
(1999) 07 MAD CK 0090
In the Madras High Court

V. Veeraraghavan

APPELLANT

Vs

State Bank of India, Mettupalayam Branch

RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1999) 3 MLJ 702

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Plaintiff in O.S. No. 437 of 1994 on the file of the I Additional Subordinate Judge's Court, Coimbatore, is the revision petitioner. The petitioner is aggrieved by the order of the lower court in I.A. No. 947 of 1998 filed by the respondent herein.

2. Petitioner filed a suit for recovery of an amount of Rs. 4,62,337.50 with interest at 18% p.a. from the date of suit till the date of payment and also for the costs of the suit. The defendant/respondent herein is a nationalised bank. Even though the respondent entered appearance in the suit, did not file written statement and finally ex parte decree was passed on 14.10.1996. By the time the decree was passed, the amount swelled to nearly Rs. 7,40,000 apart from the costs of the suit. The petitioner herein filed an execution application on the basis of the ex parte decree. The Bank received notice in E.P. in January, 1998 and on their failure to make any representation, an order of attachment was ordered on 24.3.1998. The Amin visited the petitioner's bank and informed them about the attachment of the movables ordered by the court. When the attachment could not be effected, the petitioner herein moved for police aid. But, it is seen that the attachment was not effected since the petitioner made a part payment on 24.4.1998 and the matter was adjourned to 17.6.1998. On that day also, the Bank made another payment and the case was posted on 10.7.1998 for payment of the balance amount as a last chance. On 13.7.1998 also, the Bank was allowed to make a part payment of Rs. 10,000. The executing court directed

the Bank to pay at least 1/3rd of the balance amount within a month. It is seen, even thereafter the payment could not be made and the properties were attached. It is at that time an application was filed by the respondent herein in I.A. No. 947 of 1998 along with a petition under Order 9, Rule 13 of the CPC to set aside the ex parte decree. I.A. No. 947 of 1998 was filed to condone the delay in filing the application to setting aside the ex parte decree. There is a delay of 744 days.

3. In I.A. No. 947 of 1998, the Bank contended that they were under the bona fide impression that the written statement was filed and the suit was yet to come up for trial. They also further averred that they did not receive any information from their counsel and they came to know about the ex parte decree only when the Amin visited the bank premises for effecting attachment. For the said petition, the petitioner filed a detailed counter and wanted the application to be dismissed.

4. By the impugned order, the lower court allowed the same on terms i.e., asking the bank to deposit the entire costs of the suit in court and also Rs. 1,000 to be paid the counsel. The court below also directed that in case the amount is not paid, the application will stand dismissed.

5. It is not disputed that the Bank has complied with the directions and the delay has been condoned.

6. Learned Counsel for the petitioner submitted that the impugned order passed by the lower court is perverse and it has not taken into consideration the settled legal principles in condoning the delay. It is further argued that the lower court has not entered a finding as to whether there was sufficient cause for condoning the delay. According to the counsel the only finding by the trial court is that since it is a nationalised bank and since public money is involved some lenience will have to be shown and it should not be treated just like the case of a private individual. The lower court has also said that in the case of public institutions, there will be some laches and that by itself cannot be reason to discard the case. According to the counsel, the above reasons are only grounds for condoning the delay.

7. As against the said contention, learned Counsel for the respondent submitted that discretion exercised by the lower court and the same should not be looking to be interfered u/s 115 of the Code of Civil Procedure. Learned Counsel also supported the view taken by the trial Judge that the case of public institution is not to be treated on par with the case of a private individual. Counsel further submitted that in this case, the Bank had to depend only on the counsel who failed to discharge his professional duty. It is further submitted by the counsel that even though in the execution proceedings part payments said to have been made, the Bank has not authorised to make the same and the Bank has not paid the same. Learned Counsel also brought to my notice, the correspondence between the counsel and the Bank. The counsel submitted that from the

correspondence it could be seen that the bank completely believed the counsel who failed to inform the bank about the postings and even after the ex parte decree was passed, the counsel did not inform the same and the bank was under the bona fide impression the suit is still pending. Learned Counsel submitted that even the affidavit in support of the application I.A. No. 947 of 1998, they have to rely only on the counsel and they have now changed the person. Disciplinary action also has been taken against the staff of the Bank. Counsel also pleaded that no ground has been made out for interference u/s 115 of the Code of Civil Procedure.

8. Heard both sides.

9. Learned Counsel for the respondent brought to my notice, the letter written by the Bank to Advocate Shri V. Sivakumar dated 5.12.1998 which shows the vivid picture of how the counsel failed to discharge his duties. From that letter, it could be seen that after filing the vakalath, the counsel did not inform the Bank and they were completely kept under dark about subsequent developments. Even after the ex parte decree was passed, Bank was not informed in time. When an order of attachment was about to be effected, to avert the same, it was the counsel who made some part payments. After making those part payments, the counsel requested the bank that he may be reimbursed the amount which he has paid. The bank refused to do so, stating that they have not authorised him to make the payment nor he has informed about the prior proceedings. The bank also accused the counsel for acting against the bank's interest and wanted explanation from the counsel for having neglected his professional duty, which has caused damage to the bank. It is also seen from the type set of papers, the disciplinary action has been initiated against the staff who is responsible for the laches.

10. It is seen that when the Amin wanted to effect attachment, they moved a stay which was not granted by the executing court. The same was challenged before this Court in C.R.P. No. 3649 of 1998. There also, the Bank has given how the counsel derelicted his duty and the loss suffered by the Bank. It is stated therein that even the affidavits in support of setting aside the ex parte decree and to condone the delay applications were dictated by the counsel since the Bank was in a helpless position. The counsel has now been changed.

11. Why I am extracting these facts are only to show that the Bank itself is not cause of negligence of laches on its part. It is true that the action of the counsel binds the client.

12. In G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, . Their Lordships of the Hon''ble Supreme Court considered the question as to how far the conduct of the Government Pleaders in not taking any action in time, as a ground for condoning the delay in filing the appeal. In para 14 of the judgment, their Lordships said thus:

There is, it is true, no general principle saving the party from all mistakes of its

counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time barred appeal. Each case will have to be considered on the particularities of its own special facts. However the expression "sufficient cause" in Section 5 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 bona fides is imputable to the party seeking condonation of the delay. In Katiji case, this Court said: (S.C.C. P.108, para. 3)

When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay....

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

13. In U.C.O. Bank v. Iyengar Consultancy Services Pvt. Ltd. (1994) 2 S.C.C. 399 also a case for the counsel did not inform the client about the disposal of the suit and also did not take any steps to have the ex parte decree set aside in time. That is also case of nationalised bank. In para 4 of the judgment, their Lordships have held thus:

The appellant has adduced sufficient material to support its submission that it was not aware of the passing of the ex parte decree and that having engaged Shri A.N. Tewari as its counsel, on the basis of the information given by the counsel from time to time, it was under the impression that the suit was pending and was being properly contested. It has also been shown from these documents that it was much after the passing of the ex parte decree that the appellant came to know the factual position and it was then that the appellant took further steps by engaging another counsel in place of Shri A.N. Tewari.

14. Similar is the case reported in Sushila Narahari and Others Vs. Nandakumar and Another, that is also a case where the counsel derelicted his duty to inform his client. The case arose from this Court and the delay was condoned holding that the client should not suffer. In that case, the Advocate withdrew from the case without notice to the client which caused an ex parte decree to be passed. Their Lordships set aside the order and also condoned the delay.

15. In Rafiq and Another Vs. Munshilal and Another, , was a case where the counsel did not present himself in court which adversely affected the client. Their Lordships questioned thus:

What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would

not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative.

16. Learned Counsel for the respondent also brought to my notice plaint claim and submitted that no decree could be passed on those allegations. In an application u/s 5 of the Limitation Act and under Order 9, Rule 13 of the Code of Civil Procedure, the court may not be justified in taking into consideration the merits of the case. But one thing that is clear is that a nationalised bank would not suffer due to dereliction of duty of its agent. The bank has to depend only on their lawyers. It was the very same counsel who was representing the bank for years and bank did not have any ground to suspect his integrity or honesty. Absolute confidence and faith of the client on its counsel might be the reason why the bank also put the signature whenever and wherever is wanted by the counsel. The nationalised banks are dealing with the public money and if it put to any loss, it is the general public that has to bear the burden. Just like Government, it has also to depend on its lawyers in legal matters. If there is omission on the part of the lawyers, ultimately, the person affected is the institution itself. There is no finding by the lower court that there had been deliberate laches on the part of the bank or he did not file the application in time only due to its laches. The lower court has also taken into consideration the public interest involved while allowing the application u/s 5 of the Limitation Act.

17. In a recent decision by the Hon'ble Supreme Court reported in N. Balakrishnan Vs. M. Krishnamurthy, , in paras. 10 to 12 of the judgment, their Lordships held thus:

10. The reason for such a different stance is thus:

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.

11. 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 life span 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 reipublicae supersedet 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.

12. 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. This Court has held that the words "sufficient cause" u/s 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shankuntala Devi Jain v. Kuntal Kumari and State of W.B.* v. Administrator, Howrah Municipality.

Their Lordships further went and said thus:

13. It must be remembered that 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. 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 earlier portion of the judgment in para 9, Their Lordships further held thus:

9. It is axiomatic that condonation of delay of 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. 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.

18. In this case, the lower court has exercised its discretion and is of the view that the delay is to be condoned. While exercising the jurisdiction u/s 115 of the Code of Civil Procedure, unless it is shown there is a failure of justice or the petitioners would put to irreparable injury or loss, interference u/s 115 cannot be had.

19. Further recent decision of the Hon"ble Supreme Court reported in Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd. (1991) 1 S.C.C. 37, in para 11 of the judgment, their Lordships said:

even if such an order passed by the subordinate court has any illegality or is affected by material irregularity, the High Court will not interfere unless the said order, if allowed to stand, would occasion a failure of justice or its effect would be infliction of irreparable injury to any party.

20. In this case, the lower court has taken into consideration the interest of both the petitioner and respondent, cost has been allowed. Application u/s 5 of the Limitation Act is allowed on payment of costs and the Bank was also directed to deposit the entire costs of the suit so far incurred. I do not find any ground to interfere u/s 115 of the Code of Civil Procedure. The C.R.P. is therefore dismissed.

21. Learned Counsel for the respondent submitted that necessary direction may be given to the lower court to dispose the suit itself and the Bank will take earnest steps to see it is not prolonged any longer. The suit is only for recovery of money and it is filed in the year 1994. Under these circumstances, I issue following directions: The ex parte decree against the respondent i.e., State Bank of India, Mettupalayam Branch is set aside and the lower court is directed to restore the plaint in O.S. No. 437 of 1994 to its file. The Bank is directed to file its written statement within four weeks from today. The lower court is directed to dispose of the suit on or before 31.12.1999.

22. In the result, the C.R.P. is dismissed as above with the above directions, no costs. Consequently, C.M.P. No. 9749 of 1999 is closed.