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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.06.2025

CORAM

THE HON'BLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD)No.448 of 2022

1. M.Balasubramaniam
2. M.Sanjukumar
3. M.Jagadeesh .. Petitioners

Vs.

M.Ashokan .. Respondent

Prayer: Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 03.12.2021 made in I.A.No.1199 of 2017 in O.S.No.1761 of 2013 on the file of the Principal District Munsif, Coimbatore.

For the Petitioners : Mr.N.Ponraj

For the Respondent : Mr.K.Rajasrinivas
for M/s.P.V.S.Giridhar Associates

ORDER

This civil revision petition challenges the order passed by the learned Principal District Munsif, Coimbatore, in I.A.No.1199 of 2017 in O.S.No.1761 of 2013 dated 03.12.2021.

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2. For the sake of convenience, the parties would be referred to as per their ranks in the suit.

3. The civil revision petitioners are the plaintiffs in the suit. O.S.No.1761 of 2013 is a suit filed for the following relief:-

> *"a) directing the defendant herein to vacate from the suit property and deliver vacant possession of the same to the plaintiffs herein by way of mandatory injunction.*
>
> *b) directing the defendant to pay the plaintiffs the cost of the suit."*

4. The case of the plaintiffs is that the suit schedule property belongs to one Late *Maruthaveeran*, their father. The said *Maruthaveeran* has obtained the property by way of a registered partition deed in Document No.1634/1979 dated 26.03.1979. This document is registered on the file of the Joint II Sub-Registrar, Coimbatore. The plaintiffs, however, plead that on 26.05.2000, the said Late *Maruthaveeran* executed a "Will" bequeathing the suit property jointly in favour of the plaintiffs. The Joint I Sub-Registrar, Coimbatore, has registered the document in Document No.250/2000 on 26.05.2000.

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5. The said *Maruthaveeran* passed away on 11.01.2005. The plaintiffs plead that the defendant was in permissive occupation of the property and refused to vacate the property, despite several demands by the plaintiffs. Being left with no other alternative, they issued a pre-suit notice and as there was no reply from the defendant, they came forth with the suit.

6. It is not in dispute that suit summons was served upon the defendant. Despite the same, the defendant did not enter appearance. Therefore, he was set *ex parte*. The *ex parte* evidence was recorded by the Court and the suit was decreed, as prayed for, on 25.04.2014.

7. To set aside the same, the defendant presented I.A.No.1199 of 2017. The reason given by the defendant is that on 25.04.2014, he was not feeling well. Therefore, he was not in a position to instruct his counsel in time. On account of ill health, he sought condonation of delay of 642 days in filing the the application to set aside the *ex parte* decree.

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8. The plaintiffs filed a detailed counter to the said application. They pointed out that there was no *bonafide* ground to condone the delay and to set aside the *ex parte* decree. According to them, the total number of days is 1143 and not 642. Consequently, they sought dismissal of the application.

9. The learned Trial Judge, who took up the application for disposal, considered the application under Section 5 of the Limitation Act, 1963, as if it were an application to condone the delay in representing, as is clear in paragraph 5 and 6 of the impugned order. On the basis of this finding, he proceeded further and condoned the delay.

10. Aggrieved by the same, the plaintiffs are on revision before this Court.

11. I heard *Mr.N.Ponraj* for the civil revision petitioners and *Mr.K.Raja Srinivas* for *M/s.P.V.S.Giridhar Associates* for the respondent.

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12. *Mr.N.Ponraj* has pointed out that the *ex parte* decree came to be passed on 25.04.2014, whereas, the petition to condone the delay was filed only on 16.07.2017 and therefore, the calculation given by the defendant of 642 days is *ex facie* erroneous. He further pointed out while the defendant had stated that there is a delay in filing the application to set aside the *ex parte* decree, whereas, the learned Trial Judge construed as if it is an application for condonation of delay in representation and this also reveals patent non-application of mind and ought to be interfered with by this Court in exercise of its powers of revision.

13. *Per contra*, *Mr.K.Raja Srinivas* states that the learned Trial Judge has given reasons why he has construed the application as an application to condone the delay in representation. He states that the application was filed on 02.06.2014 and therefore, the subsequent period should only be construed as condone delay in representation. Therefore, he states that since the Trial Court has exercised the jurisdiction to condone the delay, this Court should not interfere in the power of revision.

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14. I have carefully considered the submissions of both sides and have gone through the records.

15. Before I proceed into the merits of the case, I have to recollect the principles that have been laid down by the Supreme Court in ***N. Balakrishnan vs M. Krishnamurthy***[1], wherein, the Supreme Court has pointed out that if the Trial Court has condoned the delay, this Court should loathe to interfere with the order in exercise of the power of revision, unless and until the order passed, is capricious or arbitrary.

16. Here is a case where the parties are siblings. Three siblings want to recover the property from another. On the date of which the *ex parte* decree was passed, apart from the first plaintiff, no one else tendered evidence before the Court. The plaintiffs rely upon the "WILL" executed by the father of the parties to this litigation. If not for the "WILL", the defendant also would havE a share. The least that is expected to the plaintiffs is the examination of at least one attestING

1 *1996 7 SCC 123*

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witness to the document.

17. A perusal of the judgment of the Trial Court dated 25.04.2014 reveals no attestING witnesses had been examined. In terms of the Indian Succession Act, 1925, and the Indian Evidence Act, 1872, in order to prove a "WILL", examination of at least one attesting witness is essential. Even if a defendant were to remain *ex parte*, still the Court would have to examine an attesting witness in order to come to a satisfaction that the "WILL" had in fact been written by the deceased testator.

18. When this was pointed out to *Mr.N.Ponraj*, he immediately referred to the judgment made in ***Mohamed Ali vs V. Jaya & Ors.***[2] to plea that this Court should not look into the merits of the case at the time of considering Section 5 of the Limitation Act, 1963.

19. A careful perusal of this judgment shows that, that was a case where a learned Single Judge of this Court has set aside the

2 *Civil Appeal No.4113 of 2022; Dated: 11.07.2022.*

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decree itself on the ground that it does not satisfy the requirements of Order XX Rule 6. The learned Single Judge had not considered whether sufficient cause has been given, instead, she proceeded to hold that the decree itself is liable to be interfered with in exercise of power under Article 227. It was under those circumstances, the Supreme Court followed the judgment of itself in ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Ors. vs. Tuticorin Educational Society and Ors.***[3], and held that the power under Article 227 must not be exercised when there is an effective alternate remedy available to the party.

20. The judgment of ***Mohamed Ali*** *(supra)* is not a proposition that has been urged by *Mr.N.Ponraj* that this Court should not look into the merits of the case while considering the merits and demerits on application under Section 5 of the Limitation Act, 1963.

21. Here, the defendant has pleaded that he was not feeling well. Counter that has been filed by the plaintiffs. Apart from merely stating that there is no *bonafide* reason for condonation of delay, it

3 *(2019) 9 SCC 538*

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has not specifically denied the fact that the defendant had been sick on 25.04.2014. What has not been denied has to be deemed to have been admitted. Furthermore, as the learned Trial Judge has exercised discretion, I am not inclined to interfere. Yet, I am inclined to modify the order passed by the learned Trial Judge, for he has only imposed a cost of Rs.3,000/- for condoning the delay.

22. The property is within the limits of Coimbatore Town and everyday that the defendant is in occupation, it is going to create an issue between the parties. Hence, while confirming the order of the learned Trial Judge in condoning the delay, I am inclined to enhance the cost from Rs.3,000/- to Rs.50,000/-.

23. *Mr.K.Raja Srinivas* states that the amount of Rs.3,000/- has already been deposited by the defendant into the Court. He is given **four weeks'** time from **today** to pay the balance of Rs.47,000/-. The plaintiffs will be entitled to withdraw the amount already deposited and the defendant has no objection for the plaintiffs to withdraw the said amount.

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24. Once the aforesaid costs is paid, the learned Principal District Munsif shall ensure that the written statement is filed in the suit on or before 14.08.2025. In case the amount of Rs.47,000/- is not paid within a period of four weeks from today or/and the condition for filing a written statement is not complied with, the benefit granted in this order will stand forfieted. Consequently, C.M.P.No.2372 of 2022 is closed.

23.06.2025

Speaking Order/Non-Speaking Order
Index: Yes/No
Neutral Citation : Yes/No

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To:

1. The Principal District Munsif, Coimbatore.

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V. LAKSHMINARAYANAN,J.
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