

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.3649 of 2011
and
M.P.No.1 of 2011

S.Jayaprabakaran

.. Petitioner

vs

Arulmighu Chelliamman Thirukkcoil,
Rep. by its Fit Person/Executive Officer,
Vellore-Katpadi Road,
Palatrankarai, Vellore.

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order dated 8.1.2010 made in I.A.No.384 of 2008 in O.S.No.557 of 2005 on the file of the learned Additional District Munsif, Vellore, in-charge of Principal District Munsif Court, Vellore.

For Petitioner

: Mr.K.B.Arul

For Respondent

: Mr.Ravichandran
for M/s.AU.Ilango

ORDER

This revision is directed against the order of the learned Additional District Munsif, Vellore, in-charge of Principal District Munsif in I.A.No.384 of 2008 in O.S.No.557 of 2005 dated 8.1.2010, dismissing the petition filed under Section 5 of the Limitation Act and declining to condone the delay of 231 days in filing petition to set aside the ex parte decree dated 12.6.2007.

2. Brief facts are that the petitioner, who is the defendant in the suit had filed I.A.No.344 of 2008 in O.S.No.557 of 2005 under Section 5 of Limitation Act to condone the delay of 231 days in filing petition to set aside the ex parte decree dated 12.6.2007 stating that he had filed I.A.No.605 of 2006 to set aside the ex parte order passed against him and the same was allowed by the Court on payment of cost of Rs.200/- on or before 20.3.2007 and posted the petition for hearing on 21.3.2007. Since the petitioner has not received any communication from his counsel on record that I.A.No.605 of 2006 was allowed on payment of cost, he could not able to pay the cost on the stipulated time and the petition was dismissed on 21.3.2007. But a week ago, the petitioner came to know the ex parte decree passed in the suit on 12.6.2007. According to the petitioner, non-payment of

cost in I.A.No.605 of 2006 and non-prosecution of the case on his part was neither wilful nor wanton. There is a delay of 231 days in filing petition to set aside the ex parte decree dated 12.6.2007 and prayed for setting aside the delay.

3. Resisting the petition, the respondent filed counter stating that since the petitioner has not paid the cost, I.A.No.605 of 2007 was dismissed on 21.3.2007 and the petitioner has also not filed any application seeking extension of time to pay the cost. The petitioner was fully aware of the ex parte decree and deliberately kept quite and filed petition without having no grounds to set aside the ex parte decree. That apart each and every day delay has not been properly explained. Hence, prayed for dismissal of the petition.

4. Upon consideration of the rival submissions, the trial Court dismissed the petition to condone the delay. Challenging the same, the petitioner has filed the Civil Miscellaneous Appeal.

5. Challenging the impugned order, the learned counsel for the petitioner submitted that earlier for non-filing of the written statement, the petitioner set ex parte and he had filed I.A.No.605 of

2006 to set aside the ex parte order. I.A.No.605 of 2006 was allowed on payment of cost of Rs.200/-, but the counsel on record has failed to communicate the order of the Court to the petitioner. Thereafter, he came to know that for non-payment of cost, I.A.No.605 of 2006 was dismissed and ex parte decree was passed in the suit on 12.6.2007.

6. The learned counsel further submitted that now the petitioner filed petition to set aside the ex parte decree with a delay of 231 days and the delay is neither wilful, nor wanton and the trial Court erred in dismissing the petition. The learned counsel then submitted that the trial Court ought to have considered that the petitioner had changed his counsel and filed petition for condoning the delay immediately after knowing the factum of passing of the ex parte decree and prayed for setting aside the order of the trial Court.

7. Per contra, reiterating the findings of the trial Court, the learned counsel for the respondent submitted that the petitioner wantonly allowed the suit to be decreed ex parte and the aim of the petitioner is to drag on the suit proceedings. Finding that the petitioner has failed to explain each and every day delay, the trial Court rightly dismissed the petition and there is no need to interfere

with the same.

8. I have considered the submissions of the learned counsel appearing on either side and also perused the materials available on record.

9. The points arose for consideration is whether the petitioner had satisfactorily explained the delay of 231 days in filing petition to set aside the ex parte decree and whether the trial Court was right in dismissing the petition.

10. The petitioner seeking to condone the delay of 231 days in filing petition to set aside the ex parte decree as he was unaware of the conditional order passed by the trial Court in I.A.No.605 of 2006 directing him to pay cost of Rs.200/- to the respondent, failing which the petition shall stand dismissed. The reason given for the delay is that the petitioner's counsel has not informed the order passed in I.A.No.605 of 2006 qua payment of costs.

11. The trial Court held that the petitioner has not explained or given sufficient reason for condoning the delay of 231 days in filing

petition to set aside the ex parte decree. As stated supra, the petitioner has given reason for the delay that his earlier counsel had not informed about the payment of cost ordered by the Court in I.A.No.605 of 2006. To show that the petitioner was aware of the conditional order passed by the Court as well as the ex parte decree passed in the suit, the respondent has not filed any material.

12. It is settled law that "sufficient cause" must receive a liberal construction so as to advance substantial justice when no negligence, or inaction, or want of bona fide, is imputable to the applicant, the over-riding consideration being doing substantial justice. The Court should not lightly condone the delay in filing the application to set aside the ex parte decree. Discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The true test is whether the petitioner had acted with due diligence.

13. In *N.Balakrishnan v. M.Krishnamurthy*, reported in 1998 (2) CTC 533: 1998 (7) SCC 123, the Hon'ble Supreme Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing malafide or deliberate delay as a dilatory tactic, the Court should

normally condone the delay. However, in such a case the Court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. In that context the Hon'ble Supreme Court observed as follows:

"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 condonable due to want of acceptable explanation whereas in certain other case, delay of a 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 wholly 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".

14. Court has to see whether sufficient cause is shown for the delay. What is or what is not 'sufficient cause' would depend upon varied and special circumstances of each case. To decide whether sufficient cause is shown or not, it is very undesirable to act upon precedents as every Judge has to deal with particular facts of each case.

15. In *State of Haryana v. Chandra Mani and others*, reported in 1996 (II) CTC 109, the Hon'ble Supreme Court held thus:

"11. The expression "sufficient cause" should therefore, be considered with pragmatism in injustice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the causelaid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. it must be held that the delay of 109 days in this case has been explained and that it is a fit case for condonation of the delay."

16. Under Section 5 of the Limitation Act, it is only sufficiency of the cause that matters and not the length and breadth of the delay. While dealing with the Section 5 application, the question of diligence or bona fides are to be considered.

17. In *State of Kerala v. E.K.Kuriyipe*, reported in 1981 (Supp) SCC 72, the Hon'ble Supreme Court held that whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case.

18. The respondent has filed the suit for permanent injunction restraining the petitioner from putting up any constructions whatsoever over the suit property without permission of the respondent and also mandatory injunction directing the petitioner to remove all constructions put up on the suit property by him and in case of his failure to do so, to have the constructions removed through the process of Court. Case of the petitioner is that he is the lessee of the vacant suit site and he had not put up any construction over the suit vacant site.

19. On a perusal of the materials, it is seen that the petitioner had filed I.A.No.605 of 2006 to set aside the ex parte order along with written statement and the same was dismissed by the Court for non-payment of cost. It appears that in the petition to condone the delay in filing petition to set aside the ex parte decree, the petitioner has explained reason for the delay in filing petition to set aside the ex parte decree.

20. The learned counsel for the respondent submitted that when the trial Court has exercised the discretion declining to condone the delay, unless it is shown to be manifestly perverse, the revisional Court would not interfere with the impugned order. The learned counsel would submit that there is no bona fide in the application and therefore, the delay cannot be condoned and hence, the trial Court has rightly declined to condone the delay and the same cannot be interfered with.

21. It is not possible to lay down as to what cause or matters would constitute sufficient cause under Section 5 of the Limitation Act. Those words should be liberally construed so as to advance substantial justice, when no negligence or inaction or want of bona fides is

imputable to a party. The petitioner alleged that his earlier counsel has failed to communicate the conditional order as well as the subsequent dates and that he could not attend the Court. The trial Court was not justified in disbelieving the same. The trial Court ought to have seen the defence made by the petitioner in the suit.

22. No presumption could be made in an application filed under Section 5 of the Limitation Act that the delay was occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay, as in any case, especially a injunction suit, the litigant is the one who stands to lose the most as the case needs to be decided in the finality to provide him/her with any relief, it is he/she who runs a serious risk. Therefore, in my considered view, there is no proper exercise of discretion by the trial Court.

23. It is settled law that 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.

24. Generally delays in preferring application to condone the delay in filing the petition to set aside the ex parte decree/restore the suit is required to be condoned in the interest of justice, where no gross negligence or deliberate inaction or lack of *bona fide* is imputable to the party seeking condonation of delay. In the case on hand, as stated supra, the respondent had failed to prove that only with a view to drag on the proceedings and in order to give trouble to the respondent, the petitioner had filed the petition. Moreover, the reason for delay given by the petitioner is satisfactory.

25. When the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay, if the Court is satisfied that the delay occasioned not due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.

26. The trial Court, instead taking note of the sufficient cause explained by the petitioner, it has arrived at a conclusion that the

petitioner had failed to prove each and every day delay. As observed above, the petitioner had shown sufficient cause for the delay in filing petition to set aside the ex parte decree dated 12.6.2007 passed in the suit. Therefore, in the interest of justice and in the facts and circumstances of the case on hand, the order of the trial Court is liable to be set aside and petition seeking to condone the delay of 231 days in filing petition to set aside the ex parte decree stands allowed, however, subject to payment of cost to the respondent.

27. In the result,

(a) The Civil Revision Petition is allowed by setting aside the order in I.A.No.384 of 2008 in O.S.No.557 of 2005 passed by the learned Additional District Munsif, Vellore, in-charge of Principal District Munsif, Vellore on condition that the petitioner should pay a sum of Rs.5,000/- (Rupees Five Thousand only) as cost to the respondent within a period of two weeks from the date of receipt of a copy of this order.

(b) The trial Court is directed to number the set aside ex parte decree application and pass orders within a period of one month on production of payment receipt

by the petitioner by giving notice to either parties.

(c) On passing order in the application to set aside the ex parte decree, the trial Court is directed to dispose of the suit within a period of two months thereafter, without giving any adjournment to either parties.

(d) Consequently, connected miscellaneous petition is closed.

17.02.2017

vs

Note: Issue order copy on 22.01.2019

Index : Yes

To

The Principal District Munsif,
Vellore.



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M.V.MURALIDARAN, J.

VS



Pre-delivery order made in
C.R.P. (NPD) No.3649 of 2011
and
M.P.No.1 of 2011

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