

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 23.12.2016

Pronounced on 03.01.2017

DATED: 03.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP.No.2579 of 2012

and

M.P.No.1 of 2012

1.G.Indirani
2.S.G.Senthil
3.G.Manivasagam
4.G.Mallika

.. Petitioners

Vs.

K.Arjunan

..Respondent

Prayer: Civil Revision Petition filed under Section 115 of CPC, against the Petition and order passed in I.A.No.689 of 2010 in O.S.No.549 of 2008, on the file of the Principal Sub-Judge, Coimbatore, dated 01.07.2011 and to set aside the same.

For Petitioners : M/s.P.Indumathi

For Respondent : Mr.P.B.Balaji

O R D E R

The defendants are the civil revision petitioners before this Court, challenging the order of dismissal passed in I.A.No.689 of 2010 in O.S.No.549 of 2008, dated 01.07.2011 by the learned Principal Subordinate Judge, Coimbatore.

2.It is an unfortunate case of the dismissal of the condone delay petition filed by the defendants for condoning the delay of 68 days for filing the set aside application under Order 9 Rule 13 CPC.

3.The Courts below must have seen the petitions which are they dealing the Interlocutory Applications about the nature of the applications and thereafter they should pass suitable orders for avoiding the multiplicity proceedings of the case.

4.This is one of the case an example that the learned Principal Subordinate Judge, Coimbatore, unfortunately has dismissed this application, which was filed by the petitioners/defendants for the condoning the delay of 68 days only to set aside the exparte decree. If the learned Judge has shown his judicial view on this application,

definitely he would have allowed the application, but instead of that he simply dismissed the application on the only ground by saying that the petitioners/defendants are under carelessness, this application has been filed.

5.The respondent/plaintiff has filed the suit for recovery of amount for a sum of Rs.5,07,000/- with subsequent interest at the rate of 18% per annum on the principal amount of Rs.4,00,000/- and also costs of the suit to be paid within a certain time fixed by the Court failing which the hypotheca, being the schedule mentioned property being brought for sale and the sale proceeds applied for the discharge of the amount due to the plaintiff and in case the same is not sufficient to discharge the debt due to the plaintiff, passing a personal decree for the balance amount due to the plaintiff as against the defendants.

6.Denying averments made in the plaint, this petition has been filed and the suit was posted for filing written statement and for hearings.

7.When the suit was posted on 05.06.2009, for filing of written statement, but no written statement was filed. Hence, on 05.06.2009

the exparte decree was passed against the defendants.

8.In the above circumstances, the petitioners/defendants has filed the above application in I.A.No.58 of 2009 which was later on re-numbered as I.A.No.689 of 2010 for condoning the delay of 68 days in filing the petition for set aside the exparte decree under Order 9 Rule 13 of CPC.

9.The case of the petitioners/defendants are that originally they engaged one Mr.Loganathan, Advocate to appear on behalf of them, accordingly the said Loganathan, Advocate has filed vakalath on behalf of the defendants and the matter was posted on 05.06.2009 for filing the written statement, but the written statement was not filed. That fact was not brought to the notice of the defendants, but their counsel instructed him to come to his office only when he calls him and further he assured him that he would take care of the above proceedings. Believing the representation of his advocate, he did not come to his office and since there was no information from their Advocate for nearly three months. But, thereafter, when the third respondent went to his office and enquired about the case, at that time his Advocate informed that the case was called on 05.06.2009 and due to non-filing of the written statement, the suit was decreed

exparte in favour of the plaintiff.

10.The third defendant also filed an affidavit that there was no carelessness or negligence on his part in non-filing the written statement, but only due to the genuine reason it was happened. Therefore, immediately, the third defendant has got back the bundles from the previous counsel and entrusted the same to the present counsel with a request to take necessary steps to file the set aside application.

11.After engaging the present counsel in the lower Court on instructions, the set aside petition was filed under Order 9 Rule 13 CPC along with the condonation delay petition for condoning the delay of 68 days in filing the set aside application. In the affidavit of the petitioners/defendants stated that the reason stated above was a genuine reason for their non-appearance. Therefore, they prayed the Court below namely the Principal Subordinate Judge, Coimbatore to allow the said application.

12.Per contra, a counter affidavit has been filed on behalf of the respondents and denying the entire allegations stating in the

additional affidavit made in I.A.No.689 of 2010.

13.The respondent in his counter stated that the set aside application is not at all maintainable since the suit decree was passed on merits on 05.06.2009 and this petitioners/defendants ought to have preferred only an appeal before the appellate Forum and no application for setting aside the exparte decree will be maintainable before the Court below.

14.The respondent/plaintiff also states that the petitioners/defendants are seasoned litigants making false stories before the Court in which he has stated in para-3 of the affidavit is a perfect example of the dramatic way of stage performance to draw the sympathy of the Court below. The respondent also states that the Court summons were served to all the petitioners/defendants and the main suit were posted on 22.07.2008, 14.08.2008, 20.08.2008, 29.08.2008 and 25.09.2008 for await of process.

15.The respondent also states in his counter that the first petitioner/defendants and 4th petitioner/defendant were represented by their counsel one Mr.A.Anandhakumar and the second petitioner/defendant was represented by his Advocate

Mr.Viveakanandhan and the 3rd petitioner/defendant was represented by his Advocate one Mr.M.Loganathan and all of them made their appearance on 25.09.2008 and sought four times for filing written statement. Therefore, the case was adjourned by the Court to 24.10.2008, 04.11.2008, 19.11.2008 , 17.12.2008 and 23.12.2008 and finally all these petitioners/defendants were set exparte on 07.01.2009.

16.The respondent also stated in his counter that when all these defendants were represented for separate counsels, but, in such state of affairs the sworn affidavit stated by the first petitioner that as if the case was entrusted with counsel only Mr.Loganathan alone instructed to appear this case. Therefore, it is made clear that it is totally mis-represented before the Court below. Hence, the respondent prayed that for the only reason for suppression of the material facts and for playing fraud on the Court, the condone delay application has to be dismissed. Hence, he prayed the trial Court for dismissal of the condonation delay application.

17.Considering both side cases, the learned trial Court namely the Principal Sub-Judge, Coimbatore was pleased to dismiss the

application on 01.07.2011, on the ground that though the petitioners/defendants were set exparte on 23.12.2008, the decree was passed on 05.06.2009. Hence, sufficient opportunity was given to the defendants, but the defendants were not availed the said opportunity.

18.The learned Judge also given the reason stating that the petitioners/defendants have got knowledge about the case proceedings, but purposely they have not appeared, the learned Judge also come forward by saying that it is settled position of law, that the Court must take a liberal view but at the same time, as far as the condonation of delay is concerned, the Court should not do so on exercising equity and if it is done, it would be nothing but extension of limitation which is not available to a party under an enactment. Challenging the said order, the petitioners/defendants has filed the above civil revision petition.

19.I hear M/s.P.Indumathi, learned counsel appearing for the petitioners and Mr.P.B.Balaji, learned counsel appearing for the respondent.

20.It is an admitted fact that the defendants were engaged the

counsels, this Court and the Hon'ble Apex Court very clearly held that the litigants should be vigilant in their case, and they should not shift their burden on their Advocates.

21. But, in the present case, though the suit was set aside very long back i.e. on 23.12.2008, but an ex parte decree was passed only on 05.06.2009, i.e. after six months the ex parte decree was passed.

22. In the present case, there are three Advocates who appeared for the four defendants. When the litigants are vigilant in their cases, the same should also apply to the counsel, who appeared for the litigants. It is an example of the present case, though the said ex parte order was passed on 23.12.2008, but, there are three counsels who appeared for all the four defendants, but were not informed to their respective parties, since the ex parte decree was passed only on 05.06.2009, nearly six months the suit was pending without passing any orders.

23. The learned counsel, who appeared for the litigants, should act as per the code of conduct of Advocates Act 1960, since when the litigants engaged them for their cases, they must have taken

care of each and every cases appeared on behalf of the litigants by them. It is an admitted fact that all the litigants are educated or uneducated since most of the villages, the litigants who appeared before the Court were uneducated, but the counsels, who appeared on behalf of the educated litigants as well as uneducated litigants, are well educated persons. Apart from this, the learned counsels were also known about the Court proceedings and they must have informed the litigants particularly, their respective clients about the case proceedings.

24.In the present case the respondent was set exparte and exparte decree was passed for the only reason that the non-filing of the written statement, and originally in earlier to the said proceedings dated 23.12.2008, the case was adjourned periodically for filing of the written statement, particularly, 24.10.2008, 04.11.2008, 19.11.2008, 17.12.2008, and 23.12.2008.

25.Whether it is not the duty of the counsels of their respective parties for filing written statement or filing counters in their respective cases, but after getting adjournments, it is bounden duty of the counsel to informed their parties, if they are appeared personally and if the parties were not appeared on the particular

dates. In the present case, if the learned counsel would have taken action, even on 25.09.2008 for the first hearing, where the counsels were appeared and filed their vakalath on behalf of the defendants, and if they would have informed their parties, definitely they would filed the written statement before the said date, i.e. 23.12.2008, even otherwise on 07.01.2009 itself, if they informed about the exparte order passed on 23.12.2008 that would help this defendants to enable them to file an application for setting aside the exparte orders. But, what was the reasons, the counsels were not informed the defendants, who appeared earlier for these defendants. But the only ground by the petitioners/defendants in this case is that earlier counsels were not informed about the proceedings.

26.It is an admitted fact that this petitioners were made false representation before the Court that only Mr.Loganathan, Advocate was appeared on behalf of all the four defendants. But, the defendants may not know the appearance of the other two Advocates, who instructed by Mr.Loganathan for appearing of each defendants, by each counsels, but the learned Judge would not say that the suppression of the three Advocates appearance in this case will not take away the right of filing the application for set aside the exparte decree.

27. When the litigants and the counsels were not vigilant in their cases, the Court must have shown lenient view considering the set aside order or ex parte decree applications along with the condonation delay.

28. In the present case, it is only for 68 days delay in filing the set aside application, but the learned Judge has given reasons for the dismissal of the application, would not acceptable one and he must have judicially viewed the situation if the application for condonation of delay of 68 days would dismissed definitely, this defendant may approach the Appellate Court or higher Forum by way of an appeal or revision. Therefore, there is a multiplicity proceedings on the cases and they may get the delayed justice. In fact, in this case, though the ex parte decree was passed on 05.06.2009, but this time, the plaintiff would not get fruits of the decree, even after the lapse of 7 years, since the civil revision petition is unnecessarily pending from the year 2012 onwards and the ex parte decree dated 05.06.2009 was also stayed and pending.

29. Therefore, in my considered opinion that the Courts below have shown his judicial view in respect of the circumstances of the

case, he would allow the petition, but simply dismissed the petition for merely 68 days in filing the set aside application. This Court oftenly directed the Courts below while passing the orders, they must have shown their judicial view while deciding the cases of condonation of delay, liberal view must be shown, but in the present case, it was totally ignored by the learned Principal Sub-Judge, Coimbatore. Apart from this, the cases in suits like recovery of amount, declaration and partitions, the decree should be passed only on merits, since if the decree has not been passed on merits that would create the multiplicity proceedings of the cases. Therefore, in the interest of justice, this application must be allowed, but for the period from 29.04.2008 to 06.09.2009, the petitioners/ defendants were not given any proper reasons for the delay causing either by the petitioners/defendants or their previous counsels, therefore, they must compensated for the delay of 68 days. Accordingly, this Court should have interfered with the orders passed by the Court below in I.A.No.689 of 2010 in O.S.No.549 of 2008, dated 01.07.2011 and it is liable to be set aside.

30.In the result:

(a) this civil revision petition is allowed, by
setting aside the order passed in I.A.No.689 of

2010 in O.S.No.549 of 2008, dated 01.07.2011, on the file of the Principal Sub-Judge, Coimbatore, on condition that the petitioners should pay a sum of Rs.1000/- to the respondent or his counsel within a period of one week from the date of receipt of a copy of this order.

(b) the learned trial Court namely the Principal Sub-Judge, Coimbatore is hereby directed to number the set aside application and dispose the same within a period of 30 days from the date of receipt of a copy of this order, by giving notice to both parties.

(c) after passing the order in the set aside application, the trial Court must have dispose the suit within a period of one month on day to day basis, without giving any adjournment to either parties and both the parties are hereby directed to give their fullest co-operation for early disposal of the suit within the time limit as fixed by this Court.

31. Accordingly, the civil revision petition is allowed. No costs.
Consequently, connected miscellaneous petition is closed.

03.01.2017

Index:Yes
Internet:Yes

vs

To

The Principal Sub-Judge,
Coimbatore.

M.V.MURALIDARAN, J.

VS

Pre-Delivery order made in
CRP(NPD)No.2579 of 2012
and
M.P.No.1 of 2012

03.01.2017