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Adhikesavan Vs. Kalavathi

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Court : Chennai

Decided On : Feb-19-2008

Reported in : (2008)3MLJ268

Judge : A.C. Arumugaperumal Adityan, J.

Acts : Limitation Act - Sections 5; Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 - Sections 23

Appeal No. : C.R.P.(NPD). No. 20 of 2008 and M.P. No. 1 of 2008

Appellant : Adhikesavan

Respondent : Kalavathi

Advocate for Def. : N. Premkumar, Adv.

Advocate for Pet/Ap. : J. Sudhakaran, Adv.

Disposition : Petition allowed

Judgement :
ORDER

A.C. Arumugaperumal Adityan, J.

1. The order passed in I.A. No. 1454 of 2007 in O.S. No. 367 of 2004 on the file of the Court of District Munsif, Madhuranthakam is under challenge. The said petition

was filed under Section 5 of the Limitation Act to condone the delay of 1096 days in filing a petition to set aside the exparte decree. Admittedly, the petitioner is the brother of the respondent. The respondent is the sister of the petitioner, who had filed a suit in O.S. No. 367 of 2004 for delivery of possession of her 1/2th share in the plaint schedule property basing her claim under a Will. The reasoning stated in the affidavit to the application in I.A. No. 1454 of 2007 for condoning the delay is that due to his illness, he could not contact his counsel and that on 16.6.2005, when the matter was posted for filing written statement, his counsel has failed to inform the date of hearing for filing written statement and hence he was set exparte on 16.6.2005.

2. The learned Counsel appearing for the revision petitioner would rely on a decision reported in N. Balakrishnan v. M. Krishnamurthy 1998 (II) CTC 533 and contended that if proper explanation for the delay is shown to the Court then it is the duty of the Court to condone the delay and it is immaterial how long the delay was and that the rule of Limitation is not meant to destroy the rights of the parties, if sufficient cause is shown by the petitioner to condone the delay. The facts of the said ratio is similar to the preset facts of the case. The petitioner/plaintiff in the said suit has filed a petition to restore the suit which was dismissed for default on 17.2.1993. After receipt of the notice in the Execution Proceedings, he had approached his advocate on 5.7.1995. He had signed the vakalatnama for resisting the suit, besides making a payment of Rupees Two Thousand towards advocate's fees and other incidental expenses. But the advocate did not do anything in the court even thereafter. On 4.8.1995, the execution warrant was issued by the Court and he became suspicious of the conduct of his advocate and hence rushed to the Court from where he got the disquieting information that his application to restore the suit which was dismissed for default as early as on 17.2.1993 itself and thereafter he came to know that his advocate had left the profession. Hence he filed the present application to restore the suit which was dismissed on 17.2.1993. There was a delay of 883 days in filing a petition to restore the suit. Hence, he has filed a petition under Section 5 of the Limitation Act to condone the delay of 883 days in filing a petition to restore the suit. The relevant observations in the said ratio are relevant for the purpose of deciding this revision are as follows:

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 may be 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 every body 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. 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 criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases 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.... A Court knows that refusal to condone the 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' under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice viz. Shakuntala Devi Jain v. Kuntal Kumari : [1969]1SCR1006 and State of West Bengal v. The Administrator, Howrah Municipality : [1972]2SCR874a . 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 malafides or it is 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 delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a 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 of his loss.

For the same proposition of law, the learned Counsel appearing for the revision petitioner relying on another ratio in The Secretary, Madras Race Club, Chennai v. Saraswathy Kailasam 2007 (2) CTC 58. The relevant observation in the said Judgment runs as follows:

Under Section 23 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, the Appellate Authority has wide powers and the Appellate Authority has to independently consider the matter. If the R.C.A. is not restored, the eviction order passed would become final and it would amount to shutting the door to the petitioner. In the words of the Supreme Court it must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds, but because it is capable of removing injustice, and is expected to do so.' Declining the condone the delay in filing the petition for restoration of the Appeal would result in serious miscarriage of justice and shutting doors to the petitioner. At this juncture, we may usefully refer to Ramegowda v. Special Land Acquisition Officer : [1988]3SCR198 . 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 bonafides is imputable to the party seeking condonation of delay. In the present case, there is delay in filing application for restoration of the Appeal. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. Declining to condone the delay in filing the application for restoration of Appeal would result in serious miscarriage of justice. The respondents cannot be allowed to have the benefit of the unchallenged eviction order passed by the Rent Controller.

In Rafiq v. Munshilal : [1981]3SCR509 wherein the Honourable Apex Court has held as follows:

The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest...what is the fault of the party who having done everything in his power and 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 misdemeanour of his agent. The answer obviously is in the nagative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order.

3. The learned Counsel appearing for the respondent would submit that even after availing sufficient time for filing written statement, the defendant has failed to file written statement on 1.6.2005 and hence he was set exparte. To show his bonafide that the defendant inspite of his instruction has failed to turn up on the date of hearing i.e., on 1.6.2005 to enable him to prepare and file a written statement into the Court, the learned Counsel would have informed the Court that he has not received any instructions from the defendant. But from the entries in the adjudication paper filed by the learned Counsel appearing for the respondent it is seen that there was no submission made by the learned Counsel appearing for the defendant before the trial Court as to the effect that he has not received any instruction from his client. But the affidavit to the application in I.A. No. 1454 of 2007 filed by the petitioner would go to show that since his counsel has failed to inform the date of hearing to him, he could not contact his counsel in time which resulted in passing an exparte decree against him on 16.6.2005 which is not due

to any deliberate act of him. The dispute is between the brother and the sister who claimed their respective 1/2th share in the suit property under two Wills. Under such circumstances, I am of the view that after showing sufficient cause for his absence, the petitioner shall not be shut his defence in the suit.

4. In fine, the civil revision petition is allowed and the order passed in IA. No. 1454 of 2007 in O.S. No. 367 of 2004 on the file of the Court of District Munsif, Madhuranthakam is set aside and the exparte order passed against the petitioner in the suit itself is set aside on condition the petitioner pays a sum of Rs. 3,000/- (Rupees Three thousand) only towards cost to the other side within a week, failing which the civil revision shall deem to have been dismissed. On compliance of the condition, the learned Court below shall restore O.S. No. 367 of 2004 to his file and the petitioner shall file written statement within a week from the date of restoration of the suit and the learned trial Judge shall dispose of the same within a period of two months thereafter in accordance with law. No costs. Consequently, connected M.P. No. 1 of 2008 is closed.

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