

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

CRP (NPD) No.1790 of 2013

Hemamalini .. Petitioner

Vs.

T.Sakunthala .. Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Civil Procedure Code, against the order passed in I.A.No.114 of 2011 in O.S.No.260 of 2010 dated 11.08.2011 on the file of the Learned Principal Subordinate Judge, Salem.

For Petitioner : Mr.P.Jagadeesan

For Respondent : Ms.Asha
for M/s.Sarvabhauman Ass.

ORDER

The Revision Petitioner/Fourth Defendant has preferred the present Civil Revision Petition before this Court as against the order dated 11.08.2011 in I.A.No.114 of 2011 in O.S.No.260 of 2010

passed by the Learned Principal Subordinate Judge, Salem.

2.The Learned Principal Subordinate Judge, Salem, while passing the impugned order in I.A.No.114 of 2011 in O.S.No.260 of 2010 on 11.08.2011 (filed by the Petitioner/Fourth Defendant) at paragraph 6 had observed the following:

"6.Heard. Records perused. The petitioner who has been examined as P.W.1 would admit in his evidence that the summon in the partition suit was received by her during the year 2005. The petitioner who had the knowledge of alienate the portion of the suit property during the pendency of lis, would not have allowed her uncle to look after her case. And the contention of the petitioner is least convincing. Further, the petitioner who had appeared through counsel in final decree application on 23.03.2010 could have taken step to set aside the decree passed against her and the reason stated by the petitioner that her uncle betrayed her would not be a sufficient cause to condone such inordinate delay. For seeking relief under Section 5 of the Limitation Act, the applicant must satisfy the Court that she has sufficient cause for not making the

application within the prescribed period. The term sufficient cause implies that the cause must be reasonable and there must not be any negligence or inaction or want of bonafied intention on the part of the applicant. The reason stated by the petitioner clearly shows her negligence which disentitles her to get any relief under Section 5 of the Limitation Act. The Petitioner cannot plead for substantial justice and the liberal approach to be adopted by the Court while dealing with Section 5 application cannot be employed in a cavalier manner when the present application lacks bonafied."

and resultantly, dismissed the petition with costs.

3. Assailing the validity and legality of the order dated 11.08.2011 in I.A.No.114 of 2011 in O.S.No.260 of 2010 on the file of the trial Court, the Learned counsel for the Revision Petitioner/Fourth Respondent submits that the impugned order passed by the trial Court in dismissing the I.A.No.114 of 2011 (filed under Section 5 of the Limitation Act, 1963) is an erroneous, unjust one and also, contrary to Law.

4. The Learned counsel for the Petitioner contends that the

trial Court has not taken into account the valid and convincing reason for condonation of delay of 460 days in the subject matter in issue.

5.The Learned counsel for the Petitioner strenuously projects an argument that the Petitioner/Fourth Defendant had no knowledge about passing of the Ex-parte Preliminary Decree dated 13.10.2009 and as soon as the Petitioner came to know about the said Ex-parte Preliminary Decree, had projected the I.A.No.114 of 2011 without any loss of time.

6.The prime submission of the Learned counsel for the Petitioner is that the Petitioner was made to believe by her maternal Uncle, the 6th item of property was not covered in the Preliminary Decree and only when she received the notice on 10.02.2011, she came to know that the 6th item was also included in the Preliminary Decree. The other plea taken on behalf of the Petitioner is that the Petitioner's signatures in vakalat and other forms were taken by her Uncle, but he had not engaged any lawyer to defend her case and hence, she was set Ex-parte in the suit.

7.It is represented on behalf of the Petitioner that the Petitioner has very good case on merits and indeed, the 6th item of the suit property is not amenable for Partition, as it is her separate property, having been bequeathed in her favour by her maternal grandfather.

8.The Learned counsel for the Petitioner urges before this Court that the trial Court should have seen that 'meritorious cases' ought not to be thrown out on the ground of mere delay and on account of technicalities and in fact, an opportunity should be given to the Petitioner to defend the suit on merits.

9.During the last leg of his argument, the Learned counsel for the Petitioner contends that Petitioner's Maternal Uncle deliberately let her down which resulted in the delay in setting aside the Ex-parte Decree.

10.The Learned counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in ***Collector, Land Acquisition,***

Anantnag and another V. Mst.Katiji and others reported in **1987 (2) Supreme Court Cases at page 107 and at special page 108**, wherein at paragraph 3, it is observed as follows:

"3.The legislature had conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that:

1.Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2.Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being

defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

11.At this stage, this Court has perused the averments in I.A.No.114 of 2011 (filed by the Petitioner/Fourth Defendant before the trial Court). The Petitioner in the affidavit in I.A.No.114 of 2011 had averred that when she was aged about 6 years, her father A.P.Elangovan, her mother Savithiri and her sister Geetha died by committing suicide and she is the only surviving legal heir of her late mother Savithiri and her Maternal Grandfather, M.Subramaniam was appointed as guardian for her as per orders in G.O.P.No.93 of 1984 dated 28.04.1988 passed by the Learned District Judge, Salem and further, she was brought up from the age of 6 years by her Late Grandfather (said M.Subramaniam) till his death. Also, in the aforesaid affidavit in I.A.No.114 of 2011, it was mentioned that during the lifetime of her grandfather M.Subramaniam, he executed a Will dated 15.05.1995, bequeathing the property described as Item No.6 in the suit schedule, in her favour out of love and affection and after his demise, the said property became her absolute property and she was in possession of the same. Therefore, the said suit 6th item of property cannot be a subject matter for partition and after the demise of her grandfather, she

was assisted by her Maternal Uncle M.S.Rathinavel.

12.This Court, on going through the contents of the affidavit in I.A.No.114 of 2011 (filed by the Petitioner/Fourth Defendant) is of the view that the Petitioner had taken a crystalline stand that on receipt of suit summons, she met her Maternal Uncle M.S.Rathinavel, who instructed her to sign in some forms and assured to look after the case and hoping that he would take care of her interest, she signed in vakalat form and other blank papers. In fact, her categorical assertion is that she relied on her Maternal Uncle M.S.Rathinavel and kept quiet and subsequently, she received the notice in Final Decree Proceedings. Again, she met her Maternal Uncle, the said M.S.Rathinavel, who obtained some signatures in vakalat form and assured to engage a lawyer and take care of her interest. Even then, her Maternal Uncle had not informed her about the fact of passing of Decree. When that being the fact situation, she sold the suit 6th item to third parties by means of a Registered Sale Deed dated 28.07.2010 based on the belief that the said property absolutely belong to her. Only thereafter, her Vendee received notice on 08.01.2011 from the Sixth Defendant stating that 'Decree' was passed including the said 6th item also.

13. Apart from the above, the Petitioner at paragraph 9 of the affidavit in I.A.No.114 of 2011 had stated that in the Final Decree Proceedings, her Uncle Rathinavel had engaged an Advocate Mr.V.C.Srinivasan on her behalf, with the help of signed papers and vakalat given to Rathinavel. But as assured, he had not taken any steps to contest the main suit to delete the 6th item of property.

14. The Pith and Substance stand of the Petitioner is that she was kept in dark all these days about the proceedings and since she relied upon her Maternal Uncle's words, she had not personally looked into the Court proceedings. Added further, the Sixth Defendant (Chitra) had issued a legal notice on 08.01.2011 to the Petitioner's Vendees stating that the Preliminary Decree was passed in respect of 6th item also and since she changed her residence to Suramangalam, her Vendees could not immediately contact her. Moreover, her Advocate on record, had not contacted her and informed her about the proceedings. Only on 10.02.2011, her Vendee, one Jayapal, traced out her address and contacted her and

he only revealed all the facts and present position of the case and then only, she came to know that the suit was Decreed on 13.10.2009 and she was betrayed by her Uncle Rathinavel.

15.The Petitioner had specifically averred at paragraph 13 of the affidavit in I.A.No.114 of 2011 in O.S.No.260 of 2010 that the Preliminary Decree was passed by the trial Court in O.S.No.157 of 2005 on 13.10.2009 and the said Decree is an Ex-parte Decree. Also that, others had colluded together and obtained the said Decree. That apart, she has a fair chances of success and good defence in the suit. Only on 10.02.2011, her Vendees informed her about the passing of the Preliminary Ex-parte Decree dated 13.10.2009 and she took few days to verify the suit records and to prefer the petition. Only on 12.02.2011, she obtained the back papers from the counsel on record. In that process, there had occasioned the delay of 460 days in filing the I.A.No.114 of 2011 in O.S.No.260 of 2010 before the trial Court, which is neither wilful nor wanton but due to the aforesaid reasons.

16.Conversely, the Respondent/Plaintiff in her counter to I.A.No.114 of 2011 in O.S.No.260 of 2010 on the file of the trial

Court had stated that the Petitioner/Fourth Defendant subsequent to her appearance in the Preliminary Decree stage was set Ex-parte on 13.10.2009 and after that, a notice was served on her in the Final Decree Proceedings as early as in the month of January, 2010. Added further, on 23.03.2010, the Petitioner appeared through an Advocate by name Mr.V.C.Srinivasan and for more than a year, time was taken by her to file counter in respect of Final Decree Proceedings.

17.It is represented on behalf of the Respondent/Plaintiff that the Petitioner/Fourth Defendant had sold the 6th item of the suit property with the sole aim to defeat the claim of the Respondent/Plaintiff and other legal heirs of the said Subramaniam. In Law, the sale effected by the Petitioner in respect of 6th item of the property is hit by 'Lis Pendens' as per Section 52 of the Transfer of Property Act, 1882.

18.On behalf of the Respondent/Plaintiff, it is projected before this Court that the Petitioner in the affidavit in I.A.No.114 of 2011 in O.S.No.260 of 2010 on the file of the trial Court had given all excuses for not contesting the Preliminary Decree and the

I.A.No.114 of 2011 filed by her, seeking to condone the delay of 460 days in filing the petition to set aside the Ex-parte Preliminary Decree dated 13.10.2009 is only to drag on the proceedings endlessly. As such, there are no merits in I.A.No.114 of 2011 and the order of dismissal passed by the trial Court in I.A.No.114 of 2011, by assigning the reasons thereto, are just, fair and a valid one.

19.It is to be noted that when a Court of Law deals with an application for condonation of delay, ordinarily, it is to adopt a lenient and liberal approach so as to advance the cause of justice. Apart from that, a Court of Law is not to adopt a hyper-technical and pedantic approach, while dealing with a condonation of delay application. The term 'Sufficient Cause' although is to receive a liberal construction, it cannot be construed as a one 'Beyond the control of Party'. Where negligence or inaction or lack of bona-fides is attributable to a litigant, then, the delay in issue ought not to be condoned.

20.In this connection, this Court pertinently worth recalls and recollects the decision of Hon'ble Supreme Court in ***H.Dohil***

Constructions Company Private Limited V. Nahar Exports Limited and Another reported in **(2015) 1 Supreme Court Cases 680 at Special Page 681** whereby and whereunder at Paragraph Nos.19 and 24 it is observed and held as follows:-

"...19.It is true that the delay in filing the appeals was only 9 days and that the longer delay was only relating to the refiling of the appeal papers. But even if it is related to refiling of the appeals, the net result is that the appeals could be taken into records only when such a delay in refiling is condoned. Therefore, if the refiling had been made within the time granted by the Registry of the High Court, no fault can be found with anyone much less with the party concerned or whomsoever was entrusted with the filing of the papers into the registry. But when an enormous delay of nearly five years occurred in the matter of refiling, it definitely calls for a closer scrutiny as to what was the cause which prevented the party concerned from refiling the papers in time to enable the Registry to process the papers and ascertain whether the papers were in order for the purpose of numbering the appeals.

24.The failure of the respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the respondents. Further, when the respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of filing of appeal papers on 06.09.2007, the reasons which prevented the respondents from not paying the court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bona-fides in its approach.

Also, in the aforesaid decision, at page 682, in paragraph 25, it is held as follows:

"25.Thus, there is total lack of bona fides in its approach and the impugned order of the High Court in having condoned the delay in filing

as well as refiling, of 9 days and 1727 days respectively, in a casual manner without giving any reason, much less acceptable reasons, cannot therefore be sustained.”

21. On a meticulous consideration of respective contentions and also, this Court taking note of the facts and circumstances of the present case in a cumulative fashion, comes to a consequent conclusion that the Petitioner/Fourth Defendant even though had assigned some reasons for the delay of 460 days in filing the I.A.No.114 of 2011 to set aside the Ex-parte Decree against her, they are not convincing and also the reasons ascribed by the Petitioner are not 'good cause' or 'sufficient cause'. As such, this Court is not inclined to take a lenient and liberal view in condoning the delay of 460 days in question. At this stage, this Court very significantly points out that the conclusions arrived at by the trial Court in dismissing the Application filed under Section 5 of the Limitation Act, 1963, in I.A.No.114 of 2011 in O.S.No.260 of 2010 do not require any interference in the hands of this Court sitting in Revision. Per contra, the order passed by the trial Court in I.A.No.114 of 2011 is a flawless one. Hence, the Civil Revision

Petition fails.

22.In the upshot, the Civil Revision Petition is dismissed, leaving the parties to bear their own costs. Resultantly, the order dated 11.08.2011 in I.A.No.114 of 2011 in O.S.No.260 of 2010 is confirmed by this Court for the reasons assigned in this Civil Revision Petition.

01.03.2016

Index : Yes

Internet : Yes

DP

To

1.The Principal Sub Judge,
Salem.

M.VENUGOPAL, J.

DP

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