
(2009) 12 MAD CK 0183

In the Madras High Court

Case No : C.R.P. (N.P.D) No. 2390 of 2009 and M.P. No. 1 of 2009

Bagyalakshmi and Palaniammal

APPELLANT

Vs

Rama Palaniappan

RESPONDENT

Date of Decision : 30-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Section 5

Citation : (2009) 12 MAD CK 0183

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : A.K. Kumarasamy, for the Appellant; M. Sudhakar, for S.K. Raghunathan, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The revision petitioners/plaintiffs have filed this present civil revision petition as against the order dated 10.6.2009 in I.A. No. 528 of 2007 in O.S. No. 698 of 2004 passed by the learned Principal Subordinate Judge, Tiruppur in allowing the application filed by the respondent/defendant filed u/s 151 CPC and Section 5 of the Limitation Act praying to condone the delay of 945 days by directing the respondent/defendant to deposit a sum of Rs. 20,000/- towards cost of stamp papers and registration charges incurred by the petitioners/plaintiffs into Court before 22.6.2009 etc.,

2. The trial Court, while passing orders in I.A. No. 528 of 2007 has inter alia opined that" there is nothing mentioned by the Court while passing a conditional order directing the respondent/defendant to deposit a sum of Rs. 20,000/- into Court before 22.6.2009 towards the cost of stamp papers and registration charges incurred by the petitioners/plaintiffs and it has also further directed the respondent/defendant to pay a sum of Rs. 1000/- towards cost before 22.6.2009 and also directed the amount of Rs. 20,000/- to be deposited in a Nationalised Bank till the final decision is arrived at in the suit.

3. According to the learned Counsel for the petitioners/plaintiffs, the trial Court has committed an error in allowing I.A. No. 528 of 2007 dated 10.6.2009 based on a conditional order and the same is vitiated by material irregularity and the same is contrary to the law and as a matter of fact, the trial Court has not appreciated all the vital fact that the exparte decree has been passed on 10.2.2003 but the application to condone the delay to set aside the exparte decree already has been filed on 14.9.2005 but the same has been numbered in the year 2007 only and apart from the above, though the respondent/defendant has come to know about the exparte decree as early as on 26.7.2005, he has not taken steps to prosecute the application to set aside the exparte decree immediately thereafter and more over, I.A. No. 528 of 2007 has been posted for hearing on 19.7.2005 after ten hearings in the application and the same has been dismissed on 19.7.2005 for non prosecution and the same has been restored to file in I.A. No. 1140 of 2007 on 17.8.2008 and the respondent/defendant, though filed a medical certificate regarding his illness for three years, he has not examined the doctor to prove the same and that the production of medical certificate is not sufficient without examining the doctor who has issued certificate to prove the illness of the other party and the limitation is not merely a technical consideration, but is based on principles of sound policy as well as equity and all these aspects of the matter have not been adverted to by the trial Court in a proper perspective and therefore prays for allowing the revision petition in the interest of justice.

4. Per contra, the learned Counsel for the respondent/defendant submits that the trial Court has accepted the reasons ascribed by the respondent/defendant in his affidavit in regard to the condonation of delay of 945 days in filing an application u/s 5 of Limitation Act praying to set aside the exparte decree and the trial Court has passed a reasoned order taking note of the facts and circumstances of the case in entirety and therefore the same need not be interfered with by this Court at this stage sitting in revision.

5. The learned Counsel for the petitioners/plaintiffs contends that a liberal approach formula made by the trial Court is not applicable to the facts of the present case on hand and to lend to support his contentions, he relies on the decision reported in Sundar Gnanavolivu rep by its Power of Attorney Agent Mr. Rukmini v. Rajendran Gnanavolivu rep by its Power of Attorney Agent Veina Gnanavolivu 2003(1)L.W. 585 wherein it has inter alia held that "when there is total lack of bona fides on the part of the petitioner while coming forward with the present application, going by the Principles set out in the various Judgments, were are of the view that this case falls within the exception to the rule and does not deserve the liberal approach formula in matters relating to condonation of delay. We are therefore not satisfied with the reasons adduced by the petitioner while seeking for condonation of delay of 431 days in filing the first appeal etc."

6. He also cites a decision reported in G. Jayaraman v. Devarajan 2007(3)L.W. 1034 wherein it has been held that "Delay cannot be excused as a matter of

judicial generosity. Rendering substantial Justice is not to cause prejudice to the opposite party and liberal exercise of jurisdiction u/s 5 of the Act would cause prejudice to the plaintiff/decreed holder, who has been pursuing the money suit for quite a long time and in condoning the delay, there is improper exercise of discretion and therefore the impugned order cannot be sustained".

7. Added further on the side of the petitioners/plaintiffs relying on a decision reported in Sivakumar v. R. Sengodan 2007(4)CTC 506 wherein it is held that "Court, though, must take liberal view, should not do so on exercising equity as it would be nothing but extension of limitation not available under enactment and in the absence of sufficient and convincing reasons, Court should not excuse delay".

8. More over, the learned Counsel for the petitioners/plaintiffs cites a decision reported in Gomathi Ammal Vs. Madhusoodanan Nair and Another, wherein it is held that "Failure to adduce evidence for non appearance and seeking condonation of delay on vague allegation of illness and mere production of medical certificate are not sufficient to condone the delay and party should get into witness box to speak about case as evidenced by medical certificate and no sufficient cause is made for condoning the delay."

9. Also on the side of the petitioners/plaintiffs, the learned Counsel placed reliance on the decision reported in Shanmugam v. Chokkalingam 2009(5)CTC 48 wherein it is held that "an application to set aside ex parte decree filed long thereafter, the defendant is guilty of laches and negligence and that sufficient cause has not been made out by the defendant and that the delay cannot be condoned and the revision petition has been dismissed.

10. Continuing further, the learned Counsel for the petitioners/plaintiffs cites a decision in Sankaralingam v. V. Rahunan 2002(3)CTC 13 wherein it is held that "contradiction between averments in affidavit and oral evidence, total wilful negligence and inaction in not acting promptly, failure to place any material before Court to substantiate his case and absence of arguable points in law in defence disentitled defendant to get necessary relief u/s 5 of the Limitation Act 1963 and the explanation offered by the defendants/petitioners did not constitute sufficient cause and delay could not be condoned."

11. Further, the learned Counsel for the petitioners/plaintiffs cites a decision in C. Raghupathy v. C. Govindan 2009(1) CTC 319 wherein it is held that".. . . limitation is not merely a technical consideration but based on principles of sound public policy as well as equity and that a victorious litigant cannot be expected to remain disgruntled indefinitely for a period to be determined at the whims and fancies of the opponent."

12. The learned Counsel for the petitioners/plaintiffs relies on a decision reported in Selvaraj v. Ramachandran 2007(3) L.W. 146 wherein it is held that "each and every day's delay is to be explained by the third defendant and particularly in this case, the delay is 1654 days and under such circumstances, Court is of the view

that the order passed by lower Court is liable to be set aside.

13. The learned Counsel for the petitioners/plaintiffs placed reliance on the decision reported in Rathinammal v. Muthusamy and Ors. 2004(3) MLJ 36 wherein it is observed that "the delay of 545 days in seeking to set aside an ex parte decree cannot be condoned when the party aggrieved is not diligent in pursuing the matter and approaches the Court only during execution proceedings."

14. However, the learned Counsel for the respondent/defendant cites a decision of Hon"ble Supreme Court in N. Balakrishnan Vs. M. Krishnamurthy, wherein it is held as follows:

Condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Some times delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. 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. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. The words "Sufficient cause" u/s 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.

15. It is significant to refer to the affidavit in I.A. No. 528 of 2007 wherein the respondent/defendant as petitioner has averred that "an ex parte decree has been made on 10.2.2003 and that due to severe breathing disorders, Urinary Block and Ulcer, he has been advised to take bed rest and only he came to know that an ex parte decree was passed against him on 10.2.2003 and therefore, he has filed an application to set aside the ex parte decree passed against him and there has been a delay of 945 days in projecting an application to set aside the ex parte decree which has been filed u/s 5 of the Limitation Act and u/s 151 of CPC.

16. In the counter filed by the respondents before the trial Court, it is mentioned that "the petitioner has been personally served with the notice in E.P. No. 30 of 2005 and at least on the date of service of the execution notice, the petitioner would have known about the decree and there is no explanation for the delay that has occurred after service of execution notice on 26.7.2005 and it is unbelievable that the petitioner has kept quiet, without contacting his lawyer for

975 days after the date on which his suit was listed for trial etc., and further that the execution petition has been posted for enquiry "as a last chance" on 24.7.2006 and the petitioner has successfully dragged on the execution petition on the ground that he will settle the matter and more over, the Court has approved the draft sale deed and directed the respondents to produce the fair sale deed and that the respondents have to purchase stamp papers and engross the fair sale deed thereon and the petitioner has entered appearance on 5.8.2005 in the execution petition and until March 2007, the petitioner never made a representation that he has already filed a petition to set aside the exparte decree and the last for two years, the petitioner appears to have kept on presenting and re-presenting the petitions and the application filed by the respondent is an abuse of process of Court and there is no substantial justice and truth in the said application.

17. It is to be borne in mind that Section 5 of the Limitation Act enables a Court of Law to deliver substantial justice in disposing of the matters on merits. Generally speaking, the term "sufficient Cause" is an elastic one to apply the law in a purposeful and meaningful manner to subserve the ends of justice. As a matter of fact, when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that the delay has occasioned deliberately, or on account of culpable negligence or on account of malafides. A litigant does not stand to benefit by resorting to delay. Instead he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. The term "sufficient cause" is used by the Legislature to enable a Court of law to apply the law in a rational common sense pragmatic fashion to subserve the ends of justice. To put it differently, the term of "sufficient cause" u/s 5 of the Limitation Act ought to receive a liberal construction so as to advance substantial justice. The length of delay is immaterial but the acceptability of the explanation is only criterion. If the explanation offered does not suffer from malafides or smack of malafides then the Court must lean in favour of the litigant. Also, when the Court accepts the explanation offered by a party, it is result of positive exercise of discretion and by and large, this Court sitting in revision should not disturb the finding of the trial Court, unless the exercise of discretion has been on an untenable ground or in an arbitrary or on perverse grounds. While allowing the application for condonation of delay, the other side should not be lost sight of and a Court of law shall compensate the other side for the loss sustained by him.

18. As far as the present case on hand is concerned, the trial Court has taken note of Ex P1, medical certificate dated 1.1.2003 issued by Dr. N. Palaniappan, P.N. Hospital, Namakkal, Ex P2 medical receipts and Ex P3 medical prescription and also it has considered the evidence of respondent/defendant as P.W.1 and from Ex P1 medical certificate of P.N. Hospital, it is clear that the respondent/

defendant has been taken treatment with Mr. N. Palaniappan from 1.1.2003 and that he has been advised to take rest and also from Ex P2, medical prescription issued by Dr. N. Palaniappan. P.N. Hospital, Namakkal shows that the respondent/defendant has been required to take tablets and from Ex P3 Urine Report dated 2.4.2006 in favour of the respondent/defendant, it is clear that the respondent/defendant has been taking treatment and he has undergone some medical test under the guise of medical supervision of the doctor. Even though Dr. N. Palaniappan, who issued Ex P1 medical certificate dated 1.1.2003 has not been examined before the trial Court in IA. No. 528 of 2007, the fact that the respondent/defendant has been under treatment with Dr. N. Palaniappan cannot be denied by anyone including the petitioners/plaintiffs. In law, marking of documents is one end and proving the contents of the same is another end. Nodoubt to prove Ex P1 medical certificate, the respondent/defendant ought to have examined the doctor, who issued the medical certificate. But the non examination of the said doctor, who issued medical certificate Ex P1 will not totally demolished the case of the respondent/defendant in the considered opinion of this Court. More over, in the instant case, the petitioners/plaintiffs have not even taken steps to summon the doctor, who issued Ex P1 medical certificate and to dispute the veracity of the contents of the medical certificate issued by him.

19. Though the plea is taken before this Court that it is for the respondent/defendant to prove the contents of Ex P1 medical certificate by examining the doctor who has issued the same. Hence this Court is of the considered view that the non examination of the doctor who issued Ex P1 medical certificate will not be a circumstance which can go against the respondent/defendant, inasmuch as in our processual system of jurisprudence, a court of law has to deliver substantial justice to a party overriding the technical grounds and that too a Court of law is to adopt a liberal and elastic approach and not to adopt a pedantic approach to secure the ends of Justice and to prevent an aberration of justice.

20. Be that as it may, on a careful consideration of respective contentions, this Court is of the considered view that the explanation for the delay set out by the respondent/defendant has been found satisfactory by the trial Court while exercising its power of discretion in an elastic manner and further the trial Court has directed the respondent/defendant to deposit a sum of Rs. 20,000/- towards expenses incurred for stamp papers and registration charges by the revision petitioners/plaintiffs and has also directed the respondent/defendant to pay a cost of Rs. 1000/- within a particular point of time, does not suffer from any serious infirmity or patent illegality, and the same need not be interfered with by this Court sitting in revision resultantly, this revision petition fails.

21. In the result, this revision petition is dismissed leaving the parties to bear their own costs. The order passed by the trial Court in I.A. No. 528 of 2007 in O.S. No. 698 of 1994 on the file of Principal Subordinate Judge, Tiruppur is affirmed by this Court for the reasons assigned by this Court in this revision.

Consequently, connected M.P. No. 1 of 2009 is also dismissed.