

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.12.2016

Pronounced on : 03.02.2017

CORAM:

THE HONOURABLE Dr.JUSTICE S.VIMALA

C.M.A.No.2440 of 2016

and C.M.P.No.17187 of 2016

Vidjayane Mohanabayammalle Saroja (died)
Rep. By her Legal Representatives

1. Vidjayane Latchoumy
2. Vidjayane Selvy
3. Vidjayane Prabavady
4. Vidjayane Velradjou Appellants/Petitioners

...Vs...

1. Vijayalakshmi 1st respondent/Plaintiff
2. Bommi
3. Manikandan (Minor) ... Respondents/Respondents/
Defendants 3 and 4

Civil Miscellaneous Appeal filed under Section 104 of C.P.C.
r/w. Order 43 Rule 1(t) of C.P.C. against the order and
decreetal order dated 15.12.2015 made in I.A.No.547 of 2014 in
A.S.No.3 of 2011 on the file of II Additional District Judge at
Puducherry.

For Appellants : Mr.G.Masilamani,
Senior Counsel
for M/s.T.Sathiyamoorthy
For R1 : Mr.S.Radha Gopalan
For R2 & R3 : Mr.Karthik Raja

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JUDGMENT

The dismissal of the re-admit (restoration) application, filed by the petitioners/appellants, under Order XLI Rule 19 r/w. 151 CPC, in I.A.No.547 of 2014 in A.S.No.3 of 2011, to re-admit the appeal and to permit the petitioners/appellants to argue their case on merits, is under challenge in this Civil Miscellaneous Appeal.

2. Brief facts:

(i) The first respondent herein, namely, Mrs.Vijayalakshmi, filed a suit for declaration, delivery of possession and permanent injunction, in O.S.No.298 of 1988, before the learned Principal Sub Judge at Pondicherry. The suit was dismissed by the trial Court on 23.12.1994, holding that the execution of Will and Codicil were not proved by the plaintiff and that they are not in requisite form as required under French Code Civil. Aggrieved over the same, the plaintiff/first respondent herein filed an appeal in A.S.No.234 of 1995 and got renumbered as A.S.No.80 of 2006, after transfer to the Second Additional District Court, Puducherry.

(ii) The second Additional District Court, Puducherry, by Judgment and decree dated 05.08.2009, remanded the matter to the Trial Court. Thereafter, the suit was decreed on 27.10.2010. Thereafter, appeal was filed by the respondents/appellants herein in A.S.No.3 of 2011, before the Second Additional District Court, Puducherry. Pending appeal, the respondents/appellants herein filed an application in I.A.No.234 of 2014 praying to remand the appeal to the trial Court on the ground that the earlier order of remand was not fully complied with. That application was dismissed on merits. The dismissal of the application was challenged by the respondents/appellants herein before this Court in CRP (PD) No.1926 of 2014. The Civil Revision Petition was dismissed on 04.06.2014. Only because of pendency of the Civil Revision Petition, the appeal in A.S.No.3 of 2011 had been kept pending. Holding that the absence of the petitioners on 16.06.2014 to argue the appeal was unjustified, the application in I.A.No.547 of 2014, filed by the appellants herein, praying to set aside the Judgment and decree in A.S.No.3 of 2011 dated 16.06.2014 and to re-admit the appeal for hearing, was dismissed.

2.1. Originally, challenging the order passed in I.A.No.547 of 2014 in A.S.No.3 of 2011, Civil Revision Petition in CRP(NPD) No. 2153 of 2016 had been filed. Later on, a memo was filed seeking to direct the Registry to convert the Civil Revision Petition into a Civil Miscellaneous Appeal. This request was made based on the Judgment reported in 2012 (6) CTC 144 (Saraswathi Bai and three others vs. B.S.Ramachandran @ Chandra Sah and two others), wherein, the Registry was directed to

convert the Civil Revision Petition into an appeal under similar circumstances. Thereafter, the Civil Revision Petition in CRP (NPD)No.2153 of 2016 was ordered to be numbered as C.M.A.No.2440 of 2016 and it was numbered accordingly.

2.2. In A.S.No.3 of 2011, the appellate Court reserved the appeal for judgment on 11.06.2014. On 03.06.2014, the appellants had filed a memo, intimating that CRP(PD)No.1926 of 2014 was pending before this Court and as it had been listed as Item No.73 on 02.06.2014, it is likely to be taken up for hearing in a day or two.

2.3. On 04.06.2014, CRP(PD) No.1926 of 2014 was dismissed by this Court, but, the order copy was received by the appellants only on 13.06.2014. The appellants wanted to explore the possibility of filing an appeal as against the dismissal of CRP (PD) No.1926 of 2014. In the mean time, A.S.No.3 of 2011 was dismissed on 16.06.2014 on merits.

2.4. This order was against the provisions of Order XLI Rule 17 which stipulates that if the appellant does not appear on the day fixed for hearing, the Court shall only dismiss the appeal for non-prosecution and shall not decide the appeal on merits.

2.5. Only thereafter, on 04.07.2014, I.A.No.547 of 2014 was filed under Order XLI Rule 19 CPC, praying to set aside the judgment dated 16.06.2014 and to re-admit the appeal.

3. It is the grievance of the appellants that even though the appellate Court, having knowledge that the appellants were not heard on merits, has chosen to dismiss the application to re-admit the appeal.

4. The learned counsel for the appellants contended that opportunity of hearing is the hallmark in the process of rendering justice and when the valuable right is involved, the court below should not have dismissed the application to re-admit the appeal.

5. It is further contended that the Court should have allowed the application to re-admit the appeal, especially, when the Court committed a mistake in passing the judgment on merits, without hearing the appellant, as if the appellants had been heard on merits.

6. In support of the contentions raised, the following decisions are relied upon by the learned counsel for the appellants.

6.1. Contending that sufficient cause should receive elastic expression and it should be construed liberally, the decision

reported in 2000 (3) SCC 54 (G.P.Srivastava vs. R.K.Raizada and others) is relied upon and the important observation reads as under:

"7. Under Order 9 Rule 13 CPC, an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

6.2. Even though the judgment has been rendered on merits in the appeal, that cannot be a ground to refuse to re-admit the appeal as the Judgment was pronounced without hearing the appellant. So contending, the decision reported in 2007 (13) SCC 574 (Sarwan Singh vs. Kishan Singh (Dead) through LRs. and others) is relied upon. The relevant observation reads as under:

"6. It is to be noted that in the application for restoration the reasons for non-appearance at the time when the matter was taken up had been indicated. It was noted that the matter was fixed for filing of the

vakalatnama of the respondents. There was unintentional absence and the reason for the same was indicated. The High Court has not found the reason indicated to be in any manner incorrect or untrue. Merely because the appeal has been dismissed on merits that could not have been a ground to refuse restoration of the appeal.

6.3. To explain the meaning of appearance by pleader or party in Order XLI and also in support of the contention that the provisions of Order XLI, Rule 19 are not exhaustive of the powers of the Appellate Court to restore an appeal for hearing, the decision reported in 2012 SCC OnLine Bom 1462 (H.P.Mehta vs. M/s.Anurag Sites) is relied upon, where under, the observation reads as under:

"14. A Single Judge of the Madras High Court has in taking the same view in P.Ganeshan v. UCO Bank represented by its Branch Manager, Namagiripet Branch adverted to a decision of a Division Bench of Madras High Court in Kaliappa vs. Kumarasami, where, it was held as follows:

"The real question for determination at issue is whether the appearance mentioned in Order 3, Rule 1 is merely a physical appearance, or whether it must be an appearance with the intention of pleading in a suit. It is argued for respondents that mere physical appearance is sufficient, but if this is so it would be an appearance if a party happened to be anywhere on the Court precincts with or without the knowledge of the Court. It is therefore rather difficult to accept the argument that mere personal appearance is sufficient. It is clearly, we think, intended that the appearance must be, not as a man, but as a party and with the intention of acting as such party in that suit. If this is correct, then the mere fact that the party was present in Court when his pleader reported no instructions would not amount to an appearance for he is merely there as the person who was represented by his pleader. The pleader acted on his behalf and when he ceased to do so, the party took no further part in the proceedings. The mere fact that he was in Court cannot make it an appearance in the suit."

The learned Single Judge of Madras High Court has followed the view of Mr.Justice Krishna Iyer (as His Lordship then was as a Single Judge of the Kerala High Court) in Kuruvilla Chandy v. Hassar Bava Rawther and a decision of the Allahabad High Court in Allah Bux v. Budha.

15. A Division Bench of this Court in Sonubai Baborao Gaikwad v. Shivajirao Krishnarao Gaikwad has

held that the provisions of Order XLI, Rule 19 are not exhaustive of the powers of the Appellate Court to restore an appeal for hearing. In taking this view, the Division Bench relied on a judgment of the Privy Council in Raja Debi Bakhsh Singh v. Habib Shah, Shah, J. has held as follows:

" As regards the first question, I am of opinion that the court has such a power. The provisions of Rule 19 are not exhaustive on the point. Under that rule the Court is bound to re-admit the appeal if sufficient cause is shown for the default, without any reference to the merits of the appeal. The inherent powers of the Court to discharge an order made for default depend upon somewhat different considerations."

In a separate Judgment, Crump, J. held as follows:

"But even if this rule is not applicable the case would be one in which the Court ought, I think, to interfere ex-debito justitiae and the inherent powers of the Court under Section 151 of the code of Civil Procedure can very properly be applied to this case. The principles on which the Privy Council acted in Raja Debi Bakhsh Singh v. Habib Shah are applicable."

16. However, on behalf of the respondent it was urged that the powers of an Appellate Court are distinct from those of a Trial Court in a suit. Reliance was sought to be placed on the provisions of Order XLI, Rule 11(4). Rule 11(4) stipulates that where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so. In our view, the provisions of Rule 11(4) do not define the ambit of the expression "does not appear" in Rule 11(2). The consistent view which has been taken by the Courts in the country is that appearance must mean, where a plaintiff or a defendant appears through an advocate; appearance through an advocate who is able to assist the Court by answering all material questions in the suit. We are of the view that the same meaning must be ascribed to the words used in the context of the power of the Appellate Court in Order XLI, Rule 11(2).

17. In the present case, as the record before the Court would indicate, the Motion for condonation of delay in filing the appeal was called out for hearing on 15 February 2010. The Motion sought condonation of a delay of 82 days in filing the appeal. The counsel appearing on behalf of the Appellant-Applicant stated that he had no instructions. It was in this background that the Motion was disposed of as not

pressed and the appeal consequently was treated as being disposed of. Evidently, the Advocate who appeared on behalf of the Appellant, instructed by the attorneys who had entered appearance, had no instructions and was unable to make any effective submissions on behalf of the Appellant. The appearance for the purpose of Order XLI, Rule 11(2) must mean effective appearance and not merely an appearance by remaining physically present or in attendance before the Court. Consequently, it would have to be held that the Court when it proceeded to dismiss the Motion for condonation of delay, exercised powers under Order XLI Rule 11(2). Consequently, the appeal could be restored to file, if a case within the meaning of Rule 19 of Order XLI has been made out. The grounds which have been set up in the affidavit-in-reply of the Motion would establish sufficient cause for the restoration of the Motion for condonation. The Appellant had been represented by Mr. Vakil before the learned Trial Judge and by Mr. Udani, who was his junior. It was at their behest that, according to the Appellant, he had engaged the services of L.C. Tolat & Co. in appeal. As a matter of fact, the record would indicate that on 29 January 2010 it was Mr. Udani who had appeared on behalf of the Appellant instructed by L.C. Tolat & Co. though it has been stated that he was not working with that firm of solicitors. If the solicitors had no instructions from the Appellant, it would have been only appropriate and proper for them to apply for a discharge from the proceedings. That the solicitors did not do so but merely stated that they had no instructions, would not make any difference either to the powers of the Court or to the exercise of discretion in the present case. At the same time, any order for restoration of the Motion should, in the interest of justice, be made conditional on payment of costs quantified by the Court."

7. The learned counsel for the first respondent contended that the application to re-admit the appeal cannot be allowed automatically, but, it can be considered only if sufficient cause is shown and neither cause nor sufficient cause has been established in this case and therefore, the court below is justified in dismissing the petition.

7.1. Contending that allowing the application to re-admit the appeal would amount to misplaced sympathy and that as rightly expected, the Court below had been sensitive to delays in justice delivery system and therefore, if at all, litigant

public should not lose faith in the judicial system, the order passed by the Court below must be upheld. In support of this contention, the decision reported in 2011 (9) SCC 678 (Shiv Cotex vs. Tirgun Auto Plast Private Limited and others) is relied upon. The relevant observation reads as under:

"15. It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16.....

17. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether the plaintiff or the defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.

18. Insofar as the present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in

second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed."

8. It is strenuously contended by the first respondent that the past conduct of the party in conduct of the proceeding is the important circumstance, which the Court must keep into the mind and rightly the Court below has considered the past conduct of the petitioners/appellants herein and rightly dismissed the application and therefore, the order of the Court below cannot be set aside.

9. On a question of law, the presentation by both sides were appealing, but, the question as to whether the question of law would accommodate the facts of this case into it, is the issue to be considered.

9.1. The word "sufficient cause" came to be interpreted by the Hon'ble Supreme Court in the case reported in AIR 2010 SC 3043 (Balwant Singh (Dead) vs. Jagdish Singh & Ors.), which reads as under:

"Sufficient cause:- The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention."

9.2. Therefore, the question to be considered is whether the appellants had shown that besides acting bona fide, they had taken all possible steps within their power and control, in approaching the Court, without any unnecessary delay. In other words, whether or not the cause pleaded by the appellants is sufficient to admit the appeal for re-hearing. In other words, whether the appellants could have avoided the decision in the appeal being taken without being heard by the exercise of due care and attention.

10. It is the case of the first respondent that the appellants could have avoided the unilateral decision in the appeal by giving instructions to his pleader or by filing an application for adjournment or by being personally present in the Court and when it is not done, it is a case for deciding the appeal without hearing the appellants. In other words, the contention is that it is an invited injury by the appellants themselves and therefore, they cannot have any grievance against the order passed by the court below.

11. It is true that the counsel for the appellants could have appeared and argued the appeal, but, it appears that the appellants were exploring the possibility of further course of action being taken, consequent to the dismissal of the Civil Revision Petition before this Court. The non-appearance of the appellants is explained by stating that the wife of the fourth appellant was pregnant at that point of time and he had to take his pregnant wife for treatment. Even if he had been present, his presence could not have been marked as contemplated under Order 41 CPC, as it is expected of the counsel only to argue the appeal. The other possibility is that the appellants would not have expected that their counsel would report no instructions. Moreover, the delay is also not inordinate. It is within excusable limit.

11.1. The long pendency of the appeal from the year 2011 could not be attributed to the appellants alone, as the first respondent himself has taken out two applications, i.e. I.A.No.18 of 2013 dated 25.07.2013, seeking amendment of the plaint schedule properties and another I.A.No.39 of 2013 dated 11.11.2013, seeking to produce additional documents.

11.2. When the Court has waited for the disposal of the Civil Revision Petition before this Court, the appellate Court ought to have accommodated the appellants for few more days, indicating that no further adjournment would be granted to them.

11.3. The Court below should have allowed the application to re-admit the appeal, especially, when the appeal was decided on merits, which was against the provisions of Order 41 Rule 17. Therefore, this Court is of the view that the appellants herein

have shown sufficient cause for the non-prosecution of the case before the court below.

11.4. However, the fact remains that the first respondent is made to believe that the matter has attained finality so far as the appeal is concerned. Her faith is shaken because of the subsequent application filed. The time, energy, and expectation of the petitioners/appellants herein, which was put into jeopardy has to be compensated.

11.5. Therefore, the order dated 15.12.2015, passed by the learned Second Additional District Judge, Puducherry, in I.A.No.547 of 2014 in A.S.No.3 of 2011, dismissing the application to re-admit the appeal, is set aside. The matter is remitted back to the Second Additional District Court, Puducherry, subject to the condition that a) the appeal must be disposed of within a period of one month from the date of receipt of a copy of this Judgment, for which, the appellants are expected to make their submissions apart from filing their written arguments before the period prescribed; b) the appellants shall pay a cost of Rs.20,000/- to the first respondent within a period of one week from the date of receipt of a copy of this Judgment.

12. In the result, the Civil Miscellaneous Appeal is allowed subject to the terms stated above. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Second Additional District Court,
Puducherry.

+1cc to Mr.S. Radhagopalan, Advocate, S.R.No.6753
+1cc to Mr.T. Sathiyamoorthy, Advocate, S.R.No.6899
+1cc to Mr. K.S. Karthikraja, Advocate Sr.No.7185

vsn (CO)
md(11/04/2017)

C.M.A.No.2440 of 2016