

Reserved on : 10.08.2016

Delivered on : 18.08.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAIWAMY

C.R.P.(NPD).No.414 of 2016 and
C.M.P.No.2204 of 2016

1.P.Sudhakar

2.P.Suresh

3.P.Suganya

... Petitioners

Vs.

1.T.K.Govinda Raj

2.The District Collector,
Vellore District,
Sathuvacheri,
Vellore - 9.

3.The Tahsildar,
Vaniyambai,
Taluk Office,
Vaniyambadi.

... Respondents

Civil Revision Petition filed under Section 115 of the Civil Procedure

Code against the fair and decreetal order dated 03.11.2015 passed in I.A.No.295 of 2014 in O.S.No.109 of 2012 on the file of the Principal District Munsif cum Judicial Magistrate, Vaniyambadi, Vellore District.

For Petitioner : Mr.A.Palaniappan

For Respondents : Mr.S.Vadivel Murugan (R1)

No appearance - R2 & R3

ORDER

The above Civil Revision Petition arises against the fair and decreetal order passed in I.A.No.295 of 2014 in O.S.No.109 of 2012 on the file of the Principal District Munsif cum Judicial Magistrate, Vaniyambadi, Vellore District.

2.The defendants 1 to 3 are the revision petitioners, the 1st respondent was the plaintiff and the defendants 4 & 5 are the respondents.

3.The plaintiff filed the suit in O.S.No.109 of 2012 for declaration, permanent injunction and mandatory injunction.

4.Since the defendants had remained absent before the trial Court, the trial Court set them exparte and passed an exparte decree on 21.01.2013. Thereafter, the defendants 1 to 3 filed an application in I.A.No.295 of 2014 to condone the delay of 468 days in filing the application

to set aside the exparte decree dated 21.01.2013.

5.The petitioners 2 & 3 are the brother and sister respectively of the 1st petitioner. In the affidavit filed in support of the petition, the petitioners have stated that they engaged a counsel to appear on behalf of them before the trial Court and that the counsel informed them that at the time of filing of written statement, she would inform them and that after receiving the information from the counsel, they can come and meet her for filing the written statement. The petitioners have stated that the 1st petitioner was looking after the Court proceedings after the death of their father. Further, the petitioners have stated that the 1st petitioner went out of station with regard to his occupation and therefore, he could not meet their counsel. Subsequently, when the 1st petitioner tried to contact their counsel, he was informed that she has gone abroad. Only a month before the filing of the application (i.e.) in May 2014, the petitioners were informed by the Villagers that the plaintiff had obtained a decree against them. Since the petitioners' counsel had gone abroad, she could not be contacted. Subsequently, the petitioners engaged some other counsel and the new counsel informed them that an exparte decree was passed against them on 21.01.2013.

6.Since the petitioners are school drop outs, they did not have the

legal knowledge. The petitioners have stated that they came to know about the exparte decree only on 06.05.2014 and filed the application on 02.06.2014. The plaintiff filed his counter wherein he had disputed the averments stated in the affidavit filed in support of the petition. In the counter, the plaintiff has stated that the defendants 1 to 3's counsel entered appearance in the suit and thereafter, the defendants have not taken any steps to file their written statement. The trial Court had adjourned on several occasions for filing the written statement. Hence, the trial Court had decreed the suit exparte on 21.01.2013. Pursuant to the decree passed in the suit, the plaintiff filed an Execution Petition in the year 2013 in E.P.No.1 of 2014 and the Executing Court also passed orders directing the defendants 4 & 5 to sub-divide the suit property and issue patta. The defendants were well aware of the orders passed in the Execution Petition, inspite of the same, the petitioners chose not to file any application to set aside the exparte decree. In these circumstances, the plaintiff prayed for dismissal of the application.

7.Before the trial Court, on the side of the petitioners/defendants 1 to 3, the 1st petitioner was examined as P.W.1. The trial Court, taking into consideration the case of both parties, dismissed the application. Aggrieved over the same, the defendants 1 to 3 have filed the above Civil Revision

Petition.

8. Heard Mr.A.Palaniappan, learned counsel appearing for the petitioners and Mr.S.Vadivel Murugan, learned counsel appearing for the 1st respondent.

9.Mr.A.Palaniappan, learned counsel appearing for the petitioners submitted that the trial Court should have accepted the reasons stated by the defendants 1 to 3 and condoned the delay. Further, the learned counsel submitted that when the petitioners/defendants 1 to 3 have explained the reasons for the delay, the dismissal of the application is erroneous.

10.In support of his contentions, the learned counsel for the petitioners relied upon the following judgments:

(i)1999-1-L.W. 739 [N.Balakrishnan Vs. M.Krishnamurthy]

wherein the Hon'ble Supreme Court held that the length of delay is no matter and sufficiency of the explanation is the relevant criterion and the duty of the Court is to advance substantial justice and give liberal construction to the Section.

(ii)(1998) 7 Supreme Court Cases 123 [N.Balakrishnan Vs. M.Krishnamurthy] wherein the Hon'ble Supreme Court held that where a

Court condones the delay in positive exercise of discretion, Superior Court and more particularly, the Revisional Court should not normally disturb the same. But where request for condonation of delay is refused, it would be open to the Superior Court to come to its own finding on the basis of explanation for the delay given by the party.

(iii)2002 - 4 - L.W. 202 [C.Selvaraj Vs. M.Subramani] wherein this Court held as follows:

“8.When the petitioner did not show any interest in filing the written statement at an early date and prolong the matter for nearly more than two years without filing the written statement, the conduct has to be taken into consideration. Though I do not find any error of jurisdiction in the order of the lower Court, however, keeping in mind the ruling of the Apex Court in the case of N.Balakrishnan Vs. M.Krishnamurthy (1999-1-L.W. 739), I am of the view that some leniency may be shown to the petitioner by imposing the cost. In the above case, the Apex Court has held as follows:

“A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words 'sufficient cause' under Section 5 of the Limitation Act should receive a liberal construction so as

to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* (AIR 1969 SC 575) and *State of West Bengal V. The Administration, Howrah Municipality* (AIR 1972 SC 749).

It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the Court should lean against acceptance of the explanation. While condoning delay, the Court should not forget the opposite party altogether. It must be born in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant, the Court shall compensate the opposite party for his loss.”

On the above principles, I am of the view that the petitioner need not be non-suited on the ground of the inordinate delay alone. To show his bona fide, a chance can be given by imposing the cost; especially when the reason for the delay as pleaded is that of non-communication with the advocate.”

11. Countering the submissions made by the learned counsel for the petitioners, Mr.S.Vadivel Murugan, learned counsel appearing for the 1st respondent/plaintiff submitted that the defendants have not explained the reasons for the delay in a proper manner and in the absence of sufficient cause shown by the petitioners, the delay should not be condoned.

12. In support of his contentions, the learned counsel appearing for the 1st respondent relied upon the following judgment:

(i) 2004-1-L.W. 406 [A.P.Ramasamy Vs. Dhanalakshmi] wherein this Court held as follows:

“8. It is settled law as laid down in the decisions referred to above that in considering the application filed under Section 5 of the Limitation Act, the Court should exercise the discretionary power conferred under Section 5 of the Limitation Act liberally. But even while liberally exercising the discretion, the Court is burdened with the obligation to test the bona-fide of the reason placed by the litigant, which should not unnecessarily cause relative hardship of the respondent also. The rules of limitation are not meant to destroy the rights of the parties, but they are meant to see that the parties do not resort to dilatory tactics to seek their remedy promptly. Unless a party shows that he is put to manifest injustice or hardship, the discretion exercised by the lower Court is not liable to be revised. If the explanation does not smack of mala-fides or it is put forth as

part of a dilatory strategy, the Court must show utmost consideration to the suitor. If the delay was occasioned by party deliberately to gain time, then the Court should lean against acceptance of the explanation and while condoning the delay, the Court should not forget the opposite party altogether. Length of delay is no matter, acceptability of explanation is the only criterion. A Court granting indulgence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever. "Sufficient cause" must be a cause which is beyond the control of the party invoking the aid of the Section. A cause for delay which a party could have avoided by the exercise of due care and attention, cannot be sufficient cause."

(ii) 1997 (II) CTC 663 [P.K.Ramachandran Vs. State of Kerala and another] wherein the Hon'ble Supreme Court of India held as follows:

"6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by

time. No costs.”

(iii)An unreported judgment reported ***dated 20.07.2016*** made in ***C.R.P.(NPD).No.1933 of 2016*** wherein relying upon the judgment reported in ***(2015) 1 Supreme Court Cases 680 [H.Dohil Constructions Company Private Limited Vs. Nahar Exports Limited and another]***, I had an occasion to dismiss the Civil Revision Petition and confirm the order refusing to condone the delay of 491 days in filing the application to set aside the exparte decree stating that the defendant has not given sufficient reason for condoning the delay.

13.On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied upon by the learned counsel on either side, it could be seen that in the affidavit filed in support of the petition, the petitioners have stated that they engaged a counsel and the counsel also filed her vakalat before the trial Court and took time for filing written statement. The 1st petitioner, who was examined as P.W.1, in his evidence has stated that he was having the mobile phone number of their counsel and that he used to contact their counsel on every hearing date. Further, he has stated that when he contacted their counsel, it was informed that she had gone to

some foreign country. When the suit was filed in the year 2012 and the counsel also entered appearance on behalf of the defendants 1 to 3, the suit was adjourned on several occasions for filing of the written statement of the defendants 1 to 3. In spite of availing several opportunities to file their written statement, the defendants chose not to file their written statement. The ex parte decree was passed on 21.01.2013. When P.W.1 has stated that he used to contact their counsel over mobile phone on every hearing date, the contention of the defendants that they were not aware of the ex parte decree passed on 21.01.2013 cannot be accepted.

14.The learned counsel appearing for the petitioners produced the flight tickets of the petitioners' counsel, which would reveal that she went to the USA on 29.01.2014 and returned on 28.05.2014. Therefore, it is clear that the petitioners' counsel was not available between 29.01.2014 and 28.05.2014.

15.When the ex parte decree was passed as early as on 21.01.2013, the non-availability of the petitioners' counsel one year thereafter, has no relevance. The petitioners' counsel was very much available at Vaniyambadi for one year after the passing of the ex parte decree on 21.01.2013. In other words, the counsel had gone to the USA only after one year, after the

passing of the exparte decree. When the petitioners were contacting their counsel over mobile phone on each and every date of hearing, as prevented them from contacting their counsel for one year after the passing of the exparte decree, was not explained by the petitioners. Even assuming that the 1st petitioner has gone out of station with regard to his employment, he could have contacted their counsel over phone what he was doing regularly. While liberally exercising the discretion, the Court is burdened with the obligation to test the *bona fide* of the reason placed by the litigant, which should not unnecessarily cause relative hardship. The provisions of the Limitation Act are not meant to destroy the rights of the parties, but they are meant to see that the parties do not resort to dilatory tactics.

16. The conduct of the parties would clearly establish that they were not diligent in prosecuting the matter in a proper manner. Even according to the petitioners, only the 1st petitioner had gone out of station with regard to his employment and the other two petitioners viz., his brother and sister were available in the very same village. The 2nd petitioner, being a male member, could have met their counsel and enquired about the pendency of the suit. When the petitioners were not diligent in contesting the matter in a proper manner, the trial Court has rightly dismissed the petition.

17.Though there is no dispute with regard to the ratios laid down in the judgments relied upon by the learned counsel for the petitioners, since the petitioners have not given reasons in an acceptable manner, the said judgments are not applicable. The ratio laid down by the Hon'ble Supreme Court in ***(2015) 1 Supreme Court Cases 680 [H.Dohil Constructions Company Private Limited Vs. Nahar Exports Limited and another]*** squarely applies to the facts and circumstances of the present case. In the absence of sufficient reason given by the petitioners, the delay cannot be condoned.

18.In these circumstances, I do not find any error or irregularity in the order passed by the trial Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Index : No
Internet : Yes
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18.08.2016

To

The Principal District Munsif cum
Judicial Magistrate,
Vaniyambadi, Vellore District.

M.DURAI SWAMY, J.
va

Order made in
C.R.P.(NPD).No.414 of 2016 and
C.M.P.No.2204 of 2016

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