

(2013) 01 MP CK 0053
In the Madhya Pradesh High Court
Case No : Civil Rev. No. 427 of 2011

Bhagchand Alias Girdharilal Yadav

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 08-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 41 Rule 3(5)
Limitation Act, 1963 — Section 5

Citation : (2013) ILR (MP) 696 : (2013) 2 JLJ 67 : (2013) 3 MPHT 172 : (2013) 1 MPLJ 643

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : Anurag Tiwari, for the Appellant; Rahul Jain, Government Advocate for Respondent Nos. 1 and 2 and Sankalp Sanghi for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Shrivastava, J.—This revision application has been filed at the instance of plaintiff who was arrayed as respondent in First Appeal No. 144/2010 before learned District Judge, Jabalpur. The facts necessary for disposal of this revision application lie in a narrow compass. Suffice it to say that a civil suit for declaration and injunction was filed by the plaintiff-present applicant in the Court of Fourth Civil Judge, Class I, Jabalpur which was registered as Civil Suit No. 120-A/2005 and which was decreed in ex parte on 3-3-2005 when defendants 1 and 2 the State of M.P. and Tahsildar, despite they were served did not appear. The said ex parte judgment and decree was assailed by the State of M.P. and Tahsildar by filing First Appeal No. 144/2010 before learned District Judge, Jabalpur arraying present applicant as respondent in that appeal. During the pendency of that appeal, respondents 3 and 4 who are the real brothers of the plaintiff applicant submitted an application under Order 1, Rule 10, CPC which has also been allowed by the impugned order. Since the appeal of the State Govt. was barred by 2026 days, therefore, an application to condone the delay

was filed by the appellants which was vigorously opposed by the present applicant by filing detailed reply which was also supported by an affidavit of plaintiff Bhagchand. The learned Appellate Court allowed the application to condone the delay and further allowed the application under Order 1, Rule 10, CPC filed by the present respondents 3 and 4 by the impugned order. In this manner, this revision application has been filed by the plaintiff-applicant.

2. The contention of Shri Anurag Tiwari, learned counsel for the applicant-plaintiff is that in order to allow application u/s 5 of the Indian Limitation Act sufficient reasons are not only required to be assigned but they should also borne out from the record. Merely by saying that sufficient reasons have been assigned and the abnormal delay of 2026 days deserves to be allowed, would not mean that indeed they are sufficient to condone the delay. Learned counsel submits that learned First Appellate Court by holding that sufficient ground has been made out, has acted illegally with material irregularity in exercise of its jurisdiction. By inviting my attention to para 3 of the application to condone the delay which has been filed by quoting wrong provision under Order 41, Rule 3(5), CPC by the respondents No. 1 and 2 (appellants in First Appeal), learned counsel submits that the factum of passing of the ex parte judgment and decree came into the knowledge of the State of M.P. and its functionaries only on 1-7-2008 when in the execution case they received notice and, therefore, from the date of the knowledge they have filed the application to condone the delay. Learned counsel further submits that the First Appeal was filed on 16-11-2010.

3. By inviting my attention to the order-sheet dated 19-10-2004 in the Civil Suit which was earlier registered as MJC No. 54/2004, it has been contended by learned counsel for the applicant that the counsel for the defendants i.e. State Govt. submitted before the trial Court that they have not received any instructions from the State Govt. and, therefore, they are unable to submit any reply of temporary injunction application as well as written statement. Learned counsel submits that in that situation, the learned trial Court proceeded ex parte against the defendants-respondents No. 1 and 2 and, therefore, the fact mentioned in para 3 of the application to condone the delay is ex facie false, and wrong that only on 1-7-2008, they came to know about the passing of the impugned judgment and decree. Learned counsel submits that in presence of the State counsel, an order to proceed ex parte was passed.

4. Learned counsel for the applicant further submits that even if for the sake of arguments it is taken that on 1-7-2008 it came into the knowledge of the State Govt. - defendants that ex parte judgment has been passed, since there is nothing in the application that on which particular date the defendants requested the Government Pleader to give opinion in the matter to file appeal, further on which date the opinion was obtained and on which particular date the matter was sent to the Principal Secretary of the Department and on which particular date the permission was received from the Law Department etc. Learned counsel submits that from the impugned order, it is gathered that on 25-9-2010, the Law

Department gave its approval and sanction to file appeal and thereafter only on 25-9-2010, an application to obtain certified copy of the impugned judgment was submitted. According to learned counsel, as soon as on 1-7-2008 when defendants came to know as alleged by them about the passing of the ex parte judgment immediately, they should have filed an application to obtain certified copy of the impugned judgment and decree passed in ex parte by the learned trial Court on 31-3-2005, but they have failed in doing so and they were waiting only to obtain sanction. Even as they say, on 25-9-2010 when sanction was received, they filed an application to obtain certified copy on the same date and it was delivered on 8-10-2010, but why the appeal was not filed immediately on that day or on the second day or after few days and why it was filed only on 22-11-2010 i.e. after near about one and half month and nothing has been mentioned to explain the further delay in the entire application and, therefore, according to learned counsel, the learned First Appellate Court has acted illegally with material irregularity in exercise of its jurisdiction to condone the delay when no sufficient ground has been made out and hence, it has been prayed that by allowing this revision application, the impugned order be set aside and the first appeal filed by State Govt. be dismissed as barred by time.

5. On the other hand, Shri Rahul Jain, learned Government Advocate argued in support of the impugned judgment and submitted that since the defendants are State Government and its functionaries, a liberal approach should be adopted and after such approach has been adopted by the learned First Appellate Court by condoning the delay, no ground is made out for any interference and, therefore, this revision application deserves to be dismissed.

6. Shri Sankalp Sanghi, learned counsel appearing for respondents No. 3 and 4 submitted that these respondents are real brothers of plaintiff-applicant and their application under Order 1, Rule 10, CPC has been allowed by learned First Appellate Court and it is necessary to hear the appeal on merits to safeguard their rights. Hence, it has been prayed by him that this revision application be dismissed.

7. Having heard learned counsel for the parties, I am of the view that this revision application deserves to be allowed.

8. The authenticity and the correctness of the order sheet dated 19-10-2004 has rightly not been doubted by learned State Counsel that indeed an order on that day was passed in the Civil Suit wherein it has been mentioned that the Government Pleader appeared on behalf of the defendants and stated that he has not received any instructions from the State Government and, therefore, he is unable to file reply to the application for temporary injunction as well as written statement. Thus, the learned trial Court proceeded ex parte against the defendants (respondents 1 and 2 in this revision application). However, in the application to condone the delay, it has been stated that on receiving the notice of execution on 1-7-2008 it came into the knowledge of the defendants-State Government that some ex parte decree has been passed against them. It would

be profitable to quote application to condone the delay in its entirety which reads thus :--

9. If this Court keeps the order sheet dated 19-10-2004 of the learned trial Court in juxtaposition to para 3 of the said application, the stand which has been taken by the State Government-defendants becomes not only ex-facie false but it is borne out that from the very beginning they were quite aware about the filing of the suit and it cannot be said that only on 1-7-2008 it came into the knowledge of the defendants-State Government that ex parte decree has been passed against them. According to me, generally an application u/s 5 of the Limitation Act is required to be considered with a pragmatic and liberal approach and especially when it is being filed by the State Government but it is equally true that such approach should be justice oriented. If the alleged sufficient cause to condone the abnormal delay of 2026 days is condoned on the aforesaid facts when they are ex facie false and when it is based upon false averments made in the application filed by the State Government by labelling it to be a liberal approach, it cannot be condoned. To me, the liberal approach should be justice oriented. The Courts do not enjoy the unlimited and unbridled discretionary powers and the discretion of judicial power should be exercised within reasonable bounds known to law. In this regard, the recent decision of Supreme Court Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others, may be seen and it would be germane to quote paras 23, 28 and 29 of the said decision which reads thus :--

23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh, as follows: (SCC p. 696, paras 25-26)

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice", cannot be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay u/s 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.

In the aforesaid decision, the High Court condoned the delay but the Supreme Court by setting aside the order of the High Court held that the judgment of the High Court is unsustainable either in law or in equity and allowed the appeal.

10. If the alleged cause shown in para 3 of the application is accepted, it would mean to allow a false ground to be a sufficient cause which can never be included within the ambit and scope of section 5 of the Limitation Act. Hence, I am of the view that learned First Appellate Court while allowing the application to condone the delay has acted illegally with material irregularity in exercise of its jurisdiction because no sufficient cause to condone the delay has been made out. It is true that an order condoning the delay in filing the appeal is a discretionary one but it is equally true that if the discretion has been exercised on the wrong principles by giving undue liberal approach which is not at all justice oriented, the learned First Appellate Court has acted illegally with material irregularity in exercise of its jurisdiction and, therefore, interference in the impugned order is needed in this revision application. I may further hold that the discretion should be exercised in favour of a person who comes with clean hands without concealing reality by placing true facts. From the aforesaid discussion, it is as clear like a noon day that in para 3 of the application to condone the delay, a false ground has been tried to be demonstrated to be true and, therefore, according to me, by exercising the discretion in favour of a party which has come with a false case and not with the clean hands, the learned Lower Appellate Court has acted illegally with material irregularity in exercise of its jurisdiction.

11. That apart, another important aspect of the matter which learned Lower Appellate Court has failed to consider is that it is not the case of the State Govt.-

defendants that the summons were not duly served upon them. The application to condone the delay is totally silent upon this important aspect of the matter. According to me, it was incumbent upon the State Government-defendants to state true facts in the application including whether summons were duly served upon them or not. For this additional reason also, I am of the view that learned Lower Appellate Court has acted illegally with material irregularity in exercise of its jurisdiction in condoning the delay in filing the appeal.

12. So far as the rights of respondents No. 3 and 4 are concerned, needless to say that they are the brothers of the plaintiff but since they were not the parties in the Civil Suit, the said decision is not binding upon them particularly when as stated by learned counsel for these respondents that these respondents have already filed a Civil Suit which is pending in the Court against the present plaintiff-applicant. For the reasons stated hereinabove, I am of the view that this revision application deserves to be and is hereby allowed. The impugned order is hereby set aside and the application to condone the delay in filing the first appeal filed on behalf of defendants-respondents No. 1 and 2 stands dismissed and eventually the First Appeal filed by defendants stands dismissed as barred by time. The rights of respondents No. 3 and 4 shall be decided in the Civil Suit filed by them. No costs.