

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

(Orders reserved on 21.04.2015)

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Application No.4277 of 2013
in
C.S.No.406 of 2007

1. M/s.Pioneer Building Syndicate Pvt. Ltd.,
Rep. by its Director Mr.Sarath Kakumanu
2. Mr.Sarath Kakumanu
3. Mrs.Sheela K.Sarath ... Applicants/defendants

Vs.

Mr.Suresh Bafna,
Prop. M/s.Mansi Mercantile Company,
No.22-B, Mulla Sahib Street,
Sowcarpet, Chennai-600 079. ... Respondent/plaintiff

Application is filed and the Judge's Summons issued under Order 14 Rule 12 of the Original Side Rules of this Court, to set aside the order passed on 02.08.2013 in Application No.1205 of 2012 in C.S.No.406 of 2007.

Civil Suit No.406 of 2007 is numbered and the plaint is filed under Order 7 Rule 1 of the Original Side Rules of this Court, read with Order 37 Rule 1 CPC, praying to pass a judgment and decree against the defendants to direct the defendants jointly and severally pay a sum of Rs.37,99,676/- with interest at the rate of 36% per annum from the date of plaint till the date of realisation and to direct the defendants to pay the costs of the suit.

For applicants : Mr.G.R.Lakshmanan

For respondent : Mr.S.Sridhar

ORDER

This application is filed by the defendants to set aside the order dated 02.08.2013 passed by the learned Master of this Court in dismissing Application No.1205 of 2012 in C.S.No.406 of 2007 praying for condonation of delay of 1675 days in filing the application seeking leave to defend the said suit in C.S.No.406 of 2007.

2. The respondent herein as plaintiff filed the suit for recovery of a sum of Rs.37,99,676/- with interest at the rate of 36% per annum from the date of plaint till the date of realisation and for costs, based on two promissory notes, both dated 14.05.1997, said to have been executed by the first defendant in favour of the plaintiff.

3. On 20.04.2010, the suit came to be decreed ex-parte. Therefore, the defendants filed an application in A.No.236 of 2011 to set aside the said ex-parte decree. On 28.01.2011, after hearing both sides, this Court allowed the said application and set aside the ex-parte decree, with an observation that it is open for the respondent/plaintiff to serve summons for

judgment, on the defendants, in accordance with the provisions of Order 37 Rule 3 CPC and thereafter, it is open for the applicants/defendants to file necessary application seeking leave to defend the suit and that the same can be considered on its own merits without being influenced by any of the observations made in the order.

4. Thereafter, A.No.1205 of 2012 was filed by the defendants on 06.01.2012 for excusing the delay of 1675 days in filing the application seeking leave to defend the suit. The defendants as applicants therein contended, apart from disputing their liability to pay the suit claim on merits, that the suit was decreed ex-parte on 20.04.2010 and they came to know of the same only on 08.06.2010. They further stated that there was a delay of 1675 days in filing the application seeking leave to defend the suit, which is neither wilful nor wanton. They also raised a plea that the suit is barred by limitation and further contended that the suit summons is defective.

5. The said application was resisted by the respondent/plaintiff by filing counter affidavit.

6. The learned Master of this Court, by the

impugned order dated 02.08.2013, found that the

enormous delay of 1675 days, was not properly explained and that the defendants had knowledge to file the application seeking leave to defend the suit even at the time of filing the application in A.No.236 of 2011 seeking to set aside the ex-parte decree. Challenging the said order dated 02.08.2013, the present application in A.No.4277 of 2013 is filed by the defendants.

7. Mr.G.R.Lakshmanan, learned counsel appearing for the applicants/defendants contended that the suit itself is barred by limitation, in view of the fact that the same came to be filed in the year 2007, based on the promissory notes said to have been executed by them on 14.05.1997 in favour of the plaintiff. He further contended that this Court, while setting aside the ex-parte decree, has specifically directed the respondent/plaintiff to serve the summons on the defendants, in accordance with the provisions of Order 37 Rule 3 CPC, and only thereafter, liberty was granted to the defendants to file necessary application seeking leave to defend the suit. Therefore, he contended that in the absence of service of any such summons by the plaintiff on the defendants, as directed by this Court in the said

order, dated 28.01.2011 in A.No.236 of 2011, the defendants cannot be found fault with in not making the application seeking leave to defend the suit, in time. However, he submitted that the defendants have filed the application for condonation of the delay in filing the application seeking leave to defend the suit, since the learned Master insisted them to file such application.

8. Per contra, learned counsel appearing for the respondent/plaintiff submitted that the suit itself is filed as an "Under Chapter Suit" and proper summons had been served on the defendants even as early as on 24.05.2007 itself and therefore, when the summons were served as summons under the said "Under Chapter Suit", there is no necessity for the plaintiff to serve the summons once again after the ex-parte decree was set aside. He further contended that the plaintiff has followed due procedures as contemplated under the Original Side Rules of this Court, namely under Order 7 Rule 3 therein. He further stated that there is no positive direction given by this Court in the said order dated 28.01.2011 while setting aside the ex-parte decree, namely, to serve summons on the defendants. Thus, he

contended that in the absence of any such positive direction, there is no necessity for the plaintiff to serve the summons once again on the defendants. He further submitted that the defendants have not stated the above reasons as the grounds in the affidavit filed by them for condoning the delay and that the delay has not been properly explained and therefore, the learned Master has rightly rejected the application to condone the delay of 1675 days in filing the application to defend the suit by the defendants. The learned counsel appearing for the plaintiff relied on the following decisions to contend that Court should not condone the enormous delay:

(i) 2008 (6) MLJ 534 (Madras High Court) (S.Panchatcharam Vs. S.Sambandha Mudhaliar and another);

(ii) 2011 (4) SCC 363 (Lanka Venkateswarlu Vs. State of A.P.) and

(iii) 2012 (2) MWN (Civil) 129 (Madras High Court) (K.Munusami Vs. Govindaraj).

9. Heard both sides and perused the materials

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available on record.

10. The respondent/plaintiff filed the above suit for recovery of money from the applicants/defendants based on two promissory notes, both dated 14.05.1997, as stated above. Even though the defendants contended that the suit is barred by limitation, as the same has been filed after ten years from the date of execution of such promissory notes, this Court at this stage is not inclined to go into such issue, since the question of limitation being a mixed question of fact and law, cannot and need not be gone into by this Court at this stage.

11. The only issue that has to be considered and decided in this application is as to whether the suit summons had been served on the defendants as observed by this Court in the said order, dated 28.01.2011 in A.No.236 of 2011 and whether the defendants are justified in seeking condonation of delay of 1675 days in filing the application seeking leave to defend the suit.

12. No doubt, originally, the suit summons had been served on the defendants on 24.05.2007 and that the defendants have not filed any application seeking leave to defend the suit, within time. If that is the only circumstance available in the present case,

certainly, this Court would have come to the conclusion that the defendants did not explain the delay of 1675 days in filing the application seeking leave to defend the suit to the satisfaction of this Court. On the other hand, there are other facts and circumstances warranting consideration of the application as discussed below. In this case, it is an admitted fact that after service of such summons earlier, the defendants remained ex-parte and an ex-parte decree was passed on 20.04.2010. They filed A.No.236 of 2011 to set aside the said ex-parte decree. While allowing the said A.No.236 of 2011, this Court has observed as follows:

"10. Therefore, this application is allowed. The exparte decree is set aside. It is open to the respondent to serve a summons for judgment in accordance with the provisions of Order XXXVII, Rule 3, CPC. Thereafter, it is open to the applicants to file necessary application for leave to defend and the same can be considered on its own merits without being influenced by any observations made herein."

(emphasis supplied)

13. It is an admitted fact that the said order

dated 28.01.2011 passed by this Court, has become final, as the same was not challenged any further. It is needless to say that once such order has become final and conclusive, it is binding on the parties to the proceedings. Under the above stated facts and circumstances, it should be seen as to whether the plaintiff is justified in stating that he need not issue or serve any such summons for judgment, on the defendants, in accordance with the provisions of Order 37 Rule 3 CPC, as observed by the learned Judge, by contending that the summons which were already served on the defendants on 24.05.2007 itself is sufficient.

14. In my considered view, such a contention of the learned counsel appearing for the respondent/plaintiff cannot be countenanced for two reasons. Firstly, the plaintiff being a party to the earlier order, dated 28.01.2011, has not objected to the observations made by the learned Judge with regard to the service of summons, nor he challenged the same by way of appeal. Therefore, he is bound by such observations of this Court. Secondly, on the date when the order was passed by this Court on 28.01.2011, the fact remained that the suit, which

was decreed ex-parte in pursuant to the issuance of earlier summons on 24.05.2007, was set aside by this Court. Therefore, the presumption is that this Court is fully aware of the summons served on the defendants earlier and inspite of such service of earlier summons, this Court has categorically made such observations for service of summons once again on the defendants in accordance with the provisions of Order 37 Rule 3 CPC. Such specific observations of this Court regarding the service of summons, cannot be ignored by the plaintiff, as it goes to the root of the matter. The learned Judge, while allowing the application seeking to set aside the ex-parte decree, has specifically observed in the said order dated 28.01.2011 that the application seeking leave to defend the suit will have to be filed by the defendants only after service of summons by the plaintiff on the defendants. No doubt, the language used in the said order dated 28.01.2011, namely "it is open to the respondent" and "it is open to the applicants", had been taken advantage of by the plaintiff to contend that there is no positive direction to the parties. In my considered view, even though it is observed so in such terminology, the

effect of those observations cannot be stated as not mandatory, especially when the liberty given to the defendants to file leave to defend application commences only from the date of receipt of service of such summons. The plaintiff has admittedly not served any such summons for judgment, on the defendants, as per the said observations of this Court, in accordance with the provisions of Order 37 Rule 3 CPC. Therefore, the contention of the learned counsel appearing for the applicants/defendants cannot be brushed aside as the one without any justification. When an advantageous position is conferred on a party by way of an order of the Court, such party cannot be found fault with in taking shelter under such advantageous position so long as the said order is in force and binding on the parties to the proceedings. The other party cannot be permitted to ignore such order and deny such advantageous position to such party, especially under the circumstance that the said order has become final and conclusive.

15. It is true that the defendants in their affidavit filed in support of the application seeking condonation of delay, have not specifically stated

about the order passed in A.No.236 of 2011, dated 28.01.2011 and also the specific observations/liberty granted by this Court to them to file application seeking leave to defend the suit only after receiving summons for judgment, from the respondent/plaintiff. Even though the abovesaid facts are not specifically pleaded in the said affidavit, learned counsel appearing for the applicants/defendants raised such a plea before this Court and it appears that the same plea was also raised before the learned Master of this Court while hearing the condone-delay-application. It is needless to say that as the order of this Court in the application to set aside the ex-parte decree, after hearing both parties, forms part of record, even in the absence of any pleading in respect of such order, this Court is bound to take note of such order and observations made thereunder, and to consider as to what could be the effect of such order and observations, more particularly, when the same has become final, conclusive and binding on the parties. Certainly, the said order of this Court, dated 28.01.2011 in the application to set aside the ex-parte decree, more particularly, the liberty granted therein to the respective parties, has got a

bearing on the application seeking for condonation of delay as well as the stand of the plaintiff in opposing such application. Thus, when the fact with regard to the order passed by this Court in the application to set aside the ex-parte decree, can be culled out from the records available, mere non-pleading about such order of this Court in the subsequent affidavit in the application filed in support of the condone-delay-application, cannot be put against the defendants so as to deny the benefit granted under such order. Otherwise, it would amount to giving a go-bye to the earlier order of this Court.

16. Learned counsel for the respondent/plaintiff relied on the decisions referred to supra, to contend that when the delay is enormous, the same cannot be condoned. There is no quarrel over the said proposition of law laid down by the Supreme Court and this Court in those decisions. This Court would agree to the said submission of the learned counsel appearing for the respondent/plaintiff, provided there is enormous delay. Further, the facts and circumstances of the present case show that the facts and circumstances of those cases relied on by the

learned counsel for the plaintiff, are totally different and distinguishable.

17. Going by the earlier proceedings as referred to supra between the parties, it is seen that the application to condone the delay in filing the application seeking leave to defend the suit, was filed on 06.01.2012, i.e. after one year from the date of the order passed by this Court on 28.01.2011 in A.No.236 of 2011. Hence, the said application cannot be termed as the one filed with such an inordinate delay. Therefore, if at all there is any delay, it should be reckoned with from the date of such order. Admittedly, the plaintiff has not served the summons as directed by this Court on 28.01.2011 in A.No.236 of 2011, on the defendants. Therefore, there is every justification on the part of the defendants in not filing the necessary application seeking leave to defend the suit, in time, as the liberty granted to them to file such application, is to take effect only after the service of the summons on them under Order 37 Rule 3 CPC, as observed by this Court in the said order dated 28.01.2011 in A.No.236 of 2011.

18. Considering all the above facts and

circumstances, the impugned order passed by the learned Master in dismissing the application to condone the delay, cannot be sustained. Further, the suit is one for recovery of money based on two promissory notes said to have been executed in the year 1997 and the suit was filed only in the year 2007. The question of limitation raised by the defendants goes to the root of the matter, and therefore, in order to give a just and fair opportunity for the defendants to defend the suit and in the interest of justice and fair play, this Court is of the view that A.No.1205 of 2012 filed for condonation of delay in filing the application seeking leave to defend the suit, ought to have been allowed.

19. Accordingly, this application is allowed and consequently, A.No.1205 of 2012 is also allowed. No costs.

sd/.K.R.C.B.J

29.04.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/28.07.2015

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 the Order/Judgment Decree in this format.