

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24-01-2020

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.P.No.23762 of 2019
in
A.S. SR. No.47114 of 2019

H.Ashok .. Petitioner/Appellant

Vs.

1.H.Suresh
2.H.Sivaji
3.R.Rajesh Kumar ... Respondents/Respondents

PRAYER: C.M.P.No.23762 of 2019 is filed under Section 5 of the Limitation Act, to condone the delay of 280 days in filing the above appeal suit before this Court.

PRAYER: A.S. SR.No.47114 of 2019 is preferred under Section 96 of Civil Procedure Code read with Order XVI Rules 1 and 2 of the Code of Civil Procedure, against the to set aside the impugned final decree dated 20.06.2018 made in I.A.No.47 of 2017 in O.S.No.2210 of 2014 as amended supplemental decree dated 17.07.2018 made in I.A.No.112 of 2018 in O.S.No.2210 of 2014 on the file of the learned XVII Additional Judge, City Civil Court, Chennai.

For Petitioner/Appellant : Mr.R.Veeramani

For Respondent No.1 : Ms.H.Kalpana

For Respondent No.3 : Mr.R.Rajeshkumar
(Party-in-Person)

J U D G M E N T

The Civil Miscellaneous Petition is filed to condone the delay of 280 days in filing the appeal suit against the final decree dated 20.06.2018 made in I.A.No.47 of 2017 in O.S.No.2210 of 2014 and supplementary decree dated 17.07.2018 made in I.A.No.112 of 2018 in O.S.No.2210 of 2014 on the file of the learned XVII Additional Judge, City Civil Court, Chennai.

2. The petitioner, who was the second defendant in the suit for partition, has chosen to file the appeal suit, challenging the final decree passed by the Trial Court. The final decree became final and the parties accepted the same and subsequently based on the application filed for passing the final decree, an Advocate Commissioner was appointed and thereafter, the Trial Court passed the final decree.

3. The reasons stipulated for condoning the huge delay of 280 days in filing the appeal suit by the petitioner is that after passing of the final decree on 20.06.2018, an application was filed for a supplementary decree in I.A.No.112 of 2018 in I.A.No.47 of 2017 in O.S.No.2210 of 2014 and the petitioner was waiting for the supplementary final decree in I.A.No.112 of 2018 and therefore, he has not chosen to file any appeal suit against the final decree passed on 20.06.2018.

4. It is contended that the Registry of the High Court has wrongly calculated the delay by reckoning the period of limitation with effect from the date of final decree i.e., 20.06.2018 passed in I.A.No.47 of 2017 in O.S.2210 of 2014. The calculation method adopted by the Registry of the High Court is erroneous on account of the fact that the supplementary final decree was passed subsequently on 17.07.2018 and if that date is taken into account for the purpose of calculating the delay, the delay would be around in 28 days in filing the appeal and the same is condonable and therefore, the delay is to be condoned and the appeal suit is to be numbered.

5. The learned counsel appearing on behalf of the petitioner states that as contended by the respondents, the learned counsel, who appeared on behalf of the petitioner before the Trial Court, made an endorsement in I.A.No.112 of 2018, which is an interlocutory application filed for supplementary final decree. The amendment pleaded in that I.A.No.112 of 2018 is the cause for the delay, is the submission made.

6. With reference to the endorsement made by the learned Trial Court advocate appeared on behalf of the petitioner in I.A.No.112 of 2018 stating that "the portion marked D in the Advocate Commissioner's Report may be allotted to the petitioner/D-2 (Petitioner before this Court). D-2 accepts the allotment and will not proceed further as against the final decree".

7. With reference to the above endorsement made by the learned Advocate appeared on behalf of the petitioner before the Trial Court, the learned counsel for the petitioner before this Court contended that such an endorsement is not binding on the

petitioner in view of the fact that the learned Advocate before the Trial Court cannot make such endorsement, so as to take away the right of appeal provided to the petitioner under law. Thus, the appeal is to be considered on merits by condoning the delay.

8. In this regard, the learned counsel for the petitioner cited a judgment of the Hon'ble Supreme Court of India in the case of Bhivchandra Shankar More vs. Balu Gangaram More and Others [(2019) 6 SCC 387], wherein in paragraphs 8 and 10, it has been held as under:-

"8. We have carefully considered the submissions and perused the impugned judgment [Balu Gangaram More vs. Bhivchandra Shankar More, 2014 SCC OnLine Bom 1199 : (2015) 2 Mah LJ 879] and other materials placed on record. The following points arise for consideration:

(i) Whether the time spent in the proceedings taken to set aside the ex parte decree constitute "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1908 so as to condone the delay in preferring an appeal against the ex parte decree on merits?

(ii) When an application filed under Order 9 Rule 13 CPC has been dismissed on merits, whether regular appeal under Section 96(2) CPC is barred?

10. A conjoint reading of Order 9 Rule 13 CPC and Section 96 (2) CPC indicates that the defendant who suffered an ex parte decree has two remedies: (i) either to file an application under Order 9 Rule 13 CPC to set aside the ex parte decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex parte decree on merits."

9. Relying on the abovesaid judgment, the learned counsel for the petitioner reiterated that the delay is neither willful nor wanton on account of the fact that he filed an interlocutory application, seeking amendment in the original final decree and therefore, the reasons are genuine. Further, an endorsement made by the learned counsel appeared on behalf of the petitioner before the Trial Court would not bind on him and based

on such endorsement, his right of appeal cannot be taken away.

10. The learned counsel appearing on behalf of the third respondent, in person, who is the legal practitioner, and the third party purchaser of the property, made a submission that he is a bona fide third party purchaser of the property mentioned in the appeal suit and his rights are to be protected. The third respondent-in person, articulated his case by stating that he purchased the property and became an absolute owner and developed the property by constructing staircase and by installing motors, bore-wells etc. Such developments were made after passing of the final decree by the Trial Court on 20.06.2018.

11. The third respondent, in person, disputed the contentions raised by the petitioner by stating that the preliminary decree passed between the parties in a partition suit became final and the final decree was passed by the Trial Court on 20.06.2018 and the final decree was not challenged at the first instance and now challenged with a delay of 280 days.

12. The reasons stated for the delay is unacceptable in view of the fact that filing an interlocutory application before the very same Court, seeking amendment or otherwise, would not be a bar for filing an appeal suit against the original final decree. Even after filing of the interlocutory application in I.A.No.112 of 2018, the petitioner had decided to accept the final decree.

13. The third respondent mainly contended that the very relief sought for in I.A.No.112 of 2018 is to pass an order by amending the final decree passed by the Trial Court on 20.06.2018 in I.A.No.47 of 2017 in O.S.No.2210 of 2014, including the share allotted to the petitioner/D-2 portion marked as 'D' in the Commissioner's Plan was in premises No.13/7, First Street, North Thirumalainagar, Villivakkam, Chennai-49".

14. Relying on the relief sought for in the interlocutory application in I.A.No.112 of 2018, the third respondent reiterated that the very relief sought for in the interlocutory application is claiming portion marked as 'D' in the Commissioner's Report. The said portion was allotted in favour of the petitioner and under those circumstances, the learned counsel appearing on behalf of the petitioner before the Trial Court, made an endorsement on 13.07.2018 as follows:-

"The portion marked 'D' in the Advocate Commissioner's Report may be allotted to the petitioner/D-2. D-2 accepts the allotment and will not proceed further as against the final decree".

15. There is a relevance in the endorsement in view of the fact that the very relief sought for in the interlocutory application to allot portion 'D' as per the Commissioner's Report. When the portion 'D' was agreed to be handed over in favour of the petitioner, the learned counsel appeared before the Trial Court made an endorsement, then this Court is of the opinion that the Advocate, who appeared before the Trial Court, did not act against the prayer as such sought for in I.A.No.112 of 2018 and at no point of time, the learned counsel acted against the interest of the petitioner herein.

16. When an Advocate make an endorsement in his capacity as a power holder (Vakalatnama) and if there is no inconsistency or affecting the rights of the parties, then the same need not be doubted by the Court. Perusal of the prayer sought for in the interlocutory application reveals that the petition for amending the final decree is filed so as to include the share of the petitioner i.e., the portion 'D' marked in the Commissioner's Report and the endorsement made by the learned counsel appeared on behalf of the petitioner before the Trial Court also reveals that the petitioner agreed for the portion marked 'D' in the Commissioner's Report and that was accepted. Accordingly, the petitioner accepted the final decree.

17. Considering the above facts, this Court is of the opinion that there is no inconsistency or the learned Advocate before the Trial Court acted against the interest of the petitioner. Contrarily, he has made an endorsement with reference to the relief sought for in the interlocutory application and under those circumstances, there is no reason to doubt the endorsement made by the learned counsel appeared on behalf of the petitioner before the Trial Court.

18. As far as the endorsement made by the learned Advocates on behalf of the parties, the third respondent cited a judgment of this Court dated 18.01.2011 passed in C.M.S.A.(MD) No.6 of 2010, wherein this Court relied on the judgment of the Apex Court and made the following observations:-

"10.It is not in dispute that the second respondent gave an undertaking on 29.05.2002 in I.A.No.308/2002 that he will not alienate the property. It cannot be said that such an undertaking could be ignored, otherwise there is no purpose in recording an undertaking by a Court and closing the application for attachment. As rightly contended by the learned counsel for the first respondent, the Honourable Apex Court has considered the effect of undertaking given to the Court in the case of BANK OF BARODA VS. SADRUDDINHASAN

DAYA reported in AIR 2004 SC 942 and quoted the following from Halsbury's Laws of England with approval:-

"An undertaking given to the court in pending proceedings by a person or Corporation (or by a Government Department or Minister of the Crown acting in his official capacity) on the faith of which the court sanctions a particular course of action or inaction has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt. Therefore an undertaking given by the party before the court amounts to an order of injunction issued by the court."

11. Further, this Court also considered the effect of undertaking given by a party in the judgment in A.B.GURUMURTHI CHETTY VS. SELLA PERUMAL PILLAI reported in AIR 1936 MADRAS 651 in the following words:-

"..... Soon after the filing of the suit, the plaintiff applied for attachment before judgment of a certain sum of money lying with the Public Works Department to the credit of the defendant. In that connexion the defendant filed an affidavit on 29th November 1933 undertaking to draw the bill amount and to deposit the same in Court pending disposal of this petition without utilising it for his other purposes. The plaintiff was not prepared to accept this undertaking because he was not sure what the defendant would do once he drew the money. That this apprehension was well founded is shown by the events that have subsequently happened. When the attachment application came on for orders before the Court on 29th itself, it appears that the defendant's vakil modified the undertaking in the affidavit and substituted an undertaking not to draw the cheque amount pending further orders of the Court on the

petition. The vakil took care to add that as the party was not present in Court then, this undertaking was given by him under instructions from the party. The Court recorded the undertaking and on 21st December 1933 an order was passed in the following terms: "Pleaders heard. Not pressed in view of the undertaking already given by defendant. Dismissed."

19. The very contents in the Vakalatnama reveals that an Advocate, on acceptance of Vakalatnama is intended to act in the interest on behalf of his clients. Only when the inference is probable, then alone the same is to be scrutinised and not otherwise. In all circumstances, the submissions as well as the endorsements made by the Advocates are to be trusted upon as they have acted on behalf of their clients.

20. This apart, the litigants are also authorising the Advocates not only to represent but also to execute and prosecute and act on behalf of the litigants in good faith and in the interest of protecting their rights in all circumstances.

21. This being the Vakalatnama, the nature of relationship created through the Vakalatnama between the Advocate and the litigants, this Court is of an opinion that the endorsements made by the Advocates are to be trusted upon in all circumstances except the contrary facts are proved.

22. In other words, if an Advocate acted totally in violation of the instructions provided or acted against the interest of the litigants, then alone the Courts are bound to look into the facts and circumstances and otherwise the Courts are bound to accept the endorsements made by the Advocate on behalf of the litigants as they are holding the power and they are acting as a representative to protect the rights of the litigants.

23. Legal profession, being a noble one and, the Advocates are always expected to maintain the utmost integrity and honesty towards the litigants. It is not as if the Advocates have got duty towards litigants alone. The three fold responsibility for an Advocate in normal parlance are that duty towards litigants, duty towards the colleagues and duty towards the Court. All the three responsibilities are bound to be performed by each and every legal practitioner in order to maintain the integrity and honesty and to uphold the judicial ethics in the Legal System. Therefore, any inference is brought out or any indifference is noticed, then alone actions are

possible and in all circumstances, the actions of the Advocates in good faith is to be trusted upon. The endorsements as well as the notice or memos filed by the Advocates are to be taken as if that the litigants have given such instructions or consented for such endorsements.

24. This being the principles to be followed, this Court is of the considered opinion that for the purpose of condoning the delay, we cannot entertain a doubt raised against the Advocate, who made endorsement before the Trial Court on behalf of the petitioner. Further, the petitioner could not be able to substantiate any such doubt against the Advocate, who appeared on behalf of the petitioner before the Trial Court.

25. This Court, while dealing with number of such miscellaneous petitions, could be able to identify that many such flimsy reasons are pleaded for the purpose of condoning the enormous delay. For example, the litigants usually plead illness, ill-health or jaundice for condoning huge delay and now such disease of jaundice is not prevailing.

26. The duty of the Advocates, as stated above, includes, avoiding of false allegations against the Advocates. Merely stating that the Advocate has not communicated about the copy of the order and not informed about the case, cannot be a valid ground for the purpose of condoning the huge delay in a routine manner. The genuinity of such statements are to be substantiated with documents. Mere filing of an affidavit stating that the Advocates not informed about the judgment would not be construed as a genuine ground for the purpose of condoning the huge delay in filing the appeal suits.

27. Law of limitation is substantive law. Thus, Rule is to follow the limitation. Unconardonable delay cannot be condoned by accepting flimsy reasons in a routine and mechanical manner. The parties are expected to be vigil in respect of their rights. A person who has left out their right cannot wake up in one fine morning and knock the doors of the Court for the relief. Thus, the parties aggrieved must be not only vigil, must also be prudent in pursuing their remedy before the Court of Law.

28. This being the basic principles, this Court is of the considered opinion that the delay cannot be condoned by the Courts in a routine and mechanical manner and the power and discretion is to be exercised judiciously and by recording reasons. The reasons must be based on sound legal principles. The Courts are bound to record the reasons for condonation of delay. Routine condonation is to be averted as the same would cause prejudice to the interest of other parties, who all are put to defend their case after a prolonged period without any valid

reason. Thus, the likelihood of the prejudice to be caused to the other parties are also to be considered by the Court before condoning the huge delay. In this regard, the Courts are bound to adopt a pragmatic approach and should ensure that the reasons are genuine and the delay is to be condoned by recording legally acceptable reasons.

29. In the present case, admittedly, the final decree was passed on 20.06.2018. Interlocutory application was filed seeking amendment with a prayer to include the portion marked 'D' in the Commissioner's Plan.

30. In the interlocutory application, the learned counsel appeared on behalf of the petitioner before the Trial Court made an endorsement that the portion marked 'D' in the Commissioner's Plan may be allotted to the petitioner/D-2. D-2 accepted the allotment and made an endorsement that he will not proceed further as against the final decree. When the interlocutory application itself is to allot 'D' portion and the endorsement also made that the petitioner would confine with the 'D' portion and the 'D' portion was already allotted to the petitioner as per Commissioner's Report, which is confirmed in the final decree in the Trial Court, there is no meaningful reason to entertain the miscellaneous petition to condone delay and thereafter entertain the appeal suit, which would cause unnecessary prejudice to the other parties, who all are parties in the final decree proceedings and this apart, the third party has purchased the property and developed the same and under those circumstances, the prolonged litigation is certainly not preferable.

31. This Court is of the considered opinion that the reasons stated in the miscellaneous petition to condone the huge delay is neither candid nor convincing. Further, the delay calculated by the High Court Registry is also in accordance with the procedure and there is no error regarding the calculation.

32. This being the factum, this Court is not inclined to entertain the miscellaneous petition. Accordingly, CMP No.23762 of 2019 is dismissed. Consequently, the AS.SR No.47114 of 2019 stands rejected. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar

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To

The XVII Additional Judge,
City Civil Court,
Chennai.

Copy To
The Sub Assistant Registrar
Main (AE)
High Court, Madras-104

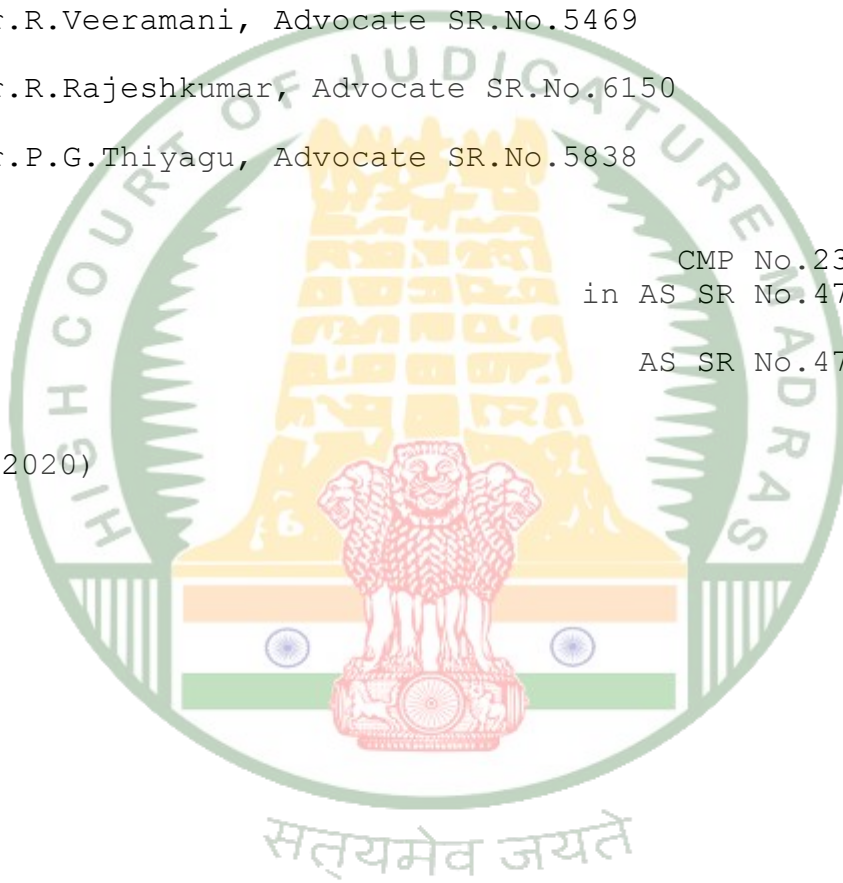
+1cc to Mr.R.Veeramani, Advocate SR.No.5469

+1cc to Mr.R.Rajeshkumar, Advocate SR.No.6150

+1cc to Mr.P.G.Thiyagu, Advocate SR.No.5838

CMP No.23762 of 2019
in AS SR No.47114 of 2019
And
AS SR No.47114 of 2019

NR (CO)
GMY (28/02/2020)



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