

(2009) 12 MAD CK 0102

In the Madras High Court

Case No : C.R.P (N.P.D) No. 3378 of 2009 and M.P. No. 1 of 2009

A.S.T. Shanmugam and D. Ashok Kumar

APPELLANT

Vs

M. Shanmugasundaram and Smt. Joy Josephine

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Evidence Act, 1872 — Section 61, 62

Limitation Act, 1963 — Section 5

Citation : (2009) 12 MAD CK 0102

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : A.E. Chelliah for C. Vasanthakumari Chelliah, for the Appellant; R. Krishnamoorthi for T.P. Manoharan, for R2 and No Appearance for R1, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—The petitioners/petitioners/defendants have projected this civil revision petition as against the order dated 31.07.2009 in I.A. No. 549 of 2008 in O.S. No. 48 of 2005 passed by the Learned Principal District Munsif, Karaikal in dismissing the application filed by the revision petitioners u/s 5 of the Limitation Act read with Section 151 of Civil Procedure Code, praying to condone the delay of 541 days in preferring an application to set aside the order of exparte dismissal of the suit dated 05.01.2007.

2. The trial Court while passing orders in I.A. No. 549 of 2008 on 31.07.2009 has inter alia opined that "this Court with open mind accepts the reason stated by the first respondent and also the second respondent in their counter. According to the submission of both the respondents the petitioner did not prove any documentary evidence to prove the delay of 541 days in filing of the set aside petition. Even though the first petitioner is not attended the Court and the second plaintiff should take care in conducting of this case on the absence of the

first plaintiff. So this Court come to the conclusion that the delay of 541 days in filing of set aside petition is not excusable and also this Court should not permit the petitioner to vaguely file this petition" and resultantly dismissed the petition with costs in the interest of justice.

3. The learned Counsel for the revision petitioners/plaintiffs urges before this Court that the impugned order of the trial Court dated 31.07.2009 in I.A. No. 541 of 2008 in O.S. No. 48 of 2005 as against law and facts of the case and that the trial Court has simply ignored the submissions from the petitioners side that the first petitioner has been away from Karaikal because of his illness and for the treatment and also that the learned Counsel has not informed him about the position of the case and that a party should not suffer on account of the failure on the part of the counsel to pursue the matter and further, the trial Court has accepted the stand of the respondents/defendants that no documentary proof is there to show that the first petitioner has been suffering from ailment and that no evidence has been let in by the respondents stating that the first petitioner has been keeping good health and the factual position is the medical report dated 20.05.2008 received from the Aravind Eye Hospitals and Post Graduate Institute of Ophthalmology, Pondicherry has been filed and Anr. letter dated 17.06.2008 from the Doctor touching the ailment and treatment has also been filed and the medical report dated 20.05.2008 speaks of the follow up since 17.10.2003 and that the first petitioner is a non diabetic patient on treatment etc., and in short there have been examinations on 15.10.2007 and the treatment called Pan Retinal Photocoagulation for both eyes in 3 sittings in the month of October, November 2007 and again examination on 04.03.2008 and treatment on 08.03.2008 and the follow up on 21.05.2008 will go to show that the relevant period after the dismissal has been consumed by his ill health and treatment and as such he has not been in a position to file the application in time and thus the "sufficient cause" has been shown but these aspects of the matter have not been adverted to and appreciated by the trial Court in proper and real perspective.

4. Continuing further, the learned Counsel for the revision petitioner/plaintiffs submits that the second petitioner as not been aware about the stages of the matter and further he has been under the genuine impression that the matter will diligently pursued by his counsel and will be informed and he has gone to do his own business at Thalatheru by putting up a new hulling rice Mill and before that he has been an Accountant of the first petitioner who has been running a rice Mill and in any event the trial Court ought to have taken a lenient view by allowing the I.A. No. 549 of 2008 by imposing a cost inasmuch as the parties should not loose an opportunity contest the case on merits, and since the matter in issue in the suit relates to property dispute the impugned order in I.A. No. 549 of 2008 dated 31.07.2009 passed by the trial Court needs to be set aside by this Court sitting in revision to prevent an aberration of justice and to promote substantial cause of justice.

5. Before the trial Court, the revision petitioners/plaintiffs in I.A. No. 549 of 2008 through the first petitioner's affidavit has averred that the first petitioner has been suffering from Diabetes Mellitus and Diabetic Retinopathy and that almost he has lost his vision ever since 2005, and they have filed the suit O.A. No. 48 of 2005 for a declaration that the sale deed dated 30.01.2004 executed and registered by the first respondent/first defendant in favour of the second respondent/second defendant is null and void as far as the "B" schedule property is concerned and since he has been away from Karaikal and that the second petitioner/second plaintiff has switched over to his own business at Thalatheru by putting up a new hulling rice Mill, and therefore, there is no one to look after his case and his counsel from Pondicherry has also not been informed about his ill health and handicap in not attending Court due to his continuous treatment and since, there has been no representation when the case came up for trial, finally on 05.01.2007 the trial Court has been pleased to dismiss the suit for default and if the exparte order of dismissal of the suit is not set aside and the suit restored to file, the first petitioner will be put to irreparable loss and injury and that a fair chance may be given to the first petitioner to conduct his case and since his health condition has been improved now because of the continuous treatment, hereafter hi will attend the Court and conduct his case periodically and regularly till it is adjudicated and for the reasons ascribed supra, there has occasioned a delay beyond his control in projecting an application u/s 5 of the Limitation Act praying to condone the delay of 541 days in filing the application to set aside the exparte order of dismissal of suit dated 05.01.2007 and the same may please be condoned.

6. In the counter filed by the second respondent/second defendant it is categorically mentioned that the allegation made in the affidavit in I.A. No. 541 of 2008 is not only vague but bereft of material particulars and the so called illness of the first petitioner/first plaintiff as alleged in paragraph 1 of the affidavit is repudiated and equally the averment in para 2 of the affidavit that the second petitioner/second plaintiff has switched over to his own business is also specifically denied and in any event these bald allegations are only lame excuses and it vividly indicates the sluggishness of the petitioner/plaintiffs and their indifferent attitude to the majesty of law and justice and the number of days delay is wantonly quoted wrongly and no acceptable reason much less any sufficient cause has been assigned to invite an order infavour of the petitioners and if the order of the dismissal of default is set aside it will take away the rights vested and accrued to the defendants and added further, the law will not come to the excuse of the party who slept over all these years and the decree granted has been acted upon and therefore it is not liable to be interfered with.

7. In the counter filed by the first respondent/first defendant it is specifically mentioned that in the affidavit sworn to by the first petitioner/first defendant for the reasons assigned are in general terms there is no judicially acceptable reason for such long period of 588 days delay and the reasons have not been supported by any documentary proof and in the absence of such reasons the delay of 588

days cannot be condoned and the same has to be dismissed. Further, it is the plea of the first respondent/first defendant that the second petitioner/second plaintiff has also got an interest in the litigation and he ought to have taken care of his case as second plaintiff though not as an agent of the first plaintiff and since he has not done the same it indicates clearly that the petitioners/plaintiffs are very careless and have not taken care of the case very seriously, and therefore the delay of 588 days may not be condoned.

8. This Court has heard the learned Counsels appearing for the parties and noticed their contentions.

9. The learned Counsel for the revision petitioners/plaintiffs sites the decision of Pavayammal and Anr. v. S.N. Chockalingam and three Ors. 2009 (5) CTC 414 wherein it is held that the term "sufficient cause" to be interpreted in a purposeful and meaningful way and that the judiciary is respected for power to remove injustice and not for its power to legalise injustice on technical grounds, overriding technicalities, substantial justice will have to be delivered to parties.

Also, in the aforesaid decision at page 416 in para 7 it is held as follows:

As a matter of fact, the Court of law is not supposed to adopt a pedantic approach instead it has to take a liberal view while dealing with the application of condonation of delay. Ordinarily a party does not stand to gain by lodging in appeal belatedly. Refusing to condone a delay will result in meritorious matter being thrown out at the nascent stage and thereby the cause of justice being defeated. On the other hand, if a party is allowed to enter into the scene of main proceedings, then the matter can be decided on merits. Of course a Court of law providing due opportunities to the parties to prove their case.

10. However, the learned Counsel for the respondents/defendants submits that according to the revision petitioners there is a delay of 541 days in projecting the condonation of delay application u/s 5 Limitation Act in I.A. No. 549 of 2008 and according to the respondents/defendants the delay comes to 588 days and that in the present case on hand the medical certificate has not been filed and the main suit has been dismissed on 05.01.2007 and as per the medical report of Aravind Eye Hospitals and Post Graduate Institute of Ophthalmology, Pondicherry dated 20.05.2008 the first revision petitioner has gone to the hospital on 15 10.2007 and that he has gone for treatment in October and November 2007 and he has gone to Pondicherry from Karaikal and further, the first revision petitioner/first plaintiff has produced a certificate dated 17.06.2008 from a Consultant Neurologist of M.J. Hospital, Mayiladuthurai interalia to the effect that he has been taking treatment for Diabetes Mellitus and Diabetic Retinopathy, since 2005 and advised him to go to Chennai Apollo Hospital for further investigation and management but significantly, in the affidavit filed by the first petitioner in I.A. No. 549 of 2008 in paragraph 1, he has stated that he has been away from Karaikal due to his medical treatment at Thanjavur, Pondicherry and Chennai etc. and nowhere in the said affidavit he has made any mention or reference to the

certificate dated 17.06.2008 of the Consultant Neurologist of M.J. Hospital, and as a matter of fact the medical report of Aravind Eye Hospital of 20.05.2008 pertaining to the first petitioner and the certificate dated 17.06.2008 of the Consultant Neurologist have not been marked before the trial Court as documents in I.A. No. 549 of 2008 and further, they have not even proved through evidence and in short the delay that has occurred must be proved satisfying the conscience of Court in the manner known to Law and in the present case on hand the petitioner has not proved the same before the trial Court and really speaking, the trial Court has rightly held in its impugned order that the long delay has not been properly explained and also that the first petitioner, namely the producer of medical report dated 20.05.2008 of Aravind Eye Hospital and the medical certificate dated 17.06.2008 issued by Consultant Neurologist of M.J. Hospital, Mayiladuthurai have not been examined to prove the version projected by the revision petitioners and a Court of Law helps the parties who are vigilant and in the present case as seen from the facts and circumstances of the case which float on the surface the revision petitioners/plaintiff have not been diligent in prosecuting their case and therefore, their condonation of delay application namely I.A. No. 549 of 2008 may not be allowed by this Court in the interest of justice.

11. The learned Counsel for the respondents/defendants sites the decision of this Court *Sarada Vs. Nhattiyala Devaki*, wherein it is observed as follows:

There is nothing in the Evidence Act, or outside it, which makes a certificate given by a medical practitioner by itself evidence at all. The Court should reject it altogether and insist either on examination on oath of the doctor who has given the certificate or at least an affidavit by him.

12. In support of the contention, condonation of delay application filed u/s 5 of the Limitation Act cannot be allowed by a Court of Law by taking a liberal attitude and in a casual manner. The learned Counsel for the respondents/defendants relies on the decision of this Court *Srinivasalu and Another Vs. Krishnammal and Others*, wherein it is held thus:

The order of the lower Court allowing the petition for condonation of delay in filing the petition for setting aside the ex parte decree appears to be obviously the result of a very liberal attitude and casual manner in which ex parte decrees are being set aside. It is not possible to absolve the Courts from the blame for the tendency which is growing in the litigants to take ex parte decrees very casually and at leisure make applications for setting them aside on bald and general averments which are rarely scrutinised with care which such applications and affidavits deserve, having regard to the stringent provisions of Section 5 of the Limitation Act. In the view of this Court, the learned Judge was clearly in error in condoning the delay in filing the petition for setting aside the ex parte decree.

13. He also draws the attention of this Court to the decision *Kathavelu v.*

Murugesan 2001 (2) CTC 658 wherein it is among other things held that:

Sufficient cause can be demonstrated by furnishing genuine reason for absence on date of hearing and person filing petition for setting aside ex parte decree should satisfy court that his explanation is adequate and that his absence was not mala fide or deliberate and the defendants absence was mala fide as he waited for 4 years to move application and a Court cannot apply principles of humanitarian approach when litigant invoking such approach thinks that he can play ducks and drakes with Court etc.

14. He seeks in aid of the decision *Myla Belli and Ors. v. B. Rajagopal* (2005) 3 MLJ 86 whereby and whereunder it is held as follows:

The existence of sufficient cause is a condition precedent for the exercise of discretion u/s 5 of the Limitation Act. No doubt the "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a case on hand, no sufficient cause is found. While dealing with an application u/s 5 of the Limitation Act, the Court ought not to light-heartedly disturb the legal right accruing to the opponent by the applicant's failure in filing application in time.

15. Continuing further, the learned Counsel for the respondent/defendant sites the decision *Sivakumar and Anr. v. R. Sengodan* (2007) 5 MLJ 718 wherein it is held that:

In a case of condonation of delay the Court must take a liberal view, but at the same time the Court should not do so in exercising equity and Court should not excuse the delay when there is no sufficient and convincing reasons, otherwise, it would be nothing but extension of limitation which is not available to a party under an enactment.

16. He also sites the decision *Pundlik Jalam Patil (D) by Lrs. v. Exe. Eng. Jalgaon Medium Project and Anr.* JT 2008 (11) SC 596 wherein the Hon'ble Supreme Court has held thus:

The power to condone the delay rests with the Court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior Court.

The Court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Court helps those who are vigilant and do not slumber over their rights.

The object for fixing time limit for litigation is based on public policy fixing a life span for legal remedy for the purpose of general welfare. They are meant to see

that the parties do not resort to dilatory tactics but avail their legal remedies promptly.

17. Also on the side of the respondents/defendants attention of this Court is drawn to the decision *Greaves Ltd., Chennai-I v. V.S. Raghavan and Anr.* 2007 (3) CTC 262 wherein at page 263 it is held that:

Mere production and marking of document by consent is not sufficient to prove contents of such document and the contents of document and facts are to be proved only by evidence of concerned person.

18. It is not out of place for this Court to point out that the revision petitioners/plaintiffs in their memorandum of grounds in the civil revision petition as point number 3, have inter alia averred that the certificate copies of the documents have been obtained from the lower Court and they are filed herewith. The affidavit accompanying the petition's also reads as; "the Doctors who have given me treatment for my eye vision are filed herewith and they may be read as part parcel of this affidavit.

19. A perusal of the affidavit in I.A. No. 549 of 2008 in O.S. No. 48 of 2005 at para 3 reads as follows

...the Doctors who have given me treatment for my eye vision are filed herewith and they may be read as part and parcel of this affidavit

Also that in para 3 of the affidavit in I.A. No. 429 of 2008 in O.S. No. 48 of 2005 the following sentences are found, "...the Doctors who have given me treatment for my eye vision are filed herewith and they may be read as part and parcel of this affidavit.

20. Therefore, it is candidly clear that the revision petitioners have spelt out in clear terms that they have filed the documents in connection with the treatment given by the Doctors to the first petitioner in respect of his eye vision.

21. Added further, a conjoint reading of Section 61 and 62 of the Indian Evidence Act point out that the contents of the documents in issue are primarily proved by production of the documents itself for inspection of the Court; the truth of its contents however has to be proved by the author of the documents in the considered opinion of this Court. Furthermore, documents relied upon by the parties must be placed on the Courts record and they have to be legally proved since the documents do not prove themselves and an authority acting thereupon, without there being proof by witnesses commits a procedural infirmity. Generally speaking, mere marking of an exhibit does not dispense with the proof of documents and if witness is not examined in proof of a document whose certificate copy has been produced and exhibited, no reliance can be placed on it.

22. Admittedly, before the trial Court in I.A. No. 549 of 2008 the revision petitioners/plaintiffs have not adduced oral or documentary evidence on their side to substantiate their case. In this connection this Court pertinently points

out Rule 32, of the Civil Rules of Practice, pertaining to "proof of facts by affidavit" which enjoins as follows:

any fact required to be proved upon interlocutory proceeding shall unless otherwise, provided by this rule, ordered by the Court, be proved by affidavit, but the judgment may in any case direct evidence to be given orally; and thereupon the evidence shall be recorded and exhibits marked in the same manner as in the suit and lists of the witnesses and exhibit shall be prepared and annexed to the judgment.

23. The revision petitioners/plaintiffs have filed the main suit O.S. No. 48 of 2005 on the file of Learned District Munsif Karaikal praying for the relief of declaration that the sale deed dated 30.01.2004 vide document No.374 of 2004 executed by the first defendant in favour of the defendant 2 is null and void abinitio and not binding the plaintiff and for permanent injunction restraining the defendants and their men agents etc., claiming right through them from interfering with the plaintiffs peaceful possession and enjoyment of the plaint "A" schedule property.

24. The stand of the respondents/defendants is that the decree passed in O.S. No. 48 of 2005 dated 05.01.2007 has been acted upon and it is not liable to be interfered with.

25. Be that as it may, on a careful consideration of respective contentions and also by taking note of the vital fact that the petitioners/plaintiffs have averred in their I.A. No. 549 of 2008 to the effect that they have filed the Doctors certificates who have given treatment to the first petitioner's eye vision, this Court on an over all assessment of the facts and circumstances of the case is of the considered view that the petitioners/plaintiffs must be provided with an opportunity to let in necessary oral and documentary evidence to prove and mark the Doctors certificate on their side in issue and also to examine witness if they so desire before the trial Court in I.A. No. 549 of 2008 and to mark the same in the manner known to law to subserve the ends of justice and further, the trial Court is also directed to provide an opportunity to the respondents/defendants to let in oral and documentary evidence (including the rebuttal evidence if any) on their side and in that view of the matter without going into the merits of the case this Court allows the civil revision petition in furtherance of substantial cause of justice.

26. In the result the civil revision petition is allowed leaving the parties to bear their own costs. The order passed by the trial Court in I.A. No. 549 of 2008 in O.S. No. 48 of 2005 is set aside for the reasons assigned by this Court sitting in revision. The trial Court is directed to restore the I.A. No. 549 of 2008 to its file and to dispose of the same afresh on merits after providing due opportunities to the revision petitioners/plaintiffs to let in necessary oral and documentary evidence to prove and mark the Doctors certificates in issue on their side in the manner known to Law and further the trial Court is also directed to provide adequate opportunity to the respondents/defendants to cross-examine the

petitioner side witness (and also to let in rebuttal evidence if any) and to dispose of the I.A. No. 549 of 2008 within a period of 45 days from the date of receipt of the copy of the order. Having regard to the facts and circumstances of the case the parties are directed to bear their own costs in this revision. Consequently, M.P. No. 1 of 2009 is closed.