(2014) 06 MAD CK 0337

Madras High Court (Madurai Bench)

Case No: C.R.P. (MD) No. 2231 of 2012 and M.P. (MD) No. 1 of 2012

Rathinam		APPELLANT
	Vs	
Srivilliputtur Kottappuram Vaisiya Chettiyar		RESPONDENT

Date of Decision: June 24, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 21, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 9(2), Order 43 Rule 1(d)
- Limitation Act, 1963 - Section 5

Citation: (2014) 5 LW 254

Hon'ble Judges: T. Mathivanan, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

T. Mathivanan, J.
Challenge is made in this memorandum of Civil Revision Petition to the fair and decretal order, dated 28.07.2012 and made in I.A. No. 580 of 2012 in O.S. No. 484 of 2005 on the file of the learned Additional District Munsif, Srivilliputtur. The revision petitioners herein are the defendants, whereas the respondent is the plaintiff in the suit in O.S. No. 484 of 2005.

2. On perusal of the records, it is revealed that the respondent herein has filed the above suit as against the revision petitioners seeking the relief of declaration and recovery of vacant possession of the properties specified in the plaint schedule. Indeed, the revision petitioners/defendants have contested the suit by filing their written statement, however, they remained ex-parte and in consequence thereof, the suit was decreed ex-parte on 13.07.2010. Since there was a delay of 167 days in filing an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 to set aside the ex-parte decree, the revision petitioners/defendants were constrained

to file an application in I.A. No. 580 of 2011 under Section 5 of the Limitation Act, 1963, to condone the delay of 167 days. That petition was strenuously contested by the respondent/plaintiff.

3. The learned trial Judge, after hearing both sides, had proceeded to dismiss that application on 28.07.2012 on the ground of non-availability of "sufficient cause" to condone the delay of 176 days.

4. Having been aggrieved by the impugned order, the present Civil Revision Petition is filed by the defendants.

5. Heard Mr. M. Thirunavukkarasu, learned counsel appearing for the revision petitioners and Mr. V. Srinivasan, learned counsel appearing for the respondent.

6. The prime question to be considered in this Civil Revision is as to whether the theory of liberal approach to advance the substantial justice can be applied in this case?

7. Section 5 of the Limitation Act, 1963 deals with "Extension of prescribed period in certain cases". No doubt, the ex-parte decree ought to have been set aside within the period of 30 days. As contemplated under Section 5 of the Limitation Act, 1963,

"any appeal or application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 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".

8. It is to be emphasized that the applicant is under the obligation to satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. If he complies with this statutory requirements, his application may be admitted and the delay, whatever may be its length may be condoned. Therefore, it is made clear that the power confers upon the Court to condone the delay is only discretionary in nature; provided the applicant satisfies the Court that he has sufficient cause for not making such application within the prescribed period.

9. A plain reading of Section 5 makes it clear beyond any shadow of doubt that it comes into operation only under the following circumstances:-

"(i) When a period of limitation is prescribed for any appeal or application other than an application under Order XXI, Civil Procedure Code;

(ii) that such period of limitation has already expired and the appeal or application is filed only after the expiry of the said prescribed period of limitation;

(iii) that the appeal or application is filed in the Court; and

(iv) that the appellant or the applicant was prevented by a sufficient cause from filing the same within such period."

10. Section 5 provides that even if, all the aforesaid conditions are satisfied, a party is not entitled to the condonation of delay in question as a matter of right because-

"(a) the jurisdiction conferred upon the Court to condone the delay by this Section is discretionary as it uses the word "may" in the Section; and (b) the proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction so conferred upon the Court.

In other words, if sufficient cause is not shown nothing further has to be done, the application for condonation of delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay keeping in view the following to well-known important considerations:-

(i) that the expiration of the period of limitation prescribed for preferring an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed, and

(ii) that if sufficient cause for condoning the delay is shown the discretion is given to the Court to exercise it to advance substantial justice."

11. This principle is supported by Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., .

12. On coming to the instant case on hand, the revision petitioners/defendants have stated in their affidavit filed in support of the petition that on 13.07.2010, this suit was posted for the cross-examination of P.W. 1. They were also informed about the stage of the suit by their counsels, however, since the first revision petitioner was ailing from severe Jaundice on and from 01.07.2010, they had been to Pabanasam at Nellai District and that they came down to their native place only on 10.11.2010. However, they were put to understand about the passing of an ex-parte decree when they were served with the notice in the Execution Petition in E.P. No. 123 of 2010 by the Court ameen.

13. This fact was vehemently denied by Mr. V. Srinivasan, learned counsel appearing for the respondent and he has adverted to that the trial was commenced as early as on 25.01.2010 and on that date, the respondent was examined as P.W. 1 and for the purpose of cross-examination, the suit stood posted on 02.02.2010. From that date onwards, even after crossing of several hearings, the revision petitioners never turned up to cross-examine P.W. 1. Then the suit was posted on 11.02.2010 for the purpose of cross-examination of P.W. 1. Since the revision petitioners had not turned up, an ex-parte decree was passed. Thereafter, the revision petitioner had taken out an application in I.A. No. 820 of 2010 to set aside the ex-parte decree. As the respondent/plaintiff had expressed no objection, that petition was allowed and the ex-parte decree was also set aside. Thereafter, once again the suit was posted

on 21.06.2010 for the cross-examination of P.W. 1 and subsequently, it was adjourned to 25.06.2010. Even though P.W. 1 was present on 13.07.2010 and ready to subject himself for the cross-examination, the revision petitioners never turned up to cross-examine him and therefore, the suit was once again decreed ex-parte on 13.07.2010.

14. Therefore, according to Mr. V. Srinivasan, the learned counsel appearing for the respondent, the revision petitioners/defendants have shown ''sufficient cause'' to condone the delay of 176 days and therefore, he has urged to dismiss this Civil Revision Petition as the impugned order did not require the interference of this Court. But, Mr. M. Thirunavukkarasu, learned counsel appearing for the revision petitioners/defendants has conceded fairly and requested the Court that one more chance might be given to the revision petitioners/defendants to put forth their case effectively before the trial Court and therefore, he has urged to apply the principle of liberal approach in this case and the delay of 176 days might be condoned.

15. On perusal of the common order passed by the learned trial Judge, dated 28.07.2012, it is revealed that the revision petitioners/defendants have filed two applications before the trial Court.

1) I.A. No. 580 of 2012 is filed under Section 5 of the Limitation Act to condone the delay of 176 days.

2) I.A. No. 581 of 2012 is filed under Order 9 Rule 13 of the Code of Civil Procedure, 1908 to set aside the ex-parte decree, dated 13.07.2010.

16. What the office of the trial Court has done is that they have numbered both the applications simultaneously. The settled principle is that unless and until the delay, in filing the application to set aside the ex-parte decree is condoned, the application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 shall not be taken on file. When there is a sizeable delay in filing an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908, to set aside the ex-parte decree, the condition precedent to number the petition under Order 9 Rule 13 is condonation of delay. As afore stated, unless and until the delay is condoned, the application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 shall not be taken on file because of some administrative as well as of procedural difficulties are there. The order passed in the application under Section 5 of the Limitation Act, 1963 is revisable in nature, whereas an order of rejection under Rule 13 of Order 9 of the Code of Civil Procedure, 1908, is appealable in nature. When the application under Section 5 of the Limitation Act as well as the application under Order 9 Rule 13 to set aside the ex-parte decree are numbered simultaneously and both the applications are dismissed like that of the present case on hand, the aggrieved person viz., the applicant cannot approach this Court (High Court) to prefer a revision against both the orders. With reference to the order of dismissal of the application under Section 5 of the Limitation Act, 1963, he has to file a revision under Section 115 of the Code

of Civil Procedure, 1908, whereas with reference to the order of dismissal of the application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 he has to prefer an appeal under Order 43 Rule 1(d) before the lower Appellate Court and not before this Court.

17. When these procedural difficulties are to be experienced by the aggrieved party, time and again the lower Courts are being instructed not to number both the applications simultaneously, despite the application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 is filed along with the application under Section 5 of the Limitation Act, 1963 to condone the delay.

18. As far as the instant case is concerned, it is brought to the notice of this Court by Mr. M. Thirunavukkarasu, learned counsel appearing for the revision petitioners/defendants that the trial Court had numbered both the applications and since the revision petition is filed as against the order of dismissal in I.A. No. 580 of 2012 which is under Section 5 of the Limitation Act, 1963 till the disposal of this revision, the appeal is against the order of dismissal of the application in I.A. No. 581 of 2012 to set aside the ex-parte decree under Order 9 Rule 13 of the Code of Civil Procedure, 1908 cannot be filed and even if it is filed, the lower Appellate Court will not number the appeal because the pendency of revision as against the order of dismissal of the application under Section 5 of the Limitation Act, 1963 operates as a bar.

19. In this connection, Mr. M. Thirunavukkarasu, learned counsel appearing for the revision petitioners/defendants has maintained that the trial Court had committed a grave error, for which the revision petitioners being the defendants could not be penalized.

20. In support of his contention, Mr. M. Thirunavukkarasu, learned counsel appearing for the revision petitioners/defendants has placed reliance upon the decision of this Court in S. Thiruvarimuthu and others vs. Southern Railways and others reported in 2005 (5) CTC 460. In this case, the learned Single Judge of this Court has observed in paragraph No. 16 as under:-

"16. It is to be pointed out that whenever the applications are filed to implead the legal representatives of the deceased party and when the applications are filed to set aside the abatement and also to condone the delay, the normal practice is to assign numbers only to one application, which is the application to condone the delay. The right practice would be to assign number to other two applications only after the delay is condoned. It is noted that in some Mofusil Courts all three applications are being simultaneously numbered, which may not be a correct procedure. In case, if the application for condonation of delay is dismissed, the other two applications viz., to set aside the abatement and to bring on legal representatives of the deceased may not be taken up at all, in which case, the assignment of numbers to those applications becomes otiose. Hence, it is always

desirable to firstly assign number to the application to condone the delay filed under Section 5 of the Limitation Act and to assign numbers to other two applications filed under Order 22, Rule 9(2) C.P.C. and Order 22, Rule 3 or 4 C.P.C. only thereafter."

21. It may also be necessary to extract paragraph No. 17 of the above cited decision for academic interest:-

"17. The objection raised on the ground of filing only one application could only be a technical objection. The procedural law is only to subserve the ends of Justice. In the decision Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, , the Supreme Court has held that the Rules and Procedures are intended to be handmaid to the Administration of Justice. The same was followed in the decision L.S. Harilakshmi vs. Laguduva Rathinammal, 1993 TLNJ 303. The application for restoration ought not to have been dismissed on the ground of technicalities."

22. Mr. V. Srinivasan, learned counsel appearing for the respondent has also, in support of his contention, placed reliance upon the decision of the Division Bench of this Court in Arun Alexander Lakshman, Proprietor Alraj Builders and V.E. Arun Vs. A.P. Vedavalli, . This Court has gone through the above said decision and found that the decision is more helpful to the case of the revision petitioners/defendants.

23. It is observed in this case, by a Division Bench of this Court, that for condonation of delay to find out whether sufficient cause is shown the true test to be applied is whether applicant has acted with due diligence. Discretion to be exercised with vigilance and circumspection. The Court should approach the issue with pragmatism and with a Justice oriented approach. "Sufficient cause" depends on facts and circumstances of the particular case.

24. In paragraph No. 34, the Division Bench has also made reference to the decision in M.K. Prasad Vs. P. Arumogam, , wherein the Honourable Supreme Court has condoned the delay on payment of exemplary cost of Rs. 50,000/- to be paid to the opposite party. In this connection, the Honourable Supreme Court has also made the following observation:-

"We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interest of Justice and under the peculiar circumstances of the case, we set aside the order impugned and condone the delay in filing the application for setting aside ex parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex parte decree as well."

25. On coming to the instant case on hand, this Court finds that, keeping in view of the discussions supra for the purpose of advancing substantial Justice, the theory of liberal approach can be applied in this case and the delay of 176 days can be

condoned on payment of heavy cost. In the result, the Civil Revision Petition is allowed and the impugned fair and decretal order, dated 28.07.2012 and made in I.A. No. 580 of 2012 in O.S. No. 484 of 2005 are set aside and the application in I.A. No. 580 of 2012 is allowed on payment of cost of Rs. 5,000/- to the learned counsel for the respondent directly within a period of one week from the date of receipt of a copy of this order, failing which, the application in I.A. No. 580 of 2012 would be dismissed automatically without any further reference to this Court. Consequently, connected Miscellaneous Petition is closed.