

(2008) 03 MAD CK 0096

In the Madras High Court

Case No : C.R.P. (NPD) No. 3321 of 2007 and M.P. No. 1 of 2007

P. Sivakumar

APPELLANT

Vs

P. Viswanathan, V. Kavitha and V. Ragupathy (Minors are rep.
by their Father P. Viswanathan)

RESPONDENT

Date of Decision : 03-03-2008

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2008) 03 MAD CK 0096

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; M. Selvam, for the Respondent

Judgement

A.C. Arumugaperumal Adityan, J.—The order passed in I.A. No. 644 of 2007 in O.S. No. 605 of 2004 on the file of the Court of Principal District Munsif, Erode, an application filed u/s 5 of the Limitation Act to condone the delay of 886 days in preferring an application to set aside the exparte decree, is under challenge. In the affidavit to I.A. No. 644 of 2007 the reason stated for 886 days delay in filing a petition to set aside the exparte decree in O.S. No. 605 of 2004 is that the petitioner's Counsel, who was engaged to defend the petitioner, who was respondent in EP. No. 58 of 2006, is that his Counsel by oversight and mistake could not attend the court and also failed to inform the petitioner about the progress of the suit.

2. But the fact remains that after the suit O.S. No. 605 of 2004 was decreed exparte, the decree holder had filed E.P.58 of 2006 for executing the sale deed as per the decree for specific performance passed in O.S. No. 605 of 2004. In EP. No. 58 of 2006 also, the respondents in EP.58/2006/the petitioners in IA. 644 of 2007, have engaged a lawyer and also filed counter in EP. No. 58 of 2006 as admitted by the petitioner in I.A. No. 644 of 2007 in the cross examination (page 3 of the additional type set of papers containing the evidence of P.W. 1 in I.A. No. 644 of 2007 in O.S. No. 605 of 2004). EP. No. 58 of 2006 was disposed of and an

exparte order was passed on 16.10.2006 since the respondents in EP. No. 58 of 2006/petitioner in I.A. No. 644 of 2007 failed to appear for the enquiry after filing the counter. For delivery of possession, the decree holder/revision petitioner herein has filed EP. No. 45 of 2007 on 28.3.2007 and while EP. No. 45 of 2007 for delivery of possession is pending the respondents herein/petitioner in I.A. No. 644 of 2007/defendants in O.S. No. 605 of 2004 had filed I.A. No. 644 of 2007 on 6.6.2007 u/s 5 of the Limitation Act to condone the delay of 886 days in filing a petition to set aside the exparte decree in O.S. No. 605 of 2004. The learned trial court had allowed the application on condition the petitioners pays Rs. 1,500/- towards costs to the other side on or before 21.09.2007. The said order is being challenged under this revision by the plaintiff in O.S. No. 605 of 2004/decreed holder in EP. No. 58 of 2006.

3. The learned Counsel for the revision petitioner relying on *Kaliammal, Ardhanari, Valliammal and Kottathooran Vs. Sundharammal and Ramalingam*, , and 2007 (2) CTC 643 *G. Jayaraman v. Devarajan* would contend that the trial Court while exercising its discretion while condoning the delay of 886 days in filing a petition to set aside the exparte decree has exercised the same in an arbitrary and vague manner without exercising vigilance. Without taking into consideration the plight of the decree holder in filing two Eps to realize the fruits of the decree and without any reasonable and acceptable reasoning for condoning the delay of 886 days in preferring a petition to set aside the exparte decree, the same was allowed by the trial Court by awarding a cost of Rs. 1,500/-, which will result in injustice to the revision petitioner herein. In both the ratios referred to above the learned Judge of this Court has followed the ratio decidendi laid down in 2003 (1) LW 585 *Sundar Gnanavolivu rep. by his Power of Attorney Agent v. Rajendran Gnanavolivu rep. by it Power of Attorney Agent*, wherein the Division Bench of this Court has held that:

...If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that records would not be relevant as there was no further proceeding in the matter. 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 case is 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.

According to the respondents herein/petitioners in IA. No. 644 of 2007/defendants in O.S. No. 605 of 2004, the only ground on which 886 days delay sought to be condoned in preferring a petition to set aside the exparte decree in O.S. No. 605 of 2004 was that their advocate by oversight could not attend the

Court for the hearing in O.S. No. 605 of 2004. But the fact remains that in subsequent EP. No. 58 of 2006, the petitioners in I.A. No. 644 of 2007/ respondents herein had engaged a Counsel and also filed counter. So at the time of filing counter in EP. No. 58 of 2006 and even at the time of receiving notice in IA. No. 58 of 2006 the petitioners in EP. No. 644 of 2007/defendants in O.S. No. 605 of 2004 were aware of the decree passed in O.S. No. 605 of 2004. But they have not immediately taken any steps to set aside the exparte decree passed against them in O.S. No. 605 of 2004. They have filed IA. No. 644 of 2007 only on 6.6.2007 i.e., after the order was passed in EP. No. 58 of 2006 for execution of the sale deed and also after the filing of another EP in EP. No. 45 of 2007 for delivery of possession on 28.3.2007. Under such circumstances, absolutely there is no justification in condoning the delay of 886 days in preferring a petition to set aside the exparte decree passed in O.S. No. 605 of 2004 on the file of the Principal District Munsif, Erode.

4. In fine, the revision is allowed and the order passed in I.A. No. 644 of 2007 in O.S. No. 605 of 2004 on the file of the Principal District Munsif, Erode, is set aside and I.A. No. 644 of 2007 is dismissed. Interim stay is vacated and the connection Miscellaneous Petitions are closed.