

HON'BLE SRI JUSTICE S.V. BHATT

C.R.P. No.714 OF 2018

ORDER:

Heard Mr.Gopala Krishna Kalanidhi for petitioners and Ms.Nagamani for respondent.

The plaintiffs in O.S No.4 of 2006 in the Court of Senior Civil Judge, Manthani are the revision petitioners. The plaintiffs filed I.A. No.17 of 2017 under Section 5 of the Limitation Act (for short 'the Act') to condone the delay of 709 days in filing a petition to set aside the abatement caused both due to the demise of 1st plaintiff on 28.11.2014 and also for not taking steps within time stipulated by law. The gist of the affidavit reads thus:

After the death of 1st plaintiff, application is filed before the Tahasildar, Ramagundam for issuance of legal heir certificate and the Tahsildar after due enquiry issued the 'family member certificate' instead of issuing legal heir certificate. The 1st plaintiff filed O.S No.4 of 2006 for partition and separate possession against the respondent. The 2nd petitioner herein, who is wife of 1st plaintiff, could not attend the Court due to ill-health and mental agony and she could not inform the death of 1st plaintiff to their Advocate.

The sole respondent filed counter affidavit and has taken objections on the stand taken in the affidavit and also the merits of the case. In an application filed for condoning the delay of 709 days for setting aside abatement for not taking the steps within time, a very meandering and lengthy counter affidavit is filed by the respondent. I have with the assistance of the learned counsel

appearing for the parties, perused the counter affidavit and this Court is compelled to observe that the averments in the counter affidavit have been expanded beyond necessity of the occasion.

The trial Judge, by referring to the distinguishing circumstance between the case on hand and the citation relied on by the petitioners held as follows:

“The counsel appearing for the petitioner submits that after the death of plaintiff No.1 in OS 04/2006 i.e. husband of the petitioner by reason of ill health and mental agony she would have filed the petition for setting aside the abatement order other wise she would have filed the petition. In support of his contention he relied on the judgment of Madras High Court Madurai Bench in Radhika others (petitioners) v/s. Srikumaran Nayar (respondent) CRP (NPD) (MD) (NO 1620/04 dated 31.01.2011) citing the above said judgment it has been contended by the learned counsel appearing for the petitioner that the petitioner shall be allowed to contest the matter then the case can be decided on merits. In the judgment supra the Hon'ble Madras High Court allowed the petition U/Sec.5 of Limitation Act and condoned the delay. But, the facts in the said case and the facts in the present case are not identical. In the said case the delay was only 77 days. Moreover, in the said case the petitioners produced medical certificates before the Sub Court which dismissed the petition, but in this case the delay was 709 days and no piece of document if filed to show that the petitioner fell sick and by reasonable ill health she could not approach the court for filing the petition. Therefore, the judgment of the Hon'ble Madras High Court will not apply to the present case. The contention of the petitioner that due to ill health following the death of her husband she could not approach before the court is not inspiring confidence. Moreover, this is the old case of 2006. 10 years have elapsed from the date of filing of the suit and more than 2 years elapsed

from the date of abatement of order. Therefore, it is too late for the petitioner to approach this court.”

and finally dismissed the application.

Mr.Gopala Krishna Kalanidhi contends that the suit is for partition and separate possession of half share in the plaint schedule properties. The 1st plaintiff was looking after the litigation, he died and even assuming without admitting that steps could not be taken to bring the legal representatives on record within the time stipulated by law, the Court should have taken a pragmatic view in the matter and ought to have accepted the prayer for condoning the delay. He places strong reliance on the decisions in *Balwant Singh (dead) v. Jagdish Singh*¹, *Dhiraj Singh (dead) through LRs v. State of Haryana*² and prays for setting aside the order impugned in the C.R.P. by condoning the delay in filing application to set aside the default order.

Ms.Nagamani, appearing for respondent contends that the prayer to condone the delay could not be exercised as matter of course and the discretion of the Court is exercised subject to a party showing sufficient cause. The Court which is called upon to exercise the discretion can condone if it is satisfied with the cause. The counsel contends that for the purpose of getting the delay condoned, let the petitioners not to show Manthani town in a poor light. According to her, the place has all the amenities and lack of communication or inaccessibility of their counsel is a plea taken for

¹ (2010) 8 SCC 685

² (2014) 14 SCC 127

convenience, particularly, for the sake of seeking condonation of delay. She prays for dismissing the C.R.P. and confirming the order under revision.

The application is filed under Section 5 of the Act to condone the delay in filing the application to set aside the abatement. The discretion of the Court vis-à-vis the requirement of sufficient cause in a case where the legal representatives are brought on record was considered in a catena of cases and the principles broadly stated are that the Court's decision to excuse the delay is judicial. Considering the scope of the power under this rule, that while on the one hand the Court should not be overly strict in requiring proof on why the application for bringing legal representatives on record or for setting aside abatement was not made in time, the restriction imposed on discretion is that every reason stated is not accepted monotonously. While considering prayer for condonation of delay in filing petition for setting aside abatement the Court ought not to be hyper technical pedantic or un-pragmatic. Further in a particular case whether the explanation furnishing sufficient cause or not will be dependent on the facts of particular fact situation. This Court is not suggesting that a straight jacket formula can be put in place for all the situations.

In the case on hand, the reasons assigned by the trial Court are completely unconvincing. May be that the decision relied on by the plaintiffs may not be applicable to the fact situation of the case, but the Court is required to examine the sufficient cause

stated by the plaintiffs and whether the cause stated makes ground for condonation of delay or not. Be that as it may, the prayer is only to condone the delay keeping in view the rights for which the parties are agitating in the O.S. No.4 of 2006. The sufficient cause stated in affidavit appears to be probable and ought not to be subjected to hyper technical scrutiny.

This Court is not convinced with the reasons in order under revision and the order under revision is set aside. The delay of 709 days is condoned. The trial Court is directed to take up the other application filed by the plaintiffs to come on record and pass orders within two weeks and further take steps to dispose of suit within three months from today.

The C.R.P. is ordered as indicated above. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.



S.V.BHATT, J

Date:10.04.2018
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