

Abdul Kareem Vs. State of Kerala

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Court : Kerala

Decided On : Mar-28-2006

Reported in : 2006(2)KLT408

Judge : R. Basant, J.

Acts : Kerala Forest Act - Sections 61D; Negotiable Instruments Act - Sections 138 and 142; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 3A

Appeal No. : W.P. (C) No. 6201 of 2006

Appellant : Abdul Kareem

Respondent : State of Kerala

Advocate for Def. : Spl. Government Pleader (Forests)

Advocate for Pet/Ap. : George Varghese Kizhakkambalam and; N. Rajesh, Advs.

Disposition : Petition allowed

Judgement :

R. Basant, J.

1. The short but interesting question arises for consideration in this Writ Petition is whether an application under Order 41 Rule 3-A of the C.P.C. must invariably be accompanied by an affidavit of the appellant concerned.

2. The fact situation is simple. The petitioner wanted to prefer an appeal under Section 61-D of the Kerala Forest Act. There was a delay of 162 days in filing the appeal. According to the petitioner, he had done the needful and had entrusted his counsel to file the appeal. But unfortunately the appeal could not be filed in time as the counsel had misplaced the case bundle. It was traced only two days prior to the actual date of filing the appeal. The petitioner/appellant, in these circumstances, prayed that the appeal may be entertained after condoning the delay in filing the appeal. That petition was filed by his counsel on his behalf. That petition filed by his counsel on his behalf was supported by an affidavit filed by the counsel wherein the counsel owned the responsibility for the delay of 162 days in filing the appeal. There are categorical statements in the affidavit by the Advocate that the delay of 162 days occurred on account of his fault in misplacing the case bundle entrusted with him by the petitioner/ appellant.

3. The court below considered the prayer for condonation of delay. The learned Additional District Judge took the view that an affidavit filed by the counsel is not sufficient to support the prayer for condonation of delay under Order 41 Rule 3-A of the CPC. The relevant observations appear in para-4 of the impugned order - Ext.P4 which I extract below in extenso:

It is to be noted that the petition is supported by the affidavit filed by the counsel appearing for the petitioner. The counsel has no right at all to file the affidavit in the matter. The appellant/ petitioner may put forward the grounds if any praying to condone the delay. The carelessness of the counsel is not a sufficient ground to condone the delay of 162 days in filing the appeal. Since the petition is not supported by the affidavit of the appellant/petitioner the petition is not maintainable. Point is answered accordingly.

In the result, the petition is dismissed.

In view of the dismissal of IA 3208/05 CMA is dismissed.

(emphasis supplied)

4. The question is found to be of frequent occurrence before the courts below and therefore the learned Counsel for the petitioner and the learned Government Pleader were requested to advance their detailed arguments.

5. Order 41 Rule 3-A of the CPC reads as follows:

3-A. Application for condonation of delay.-- (1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. (2) xxx xxx xxx (3) xxx xxx XXX.

6. The question that arises for consideration is not whether the affidavit by a counsel can be accepted or not. That would certainly depend upon the facts and circumstances of each case. In *Mata Din v. A. Narayanan* : [1970]2SCR90 , the Supreme Court reiterated the law in para.6 in the following words:

The law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way.

On that aspect, there is no dispute. It would depend upon the nature of the inadequacy/ error on the part of the counsel. In the instant case, it is not any wrong advice given by the counsel, but the inability of the counsel to file the appeal entrusted to him for filing within the date and its presentation later only after 162 days which is the conduct which the counsel owns responsibility for.

7. A learned Single Judge of this Court had occasion to consider the question in *Pioneer Shopping Complex (P) Ltd. v. Pioneer Towers Owners Association* 2001 (1) KLJ 703 : 2001 (2) KLT SN 11 P. 10. It was held, after adverting to the decisions in *Oil & Natural Gas Commission v. Offshore Enterprises Inc.* : AIR1993 Bom217 and *Padmavathi v. Kalu* : AIR1980 Ker173 that there is no bar for an

Advocate filing an affidavit for the party. The decision in Oil & Natural Gas Commission v. Offshore Enterprises Inc. : AIR1993 Bom217 is not of any crucial or vital assistance to the court as the Bombay High Court in that case was only considering the practice of certain firms which comprise of Advocate proper and Advocates who hold Power-of-Attorney acting on behalf of their clients and the Advocate proper filing an affidavit which an Advocate Power-of-Attorney ought to do. That decision is hence not of any material assistance. In Padmavathi v. Kalu : AIR1980 Ker173 , this question was not directly and specifically considered though after adverting to Order 41 Rule 3-A of the CPC, it was observed that an affidavit had to be filed along with the application for condonation of delay, submitted by the appellant.

8. My attention has also been drawn to the decision in Muraleedharan v. Sreeram Investment Ltd. : 2006(1)KLT131 where considering the provisions in Sections. 138 and 142 of the N.I. Act, it was held that an affidavit by a counsel is not sufficient and the complainant must himself file an affidavit to satisfy the proviso to Section 142 of the N.I. Act. The Statute is differently worded and it is not necessary for me, in the facts of this case, to consider whether that dictum can be approved or not and whether it requires reference to a larger Bench.

9. A careful analysis of the provisions of Order 41 Rule 3-A of the CPC cannot at all show that it insists that the affidavit must be filed by the appellant himself. When Order 41 Rule 3-A(1) of the CPC is analysed, it is very clear that what is insisted is only that:

(1) The appeal must be accompanied by an application.

(2) Such application must be supported by an affidavit.

(3) Such affidavit must set forth the facts on which the appellant relies on to satisfy the court that he has sufficient cause for not preferring the appeal within such period.

10. To me, it is significant that Order 41 Rule 3-A of the CPC does not say specifically that the affidavit must be filed by the appellant himself. The application

filed by the appellant must be supported by an affidavit and that affidavit must set forth the facts on which the appellant relies. It is not the law that the affidavit must be filed by the appellant himself. His application must be accompanied by an affidavit which affidavit must reveal the reasons relied on by him to condone the delay.

11. In the facts of this case, it is very evident that the petitioner cannot swear to an affidavit setting forth the facts not directly within his knowledge. The facts relied on by the petitioner to satisfy the court that he had sufficient cause are not facts within his exclusive or direct knowledge. He had done all what is necessary to ensure that an appeal is filed in proper time. The delay occurred only because there was misplacing of the file by the counsel. Undoubtedly, the counsel is the best person to file affidavit. I am of opinion that the member of the noble profession does not commit any indiscretion in filing such an affidavit if, as a matter of fact, the delay was attributable to conduct on his part. Whether such reason/excuse can be accepted and reckoned as sufficient to condone the delay and whether in all cases the inadequate conduct of the counsel can be sufficient reason to condone the delay are not questions before me now. That would depend upon the facts of each case. But I have no hesitation to agree that true to the noble profession to which he belongs, the gentleman Advocate does nothing wrong in owning his responsibility or his contribution to the delay in filing the appeal. So reckoned, he is the best person to file the affidavit because the cause for the delay is exclusively within his knowledge and responsibility - that is, his own conduct of misplacing the file.

12. Of course, the appellant could also have filed an affidavit. But such affidavit could only have contained the facts which he collected from his Advocate as to why the appeal entrusted by him in time could not be filed in court within the period prescribed by law.

13. To sum up, I am unable to find any justification in the contention that application to condone the delay under Order 41 Rule 3-A of the CPC must invariably be supported by an affidavit of the appellant and it is not sufficient if such application to condone the delay is supported by the affidavit of the person

who was responsible for the delay in filing the appeal. It is significant that it is not insisted in Order 41 Rule 3-A of the CPC that the affidavit must be that of the appellant. It is enough if the facts on which the appellant relies to satisfy the court that he had sufficient cause are set forth in the affidavit filed along with the appellant's application for condonation of delay. There is thus no justification in the ritualistic insistence that the affidavit must invariably be filed by the appellant or, at least, that his affidavit must also be there to support such request.

14. The decision in 1978 KIT - S.N. Case No.17 at p.6 is not relevant to the issue before me. That only dealt with the embarrassment which may be caused to the opposite counsel who has to deny the assertions made in the affidavit by another member of the noble profession. But that is not authority for the proposition that when the inadequacy/default is exclusively on the part of the counsel, the counsel cannot file an affidavit revealing to the court his responsibility for such delay.

15. I must, in these circumstances, come to the conclusion that the court below was not justified in coming to the conclusion that the petition for condonation of delay is bound to be dismissed for the reason that it was not supported by an affidavit of the appellant/petitioner herein. The challenge must succeed.

16. I am satisfied that the affidavit of the counsel reveals convincingly that there was no contumacious laches on the part of the petitioner/appellant in not preferring the appeal in time. I have no reason to not accept and act upon the affidavit filed by the counsel. I have no reason to think that the affidavit in the instant case does not contain unvarnished truth. The counsel was making an admission against his own interest owning his responsibility for the delay in filing the appeal.

17. I am, in these circumstances, satisfied that the delay deserves to be condoned and the Writ Petition deserves to be allowed.

18. In the result:

(a) This Writ Petition is allowed.

(b) Ext.P4 order is set aside. I.A.No. 3208/05 shall stand allowed and the learned District Judge shall dispose of C.M.A. No. 99/05 on merits expeditiously.

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