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Ummer., vs Chandran,

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SooperKanoon Citation : sooperkanoon.com/1404526

Court : Kerala

Decided On : Jul-03-2023

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : FAO/145/2022

Appellant : UMMER.,

Respondent : Chandran,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR MONDAY, THE 3RD DAY OF JULY 2023 / 12TH ASHADHA, 1945 F.A.O. NO. 145 OF 2022 AGAINST THE ORDER DATED 29.08.2022 IN I.A.NO.2087 AND 2088 OF 2018 IN O.S.NO.18 OF 2013 OF THE SUB COURT, CHAVAKKAD APPELLANT/PETITIONER/PLAINTIFF: UMMER, AGED 59 YEARS, S/O KOLADYPADAM PANDANTHARAVEETTIL KAMMU RAVUTHAR, PORKULAM VILLAGE, PORKULAM DESOM, TALAPPILLY TALUK, THRISSUR - 680 542. BY ADV V.A.VINOD RESPONDENTS/RESPONDENTS/DEFENDANTS: 1 CHANDRAN,

AGED 59 YEARS S/O PARATHIVALAPPIL APPUKUTTAN, CHEMMANNUR DESOM, PUNNAYURKULAM VILLAGE, CHAVAKKAD TALUK, THRISSUR - 679561. 2 PUZHANGARA ILLATHU HAMEED, AGED 55 YEARS, S/O KUNHUMUHAMMED, PATTIKKARA DESOM, CHIRANELLUR VILLAGE, TALAPPILLY TALUK, THRISSUR - 680501. 3 SHEFEEN, AGED 40 YEARS S/O NALAKATH KAVUNGALAYIL UMMAR, X/376, VELIYAMKODE PANCHAYATH, VELIYAMKODE AMSOM, GRAMAM DESOM, PONNANI TALUK, MALAPPURAM - 679 579. BY ADVS. RAJIT V.V.JOY RAMAKRISHNAN M.N. THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 03.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

P.G. Ajithkumar, J.

This is an appeal filed under Order XLIII, Rule 1(c) of the Code of Civil Procedure, 1908.

2. The appellant challenges the order dated 29.08.2022 of the Sub Court, Chavakkad in I.A.Nos.2087 and 2088 of 2018 in O.S.No.18 of 2013.

3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

4. The appellant filed O.S.No.18 of 2013 seeking a

decree for specific performance of the contract for reconveyance of the plaint schedule property. The allegation is that the appellant had borrowed Rs.6 lakhs from the 1 st respondent and as its security, the appellant was directed to execute a sale deed in respect of the first and second items of the plaint schedule property in the name of the 2 nd respondent and the third item of the plaint schedule property in the name of the 3rd respondent herein. As per an oral agreement, the 1 st

respondent agreed to re-convey the plaint schedule properties to the appellant when the amount is repaid. Although the appellant was ready and willing to repay the amount, the 1 st respondent was not ready to re-convey the properties. The suit was initially filed before the Sub Court, Thrissur, but later the same was transferred to the Sub Court, Chavakkad along with connected cases.

5. The respondents entered appearance and denied all

the averments and contended that the sale is absolute and they are in possession of the property. It is also contended that two other suits are also pending between the parties regarding the same transaction.

6. The suit was scheduled for trial on 10.08.2016. On

that day the appellant could not appear before the court, the reason being his physical inability. The appellant contends that on 01.08.2016, he suffered fracture of his leg ankle bone while he was in Mumbai. He had to undergo treatment at a hospital in Mumbai, and therefore, he could not come to Kerala immediately. The suit was therefore dismissed for

default on 10.08.2016. When he came back and filed an application to set aside the order dismissing the suit and restore the suit on file. There occurred a delay of 822 days. Therefore, he filed I.A.No.2088 of 2018 to condone the said delay under Section 5 of the Limitation Act, 1963. I.A.No.2087 of 2018 is the petition filed by him to restore the suit on file under Order IX, Rule 9 of the Code. Those petitions were opposed by the respondent by filing objection.

7. The appellant gave evidence as PW1 in support of his contentions in the interlocutory applications. He deposed

regarding his inability to appear before the court on 10.08.2016 and to come to the station immediately after the said date. He produced Exts.A1 to A5, which are regarding his treatment at a hospital in Mumbai in order to substantiate his oral testimony in court.

8. The learned Sub Judge considered the said

evidence in detail, but did not accept the same as sufficient evidence to substantiate that there was sufficient cause for his non-appearance and also for the delay.

9. In Collector, Land Acquisition v. Katiji [(1987)

2 SCC 107], in the context of Section 5 of the Limitation Act, 1963, the Apex Court held that, the expression sufficient cause employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner, which subserves the ends of justice, that being the life- purpose for the existence of the institution of Courts.

10. In Esha Bhattacharjee v. Raghunathpur Nafar

Academy [(2013) 12 SCC 649] the Apex Court while summarising the principles applicable while dealing with an application for condonation of delay held that, the concept of

liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play. The Apex Court held further that, there is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the

second calls for a liberal delineation. Para.21 of the judgment

reads thus;

> 21. From the aforesaid authorities the principles that can broadly be culled out are: 21.1 There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice. 21.2 The terms sufficient cause should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are

to be applied in proper perspective to the obtaining fact-situation. 21.3 Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis. 21.4 No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of. 21.5 Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact. 21.6 It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7 The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play. 21.8 There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation. 21.9 The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach. 21.10 If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation. 21.11 It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation. 21.12 The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13 The State or a public body or an entity representing a collective cause should be given some acceptable latitude. [underlines supplied]

11. In Rafeek and another v. K. Kamarudeen and another [2021 (4) KHC 34] a Division Bench of this Court

held that, though the expression sufficient cause employed in

Section 5 of the Limitation Act, 1963 is adequately elastic to enable the courts to apply the law in a meaningful manner, which subserves the ends of justice, as held by the Apex Court in Katiji [(1987) 2 SCC 107], the concept of liberal approach has to encapsulate the conception of reasonableness

and it cannot be allowed a totally unfettered free play, as held

by the Apex Court in Esha Bhattacharjee [(2013) 12 SCC 649]. Inordinate delay, which attracts doctrine of prejudice, warrants strict approach, whereas, a delay of short duration or few days, which may not attract doctrine of prejudice, calls for a liberal delineation.

12. Although the duration of delay is 822 days, the reasons stated for such delay appear to be genuine. The

learned Sub Judge doubted the genuineness of the medical certificates. One of the reasons stated to reject the said documents is that there was no likelihood of a person like PW1 taking treatment from a Government Hospital. It is further observed that there is conflict between the oral testimony and the documentary evidence. In the light of the law laid down in the aforesaid decisions, we are of the view that this is a case where a lenient delineation can be taken. It is therefore unnecessary to insist on strict evidence to prove the medical records. We, therefore, are of the view that the oral testimony of PW1 gets support from Exts.A1 to A5. The delay can be condoned in the light of the said evidence, but on payment of costs to the respondents to mitigate the inconvenience occasioned to him.

13. Accordingly, the impugned order in I.A.Nos.2087

and 2088 of 2018 is set aside on the condition of payment of Rs.5,000/- (Rupees five thousand only) as costs to the respondents. The cost shall be paid within a

period of two weeks. On such payment, the said petitions will stand allowed. The Sub Court, Chavakkad shall then restore O.S.No.18 of 2013 on file and proceed it with in accordance with law. Both parties are directed to appear before the Sub Court, Chavakkad on 19.07.2023. The appeal is allowed accordingly. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr

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