

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on
19.11.2020

Delivered on
27.11.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.Nos. 1107 & 1108 of 2018

and

C.M.P.No. 6249 of 2018

1.Thangaraj

2.Sri Jayanthi

... Petitioners/Defendants in both CRPs

-VS-

1.Kalyan Finance

Rep.by its Prorietor, A.Ramkumar

2.A.Ramkumar

... Respondents in both CRPs

Common Prayer: Civil Revision Petition filed under Section 115 of C.P.C., against the fair and decreetal orders passed in I.A.Nos. 521 & 522 of 2015 in O.S.No. 557 of 2012 dated 22.03.2016 on the file of the IV - Additional District Judge, Coimbatore.

For Petitioners in both CRPs : Mr.C.Deivasigamani

For Respondents in both CRPs : Mr.C.R.Prasannan

C O M M O N O R D E R

The defendants in O.S.No. 557 of 2012 have come up with these revisions challenging the orders made in I.A.Nos. 521 & 522 of 2015.

2. Those two applications were filed by the defendants seeking condonation of delay of 187 days in seeking restoration of the application under Order 9 Rule 13 that was dismissed for default and to condone the delay of two days in filing an application to set aside the exparte final decree granted in the said suit.

3. The suit was filed by the respondents herein seeking recovery of money due on a mortgage dated 27.06.2000, said to have been executed by the second defendant in favour of the plaintiffs. The suit came to be decreed exparte on 11.02.2013. Soon thereafter, that is on 18.02.2013, the defendants filed an application in I.A.No. 432 of 2013 seeking to set aside the

exparte decree. The said application came to be dismissed for non-filing of the written statement on 07.08.2013. Thereafter, the plaintiffs filed an application in I.A.No. 975 of 2013 for passing of final decree which also came to be allowed exparte on 08.01.2014. The defendants filed I.A.No: 521 of 2014 seeking condonation of delay of 187 days in seeking restoration of I.A.No:432 of 2013. The defendants also filed an application in I.A.No. 522 of 2014 seeking condonation of delay of two days in filing an application to set aside the exparte final decree.

4. Both the applications were resisted by the plaintiffs / decree holders contending that no sufficient cause has been shown by the petitioners for condonation of delay. According to the plaintiffs, these applications have been filed only with a view to drag on the suit and delay execution of the decree that has already been granted. The Trial Court accepted the defence and dismissed the applications.

5. I have heard Mr.C.Deivasigamani, learned counsel for the petitioners and Mr.C.R.Prasannan, learned counsel for the respondents.

6. Since there was an uncertainty regarding the date of filing of these applications before the Trial Court, I had called for the records. The records revealed the following:-

6.1. An exparte preliminary decree was passed in the suit on 11.02.2013. An application to set aside the exparte decree was filed by the defendants on 18.02.2013 and the same was numbered as I.A.No. 432 of 2013. On 17.07.2013, when the matter was posted for enquiry, the learned counsel for the plaintiffs in the suit and the respondents in I.A.No. 432 of 2013 had made the following endorsement:-

"The above petition in I.A.No. 432 of 2013 may be allowed on heavy terms."

6.2. De hors the said endorsement, the learned Additional District Judge, Coimbatore directed the defendants to file written statement on or before 07.08.2013. On 07.08.2013, the learned Additional District Judge passed the following order:-

" Since the petitioners did not file written statement as directed on 17.07.2013, this petition is dismissed."

7. After the dismissal of the I.A.No. 432 of 2013, the plaintiffs filed I.A.No. 975 of 2013 seeking a final decree. The defendants were served with notice and Mr.C.Deivasigamani had entered appearance for the defendants on 10.12.2013. On 08.01.2014, since no counter was filed and the respondents namely, the judgment debtors were absent, the application in I.A.No. 975 of 2013 was allowed exparte. This prompted the

petitioners herein to file the application in I.A.No. 521 of 2015 seeking condonation of delay of 187 days in filing an application to restore I.A.No. 432 of 2013, which was dismissed on 07.08.2013. This application was presented on 10.02.2014 that is almost within a month from the date of the exparte final decree namely, 08.01.2014. On the same day, the defendants also filed I.A.No. 522 of 2015 seeking to condone the delay of two days in filing the application to set aside the exparte final decree.

8. The Trial Court had however, held that the defendants have not explained the delay to the satisfaction of the Court. The Court also pointed out that the application in I.A.No. 432 of 2013 was not dismissed for default but it was dismissed for non-compliance with the earlier direction made on 17.07.2013 directing the defendants to file their written statement. Therefore, technically the dismissal was not one for default simplicitor.

9. Mr.C.Deivasigamani, learned counsel for the petitioners / judgment debtors would vehemently contend that the Trial Court was not right in dismissing the applications for condonation of delay adopting a hyper technical and strict approach. He would contend that this Court and the Hon'ble Supreme Court have been repeatedly pointed out that the Courts must be liberal in condonation of delay unless it is shown that the delay is malafide. Relying on the facts that has been culled out from the records, Mr.C.Deivasigamani would submit that there was no undue delay on the part of the petitioners in taking steps to have the exparte decrees set aside. The application for setting aside the exparte decree was filed within 10 days of the exparte decree. Unfortunately, the same was dismissed on the ground that the written statement was not filed.

10. No doubt, the Court has the power to insist upon the defendants to file the written statement along with an application under Order 9 Rule 13 or within a day fixed thereafter. But, rejection of the application on the ground of non-filing of the written statement cannot be said to be one on merits. Mr.C.Deivasigamani would contend that even a judgment rendered under Order 8 Rule 10 of C.P.C., has been held to be an exparte judgment which could be set aside by the Court upon an application under Order 9 Rule 13. Therefore, according to Mr.C.Deivasigamani, the fact that the application in I.A.No. 432 of 2013 was dismissed for non-filing of a written statement would not make a difference and the application for restoration of the same would lie.

11. Adverting to the reasons for the delay,

Mr.C.Deivasigamani would submit that the second petitioner met with an accident on 07.08.2013 and he went to Kerela for Ayurvedic treatment and came back only on 29.11.2013 and, again he had to go to Kerela and he came back only on 16.01.2014. Immediately, after his return, he had taken appropriate steps to have the exparte decrees set aside. The delay that was caused in numbering the applications as well as the disposal of the applications, according to Mr.C.Deivasigamani, cannot be attributed to the petitioners.

12. Contending contra, Mr.C.R.Prasannan, learned counsel for the respondents would submit that the suit is one on a mortgage and it was instituted as early as on 26.06.2013 and almost 8 years have been lost and if the exparte decree is set aside, the delay would cause irreparable injury to the plaintiffs. The suit is based on a registered instrument of mortgage and therefore, the defendants cannot claim that they have a very valid defence in the suit. Mr.C.R.Prasannan would also contend that the Trial Court was justified in rejecting the application for condonation of delay, taking into account the conduct of the parties. The fact that the defendants have remained exparte in the final decree proceedings also would show that they had been watching the proceedings and making all attempts to drag on the proceedings. I have considered the rival submissions.

13. As rightly pointed out by Mr.C.Deivasigamani, learned counsel for the petitioners, the petitioners cannot be said to have shown complete negligence and supine indifference in prosecuting the suit. The exparte decree came to be passed in February 2013 and soon thereafter, within 10 days, the defendants came out with an application for setting aside the exparte decree. Unfortunately, the said application was dismissed for non-filing of written statement on 07.08.2013. Immediately, a final decree application was filed. The exparte final decree came to be passed on 08.01.2014. Soon thereafter, the instant applications were filed seeking condonation of delay. Therefore, I do not find any material to suspect the bona fides of the petitioners. The counter in the final decree application was filed on 17.01.2014. The Trial has taken a very strict view and concluded that the defendants have not explained the delay properly. I am unable to concur with the conclusions of the Trial Court.

14. The Hon'ble Supreme Court in University of Delhi Vs. Union of India reported in 2019 SCC Online SC 1634 had held that the Courts must be liberal in matters regarding delay unless it is shown that the delay has been caused with a malafide intention or that the party seeking condonation of delay had derived a certain advantage because of the delay. While doing so, the Hon'ble Supreme Court after referring to the

judgment in Collector, Land Acquisition, Anantnag & Another Vs. Mr.Katiji and others reported in 1987 (2) SCC 107 had observed as follows:-

"20. From a consideration of the view taken by this Court through the decisions cited supra the position is clear that, by and large, a liberal approach is to be taken in the matter of condonation of delay. The consideration for condonation of delay would not depend on the status of the party namely the Government or the public bodies so as to apply a different yardstick but the ultimate consideration should be to render even handed justice to the parties. Even in such case the condonation of long delay should not be automatic since the accrued right or the adverse consequence to the opposite party is also to be kept in perspective. In that background while considering condonation of delay, the routine explanation would not be enough but it should be in the nature of indicating "sufficient cause" to justify the delay which will depend on the backdrop of each case and will have to be weighed carefully by the Courts based on the fact situation. In the case of Katiji (Supra) the entire conspectus relating to condonation of delay has been kept in focus. However, what cannot also be lost sight is that the consideration therein was in the background of dismissal of the application seeking condonation of delay in a case where there was delay of four days pitted against the consideration that was required to be made on merits regarding the upward revision of compensation amounting to 800 per cent."

15. If you have to examine the case on hand on the above principles laid down by the Hon'ble Supreme Court, the irresistible conclusion is that the delay should be condoned. The respondents / plaintiffs should also not be left high and dry as they have been running from pillar to post for the past 8 years in conducting the litigation. Upon reaching the conclusion that the delay deserves to be condoned, I had suggested to Mr.C.R.Prasannan, learned counsel appearing for the plaintiffs that instead of condoning the delay and remitting the matter to the Trial Court for hearing the two applications under Order 9 Rule 13 filed to set aside the exparte preliminary decree and exparte final decree, I could exercise my power under Article 227 of the Constitution of India to set aside those exparte decrees and direct the suit to be disposed of within a time frame.

16. The learned counsel magnanimously agreed to such a course despite the fact that he had vociferously resisted the revisions on the ground that the delay should not be condoned. Now that I have concluded that the delay deserves to be

condoned, both the revisions are allowed, I.A.Nos. 521 & 522 of 2015 will stand allowed, the delay in seeking to set aside the exparte final decree and the delay in seeking restoration of I.A.432 of 2013 will stand condoned. I.A.No: 432 of 2013 will stand restored and allowed. The exparte preliminary decree passed on 11.02.2013 will stand set aside. As a consequence, the exparte final decree passed in I.A.No. 975 of 2013 on 08.01.2014 will stand set aside. Since the exparte preliminary decree stand set aside, I.A.No. 975 of 2013 will stand dismissed with a liberty to the plaintiffs to take out a fresh application in the event the suit is decreed at a later point of time. Consequently, connected miscellaneous petition is closed. No costs.

17. All the above will be subject to the condition that the defendants / petitioners herein deposit a sum of Rs.3,00,000/- to the credit of the suit on or before 30.04.2021. On such deposit and production of the receipt, the Trial Court is directed to proceed with the trial of the suit in O.S.No. 557 of 2012 and dispose of the suit within four months thereafter, that is on or before 31.10.2021. In the event of failure on the part of the defendants to deposit the sum of Rs.3,00,000/- on or before 30.04.2021, both these revisions will stand dismissed with out any further reference ti this court.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkn

To:-

The IV - Additional District Court, Coimbatore.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.C.R.Prasana, Advocate, S.R.No. 37858

+1cc to Mr.Deivasigamani, Advocate, S.R.No. 38111

C.R.P.Nos. 1107 & 1108 of 2018
and C.M.P.No. 6249 of 2018

CNR(CO)
GN(07/01/2021)