

(2003) 11 MAD CK 0078

In the Madras High Court

Case No : Civil Revision Petition (N.P.D.) No's. 601 and 602 of 2003 and C.M.P. No's. 6486 and 6487 of 2003 and V.C.M.P. No's. 9746 and 9747 of 2003

Blow Plast Limited

APPELLANT

Vs

J. Devanathan, Macon Industries, The Superintending Engineer, C.C. No. 1, Andaman Public Works Department and The Executive Engineer, South Division, Andaman Public Works Department
Blow Plast Ltd., Furniture Division
Vs J. Devanathan, Prop. of Macon Industries, Sree Padan

RESPONDENT

Date of Decision : 03-11-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2003) 11 MAD CK 0078

Hon'ble Judges : S. Sardar Zackria Hussain, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for S. Thiruvengkataswamy, for the Appellant; K. Kabir and S. Baskaran, for the Respondent

Final Decision : Allowed

Judgement

S. Sardar Zackria Hussain, J.—By consent of both parties, all the three revision petitions have been taken up.

2. The earlier Civil Revision Petitions in C.R.P. Nos. 602 and 601 of 2003 have been filed by the first defendant in O.S. No. 7417 of 1996 on the file of the XV Assistant Judge, City Civil Court, Madras against the common order dated 21.2.2003 in I.A. No. 19658 of 2002, which was filed to condone the delay of 203 days in filing the petition to set aside ex parte judgment and decree dated 9.4.2002 in O.S. No. 7417 of 2003, and I.A. No. 19659 of 2002, which was filed to stay the operation of the above ex parte judgment and decree in the above suit and the later Civil Revision Petition in C.R.P. No. 1147 of 2003 has been filed by the plaintiff in O.S. No. 5148 of 1990 on the file of the VII Assistant Judge, City Civil Court, Madras against the order dated 26.3.2003 in I.A. No. 20792 of

2002 which was filed to condone the delay of 487 days in filing the petition to set aside the order of dismissal for non prosecution dated 12.7.2001 and to restore the suit O.S. No. 5148 of 1990.

3. The first respondent in C.R.P. Nos. 601 and 602 of 2003 filed the suit in C.S. No. 658 of 1991 in this Court for recovery of Rs. 1,96,362.50 together with interest and cost towards general and special damages due to poor quality of goods supplied and also for mandatory injunction directing the first defendant, viz., the revision petitioner in C.R.P. Nos. 601 and 602 of 2003, to supply 1788 Shells with ULTRA Violet Treatment Free of cost in terms of the warranty extended for being erected at the Netaji Stadium, Port Blair, Andaman and Nicobar Islands as replacement for the objective chairs already supplied. The above suit was transferred to the XII Assistant Judge, City Civil Court, Madras and renumbered as O.S. No. 7417 of 1996 and then transferred to the file of XV Assistant Judge, City Civil Court, Madras and the suit was decreed ex parte on 9.4.2002. Pursuant to the ex parte decree, the first respondent filed E.P. No. 1464 of 2002 on the file of the X Assistant Judge, City Civil Court, Madras in O.S. No. 7417 of 1996 for recovery of Rs. 6,14,195.93.

4. It is stated that the revision petitioner/first defendant company shifted their regional office from G.G. Complex to Bishop Wallers Avenue during the year 2000 and they have failed to inform about the change of address to their counsel and also stated that the person who was taking care of the legal affairs of the company quit the office and as such the company had no knowledge of the pendency of the suit filed against them. It is further stated that during the shifting of regional office, most of the office documents including the documents related to the pending suits were lost in transit and as such, they have unable to follow up with the cases filed by them and also the cases filed against them. Since they failed to inform their counsel about the shifting of their regional office, the counsel was also unable to contact them and inform them about the pending legal proceedings. The suit O.S. No. 7417 of 1996 was at the stage of letting in evidence on the side of the first defendant in the suit, viz., the revision petitioner and since the counsel was unable to contact the company the counsel had reported no instructions and in view of the same, the first defendant was set ex parte and an exparte decree was passed on 9.4.2002. The revision petitioner company came to know about the ex parte decree only when they contacted the counsel after the receipt of notice dated 29.10.2002 on 8.11.2002 from the counsel for the first respondent/plaintiff informing that the execution petition in E.P. No. 1464 of 2002 in O.S. No. 7417 of 1996 was filed on the file of the X Assistant Judge, City Civil Court, Madras against the revision petitioner for recovery of Rs. 6,14,187.93. The revision petitioner immediately filed an application for setting aside the ex parte decree dated 9.4.2002 and by way of abundant caution, the application in I.A. No. 19658 of 2002 to condone the delay of 203 days in filing the petition to set aside the ex parte decree was also filed. The revision petitioner also filed an application in I.A. No. 19659 of 2002 to stay the operation of the judgment and decree dated 9.4.2002 in O.S. No. 7417 of

1996 on the file of the XV Assistant Judge, City Civil Court, Madras pending disposal of the petition to set aside the ex parte decree.

5. Both the petitions in I.A.Nos.19658 and 19659 of 2002 in O.S. No. 7417 of 1996 were opposed by filing counter by the first respondent/plaintiff, who filed the suit O.S. No. 7417 of 1996. The trial Court dismissed both the petitions as per common order dated 21.2.2003. The said common order dismissing the petitions I.A.Nos.19658 and 19659 of 2002 in O.S. No. 7417 of 1996 is challenged in the Civil Revision Petition Nos.602 of 2003 and 601 of 2003 respectively.

6. The revision petitioner filed O.S. No. 5148 of 1990 on the file of the VII Assistant Judge, City Civil Court, Madras against the respondent in relation to the same transaction subject matter of the suit O.S. No. 7417 of 1996 and the suit was contested by the respondent in C.R.P.1147 of 2003 by filing written statement. The suit was dismissed for default on 12.7.2001. For the reasons set out in the affidavit in I.A.Nos.19658 and 19659 of 2002 and on coming to know about the ex parte decree in O.S. No. 7417 of 1996 dated 9.4.2002 only after receipt of notice in the execution petition in E.P. No. 1464 of 2002 in O.S. No. 7417 of 1996 on 8.11.2002 and on contacting their counsel, the revision petitioner also came to know that the suit O.S. No. 5148 of 1990 filed by them was dismissed on 12.7.2001 for non prosecution and so they have filed petition in I.A. No. 20792 of 2002 to condone the delay of 487 days in filing the petition to restore the suit O.S. No. 5148 of 1990 which was dismissed for non prosecution on 12.7.2001.

7. The above petition was opposed by the respondent herein by filing counter. The trial Court as per order dated 26.3.2003 dismissed the petition and the same is challenged in this Civil Revision Petition.

8. The point for consideration in C.R.P. Nos. 601, 602 and 1147 of 2003 is as to whether the dismissal of I.A. No. 19658 of 2002 filed to condone the delay of 203 days in filing the petition to set aside the ex parte decree dated 9.4.2002 and I.A. No. 19659 of 2002 filed to stay the operation of the judgment and decree dated 9.4.2002 in O.S. No. 7417 of 1996 by the trial Court is justifiable, and as to whether the dismissal of I.A. No. 20792 of 2002 filed to condone the delay of 487 days in filing the petition to set aside the order of dismissal dated 12.7.2001 for non prosecution and to restore the suit O.S. No. 5148 of 1990 by the trial Court is justifiable.

9. The learned senior counsel for the revision petitioner in these Civil Revision Petitions argued that in view of the reasons set out in the affidavit in I.A.Nos.19658 of 2002 and 19659 of 2002, the revision petitioner was unable to be present in Court for examination of witness on their side in O.S. No. 7417 of 1996, because of which they were set ex parte and an ex parte decree was passed on 9.4.2002 and so, they had to file the petition to set aside the ex parte decree and also by way of abundant caution filed I.A. No. 19658 of 2002 to

condone the delay of 203 days in filing the petition to set aside the ex parte decree in O.S. No. 7417 of 1996 and also I.A. No. 19659 of 2002 for staying the operation of the judgment and decree dated 9.4.2002 in O.S. No. 7417 of 1996. For the same reason, the revision petitioner was also unable to be present in Court to conduct the trial of the suit in O.S. No. 5148 of 1990, because of which the suit was dismissed for non prosecution on 12.7.2001 and they had to file the petition to condone the delay of 487 days in filing the petition to set aside the order of dismissal for non prosecution. The learned senior counsel for the revision petitioner submitted that in view of such reasons, which is beyond their control, the revision petitioner was unable to be present in Court during those hearings and their absence was not wanton nor wilful and so the petitions filed by them before the trial Court have to be allowed as set out above.

10. The learned senior counsel for the revision petitioner has relied on the judgment of the Hon'ble Apex Court reported in M.K. Prasad Vs. P. Arumogam, . In that case, the Supreme Court has ruled at page 178:-

"In construing Section 5 of the Limitation Act, the court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. The court has a discretion to condone or refuse to condone the delay as is evident from the words "may be admitted" used in the section."

The Supreme Court has also ruled at page 180 in paragraph 10:-

Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs."

The other decision relied on by the learned senior counsel for the revision petitioner is N. Balakrishnan Vs. M. Krishnamurthy, . In that case, the Supreme Court has ruled at page 124:-

"The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered.

Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublica ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

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. Sometimes 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"

Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court should be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

However, while condoning the 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 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.

In the present case the appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be

said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

The explanation for the delay set up by the appellant was found satisfactory to the trial court in the exercise of its discretion and the High Court went wrong in upsetting the finding, more so when the High Court was exercising revisional jurisdiction. Nonetheless, the respondent must be compensated particularly because the appellant had secured a sum of rupees fifty thousand from the delinquent-advocate through the Consumer Disputes Redressal Forum. Therefore, the impugned order is set aside by restoring the order passed by the trial court but on a condition that the appellant shall pay a sum of rupees ten thousand to the respondent (or deposit it in the Supreme Court) within one month from the date of present judgment."

The other decision relied on by the learned senior counsel for the revision petitioner is a Full Bench judgment of Gujarat High Court in Municipal Corporation of Ahmedabad Vs. Voltas Limited and Others, . In that case, the Gujarat High Court has held (Majority view):-

"The phrase "sufficient cause" as occurring in Section 5 of the Limitation Act pertains to the establishment of the appropriate facts before the Court to which the Court can apply its mind and arrive at a conclusion regarding the sufficiency of the cause or otherwise. In essence, therefore, the phrase "sufficient cause" is not a question of principle, but is a question of fact. Hence, whether to condone the delay or not depends upon the facts and circumstances of each case as "sufficient cause" for condonation of delay depends only on the facts placed by the applicants before the Court. The principle in law only is that the Courts are required to take a liberal view while considering the facts constituting the sufficiency of the cause, on the basis of which condonation of delay is sought. This does not necessarily amount to saying that all applications for condonation must be granted. This is necessarily within the discretionary jurisdiction of the Court, and the Court deciding the application for condonation would necessarily exercise its discretion judicially in the light of the well established principles, as regards the appreciation of the relevant facts."

11. On the other hand, the learned counsel for the respondent in these Civil Revision Petitions, referring the counter filed in the petition in I.A. No. 20792, argued that the suit O.S. No. 5148 of 1990 was dismissed at the first instance on 10.12.1991 as the witness of the revision petitioner failed to appear and it was restored on 23.3.1993. Once again it was dismissed on 25.1.1994. Thereafter it was restored on 4.1.2001. Again, at the request of the revision petitioner it was adjourned and it was dismissed on 12.7.2001. It is further argued that the suit O.S. No. 7417 of 1996 was periodically posted for trial and the suit was decreed ex parte on 9.4.2002. In the counter it is opposed that the revision petitioner

came to know about the ex parte decree in O.S. No. 7417 of 1996 and the dismissal of the suit in O.S. No. 5148 of 1990 only on receipt of the notice in E.P. No. 1464 of 2002 in O.S. No. 7417 of 1996 claiming a sum of Rs. 6,14,195.93 on 8.11.2002 since it is not stated in the affidavit that who was the person in-charge of the legal affairs of the company and as to when he has left the service of the revision petitioner company and when was their regional office completely shifted to G.G. Avenue in the year 2000. Further the learned counsel for the respondent contended that the delay of 203 days in filing the petition to set aside the ex parte decree and judgment in O.S. No. 7417 of 1996 and the delay of 487 days in filing the petition to set aside the order of dismissal dated 12.7.2001 for non prosecution and to restore the suit O.S. No. 5148 of 1990 have not been satisfactorily explained. Hence, considering these facts, the trial Court has dismissed the petitions.

12. The learned counsel for the respondent relied on the decision reported in 2002 (3) C.T.C. 13 (Sankaralaingam and another - vs. - V. Raghuraman). In that case, this Court has held that when the Court dealing with petition u/s 5 of Limitation Act, 1963, the Court should examine four aspects namely, (i) Whether petitioner has satisfactorily proved sufficient cause for delay, (ii) whether petitioner is guilty of negligence or inaction or want of bona fide, (iii) whether valuable right that has accrued to other party is likely to be defeated by condonation of delay and (iv) whether petitioner has arguable points on facts and law. The decision whether explanation offered is sufficient cause or not would depend upon facts of every case. 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 defendants to get necessary relief u/s 5. The explanation offered by defendants/petitioner did not constitute sufficient cause and delay could not be condoned. The other decisions relied on by the learned counsel for the respondent are:-

(1) 100 Madras Law Weekly 666 (Srinivasalu.E & another - vs. - Krishnammal and others),

(2) 2001 A.I.H.C. 1229 (Vaijayanthimala and others - vs. - A. Ramasamy),

(3) 2001 A.I.H.C. 3165 (Reliance Industries Limited, - vs. - M. Rajkumari),

(4) 1997 A.I.H.C. 4155 (G. Kalamegam and another - vs. - K. Murugesan and another)

In the above decisions, it has been held that in the absence of plausible explanation given for the delay and the averments in the affidavit being vague and devoid of details, the application for condoning the delay in setting aside the exparte-decree should be dismissed.

13. The suit claim in O.S. No. 7417 of 1996 is to the tune of Rs. 1,96,362.50 towards general and special damages with future interest. The suit was resisted

by the first defendant, viz., the revision petitioner by filing written statement and the suit is hotly contested disputing the suit claim. In the suit, the evidence on the side of the plaintiff was over and when the case was pending for examination of witness on the side of the first defendant, the counsel for the first defendant reported no instructions and because of which, the first defendant was set ex parte and an ex parte decree was passed on 9.4.2002 against the revision petitioner. The revision petitioner company/first defendant came to know about the ex parte decree on receipt of notice dated 29.10.2002 on 8.11.2002 from the counsel for the plaintiff informing that E.P. No. 1464 of 2002 was filed in that suit for recovery of Rs. 6,14,187.93 and on contacting their counsel, it was informed accordingly and so they filed a petition to set aside the ex parte decree and by way of abundant caution, they also filed petition I.A. No. 19658 of 2002 to condone the delay of 203 days in filing the said petition. The revision petitioner along with above petitions also filed I.A. No. 19659 of 2002 for the stay of the operation of the judgment and decree dated 9.4.2002 in that suit. The explanation offered for their absence and the non examination of witness on the side of the revision petitioner in the suit is that their regional office was shifted from G.G. Complex to Bishop Wallers Avenue during the year 2000 and they did not inform the same to their counsel and also the person, who was in-charge of the legal affairs of the company, had quit the office and the revision petitioner company had no knowledge of the pendency of the suit. The other reason is that during the shifting of their regional office, most of the office documents including the documents relating to the pending suits were lost in transit and so they were unable to follow up the cases filed against them and also filed by them. Their counsel also did not inform the pending legal proceedings since they were unable to inform their counsel about the shifting of their regional office.

14. The revision petitioner/first defendant also filed suit O.S. No. 5148 of 1990 in respect of the same transaction subject matter of the suit O.S. No. 7417 of 1996 and the suit was contested by the defendant who filed the other suit, by filing written statement. The suit O.S. No. 5148 of 1990 was also dismissed for default on 12.7.2001. When the revision petitioner contacted their counsel on receipt of the notice in E.P. No. 1464 of 2002 in O.S. No. 7417 of 1996, they were informed that O.S. No. 5148 of 1990 also was dismissed for default on 12.7.2001 and for restoration of the said suit, they also filed a petition and also filed I.A. No. 20792 of 2002 for condoning the delay of 487 days in filing the said petition. The same explanation is offered for the delay of 487 days in filing the said petition. The very fact that the suit O.S. No. 5148 of 1990 also allowed to be dismissed for default on 12.7.2001 would go to show that because the revision petitioner shifted their regional office from G.G. Complex to Bishop Wallers Avenue during the year 2000 and since they failed to inform about the change of address to their counsel, in view of the fact that the person, who was in-charge of the legal affairs of the company had quit the office and as such, the revision petitioner company was not aware of the pendency of the legal proceedings filed by them as also filed against them. The other reason is also convincing that since the

documents related to the pending suits were lost in transit, they were unable to follow up with the cases and ultimately they came to know about the dismissal of the suit O.S. No. 5148 of 1990 filed by them and the ex parte decree passed against them in O.S. No. 7417 of 1996 both relating to the same transaction on receipt of the notice in execution petition dated 29.10.2002 on 8.11.2002 from the first respondent's counsel informing that E.P. No. 1464 of 2002 in O.S. No. 7417 of 1996 was filed for recovery of Rs. 6,14,187.93, pursuant to which, on contacting their counsel, he informed about the ex parte decree passed against them in O.S. No. 7417 of 1996 against the revision petitioner company on 9.4.2002 and about the dismissal of O.S. No. 5148 of 1990 on 12.7.2001.

15. It appears that the suit O.S. No. 5148 of 1990 was dismissed at the first instance on 10.12.1991 for non appearance of the witness of the revision petitioner and it was restored on 23.3.1993 and again it was dismissed on 25.1.1994 and was restored on 4.1.2001 which was adjourned to 12.7.2001 at the request of the revision petitioner. The restoration of the suit on 4.1.2001 and the adjournment of the suit to 12.7.2001 was not informed by their counsel in view of the fact that their regional office was shifted from G.G. Complex to Bishop Wallers Avenue during the year 2000. No doubt it has not been stated that who was the person in-charge of the legal affairs of the revision petitioner company, has not been stated, but it is a definite case of the revision petitioner company that they shifted their regional office during the year 2000. The revision petitioner company was not vigilant, which could have been for the reason of shifting of their regional office from G.G. Complex to Bishop Wallers Avenue during the year 2000 and the person, who was the in-charge of the legal affairs, had quit the office and in transit the documents relating to the cases filed against them and filed by them have been lost.

16. Therefore, in the interest of justice and considering all these aspects it would be just and proper, if another opportunity is given to the revision petitioner company by fixing time limit for disposal of both the suits and by awarding exemplary costs so that further delay can be avoided.

17. C.R.P. No. 602 of 2003:- In the result, the Civil Revision Petition No. 602 of 2003 is allowed setting aside the order passed in I.A. No. 19658 of 2002 to condone the delay of 203 days in filing the petition to set aside the ex parte decree dated 9.4.2002 in the suit O.S. No. 7417 of 1996 and also the application to set aside the ex parte decree dated 9.4.2002 shall stand allowed on payment of exemplary costs of Rs. 20,000/- (Rupees twenty thousand only) to the first respondent/plaintiff directly within 30 days and if the cost is not paid within the time stipulated, the Civil Revision Petition No. 602 of 2003 shall be deemed to have been dismissed. The XV Assistant Judge, City Civil Court, Madras is directed to restore the suit O.S. No. 7417 of 1996 on its file and dispose the same by March, 2004 in accordance with law. Consequently, the petition in C.M.P. No. 6487 of 2003 and the petition in V.C.M.P. No. 9747 of 2003 are closed.

18. C.R.P. No. 601 of 2003:- Since C.R.P. No. 602 of 2003 is being allowed as

above, C.R.P. No. 601 of 2003 filed against the order in I.A. No. 19659 of 2002 for staying the operation of the decree in O.S. No. 7417 of 1996 is dismissed as unnecessary. Consequently, the petition in C.M.P. No. 6486 of 2003 and the petition in V.C.M.P. No. 9746 of 2003 are also dismissed.

19. C.R.P. No. 1147 of 2003:- In the result, this Civil Revision Petition is allowed setting aside the order passed in I.A. No. 20792 of 2002 to condone the delay of 487 days in filing the petition to set aside the dismissal of the suit for non prosecution in O.S. No. 5148 of 1990 and also the petition to set aside the order of dismissal dated 12.7.2001 and to restore the above suit shall stand allowed on payment of exemplary costs of Rs. 10,000/- (Rupees ten thousand only) to the defendant directly within 30 days and if the cost is not paid within the time stipulated, the revision petition shall be deemed to have been dismissed. The VII Assistant Judge, City Civil Court, Madras is directed to restore the suit O.S. No. 5148 of 1990 on its file and dispose the same by March, 2004 in accordance with law.