

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.01.2021

Delivered on : 02.03.2021

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.Nos.9558 & 9559 of 2019

in

C.S.No.413 of 2002

P.N.Gopinathan

...Applicant in both applications

Vs

1.O. Harendra Kumar Dave (Deceased)

2.Mrs.Asha Dave

3.Mrs.Sharmila Lazro

4.Mr.Sanjay Dave

5.Mr.Anand Dave

6.Mr.R.Madhusudhanan

...Respondents in both applications

Prayer in A.No.9558 of 2019: Judges summons filed under Order XIV Rule 12 of the Original Side Rules, 1956 to set aside the order passed by the learned master in A.No.6810 of 2019 in C.S.No.413 of 2002 dated 20.11.2019 on the grounds of appeal as stated in the affidavit and the appeal may be allowed.

Prayer in A.No.9559 of 2019: Judges summons filed under Order XIV Rule 8 of the Original Side Rules, 1956 read with Section 151 of CPC to stay of all further proceedings arising out of the order and decretal order passed in A.No.6810 of 2019 in C.S.No.413 of 2002 dated 20.11.2019 by the learned Master pending disposal of the appeal.

For Applicant : Mr.T.V.Krishnamachari

For Respondents 2 to 5 : Mr.R.Venkat Raman
for M/s.Tatva Legal Chennai

COMMON ORDER

The legal representatives of the deceased 1st defendant had moved an application in A.No.6810 of 2019 to condone the delay of 4026 days in filing an application to set aside the ex parte decree

dated 12.06.2008 in C.S.No.413 of 2002. The delay having been condoned by the learned Master the plaintiff is before this Court by filing A.No.9558 of 2019. The plaintiff has also filed A.No.9559 of 2019 seeking stay of all further proceedings pursuant to the order in A.No.6810 of 2019.

2. The facts which has to be traversed for appreciating the challenge to the order of the learned Master is herein below narrated.

(i)The Applicant had filed a suit in C.S.No.413 of 2002 against the husband of the 2nd respondent and the father of respondents 3 to 5 one O.Harendra Kumar Dave and the 6th respondent herein for recovery of a sum of Rs.17,04,053/- due under promissory notes, acknowledged by issuing a cheque on 12.07.1999 which was dishonoured when presented for payment.

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(ii)The said suit had been filed as a summary suit under the provisions of Order VII Rule 1 of the OS Rules read with Order

XXXVII Rule 1 of the CPC. The defendants on entering appearance have filed an application seeking leave to defend after serving the Applicant however they did not process the same. The Applicant thereafter took out an application in A.No.1468 of 2012 under the provisions of Order XIV Rule 10 of the OS Rules read with Order VII Rule 6 (3) (b) of the OS Rules seeking to pass a decree in terms of the suit. When this application came up for hearing, the defendants had sought time for filing counter. Since they had not obtained leave of the Court to defend the proceedings they were not granted time.

(iii) Thereafter, the application was argued and ultimately by a detailed order dated 12.06.2008 the application was allowed and consequently the suit C.S.No.413 of 2002 was decreed as prayed for.

(iv) Thereafter, the Applicant as decree holder had filed an execution proceedings in E.P.No.41 of 2017 to attach and bring to sale the immovable properties of the Judgement Debtor. Though

respondents 2 to 5 had received the notice on 17.04.2017 they had not chosen to appear before the Execution Court and consequently they were set ex parte on 06.12.2017. Thereafter, the Executing Court had ordered the sale of the schedule property and the sale was fixed on 02.04.2019. It is only after the sale date had been fixed the Applicant herein had filed an application to set aside the ex parte order of attachment in E.P.No.41 of 2017.

(v) Thereafter, the 2nd respondent and the 5th respondent alone had filed A.No.2337 of 2019 to condone the delay of 876 days in filing application to set ex parte order of attachment. By order dated 25.03.2019, the learned Master was pleased to pass a conditional directing the Applicants therein namely, respondents 2 and 5 herein to pay a sum of Rs.5,00,000/- by demand draft to the Applicant herein and to deposit a sum of Rs.3,00,000/- on or before 01.04.2019 to the credit of the execution proceedings. The said order has been complied with.

3. (i) Meanwhile, the legal representatives of the 1st defendant, namely, respondents 2 to 5 herein had filed A.No.6810 of 2019 to condone the delay of 4026 days in filing an application to set aside the ex parte decree. This petition has been allowed by order dated 20.11.2019 and aggrieved by this order the Applicant / plaintiff is before this Court.

(ii) The Applicant has objected to the said application inter alia contending that this application is highly belated and cannot be maintained since the original defendants had not only failed to defend the suit filed by the Applicant by filing necessary applications for leave to defend but had also not challenged the decree in C.S.No.413 of 2002. In fact, the defendants had filed the leave to defend application after serving a copy on the Applicant / plaintiff but however the said application were not numbered. Thereafter, the suit was decreed after necessary application was moved by the plaintiff

under provisions of Order VII Rule 6 (3) (b) of OS Rules for passing a decree since leave to defend had not been obtained.

(iii) The learned Master had passed a detailed order after taking into account the conduct of the defendants and the contentions put forward by the Applicant. The Applicant would submit that this decree was not challenged by the defendants. On the contrary it is only after receiving notice in the execution proceedings and the order of sale that the respondents had come forward to file an application in the execution proceedings to raise the attachment. It only 2 years after receiving the notice of the execution proceedings that the present application for condoning the delay of 4026 days in filing the application to set aside the decree is filed. The order of the learned Master is challenged on the grounds that the defendants 1 and 2 have not chosen to challenge the decree and even now the 2nd defendant who has been arrayed as the 6th respondent has not chosen to challenge the decree passed in C.S.No.413 of 2002.

(iv)The suit being a summary suit it is not open to the learned Master to entertain application by the legal representatives especially when the same has not been challenged by the original Judgement Debtor. Even the decree had been passed only in the presence of the original defendants. Despite making such contentions backed by proof the learned Master had allowed the application on condition that a sum of Rs.5,000/- be paid to the Applicant. Challenging the same the Applicant has filed A.No.9558 of 2019. The contentions raised in A.No.6810 of 2019 has been reiterated. The order of the learned Master suffers from a total non-application of mind.

4. (i)The respondents 2 to 5 speaking through the 5th respondent would submit that they were totally in the dark about the financial details since their father was the repository of all the financial matters concerning the family. The 5th respondent would submit that the promissory note which is the cause of action for the

suit C.S.No.413 of 2020 is a rank forgery and the same had not been executed by the deceased 1st defendant. They would further submit that after they had received notice in the execution proceedings they had engaged the service of one M.Prasad to take steps to set aside the ex parte decree as also to defend the Execution proceedings.

(ii)He would further contend that it was only when certain unknown persons had visited the property in which he was residing with his mother, the 2nd respondent herein that they had realised that their counsel had not initiated any proceedings. Therefore, it was taking into account these factors that the learned Master had allowed their application for condoning the delay of 4026 days and no exceptions can be taken to the same.

5. (i)Mr.T.V.Krishnamachari, learned counsel appearing on behalf of the Applicant would submit that it is incorrect to call the order dated 20.11.2019 as an ex parte decree. A perusal of the order

would clearly show that the order was passed only in the presence of the defendants and therefore would not qualify to be an ex parte decree. Further the decree is one passed under the provisions of Order VII Rule 6 (3) (b) of the OS Rules. Therefore, the learned Master committed a grave error in treating it as an ex parte decree. A perusal of the order in A.No.1468 of 2008 would clarify the above.

(ii) The learned counsel would submit that the original defendants who had served copies of the leave to defend application on the plaintiff has not chosen to prosecute the same. The decree was passed in the year 2008 and the 1st defendant had passed away only in the year 2013 and during the interregnum he had not chosen to challenge the order. The 5th respondent who is the deponent to the affidavit filed in support of A.No.6810 of 2019 was very much aware about the suit promissory note since the pre suit notice had been issued to the 5th respondent to which he had submitted a reply dated 18.03.2002. The notice had been sent to the very same address in

which the 1st defendant was residing and therefore it is clearly evident that the respondents were very much aware about the proceedings but have deliberately chosen to stay out of the same and it was only when orders were passed in the Execution Proceedings that the respondents 2 to 5 have come forward with these applications. He would further submit that no reasons have been given for the delay and the reasons that are projected are totally false.

6.Per contra Mr.R.Venkat Raman learned counsel appearing on behalf of the respondents would submit that the respondents have approached the Court as soon as they had received the notice in the Execution proceedings. He would submit that the respondents 2 to 5 had immediately engaged a counsel to take necessary steps but however the said counsel had not proceeded with the same and as a result the delay had occurred. The learned counsel would rely on the following Judgements in support his case that in cases of delay, the Court have to adopt a more liberal approach.

i.Ramchandra Dhondu Dalvi Vs. Vithaldas Gokuladas - ***AIR 1964 Bom 251***

ii.G. Ayyadurai Vs. Ranganathan - ***C.R.P.No.4227 of 2018 and C.M.P.No.23199 of 2018***

iii.N.Balakrishnan Vs. M.Krishnamurthy - ***AIR 1998 SC 3222***

iv.Collector, Land Acquisition Anantanag and others Vs. Katiji and others - ***AIR 1987 SC 1353***

v.Mata Din Vs. A. Narayanan - ***AIR 1970 SC 1953***

vi.Concord of India Insurance Co. Ltd. Vs. Nirmala Devi and others - ***AIR 1979 SC 1666***

vii.Baobbu Singh Vs. Smt.Gangaswati - ***M.A.No.744 of 2010 (Before Hon'ble Madhya Pradesh High Court)***

viii.State of Nagaland Vs. Lipok AO and others - ***AIR 2005 SC 2191.***

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7. Discussion:

(i)The records in the above suit would reveal that the defendants

have been served with the summons in the suit. From the counter of the Applicant in A.No.6810 of 2019 it is clearly evident that the 1st and the 2nd defendants had taken out an application seeking leave to defend the suit on 18.08.2002 and 31.07.2002 respectively. However, for reasons best known to them they have not chosen to number the said applications.

(ii) Thereafter, the Applicant had filed A.No.1468 of 2008 for passing a decree in the suit as available to them under provisions of Order VII Rule 6 (3) (b) of OS Rules. Even when this application was taken up for arguments the defendants had appeared and sought time for filing their counter. However, the said request was turned down since the defendants had not taken any steps to obtain leave to defend the suit. Had the application been numbered the defendants could have very well argued before the Court and on their demonstrating the existence of a triable issue the Courts would have immediately granted them leave and they could have proceeded

further in the matter. However, the records would reveal that such an application has not been moved by the defendants.

(iii)The next factor that this Court has to take note of is that the decree was passed on 12.06.2008, the 1st defendant had died only on 06.05.2013 nearly 5 years after the decree had been passed in C.S.No.413 of 2002. However, till his death the 1st defendant has not chosen to contest the decree. Further, the 6th respondent herein who is the 2nd defendant in the suit has also not challenged the same to date. Therefore, it is very clear that the defendants had admitted the decree and had tacitly agreed to abide by the same. There is no explanation whatsoever as to why the original defendants had not sought to challenge the decree. This factum has been totally overlooked by the learned Master.

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(iv)The learned Master has allowed the application on the following grounds:

(a)Lapse on the part of the erstwhile counsel.

(b)Illness of father.

(c)Compliance of orders in A.No.2337 of 2019.

(v)As regards the first ground for allowing the application the order of the learned Master suffers from a total non application of mind since the lapse on the part of the learned counsel is pleaded only from the date on which the notice in the Execution Proceedings had been received by the respondents 2 to 5, i.e., in April 2017. Even this explanation rings hollow. The 5th respondent in the affidavit filed in support of A.No.6810 of 2019 has stated that on receiving the summons in E.P.No.41 of 2017 they had directed their Advocate to obtain details and take necessary steps to defend the case. It is further stated that the Advocate who had obtained their signatures in several affidavits did not process the same. The 5th respondent has also admitted in the affidavit that they had got in touch with their counsel only in March 2019 when unknown persons had visited their

property. It is rather strange that when defendants had received the summons in Execution Proceedings and had also come to know about the decree in C.S.No.413 of 2002 they had not chosen to contact their counsel from April 2017 to March 2019 for nearly 2 years. The learned master has blindly accepted this to be a valid reason for condoning the delay.

(vi) The learned Master has also relied upon a single sentence in the affidavit filed in support of the condone delay petition to come to the conclusion that it was only the illness that has prevented the father, namely, the 1st defendant from proceeding further in the suit. The affidavit is totally bereft of details as to when the father had fell ill prior to his death. There is no evidence whatsoever that has been filed to substantiate the statement. The learned master ought to have rejected this contention and not accepted the explanation as given.

(vii)The learned Master also placed great reliance on the compliance of the conditional order passed on A.No.2337 of 2019 in E.P.No.41 of 2017 by the defendants 2 to 5 to be one of the reasons for condoning the delay. The defendants in the suit had a decree passed on 12.06.2008 directing them to pay a sum of Rs.17,04,453/- together with the interest at 12% per annum on Rs.9,90,000/- from the date of plaint till the decree and thereafter at the rate of 6 % per annum. The Execution Proceedings had been filed for recovering a sum of Rs.29,32,561.63/- which fell due as on 12.03.2017. The conditional order had been passed only for the purpose of condoning the delay in filing an application to set aside the ex parte order of attachment in execution. The respondents 2 to 5 have only complied with a portion of the decree and this cannot be cited as the reason for condoning the enormous delay of 4026 days that too when the original defendants had not sought to challenge the decree.

(viii) The learned Master has totally overlooked the fact that the respondents 2 to 5 as legal representatives of the 1st defendant cannot seek to have a decree set aside when the 1st defendant had accepted it as final by not challenging the same. Even in the Judgement cited on the side of the respondents, namely AIR 1998 SC 3222, the Honourable Supreme Court has stated as follows:

"It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary

guideline that when courts condone the delay due to laches on the part of the Applicant the court shall compensate the opposite party for his loss."

(ix) The instant case squarely falls within the contours of this Judgement since it is the Judgement debtors who have deliberately caused the delay. They are seeking to set aside an ex parte decree which has not been challenged by the original defendants. There is no quarrel about the proposition that if sufficient cause is shown the Court should lean in favour of Applicant seeking to condone the delay. However, when the cause shown is malafides and an attempt to scuttle a legal process then irrespective of the length of the delay the Court should come down heavily on such parties.

(x) In the instant case the Applicant has obtained the decree by due process of law and the defendants who have suffered the decree have not chosen to challenge the same. It is the legal representatives

of one of defendant's who have come forward with this application to have the decree set aside and to contest the suit afresh that too when the original defendants have accepted the decree.

8. In the above circumstances, this Court holds that the order of the learned Master passed in A.No.6810 of 2019 is liable to be set aside and is accordingly set aside. The application in A.No.9558 of 2019 is allowed. In the light of the orders passed in A.No.9558 of 2019, no further order is required to be passed in A.No.9559 of 2019 and is accordingly closed.

02.03.2021

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P.T. ASHA. J,

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Pre-delivery Order in
A.Nos.9558 & 9559 of 2019 in
C.S.No.413 of 2002

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