

**Pradeep P Vs. Prasannakumar**

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**Court : Kerala**

**Decided On : Nov-15-2010**

**Judge : Thomas P. Joseph, J.**

**Appeal No. : O.P.(C) No.710 of 2010**

**Appellant : Pradeep P**

**Respondent : Prasannakumar**

**Advocate for Pet/Ap. : SRI.K.K.JOHN, Adv.**

**Judgement :**

THOMAS P. JOSEPH, J.

O.P.(C) No.710 of 2010

Dated this the 15th day of November, 2010.

1. Defendant in O.S.No.967 of 2002 of the court of learned Principal Munsiff, Kollam is the petitioner before me. Respondent filed a suit originally for prohibitory injunction, amended as one for recovery of damages also concerning a building contract work. The suit was posted for trial in the list on 03.10.2006. Petitioner filed an application supported by a medical certificate through counsel stating that he is bed ridden and is unable to appear in court. Case was posted on 09.10.2006. Petitioner was absent on that day also. That was followed by an exparte judgment and decree on 10.10.2006. On 19.02.2009, with 830 days delay petitioner filed

I.A.Nos.1036 of 2009 and 1037 of 2009 to set aside the exparte decree and to condone the delay. In the affidavit in support of the applications it is stated that following a bike accident petitioner suffered a fracture of the spine and was undergoing treatment from 01.10.2006 till date of the applications. Respondent opposed the applications. Petitioner gave evidence as PW1 and the Ayurveda Physician who is said to have treated petitioner was examined as PW2. Ext.A1 was marked in evidence. Learned Munsiff found no sufficient explanation for the delay and dismissed the applications. That was confirmed by the appellate court in C.M.A.No.105 of 2009 by judgment dated 13.08.2010 which is under challenge. Learned counsel contends that there was no proper consideration of evidence of PWs 1 and 2 and that respondent had not adduced any evidence to disprove the case of petitioner.

2. No doubt in the absence of contumacious delay or gross laches on the part of the party concerned, the approach must to give the party an opportunity to contest the case. Apex Court in State of Karnataka v. Y.Moideen kunhi (dead) by Lrs. and others [(2009) 13 SCC 192) has held that when the delay is inordinate, stricter must be the approach. Law of Limitation is not an equitable statute and a construction which would jettison the law itself cannot be made. The suit came up on 03.10.2006 on the same day petitioner made an application for adjournment stating that he is bedridden and is unable to appear in court. Ext.A1 is the medical certificate issued by PW2 and produced in the trial court. In Ext.A1 what is stated is that petitioner required ten days' rest (from 01.10.2006). The case was posted on 09.10.2006 and again on 10.10.2006. Petitioner was absent on both the days. On 10.10.2006 an exparte decree was passed. Petitioner filed I.A.No.1036 of 2009 to set aside the exparte decree along with I.A.No.1037 to condone the delay of 830 days. It is true that petitioner and the medical officer (PW2) who is said to have treated him have adduced evidence. I have gone through a copy of Ext.A1, medical certificate and the deposition of PWs 1 and 2 made available by learned counsel for petitioner. It is stated in the copy of Ext.A1 that petitioner was (allegedly) suffering from 'kadigrahm' and that he was under treatment of PW2 from 01.10.2006 till date (the date shown in the certificate is 16.02.2009). The certificate also states that petitioner was advised to take complete rest. For one thing, the certificate does not say that petitioner was advised bed rest. To the

question whether petitioner required complete bed rest for such long period, PW2 answered in the negative. PW1 stated that during the year 2007, he had PWD work and in the year 2008 he had renewed the licence. I have gone through the deposition of PW1. He did not say that contract work was got done through other persons on his behalf. It is his version that when the case came up in the list on 03.10.2006 he applied for removal of case from the list and for that purpose the affidavit brought to his house and he signed it.

3. On going through the impugned order/judgment I find that courts below were not impressed by the evidence of PWs 1 and 2. It is not as if petitioner was completely bed ridden that he could not move about. Apart from producing a medical certificate no other record for treatment or bills for purchase of medicine are produced. Though petitioner claimed that he had a fracture, PW2 stated that he had not noticed any fracture. Having heard learned counsel for petitioner and gone through copy of Ext.A1 I do not find reason to interfere with Exts.P1 and P2, order and judgment.

"Vigilantibus, non dormientibus, jura subveniunt (The law assists those who are vigilant, not those who sleep over their rights.)"

4. Petition is dismissed.

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