

(2001) 08 MAD CK 0150
In the Madras High Court
Case No : C.R.P. No. 1653 of 1999

Kandaswamy and Others

APPELLANT

Vs

Krishnamandiram Trust, Karur and Others

RESPONDENT

Date of Decision : 17-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 1, Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2001) 3 LW 752 : (2001) 3 MLJ 500

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for the Appellant; Peter Francies, for the Respondent

Final Decision : Dismissed

Judgement

1. Defendants 4, 6, 12, 27 and 36 in O.S.No.207 of 1982 on the file of the Subordinate Judge, Karur, are the revision petitioners.
2. The civil revision petition itself has been filed against the dismissal of their application in I.A.No.37 of 1997 for condoning the delay of 797 days in filing the petition under Order IX, Rule 13 C.P.C. to set aside the ex parte decree, dt. 1.9.1994, passed against them.
3. The suit was filed by respondents 1 to 3 herein representing Krishna Mandiram Trust, Karur, as its Trustees against the revision petitioners and 37 others for recovery of possession, for declaration of their right, for permanent injunction restraining the first respondent/State and its Officers and servants from in any manner interfering with the plaintiffs' peaceful possession and enjoyment of the suit property, for recovery of possession of portions of the suit property from defendants 2 to 25, and for mesne profits from the date of the suit till possession to be determined under Order 20, Rule 1 C.P.C.
4. The plaintiffs filed the suit as indigent persons and after they were permitted to sue as indigent persons, the suit was dismissed for default once on 6.11.1989.

However, it was restored on 13.10.1992 and thereafter the revision petitioners and others remained ex parte and an ex parte decree was passed against them on 1.9.1994. Alleging that they had not received any communication about the restoration of the suit and the ex parte decree passed against them from their Advocate, they took out application in I.A.No. 37 of 1997 on 6.12.1996 to condone the delay of 797 days in filing the application under Order 9, Rule 13, CPC. The only reason given in the affidavit in support of the application was, as already noted, they had not received any communication about the restoration of the suit and the ex parte decree passed against them from their Advocate. According to them, they had a good and valid defence in the above suit. Application was opposed by respondents 1 to 3 by filing a counter stating that the petitioners were residing close to the Court, that they were knowing what was happening, that since they did not have a case they had wantonly allowed the suit to be decreed and now to protract the proceedings they had come forward with an application with false and untenable allegation, that the reasons given were not bona fide, that respondents 32 to 38 in the application were not parties to the suit and they were not entitled to file the petition, that the petition had been filed with an intention to squat on the property, that previously they had filed a petition to set aside the ex parte decree and after getting the ex parte decree set aside they remained ex parte once again, and :hat it would clearly show that they had no intention to conduct the case. The counter further alleges that the suit had been pending for 17 year. and more, and that it would be highly unjust if the delay got condoned.

5. The lower Court after considering the rival contentions, in an elaborately considered order, dismissed the application filed by the revision petitioners and it is as against this the present civil revision petition has been filed.

6. Mr. T.R.Rajaraman, learned counsel for the petitioners, submitted that the plaintiffs themselves allowed the suit to go for default once and they should not find fault with the revision petitioners that they had not been diligent. The learned counsel further submitted that the revision petitioners had an excellent case on merits and they should be afforded an opportunity to contest the case, and that the petition could be allowed on terms. The learned counsel also relied on the following judgments in support of his contentions:

1. Jai Pal Singh v. Chief Settlement Commissioner, AIR 2000 SC 3496 ; 2. Vasu Thevar v. Rukmani Ammal, 2000 (1) LW 723; and 3. Devi v. Jayaraman, 2001 (3) CTC 67.

7. Mr. Peter Francis, learned counsel for the contesting respondents, submitted that the revision petitioners were absolutely lacking in bona fides, that

".....they had allowed the suit to be decreed ex parte once before and on the second occasion they very well knew that the suit was listed for trial and they had deliberately absented themselves, and that absolutely no acceptable explanation had been offered for condonation of such a long delay of 797 days.

The learned counsel also drew my attention to the specific admission made by the first revision petitioner as P.W.1 about his being informed by his lawyer about the ex parte decree and they had deliberately kept quiet, and only with a view to harass the plaintiffs, the petition had been filed. The learned counsel further submitted that none of the decisions relied on by the learned counsel for the revision petitioners would apply to the facts of the present case."

8. P.W.1 has stated in his Chief Examination as follows.:

In cross examination this is what he had stated:

This is hardly an acceptable explanation. He knew about the ex parte decree even in 1994. The ex parte decree came to be passed on 1.9.1994. Till December 1996, the petitioners were keeping quiet though they knew about the ex parte decree. In fact in cross examination, P.W.1 has stated as follows:

I am not at all satisfied that the petitioners are bona fides in seeking a decision in the suit on merits. It has already been noticed that the plaintiffs filed the suit as indigent persons. Apparently, the trust, thanks to the recalcitrant attitude of its tenants like the petitioners, was not in a position to find necessary funds for filing a suit and they had to do it as indigent persons. The suit has been pending for 17 years and it will be the height of injustice if the petitioners are to be shown any indulgence by condoning the delay.

10. In the Supreme Court case, relied on by the learned counsel for the revision petitioners, in *Jai Pal Singh v. Chief Settlement Commissioner*, AIR 2000 SC 3496, it is not known as to the circumstances which weighed with the Supreme Court to condone the delay and in my view the Supreme Court decision does not at all help the revision petitioners.

11. The next decision is by P.Sathasivam, J. in *Vasu Thevar v. Rukmani Ammal*, 2000 (1) LW 723 where the learned Judge has discussed the implications of the counsel reporting "no instructions". In my view, this decision also does not help the case of the revision petitioners..

12. The case decided by Prabha Sridevan, J. in *Devi v. Jayaraman*, 2001 (3) CTC 67 was one where the counsel was ill and the defendant was also not aware of the transfer of the suit from the High to the City Civil Court, Madras, and he suffered an ex parte decree. The defendant also became aware of the ex parte decree only when notice of Execution Petition was served. In those circumstances, the learned Judge thought it fit to condone the delay. It is not the case here. The petitioners knew about the ex parte decree even in 1994 and the time taken by them for mobilising the other petitioners, as stated in the evidence, can hardly be an acceptable reason for the delay in filing the application for setting aside the ex parte decree.

13. In *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, the Supreme Court while dealing with Section 5 of the Limitation Act observed as follows:

"In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan*, ILR 3 MAD 269.

"Section 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant"

(Italics supplied)

Unless gross negligence or deliberate inaction or lack of bona fide is imputable to the party seeking condonation of delay, Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice. In the absence of anything showing mala fide or deliberate delay as a dilatory tactic, the Court should normally condone the delay.

14. It has been held in *N. Balakrishnan Vs. M. Krishnamurthy*, as follows:

"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 would 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,"

15. In a recent decision of the Supreme Court in *M.K.Prasad v. P.Arumugham*, JT 2001 (6) SC 551 the appellant tried to explain the delay in filing the application for setting aside the ex parte decree as was evident from his application filed u/s 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appeared not to be as vigilant as he ought to have been, yet, the Supreme Court observed that his conduct did not, on the whole, warrant to castigate him as an irresponsible litigant; he should have been more vigilant but

on 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. The Supreme Court further observed that 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. Having regard to the facts of that case, the Supreme Court took a view that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in the case could be compensated by awarding appropriate and exemplary costs. In that case, the counsel for the appellant did not appear after a particular date and the other defendants did not contest the claim of the respondent. The trial court decreed the suit ex parte. It was contended by the appellant that the person who was appearing on behalf of the company left the service since 1994 because of death of his son and none had informed him about further proceedings in the Court. He was unaware of the passing of the decree against him; he could not take any proceeding in the form of an appeal or for setting it aside. He came to know about the passing of the decree after one year, only when he received the notice for execution proceedings initiated by the respondent and thereafter he filed an application for setting aside the ex parte decree along with an application for condoning the delay. The trial Court rejected the prayer of the appellant for condoning the delay of 554 days in filing the application for setting aside ex parte decree. Aggrieved by the order of the trial Court, the appellant filed a revision" petition in the High Court which was dismissed. The Supreme Court referred to a number of its earlier decisions, held that the conduct of the appellant did not warrant his being ousted from litigation.

16. In the instant case it has already been noticed that the revision petitioners knew about the ex parte decree even in 1994 and till December 1996 they did not take any steps to have the ex parte decree set aside. Absolutely, no explanation had been given in the affidavit in support of the application for condonation of delay. Though in the course of evidence they had tried to improve on the allegations in the affidavit by stating that the first petitioner took time to mobilise the other petitioners, as already observed by me, I am not at all satisfied with the explanation offered by the petitioners. They were grossly negligent, irresponsible, inactive and lacking in bona fides. The view taken by the lower court is correct. In as much as the decision of the lower Court does not involve any question regarding irregular exercise, non-exercise of jurisdiction, or illegal assumption of jurisdiction, it is not possible to interfere in revision.

17. Consequently, the civil revision petition fails and the same is dismissed. No costs. Consequently, CMP Nos. 8819 of 1999, 9819 and 9820 of 2001 are also dismissed.