly, would submit that it can be seen from the plaint that the suit claim is based on three hire purchase agreements, which are of the years

¹ (2013) 12 SCC 649



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1995 and 1998 and therefore, the very suit filed in the year 2008 was hopelessly barred by limitation. The learned Counsel would submit that the suit filed on the Original Side of this Court is to be governed by the Original Side Rules and not by the provisions of the Civil Procedure Code. Therefore, on the Original Side, there is not even a procedure for setting *ex parte*. After service of summons, time has to be given for filing written statement and if no written statement is filed, the matter would be placed before the Undefended Board and orders would be passed. That being the situation, the entire procedure adopted in setting the respondents/defendants *ex parte* and also treating the service complete are in complete violation of the procedure and therefore, the decree is prima facie unsustainable.

6. The learned Counsel would rely upon the paragraph No.8 of the affidavit filed in support of the application and submits that the petitioners have vacated the premises at Thousand Lights and therefore, they did not have the knowledge of the Execution Petition filed in the year 2016 and only upon the notice was served in the year 2019 in the Execution Petition from the District Court, Thiruvallur, they came to know of the proceedings and accordingly, the application is filed. These reasons, according to the



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learned Counsel, are sufficient reasons for condonation of delay in setting aside the *ex parte* decree.

7. The learned Counsel relied upon the judgments of the Hon'ble Supreme Court of India in *N.Balakrishnan Vs. M.Krishnamurthy*², more specifically paragraph No.8; in *Rafiq and Anr. Vs. Munshilal and Anr.*³, more specifically paragraph No.3; in *M.K.Prasad Vs. P.Arumugam*⁴, more specifically paragraph No.9; in *Ram Nath Sao Alias Ram Nath Sahu and Ors. Vs. Gobardhan Sao and Ors.*⁵, more specifically paragraph No.12; in *State of Nagaland Vs. Lipok Ao and Ors.*⁶, more specifically paragraph No.15; in *The State of W.B Vs. The Administrator, Howrah Municipality and Ors. etc.,*⁷, more specifically paragraph Nos.27, 32 and 37A; in *Bank of India Vs. Mehta Brothers and Ors.*⁸, more specifically paragraph Nos.24, 39; in *Parimal Vs. Veena*⁹, more specifically paragraph Nos.18 and 19 and the judgment of this Court in *C.Subramanian Vs. Tamil Nadu Housing Board rep. by its Chairman and Managing Director*¹⁰, more specifically

2 (1998) 7 SCC 123

3 (1981) 2 SCC 788

4 (2001) 6 SCC 176

5 (2002) 3 SCC 195

6 (2005) 3 SCC 752

7 AIR 1972 SC 749

8 (2008) 13 SCC 466

9 AIR 2011 SC 1130

10 2000 (III) CTC 727



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paragraph No.31 for the proposition that the term "sufficient cause" should be given a liberal meaning and even carelessness, to an extent, has to be condoned by the Court towards the advancement of substantial justice as the party has to be given an opportunity to contest the matter on merits.

8. He would further submit that the respondents have already deposited a sum of Rs.20,00,000/- as ordered by the learned Single Judge. He would submit that when discretion is exercised by the learned Single Judge, ordinarily, the same should not be interfered by the Division Bench in exercise of the power under Clause 15 of the Letters Patent. Therefore, he would submit that appeal be dismissed.

9. We have considered the rival submissions made on behalf of either side and perused the material records of the case. At the outset, the entire order of the learned Single Judge allowing the application is extracted hereunder:-

" This application has been filed to condone the delay of 4245 days in filing the petition to set aside the decree and judgment dated 07.07.2010 passed in the above suit.

2. Heard both sides.



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3. *The learned counsel for the respondent has strongly opposed to allow this application.*

4. *Considering the facts and circumstances of the case, in the interest of justice, and in order to give one more opportunity to the applicant to contest his case on merits, this court is inclined to allow this application, on condition that the applicant shall deposit a sum of **Rs.20,00,000/- (Rupees Twenty Lakhs only)** before this court within a period of four weeks, failing which, this application shall stand dismissed without further reference to this court."*

Thus, it may be seen that the application, filed with such a huge delay of 11 years and six months that too after service of notice in the transmitted Execution Application, in a routine manner, without giving any finding on the submissions made by the learned Counsel on either side, is unsustainable.

10. Having found that the order of the learned Single Judge unsustainable and we find that at this belated point of time, remanding the matter back will cause serious hardship, especially having heard the learned Counsel at length and therefore we now proceed to examine as to whether the respondents/defendants have shown sufficient cause so that the delay can be condoned.



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11. At the outset, there is no quarrel over the proposition that while condonation of delay, it is not the number of days which matter, but, what matters is whether there is sufficient cause which is adduced by the party praying for condonation of delay. The Court will be liberal in accepting the reasons as sufficient causes and strict scrutiny of explanation of everyday delay is not necessary. But, however, a perusal of the affidavit filed in support of the application for condonation of delay, it is relevant to extract paragraph No.3 of the affidavit which reads as follows:-

" 3. *I have not received any notice issued in the suit. On 24.06.2010 I was informed by my counsel that a case filed by the respondent has appeared in the list in which it has been stated that D1 and D2 refused and affixed on 06.10.2009 and suit was decreed on 07.07.2010.*"

Therefore, when the respondents/defendants have categorically admitted that they have knowledge about the proceedings even as on 24.06.2010, thereafter, in the entire affidavit, absolutely no reason whatsoever has been given as to why they did not approach this Court by filing setting aside petition. As a matter of fact, a perusal of the affidavit, it only deals with the merits of the matter. Absolutely, no reason whatsoever has been given for condonation of the delay. Therefore, when no reason at



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all has been given by the appellant, there was not even the question of approaching the matter with a liberal view.

12. The submissions of the learned Counsel for the respondents/defendants are on the merits of the decree. Hence are not material for the purposes of condonation of delay. As a matter of fact, his argument about service of summons is categorically nullified by the unequivocal admission about the knowledge of proceedings even as on 24.06.2010. In this context, as rightly contended by the Learned Counsel for the appellant, the proviso to Order 9 R 13 of the Code of Civil Procedure has to be borne in mind which reads as follows:-

"ORDER IX

*APPEARANCE OF PARTIES AND
CONSEQUENCE OF NON-APPEARANCE*

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. .
.

Setting aside decrees ex parte

***13. Setting aside decree ex parte against
defendant.__***

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Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

Therefore, we are unable to persuade ourselves to condone such a huge delay of 11 years and six months and thus, this appeal deserves to be allowed.

13. In the result, O.S.A.No.240 of 2022 is allowed. The order of the learned Single Judge, dated 05.08.2022 in A.No.1707 of 2022 in C.S.No.607 of 2008 is set aside and consequently, A.No.1707 of 2022 in C.S.No.607 of 2008 on the file of this Court shall stand dismissed. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

(P.U., J.) (D.B.C., J.)
19.10.2022

Index : yes/no
Speaking order/Non-speaking order
grs

To



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The Section Officer,
Original Side,
High Court of Madras.



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**PARESH UPADHYAY, J.
and
D.BHARATHA CHAKRAVARTHY, J.**

grs

Pre-Delivery Judgment in

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