

M. Selvi Vs. Rangachari

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Court : Chennai

Decided On : Dec-10-1997

Reported in : (1998)2MLJ416

Appellant : M. Selvi

Respondent : Rangachari

Advocate for Def. : Mrs. Mythili Suresh

Judgement :

ORDER

Jagadeesan, J.

1. The petitioner herein is the defendant in O.S. No. 506 of 1991 on the file of the Additional Sub Court, Salem. The said suit was filed by the respondent herein for specific performance of the suit agreement dated 10.1.1990.

2. The said suit was decreed ex parte on 20.8.1992. Subsequent to the ex parte decree, the petitioner filed I.A. No. 651 of 1994 on 14.2.1994 for setting aside the ex parte decree and I.A. No. 650 of 1994 for condoning the delay in filing the written statement. Both the applications were posted for hearing on 16.12.1994. On that day, since the petitioner did not appear, the applications were dismissed for default. On 12.1.1995, the petitioner filed applications I.A. Nos. 73 and 74 of 1995 for restoration of I.A. Nos. 650 and 651 of 1994 respectively. The lower court

had dismissed both the applications. Hence C.R.P. No. 2224 of 1996 has been filed against the order in I.A. No. 73 of 1995, and C.R.P. No. 3075 of 1996 has been filed against the order in I.A. No. 74 of 1995.

3. Mr. R.M. Krishnaraju, the learned Counsel for the petitioner contended that the petitioner had denied the execution of the suit agreement and further pleaded that the suit agreement is a fabricated one and the respondent has defrauded the petitioner. The petitioner was not in a position to attend the court on 16.12.1994 due to her illness and the medical certificate had been produced to the effect that she was admitted in the hospital on 13.12.1994 and she was discharged only on 22.12.1994 and as such her non-appearance on 16.12.1994 on medical grounds ought to have been accepted by the court below. The lower court is not correct in dismissing the applications on the ground that the doctor was not examined.

4. On the contrary, Mrs. Mythili Suresh, learned Counsel for the respondent contended that in the counter filed by the respondent for the applications I.A. Nos. 73 and 74 of 1995 the illness of the petitioner is specifically denied and further it has been stated that she was very much present in the court premises on 16.12.1994 but did not enter into the court hall, when she was called. Hence, the lower court had dismissed the applications I.A. Nos. 650 and 651 of 1994. When the illness of the petitioner is disputed, it is the duty of the petitioner to examine the doctor in order to satisfy the court about the genuineness of the certificate. Hence the court below has rightly rejected the plea of the petitioner and dismissed the applications I.A. Nos. 73 and 74 of 1995.

5. I carefully considered the contentions of both the counsel. The short question on which the lower court had dismissed the applications I.A. Nos. 73 and 74 of 1995 is only the non-examination of the doctor. The lower court had relied upon the judgment reported in Soundarapandian v. Santhanadevan (1990)1 L.W. 113. It is the contention of the counsel for the petitioner that the doctor need not be examined to establish the medical certificate. Of course, in the normal course, to prove the medical certificate, the doctor need not be examined, But, however, when in the counter the respondents had specifically stated that the petitioner was present in the court premises on 16.12.1994 and did not enter into the court hall,

when the case was called, the illness of the petitioner itself is under dispute. When the illness of the petitioner itself is under dispute then the petitioner is duty-bound to examine the doctor in order to establish the fact that the petitioner was not well or she was seriously ill and was admitted in the hospital. Unless the doctor is examined, it may not be possible for the respondent to see the production of the Nursing Home records to establish the factum of the treatment of the petitioner as an inpatient from 13.12.1994 to 22.12.1994. In fact the same principle has been laid down in the recent judgment of this Court reported in *Lakshmiammal v. Jothi Anandan* (1997)1 L.W. 313. Hence the non-examination of the doctor so far as this case is concerned, is fatal.

6. I have also perused the evidence. The petitioner had been cross-examined suggesting that she was in the court premises on 16.12.1994. The petitioner has stated as follows:

The respondent also in her evidence specifically stated as follows:

In the cross-examination of the respondent, it has been suggested that what is stated in the chief examination is false and the same was denied by the respondent. When specifically the plea has been taken that the petitioner was present in the court premises on 16.12.1994 on the date when the applications were listed, it is the duty of the petitioner to establish her case by producing all the material particulars. Considering the defence taken by the petitioner in her written statement, I am of the view that the petitioner may be given an opportunity to examine the doctor in order to prove her illness, I am of the view that the doctor has to be examined in this case : On this ground I am not proposed to remand the matter because it would further delay the proceedings. I am of the view that the respondent can be compensated by way of cost for the prejudice that has been caused due to the conduct of the petitioner. Both the applications I.A. Nos. 73 and 74 of 1,995 are allowed on condition that the petitioner paying cost of Rs. 5,000 to the respondent herein within two weeks from today, failing which the order of the court below will stand confirmed.

7. Further the petitioner has not filed any application under Section 5 of the Limitation Act to condone the delay in filing the application I.A. No. 651 of 1994

which has been filed for setting aside the ex parte decree.

8. It is not the case of the petitioner that she has not been served with the summons. When she had been served with the summons, she is not entitled to plead that she had filed the application under Order 9, Rule 13, C.R.C. for setting aside the ex parte within 30 days from the date of knowledge.

9. Article 123 of the Limitation Act is as follows:

Description of suits

Period of limitation

Time from which period begins, to run

To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte.

Thirty days

The date of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree.

From the above provision, it is very clear that petition under Order 9, Rule 13, C.P.C. has to be filed within 30 days from the date of decree, in case the defendant had been served with the summons. The second part specifically made clear that where the summons or notice was not duly served, then only the date of knowledge has a relevance. Since admittedly the summons has been served on the petitioner, it is necessary that an application under Section 5 of Limitation Act be filed.

10. In fact a Division Bench of this Court in the judgment reported in Venkatachalam v. Sumathi (1997) 3 L. W. 698 has held that the order of the trial court, dismissing the applications for setting aside the ex parte decree without an application for condoning the delay is not correct and the petitioner ought to have been given an opportunity by filing the application. To extract the passage as follows:

It becomes necessary for us to advert to another aspect addressed to us by the learned Counsel that the learned trial Judge was not right in making it as a point for rejecting the application on the ground that no application under Section 5 of the Limitation Act was actually filed for condoning the delay. While relying upon the decision in *Meghraj v. Jesraj* : AIR1975 Mad137 , it has been contended that an application for condonation under Section 5 is not must for the court to consider such a claim for condonation of the delay; That was a case wherein an application filed under Order 9, Rule 9, C.P.C. came to be summarily dismissed in the absence of an application under Section 5 of the Limitation Act. It is in such circumstances, Ramaprasada Rao, J. as the learned Judge then was, expressed the view that if under explainable circumstances an appeal or an application is filed but without a formal or a written application for excusing the delay in presentation of the same, then the court should afford a reasonable opportunity to the party to mend matters to avoid miscarriage of justice. This is not the same to say that even in the absence of a formal application filed under Section 5 of the Limitation Act for condoning the delay explaining the reasons therefor and if need be substantiating such reasons even by letting in evidence, straightaway by arguing the matter, the claim for condonation need be countenanced. Accepting such a proposition would lead to astounding and startling results throwing the entire system of administration of justice out of gear. That apart, we are of view that this is not a case where the appellants could claim to have been taken by surprise by such plea. When they have filed their application under Order 9, Rule 13, C.P.C. a counter affidavit has been filed by the claimants respondents and in paragraph 7 of the counter affidavit it is stated that the affidavit does not disclose any reasons to treat the award as an ex parte award and the petitioners have not even filed a petition to condone the delay. The horse can be taken to the water but cannot be compelled to drink the water. Likewise, in spite of such a specific issue raised in the counter affidavit, if the appellants have been once again so indifferent and negligent even at that stage in not filing an application for condonation, this Court should not entertain even a submission from the counsel that the absence of an application under Section 5 of the Limitation Act is no bar for considering such a claim.

11. Hence the petitioner is directed to file an application under Section 5 of the Limitation Act, giving sufficient cause for the delay in filing the application I.A. No. 651 of 1994 under Order 9, Rule 13, C.P.C. The petitioner is granted three weeks time for filing such application before the court below. The lower court is directed to dispose of all the applications i.e., I.A. NO. 650 of 1994, I.A. No. 651 of 1994 and the application that is to be filed by the petitioner under Section 5 of the Limitation Act within two months from the date of receipt of the copy of this order as well as the records.

12. Both the civil revision petitions are ordered in the above terms.

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