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*CMP No. 6949 & 6947 of 2022
in OSA SR NO.47388 & 47397 OF 2021*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **21-03-2025**

PRONOUNCED ON: 03.04.2025

CORAM

**THE HONOURABLE DR JUSTICE ANITA SUMANTH
AND
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

**CMP Nos. 6949 & 6947 of 2022
IN
OSA SR NO. 47388 & 47397 OF 2021**

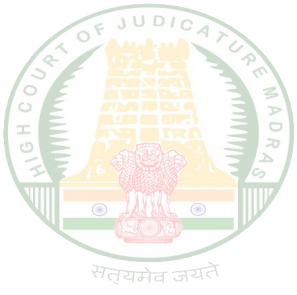
1. SHANMUGADURAI
S/O.R.Iyyam Perumal Nadar, No.42,
Papermilss Road, Perambur,
Chennai 11.

Appellant(s)

Vs

1. B.Balakrishnan
No.884-A, Vaigai Colony, Anna Nagar,
Chennai 40.
2.Park Town Benifit Fund Ltd
Rep by its Managing Director, Office at
No.223, South Mint St, 1st Floor,
Park Town, Chennai 03.
3.Vamana Auctioneers
Office at O.S. Building, Room No.137,
First Floor, New No.1, (Old No.17),
Ekambara Kumar Guru St, Chennai 03.
4.V.Umapathy
No.T-1, VOC Nagar, South St,
Tondiarpet, Chennai 81.

Respondent(s)



*CMP No. 6949 & 6947 of 2022
in OSA SR NO.47388 & 47397 OF 2021*

OSA SR No. 47388 of 2021

1. SHANMUGADURAI

Appellant(s)

Vs

1. B.Balakrishnan
No.884-A, Vaigai Colony, Anna Nagar,
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2.Park Town Benifit Fund Ltd
Rep by its Managing Director, Office at No.223,
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3.Vamana Auctioneers
Office at O.S. Building, Room No.137, First Floor,
New No.1, (Old No.17), Ekambara Kumar Guru St,
Chennai 03.

4.V.Umapathy
No.T-1, VOC Nagar, South St,
Tondiarpet, Chennai 81.

Respondents

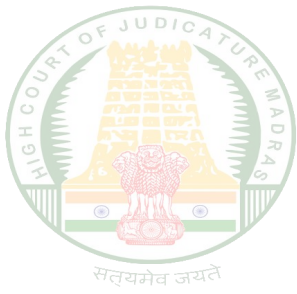
CMP No. 6947 of 2022

1. V. Umapathy
No.T-1, VOC Nagar, South Street,
Tondiarpet, Chennai- 81.

Appellant(s)

Vs

1. B.Balakrishnan
No.884-A, Vaigai Colony, Anna Nagar,
Chennai- 40
2.Park Town Benifit Fund Ltd
Rep by its Managing Director Office at
No. 223, South Mint Street 1st Floor,
Park Town, Chennai-3.



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3.M/s.Vamana Auctioneers
Office at O.S.Building, Room No.137,
First Floor, New No.1, (Old No.17),
Ekambara Kumar Guru Street,
Chennai- 3.

Respondent(s)

OSA SR No. 47397 of 2021

1. V.Umapathy

Appellant(s)

Vs

1. B.Balakrishnan
No.884-A, Vaigai Colony, Anna Nagar,
Chennai- 40

2.Park Town Benifit Fund Ltd
Rep by its Managing Director Office at No. 223, South Mint Street 1st Floor,
Park Town, Chennai-3.

3.M/s.Vamana Auctioneers
Office at O.S.Building, Room No.137, First Floor, New No.1, (Old No.17),
Ekambara Kumar Guru Street, Chennai- 3.

Respondent(s)

CMP No. 6949 of 2022

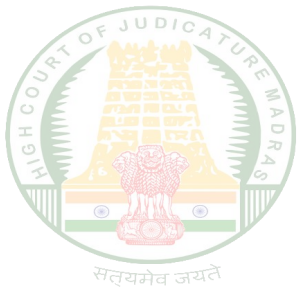
PRAYER

To grant leave to sue in favour of the Petitioner in the above OSA.

OSA SR No. 47388 of 2021

PRAYER

To set aside the judgment and decree passed in CS.No.624 of 2005 dated
15.06.2010.



CMP No. 6949 & 6947 of 2022
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CMP No. 6947 of 2022

PRAYER

To condone the delay of 3814 days in filing the OSA.SR.No. 47397 of 2021.

OSA SR No. 47397 of 2021

PRAYER

To set aside the judgment and decree passed in CS.No.624 of 2005 dated 15.06.2010.

CMP No. 6949 of 2022

For Appellant(s): Ms. Y. Kavitha

For Respondent(s): M/s.Vijayakumari Natarajan For R1
R2 and R3 - No Appearance

CMP No.6947 of 2022

For Appellant(s): Mr.R.Syed Mustafa

For Respondent(s): M/s.Vijayakumari Natarajan For R1
R2 and R3 - No Appearance

COMMON ORDER

(Order of the Court was made by C.Kumarappan J.)

The appellant herein is the first defendant before the learned Single Judge. The first respondent herein is the plaintiff, and the respondents 2 and 3 herein are the defendants 2 and 3 in C.S.No.624 of 2005.

2. CMP.No.6947 of 2022 is filed to condone the delay of 3814 days in filing the connected OSA, against the decree and judgment passed in



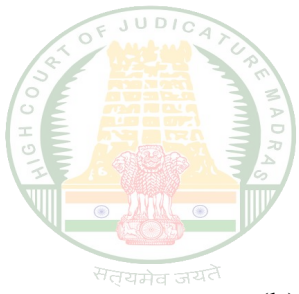
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C.S.No.624 of 2005 dated 15.06.2010. Similarly, CMP.No.6949 of 2022 is filed by the subsequent purchaser qua Mr.Shanmugadurai, being third party to the suit, seeking leave to file an appeal against the very same decree and judgment.

3. For the sake of convenience, the parties will be referred to according to their litigative status in C.S.No.624 of 2005.

4. The brief facts which are germane and give rise to the instant CMPs are as follows:-

(a). Originally, the first respondent herein filed a suit for specific performance in C.S.No.624 of 2005, wherein an *ex parte* decree was passed on 15.06.2010. Aggrieved with the said *ex parte* decree, the appellant herein filed an application to set aside the *ex parte* decree along with an application to condone the delay. The delay condonation application is A.No.2693 of 2011. The application to set aside the *ex parte* decree is A.No.910 of 2016. Apart from the above two applications, the subsequent purchaser Mr.Shanmugadurai also filed an application in A.No.911 of 2016 to implead himself as a party to the above suit. The learned Single Judge vide order dated 13.07.2016 allowed all the 3 applications.



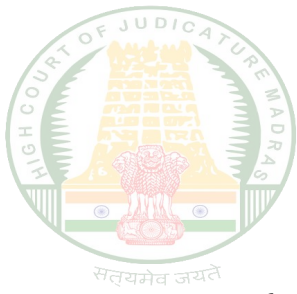
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(b). Aggrieved with the above 3 orders, the plaintiff preferred 3 OSAs in OSA.Nos.418, 420 and 421 of 2018. The Division Bench of this Court has allowed all the OSAs vide order dated 25.10.2019. Not satisfied with the order of the Division Bench, the first defendant and the subsequent purchaser Mr.Shanmugadurai preferred an SLP before the Hon'ble Supreme Court, and the Hon'ble Supreme Court in SLP (Civil) Diary No.11836 of 2020 dated 25.01.2021 dismissed the appeal by confirming the order passed in all 3 OSAs.

(c). After this first round of litigation, under the guise of preferring appeal under Section 96(2) of CPC, the first defendant has come up with a CMP in CMP.No.6947 of 2022 for condonation of delay of 3814 days in filing the appeal against the *ex parte* decree in C.S.No.624 of 2005. Similarly, the subsequent purchaser, who was not a party to the above civil suit, preferred CMP.No.6949 of 2022, seeking leave to file separate appeal against the above *ex parte* decree. It is these applications which are before us for consideration.

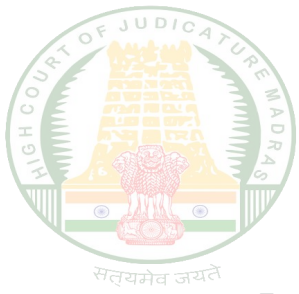
5. Heard Mr.R.Syed Mustafa, learned counsel for the petitioner in CMP.No.6947 of 2022, Mrs.Y.Kavitha, learned counsel for the petitioner in CMP.No.6949 of 2022, and Mrs.Vijayakumari Natarajan, learned counsel appearing for the first respondent in both CMPs.



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6. The learned counsel appearing for the appellant/first defendant in CMP.No.6947 of 2022 would vehemently contend that, though their attempt to set aside the *ex parte* decree become unsuccessful, the right to prefer an appeal under Section 96(2) of CPC and Order 43 Rule 1 of CPC is well protected. It is his further contention that, though there is a delay of 3814 days in filing the connected OSA, the above delay is neither willful nor wanton, but, only on the *bona fide* ground of prosecuting the order passed in earlier applications to condone the delay and to set aside the *ex parte* decree, up to the Hon'ble Supreme Court. It is the further contention of the learned counsel for the first defendant that his valuable property has been snatched by the plaintiff in collusion with the 2nd defendant. The learned counsel would further contend that right to appeal is not a mere matter of procedure and the same is a substantive right. Thus, he contended that, to protect such substantive right, the delay of 3814 days needs to be condoned. It is further contended that the delay has been occasioned only due to the *bona fide* prosecution against the *ex parte* decree up to the Hon'ble Supreme Court. To buttress his contention, he relied upon the judgment of the Hon'ble Supreme Court in *N.Mohan Vs. R.Madhu* reported in (2020) 20 SCC 302.



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7. Similarly, the learned counsel for the subsequent purchaser, who filed CMP.No.6949 of 2022 would contend that he being a *bona fide* purchaser for valuable consideration, unless a leave is granted to prefer an appeal, his right could not be protected. Hence, prayed to grant a leave to file an appeal against the *ex parte* decree.

8. Per contra, the learned counsel for the plaintiff would strenuously contend that there are no *bona fides* in the contention of the applicants, and that having failed in their attempts to set aside the *ex parte* decree, now they cannot start a second round of litigation by filing these appeals. It was further contended that there are no sufficient cause shown by these applicants to condone this huge and inordinate delay. It is also her specific submission that these petitioners are unscrupulous litigants, and only with a view to protract and to cause hardship to the plaintiff, had preferred these applications. Hence, prayed to dismiss these applications.

9. We have given our anxious consideration to either side submissions.

10. It is an admitted fact that the first defendant has contested an application to set aside the *ex parte* decree and for condonation of delay up to

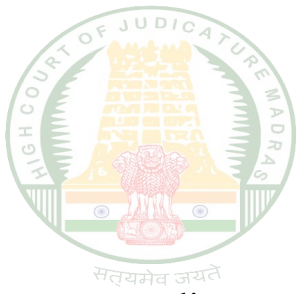


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the Hon'ble Supreme Court ,and ultimately failed in his endeavour. The present attempt to prefer an appeal under Section 96(2) of CPC has been conceived by the first defendant, after loosing all his avenue in his previous attempt. As rightly contended by the learned counsel for the first defendant, the right to file an appeal against the decree, is a statutory and substantive remedy, which cannot be dealt lightly. Therefore, even if they have lost their attempt to set aside the *ex parte* decree, still they are entitled to file an appeal against the *ex parte* decree, as a matter of right. Therefore, there is no second opinion for us, about the right of the first defendant in preferring the connected OSAs. However, now the issue is, whether sufficient cause shown to condone the delay of 3814 days in filing the connected appeal?.

11. Before we delve into the merits of the matter, it is appropriate to cull out certain material factum which are germane for the ultimate disposal of the present applications. The plaintiff preferred a suit for specific performance based upon the Sale Agreement dated 08.10.1999 and 21.03.2001, wherein an *ex parte* decree was passed on 15.06.2010. During pendency of the suit, the plaintiff has also obtained an order of interim injunction in OA.No.702 of 2005 vide order dated 21.07.2005, restraining the first and second defendants not to



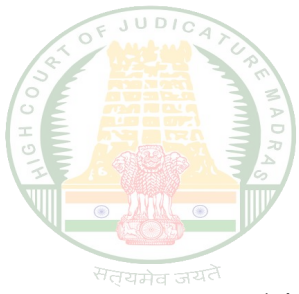
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alienate or encumber the suit property. In spite of an injunction, the first defendant has executed a Sale Deed in favour of Mr. Shanmugadurai, who is the petitioner in CMP.No.6949 of 2022.

12. It is also pertinent to refer that, subsequent to the *ex parte* decree, the plaintiff preferred an Execution Petition in EP.No.407, wherein, again the first defendant failed to appear even after receipt of the summons, and eventually, EP was allowed on 02.11.2011 and a Sale Deed was executed by the Court on 30.10.2011 in favour of the plaintiff. With the above background, let us consider, whether is there any *bona fide* or sufficient cause shown by the petitioner/first defendant herein?

13. It is the contention of the first defendant that he sold the suit property to Shanmugadurai in the year 2007. However, Shanmugadurai would contend that he was not aware about the order of injunction. After the sale in favour of Shanmugadurai, the matter was left at that stage, and after nearly 2 years, filed an application to set aside the *ex parte* decree with a delay of 675 days, which was ultimately rejected by the Hon'ble Supreme Court.



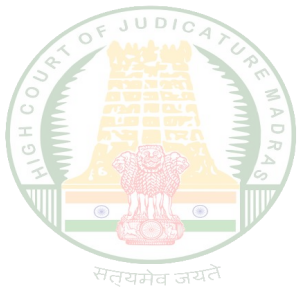
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14. At this juncture, we deem it appropriate to refer the judgment of the Hon'ble Supreme Court in ***Pathapati Subba Reddy (Died) by L.Rs and others Vs. Special Deputy Collector (LA)*** reported in ***2024 SCC OnLine SC 513***, wherein, the Hon'ble Supreme Court relied upon the judgement in ***Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.***, reported in ***AIR 1962 SC 361***, wherein the Hon'ble Supreme Court held that even if the parties shown sufficient cause to condone the delay, they are not entitled for the condonation of delay, if there is no *bona fide* and if they are unscrupulous litigants, as the relief of condonation comes within discretionary jurisdiction of the Court. In ***Pathapati Subba Redd's*** case [cited supra], the Hon'ble Supreme Court relied various judgments and ultimately in paragraph 26, has culled out the principle emerged from various judgments. For ready reference, we deem it appropriate to extract paragraph 26:-

“26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

- (i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;***
- (ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;***
- (iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be***



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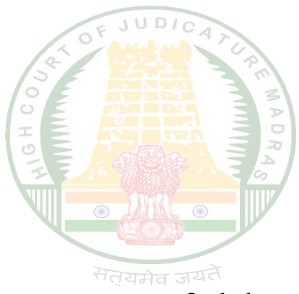


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- construed in a strict sense whereas Section 5 has to be construed liberally;*
- (iv) *In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;*
- (v) ***Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;***
- (vi) *Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;*
- (vii) ***Merits of the case are not required to be considered in condoning the delay; and***
- (viii) *Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision.”*

[Emphasis supplied by this Court]

15. The learned counsel for the appellant relied upon the judgment in **N.Mohan's** case [cited supra] and would contend that the delay of 3814 days has occurred only upon the *bona fide* contest of the application for condonation



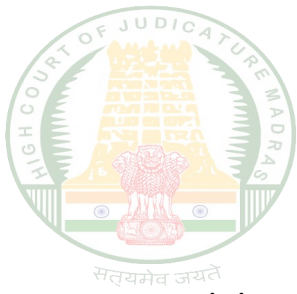
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of delay and in setting aside the *ex parte* decree up to the Hon'ble Supreme Court, therefore, the delay has been sufficiently explained. In paragraph 15 of *N.Mohan's* case [cited supra], the conduct of unscrupulous litigant had been dealt. It was referred that though the litigant can have a parallel remedy under Section 96(2) of the CPC as well as Order 9 Rule 13 CPC, only the unscrupulous litigant opt to file first an application under Order 9 Rule 13 CPC and carry the matter up to the highest forum, thereafter filing an appeal under Section 96(2) of CPC.

16. In the above judgment, it was held that the Court has to consider the dilatory tactics or lack of *bona fides of the parties* in pursuing the remedy of appeal under Section 96(2) of CPC, before condoning the delay for filing the appeal. It is settled principle of law that Section 5 of the Limitation Act has to be liberally construed with justice oriented approach. At the same time, if any right accrued upon the party in the interregnum, then delay condonation application has to be rejected. It is pertinent to mention here that while condoning the delay, there is neither any lower limit nor any upper limit. It will depend upon the facts of each and every cases.

17. Coming to the *bona fide* of the present applicants, though there was

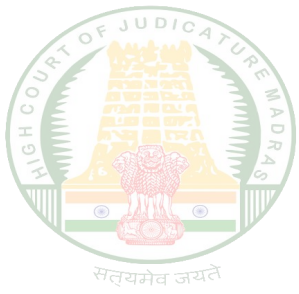


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an injunction by this Court in OA.No.702 of 2005 vide order dated 21.07.2005, the conduct of the first defendant in selling the property in contravention of the injunction order, to the third party Shanmugadurai would covertly and overtly exhibits his *mala fides* and his unscrupulousness. Apart from that, in the year 2011 itself a sale deed was executed by the Court in the name of the plaintiff and the plaintiff has been enjoying the property all these years as absolute owner of the property and has been diligently contesting all the matters including this application. Therefore, the valuable right of ownership that had accrued since 2011 upon the plaintiff cannot be lightly interfered with, by mere filing of an application for condonation of delay without any *bona fides*. In the judgment of the Hon'ble Supreme Court in ***Balwant Singh (Dead) Vs. Jagdish Singh and others*** reported in (2010) 8 SCC 685, the Hon'ble Supreme Court held that if any valuable right accrued in favour of one party as a result of the failure of the other party, then such right should not be curtailed after huge delay. For ready reference, we deem it appropriate to extract paragraph 26 of the above judgment:-

*“26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. **Once a valuable right has accrued in favour of***



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one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.”

[Emphasis supplied by this Court]

18. Accordingly, we are of the indubitable view that there are no *bona fides* on the part of the petitioner in contesting the suit, besides a valuable right having accrued and vesting upon the plaintiff since 2011. In such view of the matter, at this length of time, we do not find any justifiable grounds to exercise our discretion in favour of the appellant/first defendant. Hence, we do not find any merits in the application in CMP.No.6947 of 2022.

19. Coming to CMP.No.6949 of 2022, when the original defendant himself could not justify any ground for condonation of delay, the petitioner in CMP.No.6949 of 2022 being a subsequent purchaser having lost the impleading application in his first round of litigation, cannot have any better right than the original owner qua the first defendant for preferring an appeal.



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Hence, this CMP.No.6949 of 2022 is also dismissed.

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20. In the result, both the CMPs and the OSAs in the SR stage are dismissed. There shall be no order as to costs.

(ANITA SUMANTH J.)(C.KUMARAPPAN J.)

03-04-2025

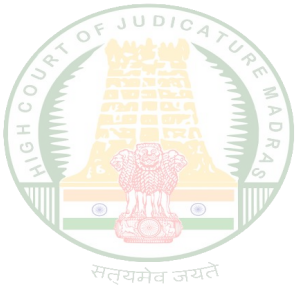
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Speaking/Non-speaking order

Internet: Yes

Neutral Citation: Yes/No



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Dr.ANITA SUMANTH, J

AND

C.KUMARAPPAN, J

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