

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

OP(C).No. 2550 of 2014 (O)

(O.S.44/2008 OF SUB COURT, NORTH PARAVUR)

PETITIONER:

M/S.CROMPTON GREAVES LTD.,
CG HOUSE, 6TH FLOOR, DR.ANNIE BESANT ROAD,
WORLI, MUMBAI - 400 030
REPRESENTED BY ITS AUTHORIZED SIGNATORY.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SRI.C.DINESH
SMT.AMMU CHARLES
SRI.G.RENJITH
SMT.JINNU SARA GEORGE

RESPONDENTS:

1. M/S.NAVANEETH HOTELS PVT.LTD.
355-359, 619 GANDHIPURM
COIMBATORE - 641 012 REPRESNETED BY ITS DIRECTOR S.MARTIN.

2. STATE OF KERALA
REPRESNETED BY THE CHIEF SECRETARY
GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001.

R1 BY ADV. SRI.A.KUMAR
R1 BY ADV. SMTG.MINI(1748)

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 25-02-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 2550 of 2014 (O)

APPENDIX

PETITIONER'S EXHIBITS:

- P1 - TRUE COPY OF IA NO. 401/2013 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, NORTH PARAVUR.
- P2 - TRUE COPY OF IA NO. 750/2013 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, N. PARAVUR.
- P3 - TRUE COPY OF MEDICAL CERTIFICATE DT. 30.1.13 PRODUCED BY THE PLAINTIFF.
- P4 - TRUE COPY OF MEDICAL PRESCRIPTION DT. 01.02.13 PRODUCED BY THE PLAINTIFF.
- P5 - TRUE COPY OF IA NO. 349/2014 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, N. PARAVUR.
- P6 - TRUE COPY OF DEPOSITION OF PW1 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, N. PARAVUR.
- P7 - TRUE COPY OF ORDER DT. 22.9.14 IN IA NO. 750/2013 IN OS NO. 44/2008 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, N. PARAVUR.

RESPONDENTS' EXHIBITS: NIL

// True Copy //

P.A. to Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.2550 OF 2014

Dated this the 25th day of February, 2015.

J U D G M E N T

Ext.P7 is under challenge. By the said order, court below restored the suit dismissed for default on payment of Rs.10,000/- as costs to the 1st respondent before the said court.

2. The facts absolutely necessary for the disposal of the original petition are as follows.

O.S.No.44/2008, a suit for specific performance of a contract, was filed by the 1st respondent herein against the petitioner. Several contentions were raised. Suit was posted for trial and included in the list on 04.12.2012. On that day, I.A.No.3384/2012 was filed by the plaintiff to have the case removed from the list. That was granted and the suit was subsequently listed to 04.02.2013. On that day,

I.A.No.401/2013 was filed seeking further adjournment on medical grounds. That petition was dismissed and the suit was dismissed for default. The plaintiff then filed I.A.No.750/2013 for restoration of the suit and in the affidavit in support of the petition it is contended that he was unable to attend the court due to medical reasons and he produced Exts.P3 and P4 medical certificates.

3. The application was strongly opposed by the 1st respondent before the court below who contended that there was no justifiable reason for the willful absence of the plaintiff on the day on which the suit was listed for trial and the reasons stated for restoration of the suit are absolutely false.

4. For the purpose of Interlocutory Application, petitioner before the court below was examined as PW1 and Exts.A1 and A2 were marked. The court below, on appreciation of the materials before it, came to the conclusion that sufficient reason has been shown for the absence on the date on which the suit was listed for trial and allowed I.A.No.750/2013 subject to the condition

that the petitioner pays a sum of Rs.10,000/- as costs to the 1st respondent within 15 days from the date of the order.

5. Assailing the above order, Sri.K.Ramakumar, learned Senior Counsel appearing for the petitioner contended that the order of the court below cannot be sustained on any grounds. On a close reading of the affidavit filed in support of the petition for removal of the case from the list and also for restoration of the suit, it can be seen that they don't go with each other and contain inconsistent statements. It is evident from a reading of the affidavit and also the deposition of PW1 that the reasons given for absence on 04.02.2013 is absolutely false. A reading of the evidence of PW1 clearly show that the actual reason was not due to medical reasons but for some other reasons. On the basis of the materials now before it, according to the learned Senior Counsel, it could not be said that sufficient cause has been shown to condone the absence on 04.02.2013.

6. Relying on the decision in **Parimal** vs. **Veena alias Bharti** ((2011) 3 Supreme Court Cases 545, learned Senior

Counsel appearing for the petitioner contended that setting aside an ex parte decree or restoring a suit is not a matter of course and it is obligatory on the part of the person who applied for the same to show that he had shown sufficient cause for the same. If the test laid down in the above decision is applied, according to the learned Senior Counsel, it can be very easily seen that the petition could not have been allowed.

7. Learned counsel appearing for the 1st respondent, on the other hand, pointed out that the court below has considered the matter in considerable detail and was convinced that there was sufficient reason for setting aside the dismissal for default. It is true that it would appear that there are some apparent anomalies in the affidavit filed before the court below on various occasions. But explaining the same, learned counsel pointed out that in the affidavit filed in support of the petition seeking adjournment of the case when it was listed for trial to 04.02.2013, it was stated that the adjournment was sought for on medical grounds and the said affidavit was accompanied by a copy of medical certificate

issued to the 1st respondent. Later when the suit was dismissed, restoration application was filed and original documents were produced. The date shown as 01.12.2012 in the affidavit is an inadvertent error which has to be read as 01.02.2013. Learned counsel went on to contend that the 1st respondent cannot be held liable for an inadvertent mistake committed by him. It is also contended on behalf of the 1st respondent that the cost that was directed to be paid has been accepted by the counter part before the court below and that shows that there has been acquiescence in the order and if that be so, original petition is only to be dismissed.

8. For the above proposition, learned counsel appearing for the 1st respondent relied on the decision in **Bijendra Nath Srivastava (dead)** vs. **Mayank Srivastava and others** ((1994) 6 Supreme Court Cases 117). It is also contended on behalf of the 1st respondent that unless it is shown that the order restoring the suit is perverse, this Court may not be justified in interfering under Article 227 of the Constitution of India.

9. Of course, as rightly pointed out by the learned Senior Counsel appearing for the petitioner, setting aside an ex parte decree or restoring a suit is not a matter of course. Law insists that there must be sufficient cause for the same by the parties concerned. In the decision in **Parimal vs. Veena alias Bharti** ((2011) 3 Supreme Court Cases 545), it is held as follows:

“13. “Sufficient cause” is an expression which has been used in a large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, inasmuch as may be necessary to answer the purpose intended. Therefore, word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, “sufficient cause” means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive”. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to

exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide *Ramlal v. Rewa Coalfields Ltd.*, *Lonand Grampanchayat v. Ramgiri Gosavi*, *Surinder Singh Sibia v. Vijay Kumar Sood and Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn.*)”.

10. It is true that there are some discrepancies in the affidavit filed before the court below both at the stage of seeking adjournment of the case and removal of the case from the list and then at a later stage when the petition for setting aside the dismissal for default was filed. Explanation offered by the learned counsel for the 1st respondent for the production of medical certificate on both occasions to which strong objection is taken by the learned Senior Counsel appearing for the petitioner seems to be a possible one. Learned counsel for the 1st respondent has pointed out that on the first occasion only e-mail copies could be produced and therefore petition seeking adjournment was dismissed and consequently the suit was dismissed for default. Subsequently when the restoration

application was filed, original of the documents were produced. Learned Senior Counsel appearing for the petitioner pointed out that even though the 1st respondent has produced Exts.P3 and P4 dated 30.01.2013 and 01.02.2013, his claim that for 21 days he was advised to take rest is not supported by any evidence on record. Of course, it is true that the medical certificate does not indicate that the petitioner before the court below was advised to take rest for 21 days.

11. A reading of the evidence of PW1 creates doubt in the mind of court. But one fact will have to be borne in mind. While dealing with such an application, the court has to bear in mind that no injustice is caused to any of the parties by allowing the application. There is nothing to indicate in the case on hand that except for the default on 04.02.2013 though proper application had been filed, plaintiff in the suit found wanting in prosecuting the suit. It is also to be remembered that petition to restore the suit was filed within the time stipulated. This also shows that plaintiff was very keen about prosecuting the suit. Moreover the

costs awarded has been paid and received. This, according to learned counsel, precludes the petitioner from assailing the order.

12. In the decision in **Bijendra Nath Srivastava (dead)** vs. **Mayank Srivastava and others** ((1994) 6 Supreme Court Cases 117), it was held as follows:

“18. That apart the principle of estoppel which precludes a party from assailing an order allowing a petition subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order. The decision of the

Andhra Pradesh High Court in *Metal Press Works Ltd. v. Guntur Merchants Cotton Press Co. Ltd.* on which reliance has been placed by the High Court, proceeds on the basis that awarding of costs was, in fact and substance, a part of the entire order allowing amendment in written statement and the said order was a conditional one. The decision of the Madras High Court in *Sree Mahant Prayag Dossjee Varu v. Raja Venkata Perumal* and the decisions of the Patna High Court in *Ramcharan Mahto v. Custodian of Evacuee Property* and *Kapura Kuer v. Narain Singh* on which reliance has been placed in the said judgment of the Andhra Pradesh High Court also emphasise that the orders under challenge were conditional orders and payments of costs was a condition precedent to allowing the petition. In *J.Devaiah v. Nagappa*, the order allowing amendment of the election petition contained a direction regarding payment of costs. It was held that the application was allowed without any condition and that the order was not a conditional order and principle of estoppel was held inapplicable".

13. The factum of having received the amount by the 1st respondent is not disputed before this Court at the time of

hearing. If that be so, there is no reason as to why the principle laid down in the above decision should not be applied to the facts of the case. Apart from all these, court below which had the opportunity to watch the demeanour of PW1 felt that he should be given an opportunity to have his case adjudicated. The court below has given cogent and convincing reason for the same. It could not be said that the findings of the court below are either perverse or contrary to the evidence on record. It is a possible view. If that be so, interference under Article 227 of the Constitution of India even assuming a different view may be possible is not warranted.

This original petition is without merits and it is accordingly dismissed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp