

Natarajan Vs. Pappathy

Natarajan Vs. Pappathy

SooperKanoon Citation : sooperkanoon.com/964175

Court : Chennai

Decided On : Jan-10-2013

Judge : T.Mathivanan

Appellant : Natarajan

Respondent : Pappathy

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

10. 01.2013 CORAM: THE HON'BLE MR.JUSTICE T.MATHIVANAN
CRP.(NPD).No.2210 of 2005 Natarajan Petitioner Vs. Pappathy
Respondent Prayer : This civil revision petition is filed under Article 227 of the
Constitution of India, against the fair and decretal Order dated 13.01.2005 and
made in I.A.No.849 of 2004 in O.S.No.1183 of 2004, on the file of the learned
Principal District Munsif Court, Namakkal. For Petitioner : Mr.T.Dhanyakumar For
Respondent : Mr.Mukunth for M/s.Sarvabhauman Associates O R D E R This
memorandum of civil revision is directed against the fair and decretal Order dated
13.01.2005 and made in I.A.No.849 of 2004 in O.S.No.1183 of 2004, on the file of
the learned Principal District Munsif Court, Namakkal, setting aside the preliminary
exparte decree dated 11.11.1998.

2. The revision petitioner herein is the plaintiff in the suit in O.S.No.1183 of 2004,
whereas the respondent is the defendant.

3. It is manifested from the records that the revision petitioner has filed the suit in O.S.No.1183 of 2004 against the respondent herein on the file of the learned Principal District Munsif, Namakkal, seeking the relief of partition in respect of his half share in the schedule mentioned property. In that suit, a preliminary ex parte decree was passed on 11.11.1998 and thereafter in pursuant to the preliminary decree, the revision petitioner/plaintiff appears to have filed a final decree application in I.A.No.502 of 2001. Only under this circumstance, the respondent herein happened to file an interlocutory application in I.A.No.849 of 2004, under Order IX Rule 13 of the Code of Civil Procedure, to set aside the preliminary ex parte decree dated 11.11.1998.

4. That interlocutory application in I.A.No.849 of 2004 was allowed on 13.01.2005 and in consequent thereof the preliminary ex parte decree was set aside.

5. Questioning the legality of the Order dated 13.01.2005 and made in I.A.No.849 of 2004, the revision petitioner has filed the present civil revision petition.

6. When the revision petition came up for hearing, Mr.T.Dhanyakumar, learned counsel appearing for the revision petitioner has submitted that after filing of the suit in O.S.No.1183 of 2004, summons were ordered to be served on the respondent and since the summons were returned as the addressee was not in the given address, he was permitted to take a substituted service in paper publication and paper publication was also ordered for the hearing of 16.10.1998 and the publication was duly effected and on that date the respondent was called ex parte and an ex parte decree was passed.

7. What he would contend is that though the ex parte decree was passed on 11.11.1998, the respondent was able to file the interlocutory application in I.A.No.849 of 2004, under Order IX Rule 13 C.P.C., only on 03.07.2001 ie., after two years ten months. Therefore, he would submit that since there was a delay, the respondent ought to have filed an application under Section 5 of the Limitation Act explaining each and every day of delay in filing the application to set aside the ex parte decree.

8. But, without adopting and adhering to the procedure enunciated under law, he had simply filed the interlocutory application in I.A.No.849 of 2004, under Order IX Rule 13 C.P.C., saying that he was served with notice in final decree application on 27.06.2004 and therefore he had filed the application within a period of thirty days from the date of receipt of the notice.

9. The learned counsel appearing for the petitioner has submitted that despite the vehement objection expressed before the Trial Court by the learned counsel for the plaintiff that was turned down and the Trial Court had proceeded to allow the application on payment of costs of Rs.250/-.

10. Now, he would submit before this Court that when there is an abnormal delay in filing the application, the Trial Court itself went wrong in allowing the application, without considering the nuance of the law enunciated under Section 5 of the Limitation Act.

11. On the other hand, the learned counsel appearing for the respondent has submitted that in fact the respondent was let known about the passing of the ex parte decree as well as the filing of interlocutory application for final decree only on 27.06.2004 when she was served with notice in the final decree application and after coming to know about this fact, she had filed the application in I.A.No.849 of 2004 under Order IX Rule 13 C.P.C., to set aside the ex parte decree passed against him.

12. In support of his submission, he has placed reliance upon the following decisions: i. Bhagmal and others vs. Kunwar Lal and others, reported in (2010) 12 SCC 159.and ii. Savarimuthu vs. Maricannu, reported in 2007 (2) CTC 470.

13. In the first decision viz., Bhagmal and others vs. Kunwar Lal and others, reported in (2010) 12 SCC 159.the appellants, who are the defendants in the suit came to know about the decree only when the execution proceedings were started. Therefore, on coming to know about the fact of execution proceedings, they had moved an application under Order IX Rule 13 C.P.C., read with Section 151 C.P.C., and it was contended before the Apex Court that the application under Order IX Rule 13 C.P.C., was moved within a period of thirty days from the date of

their knowledge of the ex parte decree.

14. After hearing both sides, His Lordship HONOURABLE Mr.JUSTICE V.S.SIRPURKAR, while speaking on behalf of the Division Bench of the Honourable Supreme Court, has observed that the well-considered order of the appellate court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellants-defendants before the trial Court in support of their application under Order 9 Rule 13 C.P.C., and on considering the rival submissions, His Lordship in Paragraph No.16 has observed as detailed below: "16.The Court was considering Article 123 of the Limitation Act. In our opinion, in this case, the limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.6.1988. An application under Order IX Rule 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any." 15. In the second decision viz., Savarimuthu vs. Maricannu, reported in 2007 (2) CTC 470.the learned single Judge of this Court has observed that the interests of justice require giving opportunity to defendant to contest the suit on merits and not refuse the same on technicalities.

16. Countering the arguments of the learned counsel appearing for the respondent, Mr.T.Dhanyakumar, learned counsel appearing for the petitioner has submitted that the respondent had deliberately and wantonly pretending as if he had the knowledge about the decree only on 27.06.2004 when she was served with the notice on final decree application. He has also maintained that despite the fact that there is an abnormal delay of two years ten months, without seeking the relief under Section 5 of the Limitation Act to condone the delay, after showing sufficient case, the respondent had adopted the short cut method by filing the application under Order IX Rule 13 C.P.C., to set aside the ex parte decree as if he had filed the application within the prescribed time of thirty days from the date of service of notice i.e., from 27.06.2004.

17. In this connection, he would submit that the Trial Court ought not to have set aside the ex parte preliminary decree, because the reasons assigned by the respondent are nothing but only a dilatory tactics and he had not shown any adequate and sufficient reasons for filing that application under Order IX Rule 13 C.P.C., without actually filing an application under Section 5 of the Limitation Act to condone the delay.

18. In support of his contention, he has placed reliance upon the following decisions: i. Sri Pillaiyarpatti Karpaga Vinayagar Koil Nagarathar Trust vs. R.M.Sevagan Chettiar, reported in 1996 (1) CTC 717.and ii. M.Ramakrishnan vs. Vinod Kumar Goyal, reported in 2006-4-L.W.650.

19. In the first decision viz., Sri Pillaiyarpatti Karpaga Vinayagar Koil Nagarathar Trust vs. R.M.Sevagan Chettiar, reported in 1996 (1) CTC 717.an ex parte decree was passed against the respondents and they had filed an application to set aside the ex parte decree. Under this circumstance, this Court has held that the ex parte decree cannot be set aside on vague allegation of illness without proof of illness and the medical certificate by itself will not prove the illness and therefore the contention was rejected in toto.

20. In the second decision viz., M.Ramakrishnan vs. Vinod Kumar Goyal, reported in 2006-4-L.W.650, the learned single Judge of this Court has observed that the trial Judge had misdirected himself in observing that there was no evidence to show that the earlier application filed by the said T was with the knowledge of the respondent herein. In fact, the trial Judge totally had lost sight of I.A.No.10693 of 1998 which was filed by the very same T claiming himself as the Power of Attorney of the respondent herein to set aside an ex parte order passed earlier in the year 1998, which the trial court had already admitted the said T as the Power of Attorney of the respondent/defendant and permitted him to file the I.A.No.10693 of 1998 to set aside the ex parte order earlier passed in the suit. It can never be said that T had filed earlier Application without the knowledge of the respondent herein.

21. Further, the learned single Judge of this Court has also observed that the learned counsel for the revision petitioner had also justified in contending that

when the ex parte decree was passed on 29.07.2002 itself, no petition to condone the delay was filed by the respondent herein even though I.A.No.19988/2003 was filed by him only on 09.09.2003. Filing a condone delay petition under Section 5 of the Limitation Act was not an empty formality and when there was a delay, the same had to be explained by the applicant to the satisfaction of the court. Hence the order of the trial court on the fact of it was vitiated as it had failed to advert to the entire facts of the case and also had omitted to note that the delay was not at all explained by the respondent.

22. Based on the above decisions, the learned counsel appearing for the petitioner has contended that filing of application under Section 5 of the Limitation Act, as observed by the single Judge, is not an empty formality and the Trial Court has miserably failed to look into the real issue involved in the given case on hand and therefore the impugned Order itself is vitiated and in spite of filing the application under Order IX Rule 13 C.P.C., the respondent should have filed an application under Section 5 of the Limitation Act explaining the delay for not filing the application within the prescribed time. Therefore, he has urged this Court to set aside the impugned Order.

23. This Court has carefully gone into the submissions, which were adverted to by both the learned counsels.

24. It appears from the counter statement of the revision petitioner that in the suit a publication was effected on 16.10.1998 and thereafter an ex parte decree was passed on 11.11.1998.

25. It is obvious to note here that in pursuant to the preliminary decree dated 11.11.1998, an interlocutory application in I.A.No.502 of 2001 was filed for passing the final decree and in that application the respondent was served with notice on 27.06.2004 and according to the learned counsel appearing for the respondent the application in I.A.No.849 of 2004 was filed within a period of thirty days from the date of knowledge of the ex parte decree dated 11.11.1998 and therefore there was no necessity for the respondent to file a petition to condone the delay.

26. But here, no reference is available to show that the respondent was let known about the filing of the suit and passing of the ex parte decree. When the revision petitioner is not able to demonstrate the fact that the respondent was having knowledge about the passing of preliminary decree it cannot be heard to say that an application under Section 5 of the Limitation Act should have been filed to condone the delay.

27. This Court has fairly considered the related facts and circumstances and having regard to the real issue, which is involved in this case, this Court finds that the petition under Order IX Rule 13 C.P.C., has been filed within the prescribed period of thirty days from the date of knowledge and therefore the question of filing of an application to condone the delay does not arise in this case and hence this Court does not find any infirmity in the Order passed by the Trial Court and for the reasons as afore-stated this revision petition is liable to be dismissed.

28. Accordingly, this revision petition is dismissed confirming the fair and decretal Order dated 13.01.2005 and made in I.A.No.849 of 2004 in O.S.No.1183 of 2004, on the file of the learned Principal District Munsif Court, Namakkal. Consequently, connected miscellaneous petition is closed. No costs. krk To: The Principal District Munsif Principal District Munsif Court, Namakkal

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com