

(2001) 03 KL CK 0021
In the High Court Of Kerala
Case No : C.R.P. No. 2191 of 2000

Pioneer Shopping Complex (P) Ltd.	Vs	APPELLANT
Pioneer Towers Owners Assn.		RESPONDENT

Date of Decision : 19-03-2001

Acts Referred:

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

Citation : (2001) 1 KLJ 703

Hon'ble Judges : S. Marimuthu, J

Bench : Single Bench

Advocate : P. Radhakrishnan, for the Appellant; Dinesh R. Shenoy, for the Respondent

Final Decision : Dismissed

Judgement

S. Marimuthu, J.—Revision is directed questioning the order passed by the First Additional District Judge, Ernakulam in I.A. No. 976 of 2000 in C.M.A. No. 124 of 2000. Respondents 1 to 4 as plaintiffs filed a suit in O.S. No. 174 of 1999 for temporary injunction restraining the revision petitioner and respondents 5 to 12 from alienating, transferring or encumbering or making any construction or alteration in any portion of the plaint B schedule property. Along with the suit they filed I.A. No. 1465 of 1999 for a temporary injunction. That application was partly allowed in granting the temporary injunction on 23-3-2000. Questioning the said order the above said C.M.A. 124 of 2000 was filed before the 1st Addl. District Judge, Ernakulam. In filing the above said appeal, there was a delay of 76 days and to condone the said delay, the said application, I.A. No. 976 of 2000 was filed. That application was allowed on payment of Rs. 2,000/- as costs. That order is now challenged in this revision, as pointed out above.

2. Learned counsel Mr. P. Radhakrishnan appearing for the revision petitioner contended that the delay of 76 days in filing the C.M.A. is not satisfactorily explained. In other words, sufficient cause is not shown and the reason stated in

the petition that due to the honest and inadvertent mistake committed by the lawyer the delay has occurred does not amount to sufficient cause. According to the learned counsel, the contention of the other side that appeal was originally wrongly filed before this court and thereafter it was withdrawn and filed before the District Court and on account of the said reason, the delay has occurred appears to be the explanation. But that does not amount to a proper advice to be given by a lawyer and therefore, such advice, even if any, which resulted in the delay cannot be taken as a sufficient cause. Learned counsel for the revision petitioner further contended that on account of the wrong advice given by the counsel the appeal was filed before this court and that in fact amounts to negligence on the part of the counsel. That negligence also cannot be taken as a sufficient cause. Further he would contend that a caveat petition had been filed through the same counsel before the District Court and that indicates that the respondents-plaintiffs and the counsel were aware that the appeal would lie only before the District Court and not before this court. Therefore, the reasons stated in the affidavit filed along with the petition for condoning the delay in filing the appeal by the counsel cannot be believable. Learned counsel also contended that an Advocate appearing for a party in the proceeding cannot file an affidavit in support of the party like one in the present matter condoning the delay. In the above circumstances, the order passed by the lower appellate court is liable to be set aside.

3. Learned counsel Mr. Dinesh R. Shenoy, appearing for the respondents-plaintiffs, who has filed the affidavit in the above said I.A. 976 of 2000, would contend that only due to his honest and inadvertent mistake the appeal was filed originally before this court and after knowing that the appeal would lie only before the District Court, it was withdrawn and filed before that court. In doing so, the delay has occurred. The delay is not willful and because of his honest and inadvertent mistake a party should not suffer. He further would contend that even if he had given an advice to the client to file the appeal before this court the advice was not tainted with any mala fides and it is a bona fide one and he has also got immunity on account of which he need not answer or explain for the contentions of the revision petitioner. Therefore, the order passed by the lower appellate court can be upheld.

4. In support of the respective contentions of both the parties, they have placed reliance on some settled principles of law on this aspect. Before referring to the propositions of law, I will extract hereunder Sec. 5 of the Limitation Act and Order XLI Rule 3(A) CPC.

Section 5. Extension of prescribed period in certain cases.-- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Order XLI Rule 3-A. Application for condonation of delay.-- (1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal with such period.

(2) If the court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

5. Now I will refer to the decisions cited by the counsel on both sides. The Supreme Court in an earlier decision reported in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, has held that even if sufficient cause has been shown by a party for the delay, the party is not entitled to condonation of delay in question as a matter of right. In *Shakuntala Devi Jain Vs. Kuntal Kumari and Others*, the Supreme Court has ruled that Sec. 5 of the Limitation Act gives the courts 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; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. In *G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore*, it is held that the expression "sufficient cause" in Sec. 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bonafides is imputable to the party seeking condonation of the delay. The Supreme Court in *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, has held that in condoning the delay the court should adopt a liberal approach. In *Ramachandran v. State of Kerala 1997 (2) KLT 647 (SC)* the Supreme Court has ruled that when the statute itself is very meagre in prescribing the time, the courts have no power to extend the period of limitation on equitable grounds.

6. From the above decisions, it is distinctly clear that even if sufficient cause is shown for condoning the delay, the court has got its discretion and the party who has shown sufficient cause cannot press as a matter of right for condonation of delay. In condoning the delay there must be liberal consideration by the courts and whether sufficient cause is shown or not has to be examined on the facts and circumstances of each case.

7. The Supreme Court in *Mata Din Vs. A. Narayanan*, has held that even the error of a counsel when it is not tainted by any mala fide motive can be justified in extending time. The Goa High Court in the decision reported in *Pandurang v. Govt. of Goa (AIR 1978 Goa. 22)* has taken the view that inadvertence of counsel in looking to some other provisions of law governing limitation cannot be a sufficient cause for condoning the delay. The Rajasthan High Court in

Badrinarain Vs. Chandanmal, has held that every wrong advice given by the counsel will not amount to a sufficient cause. No doubt, it will amount to a sufficient cause when the advice given is bona fide. But if it is due to the negligence or gross want of legal skill on the part of the counsel, that cannot be held as a bona fide mistake. The Calcutta High Court in decisions reported in Bijanlnta Bassak v. Bhudhar Chandra (AIR 1955 Cal. 180) has ruled that where there is some dispute about the law or the law is in an unsettled state, a mistake by the learned lawyer can be accepted as sufficient cause but where the matter is beyond dispute, a statement that the lawyer did not know the law cannot be accepted as sufficient cause. The Madhya Pradesh High Court in Mariambai and Another Vs. Hanifabai and Another, has held that the advice given by counsel based upon his impression and without reading relevant provisions of law cannot be stated to be a sufficient cause. This court in Case No. 17, 1978 KLTSN 6 has held thus:

It is settled law that in applications under Sec. 5 of the Limitation Act, it is the duty of the person who comes to court to condone the delay to explain the delay of each day satisfactorily. One looks in vain in the affidavit for such explanation. The counsel for the respondents obviously is in an embarrassing position on account of the fact that the affidavit is sworn to by the petitioner's counsel himself wherein absence of diligence on his part and his personal disability in the form of illness have been detailed. This embarrassment on his part has put him in a difficult position although he persisted in opposing the application to condone the delay.

I too am not satisfied fully with the grounds urged. But in view of the fact that an advocate has sworn to an affidavit stating that he was not well and that he could not therefore file the application in time influences me to exercise discretion in granting the prayer. I think it only proper that the prayer is granted on terms.

In John v. Mammukutty and others (1984 KLJ 772) this court has held that the fact that a wrong procedure was followed by the mistaken legal advice given to the party by his Advocate, that the party was residing far away from the court and/or counsel, that there was no laches on the part of the party, that he believed bona fide the advice given to him and was not aware of the correct position, that the lawyer's advice was not unreasonable nor was he careless etc., are relevant aspects to be borne in mind in the matter of condoning the delay. In yet another decision reported in South India Bank Ltd. v. Ouseph (1986 KLT 1133) this court has held that wrong legal advice is only one of the species coming under "sufficient cause". Legal advice given by members of the legal profession may sometimes be wrong. Even pronouncements by courts on questions of law may go wrong. To err is human. Therefore, what is required is only whether the explanation offered for the delay is bona fide and the delay has occurred on account of sufficient grounds shown in good faith and not the result of mala fides. etc.

8. In the present case on hand the affidavit filed in support of the petition by the

counsel would go to show that while filing the appeal an inadvertent mistake was committed by him. And further the facts and circumstances of this case would go to show that the Advocate bona fide believed that the appeal would lie before this court and therefore he filed the same before this court and after knowing that the appeal would lie only before the District Court, he had withdrawn the same and filed before the District Court. So that act of the Advocate, I feel, cannot be said to be a wrong advice given to the party concerned. I am of the view that the said act is not tainted with any malafide or any ulterior motive. In such circumstances, as held by this court, which is extracted above, without making any embarrassment to the counsel concerned when he has not acted with the mala fide intention, on some reasonable terms, the delay can be condoned. The Supreme Court in Mata Din's case (stated supra) is of the view that even if the advice given by the counsel is wrong when it is not tainted with any mala fide, the time can be extended. The next contention raised by the learned counsel for the revision petitioner would be that an Advocate appearing for a party cannot file an affidavit and it is barred under Order XLI Rule 3(A) CPC. In support of this contention he would place reliance on the decision reported in Oil and Natural Gas Commission Vs. Offshore Enterprises Inc., where it is held that an Advocate is not entitled to act in a professional capacity as well as constituted attorney of a party in the same matter or cause. An Advocate cannot combine the two roles. In yet another decision reported in Padmavathi Vs. Kalu, this court has held that the application for condonation of delay must be supported by an affidavit along with the memorandum of appeal. No doubt, the above two decisions would go to show that the delay condonation petition must be supported by an affidavit of the party and that must be filed along with the memorandum of appeal and Advocate appearing for the party should not have two roles. One is for representing the party and the other is for filing an affidavit for the condonation of the delay. But on going through the facts of the above said two cases and the principles laid down therein, I feel that there is no bar for an Advocate filing an affidavit for the party. Some of the decisions referred to above for the other aspect would also signify that there is no bar for an Advocate filing an affidavit. In short, on going through the entire materials before me and also on examining them on the footings of the principles of law stated supra, I feel that the order passed by the lower appellate court is proper and correct. The delay has occurred on account of the filing of the appeal before this court. And that could not be said, as I have pointed out above, that it is due to any wrong advice to the party by the counsel or that the counsel has acted mala fide. In these above situations, the caveat filed before the District Court shall not raise any cause of action to put the blame on the shoulders of the counsel or to upset the order of the lower appellate court. Therefore, the direction for the payment of Rs. 2,000/- as costs for the condonation of delay appears to be very reasonable. Hence, I do not find any reason to set aside the order passed by the lower appellate court in I.A. No. 976 of 2000 in C.M.A. No. 124 of 2000.

In the result, the Civil Revision Petition stands dismissed.