

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 23RD DAY OF AUGUST 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A.No.5333 of 2018

IN

C.S. No.147 of 2007

Sri Suresh Bafna,
Prop.M/s.Mansi Mercantile Co.,
No.22B, Mulla Sahib Street,
Sowcarpet, Chennai-600 079.

Plaintiff

-Versus-

1. R.Krishnaji Reddy,
S/o.Rajaram Reddiar,
2. K.Kalpana Reddy,
W/o.R.Krishnaji,
Both are residing at No.2A,
4th Street, Abiramapuram,
Chennai-600 018.

Defendants

A.No.5333 of 2018

1. R.Krishnaji Reddy,
S/o.Rajaram Reddiar,
2. K.Kalpana Reddy,
W/o.R.Krishnaji,
Both are residing at No.2A,
4th Street, Abiramapuram,
Chennai-600 018.

...Applicants/ Defendants

VS

Sri Suresh Bafna,
Prop.M/s.Mansi Mercantile Co.,
No.22B, Mulla Sahib Street,
Sowcarpet, Chennai-600 079.

... Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased to condone the delay of 564 days in filing the application seeking to set aside the exparte decree granted in the above suit C.S.No.147 of 2007 on the file of this Hon'ble Court.

This Application coming on this day before this court for hearing the court made the following order:

(*) This application prays for the condonation of 564 days delay in seeking to set aside the exparte decree dated 30.11.2006 in E.P.No.14 of 2018.

2. The first and second applicants are defendants in the suit. The suit was filed seeking a decree against the defendants jointly and severally for a sum of Rs.33,30,384/- along with interest at 36% on Rs.7,00,000/- from the date of the plaint till date of realization.

3. The trajectory of events is as follows:

Suit Summons was issued to the defendants who did not choose to appear originally. Both defendants were thus set exparte on 25.06.2010, evidence was recorded and the suit came to be decreed as against the defendants on 25.06.2010.

4. The present applicants filed Application No.5213 of 2010 praying for a set aside of the ex parte decree dated 25.06.2010. A conditional order dated 19.10.2010 was passed that was complied with and the ex parte decree came to be set aside on 21.03.2016.

5. The suit came to be placed for hearing afresh. One Mr.Nagusha, Advocate entered appearance for the applicants. No written statement was filed on behalf of the applicants. Instead, the learned counsel for the applicants/defendants filed a memo dated 26.10.2016 to the following effect:

'The Counsel for the defendant states that through his letter dated 27.04.2016 sent under registered post he had called upon both the defendants to take back the above case bundle along with the change of vakalat in the above suit as they are not co operating to conduct the case and he would be giving no instructions on their behalf in the above case. The above registered post sent to both the defendants were returned with an endorsement "Unclaimed". Subsequently also he had sent the letter dated 11.08.2016 addressed to the counsel for plaintiff in the above suit requesting him to send the copy of the suit plaint directly to the defendants as he is reporting no instructions in the matter on behalf of the defendants. A copy of the said letter dated 11.08.2016 was also sent to both the defendants under registered post but they were also returned with an endorsement "Unclaimed".

The copies of the letters dated 27.04.2016 and 11.08.2016 and the returned registered post send to both

the defendants are filed along with this memo for reference.

In view of the aforesaid facts and circumstances the counsel for defendants report no instruction in the above suit for both the defendants and this Hon'ble Court may be pleased to record this memo and pass suitable orders and thus render justice."

6. This Court, taking note of the above Memo, set the applicants ex parte in the following terms:

'Mr.Arvind Subramanaian, learned counsel represents that he has filed change of vakalath on behalf of the plaintiff, but his name is not reflected in the cause list today. Registry is directed to verify if the vakalath is in order and print his name.

2. Be that as it may, Mr.Nagu Sah, learned counsel for both defendants has filed a memo stating that there are no instructions from his client. To the Memo, he has also annexed the communications sent by Speed Post with acknowledgement due. The communications have been returned with the postal endorsement unclaimed. Therefore, it is to be construed that the noticees/addressees have refused to receive the envelope as they have not been chosen to claim the envelope. Under such circumstances, this Court is of the view that there is no need/necessity to send notice afresh to the defendants.

3. Based on by the above said memo, both the defendants are set ex-parte. The main suit is set down for exparte evidence. Post the matter before the learned Additional Master-IV for recording evidence on 10.11.2016'

7. Based on the reporting of 'no instructions' by the counsel, proceedings were continued and the defendants were yet again set exparte on 26.10.2016. After recording of exparte evidence the matter was posted for hearing and the suit decreed exparte with costs a second time on 30.11.2016.

8. It is in the aforesaid trajectory of events that the present application has come to be filed seeking to set aside the exparte decree for the second time. It is very unfortunate that the application is silent about the events relating to the first ex parte decree and the earlier application filed by the applicants for setting aside of the same. In fact the above sequence of events have been culled by the Court only from an examination of the documents available as well as the ex parte decree dated 30.11.2016. The intention of the applicants not to reveal all facts or the checkered history that this matter has had, is thus apparent.

9. Be that as it may, the Applications and the prayers advanced are examined in the light of the provisions of Section 5 of the Limitation Act for condonation of the delay of 546 days as well as Order IX Rule 13 of the Civil Procedure Code that provides for a set aside of an ex parte decree in two situations; firstly where the defendants have not been put to notice and there is a violation of the principles of natural justice and secondly where there is cause for non-appearance despite receipt of notice.

10. According to the applicants, they had entrusted the matter to a counsel and had believed that he would be appearing and taking care of their interests. It was only in the last week of June 2018 that they noticed that their names were printed in the cause list in execution proceedings initiated at the instance of the respondent and listed for hearing before the learned Master on 27.06.2018.

It was at that juncture they realized that the erstwhile counsel has reported no instructions. Thereafter they entered appearance and filed the present petition seeking to set aside the exparte decree passed against them.

11. According to the applicants they were not in station in October 2016, having accompanied their daughter for a National Golf tournament and it was only for this reason that the registered letter sent by the counsel had been returned 'unclaimed'. The applicants state at paragraph 3 of the Application as follows:

'...From the web copy of the judgment we came to know that the suit has been decreed ex parte on the ground that my erstwhile counsel Mr. Nagusha seems to be reported no instructions in the above matter on the ground that the notice sent to us has been returned unclaimed in the month of October, 2016.'

12. Thus, the applicants have sought to explain that they were unable to receive the notices/communications issued by the erstwhile counsel, since according to them they were unavailable in the month of October 2016. This argument does not advance their case and is flawed for the reason that the counsels' communications that have been returned as 'unclaimed' by the Postal Department are of the months of April and August, 2016 and not October 2016. The

applicants do not deny receipt of communications dated 24.04.2016 and 11.08.2016. They also do not state or set out any explanation as to why they did not choose to respond to the communications of the counsel in April and August 2016. The non-availability of the applicants in Chennai in October 2016 is not relevant and nothing turns upon the same.

13. Yet another argument advanced on behalf of the applicants is that pursuant to the filing of memo from the erstwhile counsel reporting 'no instructions', notice ought to have been sent directly to them. This was not done which, according to them, vitiates the exparte decree.

14. Though no counter has been filed by the respondent, serious objections are raised to the application by the respondent who also urges the Court to take into account the conduct of the applicants in the course of the matter thus far.

15. Reliance is placed on the two decisions of this Court in *A.Y.Abdul Rahim Vs. M.B.Ramesh* (2016, CJ (Madras) 1040) & *Murugan and Shankar Vs. E Elumalai and M. Kannan* (2010, CJ (Madras) 4292) to the effect that the conduct of a party should be taken into consideration to decide an application of this nature.

16. On the part of the applicants, reliance is placed on a judgment of the Supreme Court in the case of *Tahil Ram Issardas S. Sadarangani Vs. Ramchand Issardas Sadarangani* (1993 Supp(3) SCC 256). The Bench, in the aforesaid judgment, allows an application seeking restoration of a petition dismissed for default, on the ground that the advocate in question has withdrawn from the matter and there was nothing on record to show whether the petitioners had received notice of hearing of the case on that day. In

the interests of justice the Bench ordered fresh notice to the parties as the party was held not to be at fault.

17. The facts in the present case are distinguishable. I am of the view that the Applicants before me are certainly at fault for ignoring the communications from counsel sent on April and August 2016, and not pursuing the matter diligently. Having entrusted the matter to a counsel, it becomes incumbent on the parties to exercise diligence in responding to communications from the counsel particularly when it is not in dispute that the communications have been received. This is all the more so when the applicants have already been set exparte once and the Court has put them to terms while setting aside the first exparte decree.

18. In the present case, the applicants have been set exparte for the second time on 26.10.2016 on the ground that communications have been issued to the parties by the counsel in April and August 2016 that have been returned 'unclaimed'. It was thus construed that the noticees have refused to receive the same and accordingly, there was no need or necessity to issue notice afresh to the defendants. It is in the aforesaid circumstances that the defendants have been set exparte.

19. The explanation offered by the applicants in regard to the return of the postal covers is that they were not in station in October 2016. No explanation has been set out as to why letters dated 27.04.2016 and 11.08.2016 were returned 'unclaimed' and in fact, it is not the case of the applicants that they have not received the communications sent in April and August 2016. I may also mention here that, though the application states that a written statement has been filed along with the application, there is none available on file and the Registry confirms that no written statement has been filed.

20. (*) Thus, no cause, let alone sufficient cause, has been shown as to why the enormous delay of 564 days is to be condoned. The prayer for condonation of delay has thus no merit and the prayer is dismissed.

21. In the light of the discussion above, this application is dismissed.

Sd/- A.S.M.J
23.08.2018

(*) Modified as per order dated 10.09.2018

Sd./-
Assistant Registrar Comm. Cases

//Certified to be a true copy//
Dated this the day of 2018.

KY/31.08.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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