

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2017

CORAM:

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER
and

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

O.S.A.No.115 of 2017

A.Pathima

... Appellant/Plaintiff

vs.

1.J.Devarajalu

2.J.Vijayaraghavalu

3.J.Sathyanarayanan

4.J.Ananthakrishnan

5.Vedavalli

6.Pushpavalli

7.J.Ethirajalu

8.Lakshmipathi Narayanan

9.J.Lakshmipathi

... Respondents/Defendants

Original Side Appeal filed under Order 36 Rule 1 of O.S.Rules r/w Clause 15 of the Letters Patent to set aside the order dated 03.03.2017 passed in Application No.1032 of 2017 in C.S.No.497 of 2010.

A.No.1032/17: filed to condone the delay of 2013 days in setting aside the order dated 08.07.2011 passed in C.S.No.497/2010, filed to direct defendants 1,5 and 9 to pay a sum of Rs.31,32,000/-together with interest at 24% per annum from the date of institution of the suit till the date of payment; to create a charge over the schedule mentioned property till such time the claim is discharged.

For Appellant : Mr.V.Raghavachari

For Respondents : Mr.B.Manoharan for R3 and R7

JUDGMENT

[Judgment of the Court was made by RAJIV SHAKDHER, J.]

1. This is an appeal against the judgment and order dated 03.03.2017, passed by the learned single Judge.

2. By virtue of the impugned judgment and order, the appellant's application for condonation of delay of 2013 days, in seeking to set aside the order, dated 08.07.2011, passed in C.S.No.497 of 2010 has been dismissed. The order dated 08.07.2011 was passed by the learned Master. Though on the face

of it, the delay seems to be huge, there are certain facts and circumstances, which form the background of this case, which need to be noted :

2.1. The appellant, who is the plaintiff in the suit had entered into an agreement of sale with defendant Nos.1 to 5 and 9. The total consideration for purchase of the property was fixed at Rs.85 lakhs (Rupees Eighty five lakhs only). The appellant, admittedly, paid a sum of Rs.35 lakhs (Rupees Thirty five lakhs only) as advance.

2.2. It appears that the sale transaction did not go through. The appellant sought refund of the advance paid. The respondents / defendants, in fact, refunded a sum of Rs.17 lakhs out of the Rs.35 lakhs paid by the appellant herein. Insofar as the balance amount of Rs.18 lakhs was concerned, the respondents / defendants refused to refund the same.

2.3. It is because of this reason, the appellant filed a suit i.e., C.S.No.497 of 2010, wherein, a claim is made in the sum of Rs.31,32,000/- (Rupees Thirty one lakhs and thirty two thousand only) along with interest @ 24% per annum, against defendants 1 to 5 and 9.

3. As would be obvious, the suit amount includes a component of interest. It appears that the appellant has factored in an interest amounting to Rs.18 lakhs in the suit amount.

4. The record shows, the matter in the usual course came up before the learned Master on 08.07.2011. On that date, as recorded by the learned single Judge, in the impugned judgment and order, the following order came to be passed:-

"No representation. There are nine defendants. Service except D1, D3, D8 and D9 got effected and D5 is still awaited. Suit against D1, D3, D8 and D9 stands dismissed for default. As D5 process is still awaited, for giving an opportunity, await by 05.08.2011."

5. On the next date of hearing, the learned Master appears to have noted, which is also something that the learned single Judge has adverted to in paragraph 4 of the impugned judgment and order that "Batta filed for D1, D3, D8 and D9 vide D.No.29001/2011 and returned on 19.08.2011".

5.1. It is obvious that the learned Master somehow did not notice that on 08.07.2011, the suit had already been dismissed against defendants Nos.1,3,8 and 9.

5.2. Furthermore, the appellant's counsel seems to have deposited the batta blissfully, unaware of the order passed by the learned Master on 08.07.2011. Furthermore, a perusal of the extract of the proceedings, dated 08.07.2011, would show that there was no representation before the learned Master on that date.

6. The record also shows, which is again an aspect, which is not disputed before us, is that, a vakalatnama was filed on behalf of defendant Nos.3, 5 and 6 by Mr.B.Manoharan, Advocate; who is, also, present before us today. Quite clearly, Mr.B.Manoharan, Advocate, was also unaware of the proceedings held before the learned Master on 08.07.2011.

6.1. Such was the state of ignorance on both sides that the matter got referred for a possible settlement to the Lok Adalat.

6.2. As noted by the learned single Judge, the matter was taken up in the Lok Adalat, on 07.04.2014 and 30.04.2014.

7. Mr.B.Manoharan, concedes before us that respondent No.3 / defendant No.3 was present in person before the Lok Adalat, on 30.04.2014. As a matter of fact, he placed before us the proceedings of the Lok Adalat held on 30.04.2014, which read as follows:-

"..... Though the defendant is prepared to deposit the balance of Rs.18 lakhs, the plaintiff is absent and he is not interested to appear. In this connection, the matter is posted before the Court. The defendant is prepared to deposit into Court the balance of Rs.18 lakhs without prejudice of his right. Therefore the amount can be deposited by them without prejudice, with the Court, which will enable the regular Court to decide the matter."

8. It is evident that defendant No.3, on 30.04.2014 had shown inclination to deposit Rs.18 lakhs with the Court, albeit, without prejudice to his rights and contentions. Apart from anything else, proceedings are indicative of the fact that respondent No.3/defendant No.3 was completely unaware of the proceedings held before the Master on 08.07.2011.

8.1. The appellant, though, for reasons best known to him was not present before the Lok Adalat on that date i.e. 30.04.2014; a fact which got noticed in the proceedings generated on that date.

9. The fact of the matter, is that, despite respondent No.3/defendant No.3 taking a stand before the Lok Adalat that he would deposit a sum of Rs.18 lakhs with the Court, albeit, without prejudice to his rights, the needful was not done. The

matter appears to have chugged along, when, at some stage, the appellant seems to have suddenly become aware of the fact that the order dated 08.07.2011 has been passed by the learned Master.

10. It may be relevant to note that in the interregnum, respondent No.3/defendant No.3, i.e., on 03.02.2014 vide Diary No.4131 of 2014 filed a common vakalatnama on behalf of respondent Nos.3, 6 and 7 / defendant Nos.3, 6 and 7.

11. Clearly, the appellant's advocate had been slothful and less than vigilant in prosecuting the suit. This has, in a sense, worked to the advantage of respondent No.3 / defendant No.3. At this juncture, he takes a stand that the delay in setting aside the order dated 08.07.2011 cannot be condoned. This is despite what he had indicated before the Lok Adalat on 30.04.2014.

12. Therefore, we are left with a state of affairs, which is, if we were to confirm the order of the learned single Judge, a good cause, perhaps, would be lost on account of the negligence of the lawyer engaged by the appellant. On the other hand, if we were to condone the delay, respondent No.3 / defendant No.3 may perhaps end up winning a cause, albeit, on technical grounds.

13. Courts have, in most situations, been indulgent in overlooking defaults of lawyers engaged by the litigants only to secure their right to have a day in Court. Therefore, while dealing with applications for condonation of delay, to our minds, not only the period of delay, but also the background facts and circumstances, in which, delay has occurred needs to be examined. Negligence of lawyers in failing to act promptly on behalf of their clients should receive the requisite benevolence of the Court. This, of course, comes with a caveat that the client is not complicit in the delay caused by his/her lawyer.

13.1. We may refer with profit, in this behalf, the observations of the Supreme Court in case of N.Balakrishnan Vs. M.Krishnamurthy, (1998) 7 SCC 123. This was a case where the appellant before the Court was the original defendant in the suit.

13.2. The trial Court had passed an ex parte order against the appellant, qua which, an application was moved to have it set aside. The said application, was however dismissed in default.

13.3. The appellant moved to set aside the said order after delay of 883 days. The delay in moving the application was attributed to the negligence of the lawyer in as much as he

failed to inform the appellant that the application had been dismissed in default. Thereafter, despite being approached by the appellant he did not take requisite steps for course correction.

13.4. The Supreme Court, in these circumstances, allowed the appeal and while doing so, made the following observations:

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and

wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. 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 Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749].

13. 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 borne in mind that he is a loser and he too would have incurred 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." (emphasis is ours)

13.5. Therefore, having regard to the totality of circumstances, according to us, the period of delay could have been condoned and time line fixed to ensure that the suit is prosecuted with due alacrity.

14. In coming to the conclusion that the application deserved dismissal, the learned single Judge seems to have been persuaded by the fact that the property which formed the subject matter of the agreement to sell, appears to have been partitioned. According to us, that by itself could not have been the reason for rejecting the application for condonation of delay. The suit is for recovery of money and not for specific performance. Therefore, having regard to the aforesaid circumstances, we are inclined to condone the delay.

15. Accordingly, the impugned judgment and order is set aside, subject to payment of cost of Rs.10,000/- (Rupees Ten thousand only). 15.1 Mr.B.Manoharan, who appears for defendant No.3 declines to accept cost.

15.2 Accordingly, the appellant is directed to pay the cost to Tamil Nadu State Legal Services Authority. The proof of cost will be filed, within one week from the date of receipt of a copy of this order.

16. The application for restoration will be placed before the learned Judge by the Registry for disposal, upon the same being numbered. The learned single Judge thereafter, will pass, if deemed fit and necessary, a suitable order for expediting the suit.

17. The appeal is allowed in the aforesaid terms. There shall, however, be no order as to costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

svki

To

1.The Sub Assistant Registrar
Original Side, Hig Court, Madras-104

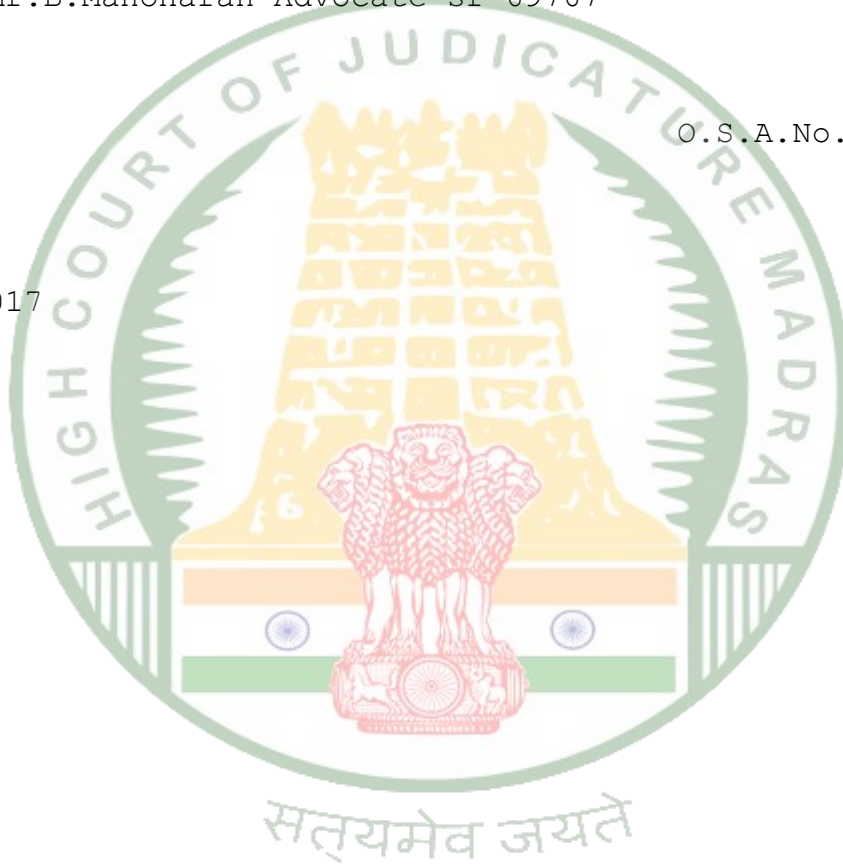
2.The Secretary
Tamil Nadu State Legal Services Authority
High Court Buildings, Chennai

+1 cc to Mr.V.Raghavachari Advocate sr 69639

+1 cc to Mr.B.Manoharan Advocate sr 69767

O.S.A.No.115 of 2017

nm(co)
aa13/11/2017



WEB COPY