(2005) 09 MAD CK 0115

Madras High Court

Case No: Civil Revision Petition No. 794 of 2002

Mercy		APPELLANT
	Vs	
Ponnusamy, Kamalai Bai and Mani		RESPONDENT

Date of Decision: Sept. 23, 2005

Acts Referred:

- Evidence Act, 1872 - Section 101
- Limitation Act, 1963 - Section 5

Hon'ble Judges: R. Banumathi, J

Bench: Single Bench

Advocate: S. Ramesh, for V. Raghavachari, for the Appellant; K.N. Thampi, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R. Banumathi, J.
This revision petition is directed against the order of the Additional District Munsif Court, Kuzhithurai made in I.A. No. 292/2001 in O.S. No. 420/1999, dismissing the petition filed u/s 5 of the Limitation Act and refusing to condone the delay of 342 days in filing the petition to set aside the exparte decree. Defendant is the revision petitioner.

2. Respondent/plaintiff has filed O.S. No. 420/1999 for declaration and Permanent Injunction. According to the plaintiff, the first defendant, who is his sister, had executed an Agreement of Sale for 35 cents of the suit Survey Number, on 26th February, 1977. D-1 did not execute the Sale Deed as per the Agreement of Sale within the stipulated period. So the plaintiff has filed the suit for Specific Performance of contract, in O.S. No. 177/1981. The suit has been decreed in favour of the plaintiff and the plaintiff has taken possession of the Suit Property. The Appellate Court reversed the Judgment and Decree in O.S. No. 177/1981. However,

the plaintiff who is in possession and enjoyment of the Suit Property and has constructed building and was residing in it with his family. It is alleged that the first defendant has made fraudulent transactions on 29th September, 1996 in favour of defendants 2 and 3, who have attempted to trespass into the Suit Property on 1st October, 1999. Hence the plaintiff has filed the suit for declaration of his title and possession and also for Permanent Injunction restraining them from trespassing into the Suit Property.

3. Exparte Decree was passed on 21st December, 1999. The second defendant/Mercy had filed I.A. No. 292/2001 u/s 5 of the Limitation Act to condone the delay of 342 days in filing the application to set aside the exparte Decree. According to the second defendant, she was not served with any suit summons. Suppressing the earlier suit, plaintiff has filed O.S. No. 420/1999 and obtained an exparte Decree behind the back of the second defendant. The second defendant prayed to condone the delay, contending that if the exparte Decree passed against her is not set aside, she will be subjected to great hardship and injury, in view of the prior litigation between the parties and the Judgment and Decree in the previous litigation.

4. In consideration of the contention of both parties, the learned District Munsif has dismissed the application stating that the delay of 342 days had not been satisfactorily explained, and no convincing reasons are made out to condone the delay and hence, dismissed the application.

5. Assailing the impugned Order, the learned Counsel for the revision petitioner/defendant has submitted that the impugned Order is a non-speaking order and without assigning any reason, the petition was dismissed. It is submitted that the Court below has not perused the relevant papers to know whether the summons was served or not and erred in finding that the delay has not been properly explained. It is further submitted that the refusal to condone the delay is against the well settled principle that the expression "sufficient cause", is to be liberally construed. In support of his contention, the learned Counsel for the revision petitioner relied upon the decision reported in [Kuppammal (died) and 3 Ors. v. S.V. Kandasami] and N. Balakrishnan Vs. M. Krishnamurthy, .

6. Countering the arguments, the learned Counsel for the respondent/plaintiff has submitted that the petition is not in proper form. It is further submitted that the revision petitioner had not taken any steps to prove that the summons was not duly served upon the second defendant. Drawing the attention of the Court to Section 101 of Indian Evidence Act, the learned Counsel for the respondent/plaintiff has submitted that the revision petitioner has not produced the materials to substantiate the claim that the summons was not served upon the second defendant. It is further submitted that in the absence of any materials produced before the lower Court, this Court cannot go into the details of the previous litigation between the parties.

7. In consideration of the contention of both parties and the impugned Order and other materials on record, the following points arise for consideration in this revision:

(i) whether the delay of 342 days in filing the petition to set aside the exparte Decree is satisfactorily explained?

(ii) whether the impugned Order refusing to condone the delay is unreasonable and unjust warranting interference?

8. The property in dispute relates to R.Sy. No. 138/9 - 40 cents in Ezhudesam Village with the building thereon bearing D. No. 6/59A. The revision petitioner/defendant claims right and title to an extent of 17 cents through a Sale Deed dated 29th September, 1996 (Date of Sale Deed not correctly known from the typed set of papers). According to the 2nd defendant she has obtained patta and is also paying House Tax for the same. On the other hand, the plaintiff claims right to be in possession, pursuant to Sale dated 26th February, 1977, said to have been executed by the first defendant for 40 cents in the suit Survey Number. O.S. No. 420/1999 is the third round of litigation between the parties. In the first round of litigation, plaintiff has filed O.S. No. 177/1981 for Specific Performance on the basis of the alleged Agreement of Sale in his favour. That suit was decreed, which was reversed by the Appellate Court. Subsequently, the plaintiff has filed O.S. No. 111/1998 before the District Munsif, Kuzhithurai, including the very same property, which was the subject matter of the earlier suit. In that suit, the revision petitioner/D-2 was also impleaded as D-4. That suit in O.S. No. 111/1998 was dismissed by the District Munsif, Kuzhithurai.

9. According to the revision petitioner, earlier the plaintiff had filed O.S. No. 177/1981 on the file of the Sub Court, Kuzhithurai, alleging that D-1 has executed an Agreement of Sale on 26th December, 1977 for a sum of Rs. 7,000/- for the same property in R.S. No. 138/9. The suit O.S. No. 177/1981 was dismissed. It was reversed by the lower Appellate Court. As against the same, S.A. No. 1193/1985 was filed by the plaintiff. S.A. No. 1193/1985 was dismissed on 12th July, 1996. Hence, it is the contention of the revision petitioner/D-2 that the plaintiff having fought out earlier litigation and having failed in the earlier round of litigation, the plaintiff has filed the vexatious suit O.S. No. 420/1999. It is further submitted that if the exparte Decree in O.S. No. 420/1999 is not set aside, it would be inconsistent with the Judgment and Decree in the earlier litigation. Judgment in S.A. No. 1193/1985 was produced by the revision petitioner/D-2 when the revision was posted for orders.

10. Raising serious objections to look into the document in S.A. No. 1193/1985, the learned Counsel for the first respondent/plaintiff has contended that the earlier litigation is no way related to the revision. The learned Counsel for the plaintiff has made three fold submissions:

(i) In the revision, the only question to be determined is whether the delay of 342 days in filing the petition to set aside the exparte decree is satisfactorily explained and whether the delay is to be condoned or not;

(ii) In paragraph no.5 of the Plaint, the plaintiff has very well referred to the earlier Agreement of Sale dated 26th February, 1977 and the earlier suit in O.S No. 177/1981 and that the Appellate Court had negatived the Judgment and Decree and it is not as if the plaintiff has suppressed the earlier litigation.

(iii) The present Suit Property relates to 40 cents sold to the plaintiff by the first defendant Kamala Bai under the Sale Deed dated 26th October, 1974. The earlier suit O.S. No. 177/1981 relates to 35 cents which was covered under the Agreement of Sale and has got nothing to do with the present Suit Property.

11. No doubt, in this revision, the Court is to consider whether the delay has been satisfactorily explained and whether the revision petitioner was prevented by "sufficient cause" for non appearance in the lower Court. However, while considering "Sufficient Cause", prima facie, it has to be seen whether the defendant has substantial defence to offer or whether the defendant was delaying the trial proceedings. In order to ascertain the nature of the plea, incidentally, the Court may take note of the contention of both parties. Hence, it cannot be said that the earlier Judgment in S.A. No. 1193/1995 cannot be looked into at all.

12. No doubt, the plaintiff has referred to O.S. No. 177/1981 in paragraph No. 2 of the Plaint. But the plaintiff has not specifically referred to the pendency of the Second Appeal. Equally, the plaintiff has not averred that the present Suit Property is different from the Suit Property in the earlier litigation. The learned Counsel for the plaintiff has submitted that the present Suit Property is 40 cents and the earlier litigation relates to 35 cents and the subject matter is entirely different. Parties are yet to go on trial. At this stage, it would not be appropriate to express any view, whether the subject matter in the earlier litigation is different from the present Suit Property. But at the outset, the contention of the plaintiff that both the parties are different does not appear to be correct. The present Suit Property relates to R.S. No. 138/9 - 40 cents and dwelling house thereon, bearing D. No. 6/59-A. The Sale Deed dated 26th October, 1974 produced by the plaintiff does not show existence of any house. It has to be noted that the revision petitioner/D-2 claims right and title to D. No. 6/59A which she claims to have purchased from the first defendant. The earlier litigation in O.S. No. 177/1981 and S.A. No. 1193/1985 was between the plaintiff and the first defendant (vendor of the revision petitioner) regarding the property in R.S. No. 138/9. While so, the contention raised that the earlier litigation relates to different Suit Property remains to be seen at the time of Trial, only when the parties adduce evidence. Suffice it to point out that in view of the earlier litigation between the plaintiff and the first defendant (vendor of the revision petitioner), this Court finds that the revision petitioner has substantial defence to put forth.

13. Exparte Decree in O.S. No. 420/1991 was passed on 21st December, 1999. Defendant has alleged that she has not received the suit summons and that the exparte Decree was passed behind her back. In the counter statement filed by the plaintiff, there is no specific denial of those allegations. There is only general denial of the averments in the affidavit and the plaintiff has not alleged that the second defendant had received the summons. While so, the learned District Munsif has found that the summons was served upon the parties. The impugned Order does not indicate any reference about the summons served.

14. The impugned Order is a non-speaking order as is seen from the following:

Local language text deleted.

15. The order is a non-speaking order. The lower Court has not pointed out whether the Court has perused the records to find out if the summons were served or not. It has also not indicated whether there is signature of the second defendant in the summons and whether the same tallies with the signature of the second defendant.

16. Order 9 Rule 13 deals with the "Setting aside decree exparte against defendant." It postulates two conditions or circumstances under which, the exparte decree could be set aside.

(i) If the (defendant) satisfied the Court that the summon was not duly served;

(ii) That he (defendant) was prevented by any sufficient cause from appearing in the Court when the suit was called on for hearing.

17. It is the contention of the second defendant that the summons was not duly served upon her. The learned Counsel for the respondent/plaintiff has contended that to prove that the summons was not duly served upon her, the second defendant had not taken any steps either to call for the summons or to examine the Process Server, who had taken the summons. No doubt, it would have been better if the revision petitioner/D-2 had examined the Process Server or called for the summons. But the revision petitioner/D-2 cannot be penalised for such lapse. She has to be given an opportunity to defend her case on merits, to meet the ends of justice.

18. In the case of New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult, has Apex Court has observed that what constitutes sufficient cause cannot be laid down by hard and fast rules. The expression "sufficient cause" should receive a liberal construction. Even in condoning the delay u/s 5 of the Limitation Act the Apex Court in the case of O.P. Kathpalia Vs. Lakhmir Singh (Dead) and Others, has observed:

If the refusal to condone the delay result in grave miscarriage of justice, it would be a ground to condone the delay.

In Collector, Land Acquisition v. Katiji 1987 SCC 107, the Apex Court observed:

The expression "sufficient cause" is adequately classic to enable the Court to apply thelaw in a meaningful manner which subserves the ends of justice - that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been taking a justifiably liberal approach in matters instituted in the Court ..... 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.

19. In the earlier round of litigation, the plaintiff was unsuccessful. S.A. No. 1193/1985, preferred against the Judgment and Decree in lower Appellate Court, was also dismissed. If the exparte Decree is allowed to stand, it would be inconsistent and contradictory to the earlier Judgment and Decree. Under such circumstances, it would not be proper to allow the plaintiff to take advantage of the exparte Decree, who was unsuccessful in the earlier rounds of litigation. As noted earlier, the correctness of the contention of the plaintiff that the Suit Property in the earlier litigation is different from the present suit property remains to be seen.

20. The expression "sufficient cause" should receive liberal construction to advance substantial justice. Observing that "sufficient cause" should receive liberal construction to advance substantial justice, in N. Balakrishnan Vs. M. Krishnamurthy, , the Supreme Court has held:

9. Appellant''s conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it maybe said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities,and to visit him with drastic consequences.

10. It is axiomatic that condonation of delay is 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 within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterio. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other caes delay of 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.

.....

13. 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 Shakuntala Devi Jain Vs. Kuntal Kumari and Others, and The State of West Bengal Vs. The Administrator, Howrah Municipality and Others, .

In this case, the explanation for the delay stated by the revision petitioner appears to be satisfactory.

21. Assuming for the sake of arguments that sufficient cause is not shown to condone the delay to set aside the exparte Decree, to meet the ends of justice, the delay is to be condoned. In 2003 (3) MLJ 369 , Thirumurthy and Anr. v. Muthammal and Ors., S.K. Krishnan, J., referring to Rohini Prasad and Others Vs. Kasturchand and Another, has also condoned the delay of 207 days in filing the petition to set aside the exparte decree to meet the ends of justice, though sufficient cause was not shown to condone the delay. In view of the earlier round of litigation between the plaintiff and the vendor of the revision petitioner, this Court finds that an opportunity is to be given to the defendant to contest the case, lest serious prejudice would be caused to the revision petitioner/D-2.

22. The lower Court has not taken note of the earlier rounds of litigation and the result thereon. There is no proper exercise of discretion. The order is erroneous and unreasonable and cannot be sustained. The impugned Order being a non-speaking one is to be set aside and this Revision Petition is to be allowed.

23. For the foregoing reasons, this revision is allowed setting aside the order dated 22nd February, 2002, made in I.A. No. 292/2001 in O.S. No. 420/1999 on the file of the I Additional District Munsif Court, Kuzhithurai. Consequently, C.M.P. No. 8028 of 2002 is closed. In the circumstances of the case, there is no order as to costs.

24. The learned District Munsif is directed to afford an opportunity to the revision petitioner/D-2 to file her Written Statement and proceed with the trial of the case in accordance with law.