
(2011) 10 MAD CK 0181

In the Madras High Court

Case No : C.R.P. (NPD) No. 3920 of 2005 and M.P. No. 1 of 2009

R. Jagadeesan (died), Sakunthala, Magendran and Parthipan	APPELLANT
Vs	
Santhakumari	RESPONDENT

Date of Decision : 19-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90
Limitation Act, 1963 — Section 5

Citation : (2012) 1 CTC 849

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : N. Manoharan, for the Appellant; S. Umapathy, for the Respondent

Final Decision : Dismissed

Judgement

R. Sudhakar, J.—This Civil Revision Petition is filed against the fair and decreetal order dated 7.8.200.9 in I.A. No. 723 of 2008 in O.S. No. 151 of 2001 on the file of the I Additional Sub-Court, Coimbatore. Legal heirs of the deceased Jagadeesan are the Petitioners herein in the Civil Revision Petition. The Respondent/Plaintiff filed a Suit against the deceased Jagadeesan for recovery of a sum of Rs. 1,45,600/- with interest on the basis of the promissory note said to have been executed by the deceased on 15.3.1987. The Defendant in the Suit received suit summons, entered appearance and filed a Written Statement on 11.2.2002 denying the suit claim. The Suit was taken up for trial and the Respondent/Plaintiff was examined in chief on 10.8.2005. Since the Defendant and his Counsel failed to appear before the Trial Court to cross-examine the PW 1, the Defendant was set ex parte and the ex parte decree was passed on 10.8.2005. On the basis of the ex parte decree, the Respondent/Plaintiff filed Execution Petition in E.P. No. 129 of 2007, in which, the Defendant entered appearance through his Counsel on 20.4.2007. Thereafter, the Execution Petition was posted on 22.6.2007 for filing Counter Statement. It was thereafter adjourned to 9.7.2007 & 17.8.2007. On 17.8.2007, the Defendant/Respondent in

the Execution Petition filed a Counter Statement. Thereafter, the Execution Petition was posted on several occasions i.e. on 24.9.2007, 23.10.2007, 5.11.2007, 10.12.2007, 25.1.2008, 10.3.2008 & 8.4.2008. The Petitioner in the Execution Petition viz., decree-holder was heard and adjourned for enquiry on behalf of the Respondent/judgment-debtor on 9.6.2008 and the case was adjourned from time to time viz., on 24.6.2008, 7.7.2008, 8.8.2008, 9.9.2008, 20.10.2008 & 25.11.2000 for enquiry on the side of the Respondent/judgment-debtor.

2. During the period when the Execution Petition was adjourned from time to time, on 7.11.2008, the judgment-debtor/Respondent in the Execution Petition filed an Application to condone the delay of 1153 days in preferring the Application to set aside the ex parte decree. That Application was numbered as I.A. No. 723 of 2008. A detailed Counter Affidavit was filed setting out the various dates of adjournment given to the judgment-debtor and that the judgment-debtor had the knowledge of the ex parte decree and in spite of the same, the judgment-debtor failed to take appropriate steps to set aside the ex parte decree in time. Therefore, he pleaded that the Application filed for condonation of delay after nearly three years i.e. 1153 days lacks bona fide and is intended to protract, the litigation to defeat the rights of the Plaintiff/decreed-holder and that the delay has not been properly explained and therefore, pleaded that there is no sufficient cause for condoning the delay. This plea was considered by the Court below on merits and also considering the relevant dates and the proceedings, the said Application was dismissed. Challenging the same, this Revision Petition has been filed.

3. Sri Manoharan, learned Counsel for the Petitioner does not dispute the above stated facts. He only points out that an Application was filed to set aside the ex parte decree on the very next day i.e. on 11.8.2005 in CFR No. 23513/11.8.2005. But it was neither returned nor numbered and was kept pending. Therefore, he filed a fresh Application after nearly three years. He relied upon the Apex Court decision in N. Balakrishnan Vs. M. Krishnamurthy, and stated that length of delay is immaterial if there is an acceptable explanation. In an Application filed u/s 5 of the Limitation Act, the word "sufficient cause" should be considered liberally so as to advance the cause of justice.

4. He also relied upon paragraphs 19 & 20 of the judgment in Improvement Trust, Ludhiana Vs. Ujagar Singh and Others, and pleaded for setting aside the order. Paragraphs 19 & 20 of the judgment read as follows:

In our opinion, the ends of justice would be met by setting aside the impugned orders and the matter is remitted to the executing Court to consider and dispose of the Appellant's objections filed under Order 21, Rule 90, C.P.C. on merits and in accordance with law, at an early date. It is pertinent to point out that unless mala fides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it out on such

technicalities.

Apart from the above, the Appellant would not have gained in any manner-whatsoever, by not filing the Appeal within the period of limitation. It is also worth noticing that delay was also not that huge, which could not have been condoned, without putting the Respondents to harm or prejudice. It is the duty of the Court to see to it that justice should be done between the parties.

5. Learned Counsel for the Respondent/Plaintiff on the other hand referred to the various dates on which, the case was posted for trial; the date on which, the Defendant was set ex parte, the date on which the Execution Petition was posted for the appearance of the judgment-debtor and for filing Counter Affidavit and the various dates of hearing to point out that the Revision Petitioner/deceased Defendant was fully aware of the ex parte decree as early as on 20.4.2007 but he failed to take steps to set aside the ex parte decree for nearly 1 year and six months after the Execution Petition was filed and served. The delay insofar as ex parte decree is nearly three years.

6. Further, certain portions of the Counter Affidavit filed by the deceased judgment-debtor in the Execution Petition has been extracted by the decree holder while opposing the I.A. filed for condonation of delay, which goes to show that the judgment-debtor was fully aware of the ex parte decree. It is contended that the judgment-debtor should have been diligent enough to follow up the case either by himself or through Counsel so as to have the matter restored to file. Further, even after the judgment-debtor entered appearance in the Execution Petition on 20.4.2007, the case was adjourned time and again and was represented by a Counsel. The case was adjourned for more than 14 occasions, during which time also, the judgment-debtor failed to take prompt action to file the Application to set aside the ex parte decree. It is not as if, he was ignorant of the proceedings as he entered appearance and was duly represented by a Counsel. He also pointed out to the counter to state that the Respondent/judgment-debtor had offered to sell one of the three houses standing in his name to satisfy the decree amount. There is also an undertaking given in the Counter Statement filed in E.P. No. 129 of 2007 that the judgment-debtor will sell one portion of the property to satisfy the decree. These facts would clearly go to show that the only intention of the judgment-debtor is to prolong the execution of the decree one way or the other while admitting the liability.

7. In the decision of the Apex Court in Balakrishnan's case, which has been cited supra, it has been held that if the explanation given is justifiable and is based on a just and reasonable cause, the period of delay need not weigh in the mind of the Court. The Apex Court emphasises the fact that the Rule of limitation is not to be used to destroy the rights of the parties and at the same time it should not be a party to resort to dilatory tactics. The Apex Court emphasised the needs to preserve time. It also cautions the Court to consider the bona fides of the parties, who pleaded for condonation of delay. In other words, it should not be a mala fide attempt and a strategy to delay the proceedings. The Apex Court also

emphasized the need for the Court to consider the opposite parties, predicament in a case where there is undue delay on the part of the opposite party. The said judgment also emphasises the role of the Trial Court in exercising its discretion. In matters of condonation of delay, findings of the Court below should not be normally interfered with by the higher Courts if it is found that the order accepting or rejecting the Application is not arbitrary or perverse.

8. In the present case, it is evident that the judgment-debtor was aware of the ex parte decree on the day when he was set ex parte. Therefore, he cannot claim that he had no knowledge, since he has suffered an adverse order, it is incumbent on the part of the judgment-debtor to diligently pursue the matter to set aside the ex parte decree. Merely filing an Application and leaving the matter there at, would only go to show that the judgment-debtor did not show due diligence. When he has suffered an order against him, he should not have been careless and idle. The inaction on the part of the judgment-debtor is further fortified by the conduct of the judgment-debtor in the Execution proceedings. In the Execution proceedings also, the judgment-debtor after having entered appearance, kept quiet for more than 1 year and six months and thereafter, filed an Application once again for condonation of delay. This shows utter callousness and irresponsible attitude.

9. In the Counter Affidavit filed in the Execution Petition at the first instance, it is stated that the judgment-debtor is willing to make the payment in terms of the decree by selling one or other property, however, wisdom dawn on him after more than one year and six months when he decided to file the Application for condonation of delay once again. This clearly establishes the lack of bona fide and dilatory tactics, which the Court below has rightly considered and rejected the plea of condonation of delay. The prejudice that has been caused to the Respondent/Plaintiff is amply established by the facts as narrated above and this Court finds no good reason to interfere with the order impugned in the Revision Petition. There is no plea of arbitrariness or perversity in the order under challenge. In the result, finding no merits, the Civil Revision Petition is dismissed. Consequently, M.P. No. 1 of 2009 is dismissed, no costs.