THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.06.2022

Pronounced on : 14.07.2022

CORAM:

THE HONOURABLE MR. JUSTICE K.KUMARESH BABU

C.R.P.(NPD).Nos.856 & 857 of 2015
and *M.P.Nos.1 & 1 of 2015*

The Sports Development Authority
By its Member Secretary,
No.116-A, Periyar EVR High Road,
Nehru Park, Chennai – 600 084. ... Petitioner in both C.R.Ps.

/Vs/

The Tamil Radhesoami Satsang Association,
Represented by its Madras Branch Secretary,
No.13, Kenneth Lane,
Chennai – 600 008. ... Respondent in both C.R.Ps.

Common Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, setting aside the orders dated 23.01.2015 passed in E.A.Nos.3257 & 3256 of 2014 in E.P.No.3944 of 2013 on the file of the Xth Assistant City Civil Court, Chennai.

For Petitioner in both C.R.Ps. : Mr.S.Santhosh Kumar
for Mr.Azhagu Raman

For Respondent in both C.R.Ps. : Mr.K.V.Prasad

COMMON ORDER

These civil Revision Petitions are directed against the orders made in E .A. Nos.3256 & 3257 of 2014 dated 23.01.2015 whereby the application filed by the petitioner seeking to condone the delay of three days in filing an application to set aside the ex-parte order and the application to set aside the ex-parte order where dismissed by learned Xth Asst Judge, City Civil Court.

2.The case of the petitioner is that the execution petition was posted for filing counter on 20.06.2014 and there was a delay in preparing the counter, as the back papers could not be collected from the previous counsel on record. Hence the petitioner was set ex-parte and further proceedings posted to 12.08.2014. The petitioner on coming to know about the ex-parte order had filed an application to set aside the same. In filing the application there has occasioned the delay of three days for which also a separate application to condone the delay was filed. The Court below without considering the applications on its proper perspective has dismissed them. Being aggrieved against the said orders, the present revision has been preferred.

3.On the contrary, the respondent case is that the application does not spell out any reasonable/ sufficient cause neither to condone the delay nor to set aside the ex-parte order and hence, is liable to be rejected. It is also the case of the respondent that the delay mentioned in the affidavit is much more than the delay specified. Hence, the respondent prayed for rejection of the applications filed by the petitioner.

4.The counsel for the petitioner had submitted that the petitioner is a Society registered under the Societies Registration Act, 1975 by the State Government of Tamil Nadu for the Development of Sports. Pursuant to its objects, the petitioner constructs and maintains various sports stadium, hostels, training centre in various districts including the City of Chennai which are meant to encourage participation by the public in various sporting activities. Mayor Radhakrihnan Stadium is a prominent Sports Stadium in the city of Chennai. The same has been developed into a sports arena for hockey, matching the international standards. One of the primary requirements for the players is the lodging facilities during the matches that are being conducted in the stadium.

5.When the petitioner started constructing a hostel facility as per the guidelines given under the Town and Country Planning Act, the respondent herein started to

object. The respondent had claimed easementary right by stating that the building constructed by the petitioner would affect the air and light which it had been enjoying for a very long time. It is argued by the learned counsel for the petitioner that a building for the benefit of accommodating sports persons has been constructed which is well within the boundaries of the petitioner's property by giving more than the required setbacks as provided under the building regulations. If the claim of the respondents is to be accepted, the petitioner would be restrained from enjoying his property, which would be violating the Constitutional Rights under Article 300A. Further, the delay is only of three days which has been fully explained in the application.

6.The Court below without appreciating the same, has held that the petitioner has miserably failed to explain the delay and has approached the Court in casual and lethargic manner. The petitioner had categorically specified that the delay had occurred due to the change in counsels which led to the delay in preparation of the counter. This reason has been simply ignored by the Court below and hence, the Court ought to have condoned the delay and should have taken up the application for setting aside the ex-parte order. Hence, prayed that this Court to set aside the order refusing to condone the delay of three days in filing the application to set aside the ex-parte order and direct the Court below to consider the application to set aside the ex-parte order.

7.Rebutting the arguments of the petitioner, the counsel for the respondent submitted that the application to condone the delay in an execution proceedings is itself not maintainable as there is no provision to condone the delay in an execution proceedings. He further contended that the petitioner had never been diligent in conducting the proceedings. In support of his contention he had stated that the petitioner had already been set ex parte in the main suit itself. Even there, they had taken out an application to set aside the ex-parte decree along with the condonation application to condone a delay of 873 days. The said application was allowed by the Trial Court, which was set aside by this Court and confirmed by the Apex Court. The petitioner, till date has not preferred any appeal against the Judgment and Decree made in the Original Suit.

8.The learned counsel for the respondent further contended that after the amendment to the Civil Procedure Code in the 1976, there is no provision to condone the delay in execution proceedings under Order XXI. He relied upon the judgment reported in ***1984 1 MLJ 214***, in the case of ***Ayappa Naicker Vs Subbammal*** and another. Placing reliance on the said judgment he had submitted that after the amendment to Order XXI Rule 106 which is *pari materia* to Rule 105 which was a

Madras amendment. Sub-rule 4 of Rule 105 has been repealed, in view of the repugnancy between the Central Law under Rule 106 and the Madras amendment of sub-rule 4 of Rule 105 of Order XXI. He also relied upon the judgment reported in ***1989 1 LW 178***, where a Division Bench of this Court had also gone into the same issue namely, whether sub-rule 4 of Rule 105 of Order XXI should be treated as have been repealed by the Amendment Act of the Parliament.

9.The issue in the said judgment was by reference to the Bench, in view of the conflicting decisions in ***Ayappa Naicker Vs Subbammal and another*** and ***Subramaniya Mudali Vs Srinivasa Pillai.*** There was a divergent view as to the applicability of the Limitation Act under Order XXI of Civil Procedure Code. The Bench after considering the various aspects, had held that the omission of applicability of Section 5 of the Limitation Act in the new Civil Procedure Code is patently express and therefore, it was held that there was an inconsistency and hence, it was the view of the Division Bench that the Court cannot exercise its power to excuse the delay in filing an application under Order XXI Rule 106 Civil Procedure Code, since the period is fixed by the statute.

10.The Division Bench further arrived at the conclusion that the decision in

Ayappa Naicker Vs Subbammal and another lays down the correct law and the contrary decision in ***Subramaniya Mudali Vs Srinivasa Pillai*** is no longer good law.

11.The learned counsel for the respondent further relied upon a judgment reported in ***(2005) 7 SCC 300***, where in the Hon'ble Supreme Court in a case arising from State of Kerala had approved the decision in ***Ayappa Naicker Vs Subbammal and another.*** Hence, the learned counsel had submitted that there is no merit in the revision and hence, stated that the same has to be rejected.

12.The learned counsel for the petitioner in his reply had relied upon a judgment reported in (***2011) 6 CTC 268*** in the case of ***N.Rajendran Vs Sriram Chits Tamil Nadu Private Limited.*** The learned Judge in detail had discussed the amendments to Order XXI right from the year 1945 and various judgments and had finally come to an conclusion and held that there is nothing on record to show that proviso to sub-rule 3 of Rule 105, would now become proviso to Sub-Rule 3 of Rule 106 of Order XXI as it is not in any way inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002 and hence, it cannot be stated to have been repealed under the Central Enactment.

13.The learned Judge further held that he was of the view that the Trial Court was wrong in refusing to entertain the application under Order XXI Rule 106 on the ground that it was filed beyond 30 days.

14. The learned counsel further relied upon the following judgments:

1.***Collector, Land Acquisition, Ananatnag & Another Vs Katiji & Another*** reported in ***(1987) 2 SCC 107***.

2.***G.Ramegowda, Major & Others Vs Special Land Acquisition Officer*** reported in ***(1988) 2 SCC 142***.

3.***Sate of Haryana Vs Chandra Mani & Others*** reported in ***(1996) 3 SCC 132.***

4.***State of Nagaland Vs Lipok Ao & Others*** reported in ***(2005) 3 SCC 752.***

5.***Tukaram Kana Joshi & Others Vs Maharashtra Industrial Development*** reported in ***(2013) 1 SCC 353.***

and drew my attention to the fact that various judgments of this Court has followed the ratio laid down in ***2011 6 CTC 268*** and prayed that this Court may be pleased to condone the delay and direct the Court below to take on file the application to set aside ex-parte order.

15.I have given my anxious consideration to the rival submissions made by the

learned counsel for the petitioner and the learned counsel for the respondent.

16.It is an interesting case where the provisions of Order XXI Rule 106 which had come into being by way of an amendment in the year 1976, is sought to be looked into. Originally when the Civil Procedure Code was enacted, Order 21 had only contained 103 Rules. By an Madras High Court amendment Rules 104 and 105 were introduced. Rule 105 provided for an application to set aside an ex-parte order. Sub-Rule 3 prescribed a period of 30 days from the date of the order for filing such application. Sub-Rule 4 provided that the provisions of the Section 5 of the Indian Limitation Act, 1908 shall be made applicable in respect of application under Sub-Rule. It is pertinent to note that the Indian Limitation Act, 1908 was repealed and replaced by the Limitation Act, 1963. Section 5 of the Limitation Act was not extended to any application under provisions of Order XXI of Civil Procedure Code. By Section 5 of the Limitation Act, 1963, Sub-Rule 4 of Rule 105 to Order XXI had become otiose. Hence, by another amendment made by the Madras High Court, Sub-Rule 4 of Rule 105 was deleted and a proviso under Sub-Rule 3 of Rule 105 was inserted which provided that if the applicant satisfies the Court that there was sufficient cause for not filing the application within the prescribed time, then the Court was clothed with a power to pass appropriate orders condoning the delay. By Act 104 of 1976, the entire Civil Procedure

Code was revamped. Rules 104 to 106 were introduced to Order XXI. It is worthwhile to note that Rules 104 and 105 of the Madras Amendment has been bodily lifted and numbered as Rule 105 and 106. But the proviso to Sub-Rule 3 of Rule 105 was not found in Rule 106 as inserted by the Amendment Act, 104 of 1976.

17.Mr.Justice V.Ramasubramanian, the author of the judgment reported in ***2011 (6) CTC 268*** has taken much pains in extracting the various amendments that have been carried out to Order XXI of Civil Procedure Code right from its inception. It is also worthwhile to note that the learned Judge had also fully considered the various judgments relied upon by the learned counsel for the respondent herein. The learned Judge had held that the judgment of the Division Bench reported in ***1998 1 LW 178*** cannot be said to be providing a ratio *decidendi* for deciding the issue as the Division Bench dealt with Sub-Rule 4 of Rule 105 which was not in force when Division Bench had considered the issue. The learned Judge had also dealt with the judgment of the Apex Court reported in ***2005 7 SCC 300***, wherein, he had held that the said judgment cannot be invoked, as a similar proviso introduced by the Madras High Court was not available in the Kerala Amendment.

18.The learned Judge after analysing the entire issue in its extent in had held as

follows:-

> "42.*Act of 2002 contained a provision for repeal and savings under Section 16, Section 16(1) was in part materia with Section 331(1) of Act 46 of 1999, both of which were identical to Section 92(2) of Act 104 of 1976. Therefore, What should be taken to have been repealed would be those inconsistent with the amendments introduced. There is nothing on record to show that the Proviso to Sub-rule# of Rule 105, which would now become the Proviso to sub-rule (3) of Rule 106 of Order 21, is in any way, inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002. So long as the Proviso under sub-rule(3) is not shown to be inconsistent with any of the amendments, it cannot be stated to have been repealed under the Central Amendment Acts.*
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> *43.Therefore, I am of the view that the order of the Court below, refusing to entertain the Application on the ground that it was filed beyond 30 days and that there was no power to entertain the same, is not in accordance with law. Hence, the impugned order of the Court below is set aside and the Court below is directed to number the Application and take it up for hearing."*

19.More than half a dozen judgements has followed the ratio laid down by this Court in the judgement reported ***2011(6) CTC 268***. I cannot shy away from the strict rules of judicial discipline in coming to a different conclusion. Hence on the legal issue

as to whether an application to condone the delay in an execution proceedings would be maintainable, I am of the view that as per the dictum laid down in ***2011(6) CTC 268*** and followed by this Court in various judgments, application to condone the delay in execution proceedings particularly under Order 21 Rule 106 is maintainable.

20.Now coming to the merits of the case, it is seen that the petitioner was set ex-parte on 20.06.2014 as counter was not filed and there was no representation. An application to set aside the ex-parte order was filed in July 2014, explaining that since there was delay in collecting the back papers from the previous counsel, the petitioner was not able to prepare and file a counter in time. It was noted that there had occasioned a delay of three days in referring the application to set aside the ex parte order. Hence application to condone the delay was filed. The said application was vehemently contested by the respondent/decree holder. The Court below as held that the application to condone the delay has been filed in a very casual and lethargic manner. It also factually found that there were periodical adjournments for filing the counter and there is no explanation to the delay. Hence, the Executing Court dismissed the application to condone the delay.

21.The counsel for the petitioner placed reliance on the following judgments to

push forward his contention that the executing court ought to have considered the case of the petitioner liberally that to when the delay is only three days.

1.Collector, Land Acquisition, Ananatnag & Another Vs Katiji & Another reported in ***(1987) 2 SCC 107***.

2.G.Ramegowda, Major & Others Vs Special Land Acquisition Officer reported in ***(1988) 2 SCC 142***.

3.Sate of Haryana Vs Chandra Mani & Others reported in ***(1996) 3 SCC 132.***

4.State of Nagaland Vs Lipok Ao & Others reported in ***(2005) 3 SCC 752.***

5.Tukaram Kana Joshi & Others Vs Maharashtra Industrial Development reported in ***(2013) 1 SCC 353.***

22.The petitioner herein is a society registered under the Societies Registration Act, 1975, which is under the pervasive control of the State Government of the Tamil Nadu. The petitioner carries out the mandates of the Government in the development of sports in the State of Tamil Nadu by providing various facilities including development of sports arenas, hostel facilities for sports persons, training centres etc. Hence, the petitioner could be considered by the State under the Constitution of India. The building that is sought to be removed is a construction put up by the petitioner is to provide lodging facilities to sports persons who come from various places all over India for

sport tournament, training and selection. It is the case of the petitioner that the building that has been constructed is well within the parameters prescribed by the Development Control Rules and the Town and Country Planning Act. Huge money has been **expended by the State Exchequer**. Only the building of the respondent has been built without giving any site set back. The building in question has been built giving more than the required setback from its property boundary. It is further case of the petitioner that the building would not prevent any natural light or air to the respondents property.

23.It is to be noted that the aforesaid contentions are all on the merits of the suit, even in which they were set ex-parte. Even though an application was allowed condoning the delay in setting aside the said *ex-parte* order, the same was the set aside by this court and confirmed by the Apex Court. I am of the opinion that the entire scenario in which the present situation has arisen is due to the lackadaisical attitude of the Authorities who had been in charge of the petitioner.

24.At this juncture, I would place reliance upon two judgements relied upon by the petitioner as guiding factor for considering the case of the petitioner.

a)(2005) 3 SCC 752

"15.It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay — intentional or otherwise — is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to

file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while the State is an impersonal machinery working through its officers or servants.

16.The above position was highlighted in State of Haryana v. Chandra Mani[(1996) 3 SCC 132] andSpecial Tehsildar, Land Acquisition v. K.V. Ayisumma [(1996) 10 SCC 634] . It was noted that adoption of strict standard of proof sometimes fails to protract (sic) public justice, and it would result in public mischief by skilful management of delay in the process of filing an appeal."

b) (2013) 1 SCC 353

"11.There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario

altogether. The functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the landowner as a "subject" of medieval India, but not as a "citizen" under our Constitution.

12. The State, especially a welfare State which is governed by the rule of law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay

and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if the whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third-party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

13.The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the courts to exercise their powers under Article 226, nor is it that there can never be a case where the courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide P.S. Sadasivaswamy v. State of T.N. [(1975) 1 SCC 152 : 1975 SCC (L&S) 22 : AIR 1974 SC 2271] ,State of M.P. v. Nandlal Jaiswal[(1986) 4 SCC 566 : AIR 1987 SC 251] and

Tridip Kumar Dingal v. State of W.B. [(2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119])

14.No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners. (Vide Durga Prashad v. Chief Controller of Imports and Exports [(1969) 1 SCC 185 : AIR 1970 SC 769] , Collector (LA) v. Katiji [(1987) 2 SCC 107 : 1989 SCC (Tax) 172 : AIR 1987 SC 1353] , Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur [(1992) 2 SCC 598 : AIR 1993 SC 802] , Dayal Singh v. Union of India [(2003) 2 SCC 593 : AIR 2003 SC 1140] and Shankara Coop. Housing Society Ltd. v.M. Prabhakar [(2011) 5 SCC 607 : (2011) 3 SCC (Civ) 56 : AIR 2011 SC 2161] .)"

25.Even though the said case relates to latches for filing writ petition the principles laid down therein with regard is as to how the issue of delay and latches have to be considered attracts my attention.

26.Considering the case on hand on the above principles laid down by the Apex Court, I am of the considered opinion that the delay of three days in filing an application to set aside the ex parte order in the execution proceedings can be condoned in the interest of public at large, for whose benefit the building sought to be removed has been put by the petitioner for the development of sports which is an outcome of the directive principles of State Policy enshrined in the Constitution of India. However, considering the lackadaisical attitude in which the authorities of the petitioner has conducted, I feel that a cost of Rs.5000/- (Five Thousand only) be imposed on the petitioner to be paid to the Tamil Nadu State Legal Service Authority, as a condition to condone the delay. The costs shall be paid within a period of four weeks from the date of receipt of a copy of this order. Further I direct the recovery of the same from the officers concerned who were not diligent in conducting the case.

27.In conclusion, the order passed by the Court below in E.A.No's 3256 & 3257

of 2014 are setaside. The Executing Court is directed to restore E.A.No.3257 of 2014 and dispose of the same within a period of four weeks from the date of payment of costs as directed, without being influenced by any of the findings given herein.

28.The Executing Court had dismissed E.A.No.3257 of 2014 as it did not find any sufficient cause in condoning the delay. As I have allowed the application to condone the delay on payment of cost, the order made in E.A.No.,3257 of 2014 is also set aside.

29.In view of the above, these Civil Revision Petitions are allowed and the connected miscellaneous petitions are closed.

14.07.2022

Index: Yes/no
Speaking/non-speaking
gba

K. KUMARESH BABU, J.

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A Pre-delivery order in
C.R.P.(NPD).Nos.856 & 857 of 2015
and M.P.Nos.1 & 1 of 2015

14.07.2022