CASE NO.:
Appeal (civil) 4779 of 2001

PETITIONER:
M.K. PRASAD

Vs.

RESPONDENT:
P.ARUMUGAM

DATE OF JUDGMENT: 30/07/2001

BENCH:
M.B. Shah & R.P. Sethi

JUDGMENT:

SETHI,J.

Leave granted.

The respondent-plaintiff filed a suit informa pauperis under Order 33 Rule 1 of the Code of Civil Procedure against the appellant and others praying therein for issuance of direction to the defendants to deliver vacant peaceful possession of the suit lands by removing the construction, if any, put on them. He further prayed that the defendants be directed to pay a sum of Rs.75,000/- towards mesne profits upto 24th March, 1987 and thereafter at the rate of Rs.5,000/- per month till the delivery of possession. The suit land was agricultural land comprised in Paimash No.199, measuring 0-4-0 Cawny, Paimash No.200, measuring 1-0-0 Cawny Paimash No.201, measuring 0-5-4 Cawny, Paimash No.273, measuring 0-4-0 Cawny, Paimash No.281, measuring 0-4-0 Cawny, Paimash No.286 measuring 0-4-0 Cawny, Paimash No.0-10-0 Cawny, measuring in all 3-13-0 Cawny situate in No.141 Kottivakkam village, Sidapet Taluk, Chingleput District bearing Patta No.32.

In the aforesaid suit the appellant was defendant No.9. On his service, he appeared through his counsel in the trial court.

On the basis of the pleadings before it, the trial court framed the following issues:

"1. Whether the plaintiffs mother Chokkammal, the life estate holder under the regd. will dated 30.6.32 had any right to deal with the properties covered under the said will?

2. Are the alienations made by life estate holder would bind the plaintiff?

3. Is not the plaintiff entitled to question the alienation effected by the life estate holder would who had no right to effect any alienation?

4. Are the alienees bonafide purchaser?

5. To what relief the parties are entitled?"

As the counsel for the appellant did not appear after 17.9.1993, and the other defendants did not contest the claim of the respondent, the trial court decreed the suit ex-parte vide its unreasoned judgment dated 5th March, 1996. It was contended by the appellant that the person who was appearing on behalf of the company left the service since 1994 because of death of his son and none has informed him about further proceedings in the Court.

Unaware of the passing of the decree against him, the appellant could not take any proceeding in the form of an appeal or for setting it aside. He came to know about the passing of the decree in 1997 only when he received the notice for execution proceedings initiated by the respondent in Execution Petition No.118 of 1997. The appellant thereafter filed an application for setting aside the ex-parte decree along with an application for condoning the delay. The trial court rejected the prayer of the appellant for condoning the delay of 554 days in filing the application for setting aside ex-parte decree. Aggrieved by the order of the trial court, the appellant filed a revision petition in the High Court which was dismissed vide the order impugned in the present appeal.

In any case in which a decree is passed ex-parte, the defendant can apply to the court by which the decree was passed for an order to set it aside and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit. Such an application can be filed within 30 days as provided under Article 123 of the Limitation Act. In case of delay, the defendant can avail of the benefit of Section 5 of the Limitation Act and seek its condonation by satisfying the court regarding the existence of circumstances which prevented him from approaching the court within the limitation prescribed by the statute.

In construing Section 5 of the Limitation act, the court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. The court has a discretion to condone or refuse to condone the delay as is evident from the words "may be admitted" used in the section. While dealing with the scope of Section 5 of the Limitation Act, this Court in Ramlal & Ors. v. Rewa Coalfields Ltd. [AIR 1962 SC 361] held:

"Section 5 of the Limitation Act provides for extension of period in certain cases. It lays down, inter alia, that any appeal may be admitted after the period of limitation prescribed therefor when the appellant satisfies the court that he had sufficient cause for not preferring the appeal within such period. This section raises two questions for consideration. First is, what is sufficient cause; and the second, what is the meaning of the clause "within such period"? With the first question we are not concerned in the present appeal. It is the second question which has been decided by the Judicial Commissioner against the appellant. He has held that "within such period" in substance means during the period prescribed for making the appeal. In other words, according to him, when an appellant prefers an appeal beyond the period of limitation prescribed he must show that he acted diligently and that there was some reason which prevented him from preferring the appeal during the period of limitation prescribed. If the Judicial Commissioner has held that "within such period" means "the period of the delay between the last day for filing the appeal & the date on which the appeal was actually filed" he would undoubtedly have come to the

conclusion that the illness of Ramlal on February 16 was a sufficient cause. That clearly appears to be the effect of his judgment. That is why it is unnecessary for us to consider what is "a sufficient cause" in the present appeal. It has been urged before us by Mr.Andley, for the appellant, that the construction placed by the Judicial Commissioner on the words "within such period" is erroneous.

In construing S.5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan, ILR 3 Mad 269,

"Section 5 gives the court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafide is imputable to the appellant."

Again in The State of West Bengal v. The Administrator, Howrah Municipality & Ors. [1972 (1) SCC 366 and G.Ramegowda, Major & Ors. v. Special Land Acquisition Officer, Bangalore [1988 (2) SCC 142 this Court observed that the expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice where gross negligence or deliberate inaction or lack of bonafide is not imputable to the party seeking condonation of delay. Law of limitation has been enacted to serve the interests of justice and not to defeat it. Again in N. Balakrishnan v. M.Krishnamurthy [1998 (7) SCC 123] this Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing malafide or deliberate delay as a dilatory tactics, the court should normally condone the delay. However, in such a case the court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. In that context the court observed:

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range

can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex-parte decree as is evident from his application filed under Section 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order impugned and condone the delay in filing the application for setting aside ex-parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex-parte decree as well.

Consequently, the appeal is allowed by setting aside the orders impugned. The appellant's application for condoning the delay and for setting aside the ex-parte decree shall stand allowed subject to payment of exemplary costs of Rs.50,000/- to be paid to the opposite side within a period of 30 days. If the costs are not paid within the time specified, this appeal shall be deemed to have been dismissed and the ex-parte decree passed against the appellant revived. We may clarify that the costs awarded by this order are in addition to the amount of Rs.10,000/- deposited in this Court for payment to the respondent vide order dated 3.11.2000.

.....J.
(M.B. SHAH)

.....J.
(R.P. SETHI)

JULY 30, 2001