

**(2005) 09 MAD CK 0080**

**Madras High Court (Madurai Bench)**

**Case No:** Civil Revision Petition No. 922 of 2002

Madasamy

APPELLANT

Vs

Sollamuthu

RESPONDENT

**Date of Decision:** Sept. 16, 2005

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1963 - Section 5

**Hon'ble Judges:** R. Banumathi, J

**Bench:** Single Bench

**Advocate:** S. Meenakshi Sundaram, for the Appellant; S.S. Desigan, for K. Srinivasan, for the Respondent

**Final Decision:** Allowed

### **Judgement**

@JUDGMENTTAG-ORDER

R. Banumathi, J.

This revision is preferred against the order dated 02.04.2002, made in I.A. No. 990/2000 in O.S. No. 311/1991 on the file of the District Munsif Cum Judicial Magistrate, Nanguneri, dismissing the petition filed u/s 5 of the Limitation Act, refusing to condone the delay of 1617 days in filing the application to set aside the ex parte decree. D-3 is the Revision Petitioner.

2. Plaintiff has alleged that by the act of Defendants, the Plaintiff was excommunicated from the village - Sevukankulam, Shenbagaramanallur Village. According to the Defendant, his normal activities like washing and daily routine of his family were affected. The Plaintiff has alleged that he was expelled from the Community only because of the acts of the Defendants. Hence the Plaintiff has filed the suit for declaration that the act of excommunication of the Plaintiff from the Community is illegal, inoperative and unenforceable against the Plaintiff and to direct the Defendants to pay a sum of Rs. 16,000/- by way of damages for their

illegal action against the Plaintiff.

3. The Defendants were served with the suit summons. All the Defendants have signed in the vakalat and entered appearance by engaging a counsel. But the suit was decreed ex parte on 27.10.1992.

4. I.A. No. 990/2000:- Execution Petition was filed against the Revision Petitioner - D-3, claiming damages of Rs. 16,000/- . According to the Revision Petitioner/D-3, he came to know about the ex parte decree only after he was served with the notice in the execution proceedings. D-3 has alleged that himself and the other Defendants D-1, D-2, D-4 and D-5 have engaged an Advocate in Tirunelveli. According to the Revision Petitioner, D-5 has stated that he would take care of the matter in conducting the suit and the Revision Petitioner has believed his words. Further case of the Revision Petitioner is that there was a village Panchayat in which the Plaintiff has agreed to withdraw the suit. When the Revision Petitioner has enquired D-5, he has stated that the Plaintiff has already withdrawn the case on 27.10.1992. Believing the words of D-5, the Revision Petitioner remained quiet. But contrary to his undertaking in the village Panchayat, the Plaintiff has filed E.P. No. 87/1996 for realizing the decree amount, seeking attachment of the property of D-3. Under such circumstances, D-3 has filed I.A. No. 990/1990 - Petition filed u/s 5 of the Limitation Act, to condone the delay of 1617 days in filing the application under Order 9 Rule 13 CPC to set aside the ex parte decree.

5. Resisting the application, Plaintiff has filed the counter statement contending that D-3 has entered appearance in the suit itself and hence the limitation commences from the date of the Decree. The inordinate delay of 1617 days has not been satisfactorily explained. The Petition to condone the delay has been filed nearly four years from the date of the decree. The Petition itself was filed in 1996, but was numbered only in the year 2000, which would show that the Petitioner/D-3 never cared to file the Petition in the proper manner and had not taken due and diligent steps in pursuing the matter.

6. In consideration of the contention of both parties, the lower Court dismissed the application finding that the Revision Petitioner/D-3 was not diligent in pursuing the suit and filing the application in a proper manner. It was found that the Revision Petitioner was negligent in conducting the suit. The learned District Munsif was of the view that even if the Plaintiff has stated that the suit would be withdrawn, the Revision Petitioner ought to have obtained the certified copy of the decree to verify whether the suit was withdrawn or not.

7. Aggrieved over the dismissal of his application, D-3 has preferred this revision. The learned counsel for the Revision Petitioner has submitted that when the suit has been decreed for paying the damages of Rs. 16,000/-, for the alleged act of excommunication, the ex parte Decree passed against the Revision Petitioner has serious consequences and that an opportunity is to be given to the Revision

Petitioner to contest the suit. Placing reliance upon [Mohammed Aslam and Others Vs. C.N.A. Gowdhaman,](#), it is submitted that it is not the length of the delay, but only the unreasonableness of the explanation offered.

8. Countering the arguments, the learned counsel for the Respondent/Plaintiff has submitted that the alleged Panchayat in which the Plaintiff is said to have agreed to withdraw the suit has not been proved by the Revision Petitioner. It is further submitted that there was total inaction on the part of the Revision Petitioner/D-3 and the lower Court has rightly declined to condone the inordinate delay of 1617 days and that the impugned Order is well reasoned and there is no reason calling for interference.

9. Whether the delay of 1617 days is satisfactorily explained and whether the impugned Order declining to condone the delay is perverse and unreasonable, warranting interference, are the points that arise for consideration in this revision.

10. The lower Court has declined to condone the delay mainly on the ground of non-examination of the villagers to prove the Panchayat. The learned counsel for the Revision Petitioner has submitted that if the exparte decree for the alleged act of excommunication and the damages is not set aside, it would result in failure of justice to the Revision Petitioner. The suit O.S. No. 311/1991 is not a simple suit of money claim. Serious allegations of excommunication of the Plaintiff is alleged. The Plaintiff has alleged that the Defendants have excommunicated the Plaintiff from his community, as a result of which, the normal activities of his family, like washing the clothes and other activities were seriously paralysed. The Plaintiff has further alleged that Petitioner and his family members are not able to attend marriage ceremonies and the funeral rites, because of the illegal action of the Defendants. The Plaintiff has filed the suit for declaration "that the act of excommunication of the Plaintiff from his community, by the Defendants, is illegal and invalid". Hence the main issue involved in the suit would be whether the alleged act of excommunication is true or not. The question of payment of damages would arise only if the alleged act of excommunication is proved and the alleged acts of impairment of the normal activities of the Plaintiff's family are proved. Considering the seriousness of allegations in the suit and the nature of issues involved, in the interest of justice, an opportunity is to be given to the Revision Petitioner to put-forth his defence. It is always desirable to determine the suits on merits, rather than leaving the matter exparte. This Court is of the view that if the exparte decree is allowed to stand, it would cause serious prejudice to the Revision Petitioner and opportunity is to be given to the Revision Petitioner/D-3 to contest the case.

11. It is not as if the Revision Petitioner/D-3 has no sufficient explanation to offer for the delay. Defendants 1 to 5 have engaged one advocate. The Revision Petitioner/D-3 has alleged that D-5 has taken in-charge of conducting the case and that the Revision Petitioner has bona fide believed D-5 that he would take appropriate steps in conducting the suit. The Revision Petitioner who has examined

himself as PW-1 has clearly stated that there was a Panchayat in the village community and the Plaintiff agreed to withdraw the suit. R.W.s 1 and 2 have denied any such Panchayat and the agreement of the Plaintiff to withdraw the suit. Having filed the vakalat, it is quite unbelievable that the Revision Petitioner/D-3 would not have chosen to contest the case. This is all the more so, in the light of the serious allegations levelled against the Defendants.

12. The lower Court has faulted the Revision Petitioner /D-3 for not examining any of the Panchayatars in support of his contention that there was a Panchayat in the village, in which the Plaintiff has agreed to withdraw the suit. It is relevant to note that after the ex parte decree on 27.10.1992, nearly four to five years has elapsed. Due to long time, in the village, there might have been change of factions and equations. Under such circumstances, the villagers might not have come forward to support the case of the Revision Petitioner on the alleged Panchayat. It is relevant to note that E.P. No. 87/1996 was not filed against the other Defendants viz., D-1, D-2, D-4 and D-5; but is said to have been filed only against the Revision Petitioner /D-3. While so, the Revision Petitioner cannot be faulted for not examining any of the villagers to prove the alleged Panchayat.

13. The explanation stated by the Revision Petitioner that he bona fide believed the words of D-5 that he would take care of the case is quite convincing. Only after receipt of notice in the execution proceedings in E.P. No. 87 /1996, the Revision Petitioner/D-3 came to know about the passing of ex parte decree and filed application on 4.4.1997 u/s 5 of the Limitation Act to condone the delay. Pointing out that the application was numbered only in 2000, the learned counsel for the Respondent/Plaintiff has attacked the conduct of the Revision Petitioner that he had not taken diligent steps even in getting the application numbered, by taking appropriate steps.

14. In the light of filing of the application in various Courts and the returns, this contention of the Respondent/ Plaintiff does not merit acceptance. For this revision, records pertaining to I.A. No. 990/2000 were called for. By perusal of the records, it comes to be known that the Revision Petitioner/D-3 has filed the application before the Sub Court, Tirunelveli which was returned stating "suit valuation is Rs. 16,000/-, as per Act 28/1995, the suit is not maintainable in this jurisdiction". Hence the application was returned to be presented in proper Court. For some time, the Revision Petitioner was pursuing the matter in the Sub Court, Tirunelveli. Thereafter, the Petition was returned stating that the suit was disposed of on 27.10.1992 by the District Munsif Court, Valliyoor and that the same is to be presented before that Court. After presentation of the Petition in various Courts, the Revision Petitioner has learnt that the case falls within the jurisdiction of District Munsif Court cum Judicial Magistrate, Nanguneri and renumbered the application before that Court, which was admitted and numbered as I.A. No. 990/2000. Immediately after he was served with the notice, the Revision Petitioner had taken diligent steps in filing the

application to set aside the ex parte decree along with application to condone the delay. Return of the Petition by various Courts and the completion of procedural formalities had taken a couple of years, for which the Revision Petitioner cannot be faulted.

15. Contending that if the explanation is convincing, the long range of delay could be condoned, the learned counsel for the Revision Petitioner/D-3 has placed reliance upon the decision of the Division Bench reported in [Mohammed Aslam and Others Vs. C.N.A. Gowdhaman](#), wherein this Court has held :

"Equally, we are conscious of the fact that the length of delay is no matter, and acceptability of the explanation is the only criterion. Sometimes, the delay of shortest range may be uncondonable due to want of acceptable explanation, whereas in certain other cases, delay of a very long range can be condoned as the explanation therefore is satisfactory. In every case of delay, there may be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. If the explanation does not smack the malafides or it is not 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 not lean towards acceptance of the explanation. We are also aware that refusal to condone the delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. Now, even the higher Court of this land have interpreted that the words "sufficient cause" u/s 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice."

With the above observation, the Division Bench has observed that to give an opportunity to the applicant, the ex parte decree was set aside, ordering cost to the Respondents. The above observation is applicable to the case in hand where the Revision Petitioner is to be given an opportunity to put forth his defence in contesting the suit O.S. No. 311/1991.

16. Contending that the Revision Petitioner was negligent and irresponsible and the explanation is lacking bona fide and the delay cannot be condoned, the learned counsel for the respondent Plaintiff has placed reliance upon the following two decisions :-

1. Kandasamy and Ors. v. Krishnamandiram Trust, Larur by its Trustees and C
2. 2002 (2) MLJ 837, Perumal v. Minor Kumaresanrep. By Mother and

17. In consideration of the facts and circumstances of the case, that the applicant knew about the ex parte decree and that they did not take any steps to have the ex parte decree set aside, the above cases were dismissed. The case in hand stands on a different footing. As discussed earlier, the Revision Petitioner bona fide

believed the words of D-5 and that there is nothing to show that the Revision Petitioner knew about the ex parte decree.

18. Considering the explanation stated by the Revision Petitioner and in the interest of justice, the delay of 1617 days is to be condoned, however, directing the Revision Petitioner/D-3 to pay a cost of Rs. 1,000/- (Rupees One Thousand only) to the Respondent Plaintiff.

19. The revision is allowed setting aside the order dated 2.4.2002, made in I.A. No. 990/2000 in O.S. No. 311/1991 on the file of the District Munsif Cum Judicial Magistrate, Nanguneri on payment of cost of Rs. 1,000/- (Rupees One Thousand only) to the Respondent/Plaintiff within one month from the date of this order, failing which the order in I.A. No. 990/2000 shall stand. CMP No. 9853/2003 is closed.

20. Once the conditional order of payment of cost is complied with, the learned District Munsif is directed to take the application under Order 9, Rule 13 CPC and consider the same and thereafter, afford opportunity to the Revision Petitioner/D-3 to contest the suit and dispose of the same in accordance with law.