

Application No.6395 of 2015 in
C.S.No.285 of 2010

K.K.SASIDHARAN,J.

This application is to condone the delay of 839 days in filing the application to set aside the ex parte decree in C.S.No.285 of 2010.

2. The respondent filed a suit in C.S.No.285 of 2010 against the applicant claiming a money decree for a sum of Rs.70,80,000/- together with interest at the rate of 24% per annum and in the event of failure to pay the decree amount to proceed against the mortgaged property shown in the plaint schedule. The applicant engaged a counsel to contest the suit. Since the counsel failed to appear, ex parte decree was passed on 11.02.2013. The applicant filed an application to set aside the ex parte decree and to condone the delay in preferring the said application. The present application is to condone the delay.

Case of the applicant :-

3. The applicant availed finance from the respondent for purchasing buses. The applicant repaid the amount to the respondent. However, the Promissory Notes and signed cheques were not returned by the respondent. The applicant preferred a complaint against the respondent to the Assistant

Commissioner of Police, Mylapore. The applicant was kidnapped by the

respondent and his henchmen on 23.06.2008 and made to execute transfer forms to transfer the buses. The respondent by way of threat made the applicant to sign 8 blank stamp papers and blank cheques and took away the registration certificates of the vehicles owned by him. The applicant preferred a complaint in Crime No.364 of 2008 before the B2 Elephant Gate Police Station.

4. The applicant received notice in the suit filed by the respondent in C.S.No.285 of 2010. The matter was entrusted to a counsel by name Mr.Balaji. The counsel agreed to conduct the case. The applicant is a resident of Madurai. It was only when he received the notice in the Insolvency Petition in I.P.No.7 of 2015 on 15.06.2015, the factum of passing the ex parte decree was known to him. The matter was thereafter entrusted to a counsel, who took steps at first to set aside the Insolvency Notice and then filed the application to set aside the ex parte decree. In the said process, there is a delay of 839 days. Since the delay was not wilful, the applicant seeks an order to condone so as to enable him to contest the matter on merits.

5. The respondent entered appearance through counsel and initially took time to file counter. He was more eager to prosecute the Insolvency Petition rather than contesting this application. When this Court made it clear that before taking up the Insolvency Petition, this application must be taken for hearing, the respondent changed his counsel and thereafter engaged

another counsel. Though sufficient opportunity was given, counter affidavit has not been filed.

Submissions:-

6. Thiru. B.Ravi, the learned counsel for the applicant contended that the applicant was not given information by the erstwhile counsel with regard to the progress of the case. The applicant was not having any intention of keeping away from the proceedings. In fact, there were series of other proceedings involving the respondent. The respondent suppressed material particulars and obtained an ex parte decree. According to the learned counsel, in case, delay is not condoned, the applicant would not be in a position to prosecute his case on merits and expose the criminal acts committed by the respondent and his henchmen. The learned counsel agreed to file written statement and co-operate for an early disposal of the suit.

7. Thiru.AL.Ganthimathi, learned counsel for the respondent submitted that it was only after filing Insolvency Petition, the applicant has filed the application to set aside the ex parte decree. The applicant was aware of the pending suit and decree passed later and as such, he has not made out a case for condoning the delay.

Discussion:-

8.The respondent filed the suit in C.S.No.285 of 2010 against the applicant contending that he received Rs.30 lakhs for purchasing two buses and later Rs.20 lakhs for his business purpose. According to the respondent, the applicant executed a mortgage deed in relation to the suit property, besides Promissory Notes and Cheques. There is nothing on record to show as to when the applicant was declared ex parte. It is not clear from records whether the Master declared the applicant ex parte. Similarly, there is no endorsement made by the Court that the applicant failed to appear and consequently, he was set ex parte.

9. Even in the judgment dated 11.02.2013, nothing was recorded as to when the applicant was declared ex parte. The learned Judge recorded that the defendant was ex parte.

10. The plaint was amended by the respondent by filing Application No.2304 of 2011. It was again amended by filing application in A.No.3615 of 2012. The amendments were permitted by orders dated 10.11.2011 and 05.09.2012. Even the name of the respondent was later amended. It is not clear as to whether notices were issued to the applicant in the amendment applications.

11. The suit was decreed on 11.02.2013 with the following finding:-

"8. Heard the learned counsel appearing for the plaintiff and perused the oral and documentary evidence adduced on the side of the plaintiff. For perusal of the documents reveal that defendant had executed Ex.P1 and P4 Promissory notes for Rs.30,00,000/- and Rs.20,00,000/- and also executed Ex.P2 and Ex.P5 acknowledgement and agreement of liability. Plaintiff has also proved that the defendant had created an equitable mortgage by deposit of title deeds only for second loan of Rs.20,00,000/-. It is also admitted that the defendant returned a sum Rs.10,00,000/- (Rs.5,00,000/- each) on 16.05.2006 and 29.05.2006 to the plaintiff . A perusal of Ex.P5 agreement of liability executed by defendant reveals that the defendant has agreed to pay a sum of Rs.59,00,000/- on 14.06.2008. As rightly contended by the learned counsel appearing for the plaintiff and from the oral and documentary evidence adduced on the side of the plaintiff, it is proved that the defendant has to pay to the plaintiff the above said amount of Rs.59,00,000/- with interest totalling Rs.70,80,000/- as claimed in the plaint.

9 But the plaintiff has not proved by reliable oral and documentary evidence regarding the alleged equitable mortgage and deposit of title deeds and the above said fact also not disputed by the learned counsel for the plaintiff. Further learned counsel for the plaintiff submitted that mortgage decree need not be passed and only prayed for money decree. Therefore, the plaintiff is not entitled to mortgage decree as claimed in the plaint and only entitled money decree (i.e.) for recovery of sum of Rs.70,80,000/- with subsequent interest.

10. In the result, the suit is partly allowed and passed a decree as the plaintiff is entitled to recovery a sum of Rs.70,80,000/- together with interest at the rate of 12% per annum from the date of plaint till the date of decree and after decree at 6% p.a. on the principal amount of Rs.59,00,000/- from the defendant and the suit is dismissed in respect of other reliefs sought for by the plaintiff in the plaint. Defendant should pay the proportionate cost to the plaintiff."

12. It is found from the judgment that the claim made by the respondent that the applicant executed a mortgage deed was disbelieved by the Court. The respondent was compelled to withdraw the relief on the basis of mortgage. This *prima facie* shows that the respondent inflated his claim. The applicant is therefore justified in his contention that he should be given an opportunity to file his response and to produce materials to disprove the claim.

13. The applicant in his affidavit filed in support of the Judge's Summons indicated the background to this litigation and the reasons contributed for the delay in filing the application to set aside the ex parte decree. There is nothing on record to suspect the bonafides of the applicant.

14. In the case on hand, in case delay is not condoned and the ex parte decree is allowed to stand, substantial contentions taken by the applicant would remain untested.

Authorities:-

15. The Supreme Court in **M.K.Prasad v. P.Arumugam, [(2001) 6 SCC 176]**, while considering the question regarding delay in applying for setting aside the *ex parte* decree, observed that the Court ought to keep in mind the judgment impugned in the matter, the extent of property involved and the stake of parties.

16. The Supreme Court in **Ram Nath Sao v. Gobardhan Sao (2002) 3 SCC 195**, explained the expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963. The Supreme Court observed that explanation for the delay should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case. The Supreme Court said:

"12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance

of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

17. The Supreme Court in ***Parimal v. Veena (2011) 3 SCC 545***, explained the concept of "*sufficient cause*" in the following words:-

"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.

15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing *substantial justice to all the parties concerned* and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it."

18. In **GMG Eng.Industries v. ISSA Green Power Solution (2015 (6) Scale 551)**, the Supreme Court observed that the term "*sufficient cause*" must receive liberal construction.

"8. It is well settled that the expression 'sufficient cause' is to receive liberal construction so as to advance substantial justice. When there is no negligence, inaction or want of *bonafide* is imputable to the Appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is to see whether the applicant has acted with due diligence".

19. The respondent has not disputed, by filing counter affidavit, the correctness of the reasons given by the applicant for condoning the delay. Even otherwise, I am of the view that in view of the facts and circumstances of the case, the delay deserves to be condoned.

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20. The delay is condoned subject to payment of a sum of Rs.10,000/- (Rupees Ten thousand only) as cost payable to the respondent within one week from today.

The application is allowed as indicated above.

28.03.2016

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