

(2008) 02 MAD CK 0057

In the Madras High Court

Case No : O.S.A. No's. 273 and 274 of 2005 and C.M.P. No's. 17706 and 17707 of 2005

G. Selvamoorthy

APPELLANT

Vs

B. Gajaraj, G. Ashok Kumar, Heerachand Jain and Gunavathi Jain

RESPONDENT

Date of Decision : 22-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2008) 02 MAD CK 0057

Hon'ble Judges : S.J. Mukhopadhaya, J;M. Venugopal, J

Bench : Division Bench

Advocate : M.V. Muralidharan, for the Appellant; R. Thiagarajan, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—O.S.A. Nos. 273 and 274 of 2005 have been preferred by the appellant/first defendant/applicant as against the orders

passed by the learned Single Judge in Application No. 1370 of 2005 in C.S. No. 561 of 2002 and in Application No. 1506 of 2005 in C.S. No.

562 of 2002 dated 15.06.2005 respectively.

2. The learned Single Judge has passed orders on 15.06.2005 in Application Nos. 1370 and 1506 of 2005 in C.S. Nos. 561 and 562 of 2002

inter-alia observing that ""the applicant has not satisfactorily explained the delay by sufficient cause more particularly the decree has been executed

and the applicant has approached this Court after coming to know of the above proceedings and accordingly, rejected these applications"".

3. According to the learned Counsel for the appellant that the learned Single

Judge should have accepted the reasons ascribed by the appellant in the condonation of delay applications to set aside the exparte decree passed in C.S. Nos. 561 and 562 of 2002 dated 01.03.2004 and that the learned Single Judge ought to have noticed that the appellant was away from the present address from 1995 to 2004 and residing at Thakkolam in his father-in-law's house and therefore, he had no knowledge about the filing of the suit and the passing of the decree in C.S. Nos. 561 and 562 of 2002 dated 01.03.2004 and only as a matter of abundant caution, the appellant/first defendant/applicant has filed the condonation of delay applications and the fact that the appellant was not in good terms with his brother, the second respondent/second defendant and that his brother, second defendant has not informed him even after his return to the present address though his brother as second defendant was a party to the compromise and these facts were not taken into consideration by the learned Single Judge and that the first respondent/plaintiff in collusion with the second respondent (viz., appellant's brother) had obtained the decree fraudulently and this was not taken note of by the learned Single Judge and therefore, prays for allowing both the appeals in issue.

4. The appellant's plea is that after the sale agreement there arose a dispute between him and his brother, the second respondent/second defendant and that the first respondent/plaintiff did not send notice for his readiness to purchase the property before 30.04.1996 or at the end of the year 1994 and during 1995 he lived with his parents-cum in-law's house at Thakkolam in Vellore District which is known to his brother, the second respondent/second defendant and that he is residing in the first floor of his house from the date on his marriage except the aforesaid period at Thakkolam and in the ground floor his brother lived and after his return to his house at Chennai and permanently residing, he has no touch with his brother and his brother has not informed him about the filing of the probate and order of the Court etc.

5. According to the first respondent/plaintiff, no valid and plausible reasons have been assigned in the applications for condonation of delay and that the affidavit filed by the appellant/applicant is silent as to how he was incapacitated from projecting the application within the prescribed period and in the interest of justice, the appeals are to be dismissed.

6. The learned Counsel for the first respondent/plaintiff cited 2008 1 L.W. 141 Bhag Mal (alias) Ram Bux and Ors. v. Munshi (D) by Lrs.,

wherein the Hon"ble Supreme Court observed as follows:

Law cannot be construed in a manner which would defeat the ends of justice -
When an appeal/suit abates, the same may not amount to

adjudication of a decree on merit, but indisputably it would attain finality -
Decision on merits is not the only test to determine the finality of decision

- Finality gained due to abatement is an illustration of the aforementioned variety.

7. In Indian Oil Corporation Ltd., Madras Vs. Mrs. Sakuntala Ganapathy Rao proprietor, Modern Home Agencies, , whereunder it is held as

follows:

Limitation Act 1963, Section 5 - 64 Days delay in filing original side Appeal -
""Sufficient Cause"" - Considerations to be borne in mind by court -

Legal right accrued in favour of other party due to expiry of limitation for filing
appeal should not be light-heartedly disturbed and discretion vested

in Court to condone delay should be exercised to advance substantial justice
when party approaching court is not guilty of negligence or inaction or

want of bonafides - period for preferring appeal cannot be extended merely
because case is hard case calling for sympathy - Party approaching

court after expiry of period of limitation should not be guilty of negligence
whatsoever - Nevertheless court should not be too strict which would

result in defeating ends of justice - Application for delay should be rejected when
there is no evidence to support condonation of delay - Word

Sufficient cause"" cannot be construed liberally because the party in default is
government of institution - Government or institution should give

satisfactory explanation for delay in approaching Court - ""Sufficient Cause""
must be cause beyond control of party in default - Cause which party

in default could have avoided by exercise of due care and caution will not be
""Sufficient cause"" - Explanation for delay shall cover whole delay

from last day prescribed for filing appeal and upto date on which appeal was filed.

Sufficient Cause"" - Delay of 64 days in filing appeal - Reasons for delay
mentioned as ""Administrative Delay"" - No proper explanation and details

regarding delay in Approaching Court - No ""Sufficient cause"" is made out -
Explanation for Delay rejected.

8. The learned Counsel for the first respondent/ plaintiff relied on order passed in

C.R.P. (NPD). No. 359 of 2007 dated 15.03.2007 G.Amsaveni

and two Ors. v. P. Kanakaraj, whereby it is observed as follows:

Consequently, this Revision petition is allowed. The application I.A. No. 160/2004 for condoning the delay and Order 9 Rule 13 CPC for setting

aside the exparte Decree shall stand allowed on payment of cost of Rs. 50,000/- to be paid to the Respondent Plaintiff within a period of six

weeks from the date of this Order. On failure to pay the cost within time stipulated, applications shall stand dismissed and all other proceedings

ordered in the execution proceedings ordered in the execution proceeding shall stand revived. It is clarified that cost of Rs. 50,000/- is ordered in

lieu of the Stamp Duty paid by the Respondent Plaintiff for getting the Sale Deed executed and towards the cost for the inconvenience caused to

the Respondent over the period.

9. He also cited Kaliammal, Ardhanari, Valliammal and Kottathooran Vs. Sundharammal and Ramalingam, , wherein it is laid down as follows:

Limitation Act, 1963, Section 5 - Condonation of delay - Petition to condone delay of 32 days in filing Petition to set aside ex parte preliminary

decree filed by defendant - Final disposal of Petition intervened by several circumstances including dismissal of such Petition for default and

followed by Petitions to restore such Petition and to condone delay in filing such Petition and final decree proceedings being allowed followed by

order of delivery of possession in execution proceedings - By time Application for condoning delay of 32 days could be taken up final decree had

been passed and delivery of possession had been ordered - Condoning delay at such stage would unsettle various proceedings of Court - Interest

of justice warrants that there must be finality to litigation and in absence of such finality rights accrued to opposite party would be unsettled by

uncertainties of litigation - Preliminary decree also recognized rightful share of defendant and granted it and following ratio laid down in Sundar

Gnanaolivu v. Rajendran Gnanaolivu 2003 (1) L.W. 585 delay could not be condoned.

10. On the side of the first respondent/plaintiff reliance is placed on the decision State of Rajasthan Vs. Nav Bharat Construction Co., , wherein it

is held as follows:

Limitation Act, 1963 - Section 5 - ""Sufficient cause"" - Pleading and proof -

Appellant State stating that delay was due to long strike of government

employees - No mention as to date of commencement or termination of strike - Application for condonation of delay being completely vague,

held, High Court committed no error in rejecting it.

11. The learned Counsel for the first respondent/plaintiff cited (2004) 3 M.L.J. 36 Rathinathammal v. Muthusamy and Ors., wherein it is observed

as follows:

Limitation Act (XXXVI of 1963), Section 5 - Ex parte decree - One of the defendants seeking to set aside the ex parte decree with a delay of 545

days - Application rejected - Order challenged in revision - Though the petitioner was impleaded at a later stage, she was aware of the suit - suit

was allowed to be decreed ex parte - Only at the time of delivery of property, the petitioner has chosen to file application for condonation of delay

- Petitioner was aware of execution proceedings - Delay cannot be condoned.

12. He also pressed into service the decision 2003 1 L.W. 585 Sundar Gnanaolivu rep. By his Power of Attorney Agent Mr. Rukmini V.

Rajendran Gnanaolivu Rep. By its Power of Attorney Agent Veina Gnanavolivu, whereby it is held as follows:

Limitation Act (1963), Section 5 - Delay of 431 days in filing the First Appeal - Suit for declaration of title and recovery of possession of property

- Applicant has not come to court with clean hands and averments in the affidavit are totally devoid of truth and lacking in bona fides - Held, Case

falls within the exception to the rule of liberal approach and does not deserve the liberal approach formula in matters relating to condonation of

delay.

13. In support of the contention that the delay cannot be condoned, the first respondent/plaintiff's counsel cited 2001 (4) CTC 722 Kandaswamy

and four Ors. v. Krishnamandiram Trust Karur, by its Trustees, T.N. Rajagopal Naidu and 33 Ors., wherein it is observed as follows:

Limitation Act, 1963, Section 5 - Petition to condone delay of 797 days in filing petition to set aside ex parte decree filed on ground that petitioner

did not have knowledge about ex parte decree - Affidavit filed in support of petition did not contain any other reason - Petitioner examined himself

as witness in said petition and in deposition admitted that he knew about decree in 1944 itself and yet he could not file petition to set aside such

decree in 1994 as he could not mobilise other petitioners - Court would normally construe Section 5 liberally and condone delay unless gross

negligence or deliberate inaction or lack of bona fide is imputable to party seeking condonation of delay - Conduct of petitioner in keeping quiet for

over two years only on account of inability to mobilise other petitioner evidences gross negligence, irresponsible inactive attitude of petitioner and

petition lacked bona fides - Delay cannot be condoned - Order refusing to condone delay confirmed.

14. The learned Counsel for the first respondent/ plaintiff also cited 2001 (3) CTC 321 Reliance Industries Limited rep. By Reliance Consultancy

Services Limited v. M. Rajkumari, whereby it is held as follows:

Limitation Act, 1963, Section 5 - Ex-parte decree passed in suit on 12.1.98 - Application to set aside ex parte decree filed on 1.3.99 -

Defendants admitted in affidavit that they came to know about ex parte decree on 1.4.98 when plaintiff communicated same - Plaintiff had

corresponded with defendants legal unit on 4.11.98 and on other dates - Defendants did not give any reason for not filing application between

1.4.98 and 1.3.99 - Defendant failed to give even plausible explanation for delay - Order of trial court rejecting application to condone delay in

filing petition to set aside ex parte decree confirmed.

15. In regard to the conduct of the party seeking condonation to be looked into by the Court, the learned Counsel for the first respondent/plaintiff

relied on the decision Binod Bihari Singh Vs. Union of India, , wherein it is observed as follows:

Limitation Act, 1963 - Section 5 - Condonation of delay - Conduct of the party seeking condonation - False plea taken by the party to get rid of

bar of limitation - Held, the party should not be encouraged by rejecting the bar of limitation pleaded by opposite party and condoning the delay.

16. We have heard the learned Counsel for the appellant and the learned Counsel for the first respondent/plaintiff and noticed the rival contentions.

17. Though a specific plea on the side of appellant/ first defendant is taken that from January 1995 till June 2004 that he lived with his parents-in-

law's house at Thakkolam, it is not convincing and in our considered opinion, the same is hardly to be believed in the context of our societal set up.

As far as the present case is concerned, the endorsement of the Bailiff [in regard

to the service of suit summons in C.S. Nos. 561 and 562 of

2002] on 21.10.2002 is to the following effect ""attempts were made on three different occasions to serve this summon personally on the within

named 1st Defendant G. Selvamoorthy but he could not be found and reported that he has gone out and also reported that his family members

refused to get this summon, hence on Monday the 21st October 2002 finding personal service is not possible. I affixed a copy of this summon on

the outer door of his residence at Door No. 39, Avadhanam Papiar Road, Choolai, Chennai-112"". A perusal of the affidavit of service filed by the

Clerk of the first respondent/plaintiff's counsel shows that notice taken to the first respondent/first defendant by Courier service was refused in

C.S. Nos. 561 and 562 of 2002, as seen from the endorsement thereto.

18. In C.S. Nos. 561 and 562 of 2002, the appellant/first defendant has not appeared in person or by counsel and it transpires from record that in

both the suits, a decree was passed by this Court on 01.03.2004. Admittedly, E.P is also pending. Suffice it to point out that the first respondent/

plaintiff has not pursued the matter diligently and the averments made in the affidavit filed in Application Nos. 1370 and 1506 of 2005 suffer from

lack of bona fides, notwithstanding the length of delay being immaterial and that the appellant/first defendant has not assigned sufficient cause for

the condonation of delay though he has reportedly come to know about the decree during Pongal holidays on 18th January 2005 and therefore,

we are not inclined to interfere with the order of the learned Single Judge dated 15.06.2005 in rejecting the Application Nos. 1370 and 1506 of

2005 and further, we opine that the learned Single Judge has assigned cogent and convincing reasons for rejecting the said applications and in that

view of the matter, both the appeals fail and the same are hereby dismissed, in the interest of justice. Resultantly, the order passed by the learned

Single Judge in Application Nos. 1370 and 1506 of 2005 dated 15.06.2005 are confirmed. Considering the facts and circumstances of the case,

the parties are directed to bear their own costs. Consequently, connected miscellaneous petitions are also dismissed.