

A M/S. GMG ENGINEERING INDUSTRIES & ORS.

v.

M/S ISSA GREEN POWER SOLUTION & ORS.

(Civil Appeal No. 4472 of 2015)

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MAY 15, 2015

[T. S. THAKUR AND R. BANUMATHI, JJ.]

Delay – Condonation of – Applications filed u/Or. 9 r 13 to set aside the ex-parte decrees alongwith the applications to condone the delay of 355 days and 382 days respectively – Applications allowed imposing condition on the appellants to deposit the entire decretal amount – High Court upholding the order – On appeal, held: Trial court should not have imposed unreasonable and onerous condition of depositing the entire suit claim in the suits when the issues are yet to be decided on merits – In revision, High Court should have kept in view that the parties were yet to go for trial and appellants ought to have been afforded the opportunity to contest the suits on merits – Since the reasons for the delay was satisfactorily explained, impugned order set aside – Delay in filing applications to set aside ex-parte decrees condoned and ex-parte decrees set aside – Code of Civil Procedure, 1908 – Or. 9 r 13.

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Allowing the appeals, the Court

HELD: 1.1 The expression ‘sufficient cause’ is to receive liberal construction so as to advance substantial justice. When there is no negligence, inaction or want of bonafide is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is

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to see whether the applicant has acted with due diligence. [Para 8] [1113-F-G] A

1.2 In the instant case, while the trial court exercised the discretion to condone the delay in filing the applications to set aside the ex-parte decrees, the trial court should not have imposed such an unreasonable and onerous condition of depositing the entire suit claim of Rs.1,50,00,000/- and Rs.10,00,000/- respectively in the suits when the issues are yet to be decided on merits. While considering the revision, the High Court should have kept in view that the parties are yet to go for trial and the appellants ought to have been afforded the opportunity to contest the suits on merits. When the S.L.Ps came up for admission, this Court passed the conditional order that subject to deposit a sum of Rs.50,00,000/- before the trial court, notice would be issued to the respondents. In compliance with the said order, the appellants deposited Rs.50,00,000/- before the trial court. Since the appellants have satisfactorily explained the reasons for the delay and with a view to provide an opportunity to the appellants to contest the suit, the impugned order is set aside. Delay in filing the applications to set aside the ex-parte decrees is condoned and the ex-parte decrees are set aside and the suits are restored to file. [Paras 11 and 12] [1115-E-H; 1116-A, C] B
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V.K. Industries and Ors. vs. M.P. Electricity Board, Rampur, Jabalpur (2002) 3 SCC 159; Tea Auction Limited vs. Grace Hill Tea Industry And Anr. 2006 (6) Suppl. SCR 163; (2006) 12 SCC 104; (2006) 9 SCALE 223; Vijay Kumar Madan and Ors. vs. R.N. Gupta Technical Education Society and Ors., 2002 (3) SCR 217 : (2002) 5 SCC 30 – referred to. G
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Case Law Reference

(2002) 3 SCC 159 Referred to. Para 6

2006 (6) Suppl. SCR 163 Referred to. Para 9

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2002 (3) SCR 217 Referred to. Para 10

CIVILAPPELLATE JURISDICTION: Civil Appeal No. 4472 of 2015.

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From the Judgment and Order dated 16.04.2013 in the High Court of Judicature at Madras, Madurai Bench in C. R. P. (NPD) (MD) No. 4 of 2013.

WITH

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C. A. No. 4473 of 2015

Brijender Chahar, D. Kumaran, Satya Mitra Garg for the Appellants.

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Nalini Chidambaram, V. Balaji, C. Kannan, Sripatha, D. Veda, Rakesh K. Sharma for the Respondents.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. Leave granted.

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2. These appeals arise out of common order dated 16.04.2013, passed by the High Court of Madras, Madurai Bench in C.R.P. (NPD) (MD) No.4/2013 and C.R.P. (NPD) (MD) No.5/2013 respectively, confirming the order dated

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4.12.2012 passed by the Principal District Judge, Thanjavur, imposing conditions to deposit Rs.1,50,00,000/- and Rs.10,00,000/-, as a condition to condone the delay in filing the applications to set aside the ex-parte decrees passed in O.S.No.3 of 2011 and O.S. No.6 of 2011.

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3. Appellants and respondents entered into an agreement of sale on 1.08.2008, under which the respondents agreed to purchase the property of the appellants being the factory premise for a sum of Rs.5,00,00,000/- and the respondents paid Rs.1,50,00,000/- towards part of sale consideration. The sale transaction could not be completed. The respondents issued legal notice dated 24.11.2010 calling upon the appellants either to execute the sale deed or refund the advance amount of Rs.1,50,00,000/- with interest at the rate of 12% p.a. The appellants received the said notice and sent the reply offering to return the said amount but without interest. The respondents filed the suit being O.S.No.3/2011 for recovery of the sum of Rs. 1,50,00,000/- with interest. The case was adjourned from time to time on various dates. On 16.06.2011, the appellants-defendants were set ex-parte in the suit. After recording evidence adduced by the respondents-plaintiffs on 5.07.2011, the said suit was decreed ex-parte by the Principal District Judge, Thanjavur.

4. Respondents have also filed another suit O.S. No.6 of 2011 for recovery of a sum of Rs.10,00,000/- said to have been paid by them to the appellants by way of an advance towards the purchase of another property. The said suit was decreed ex-parte on 16.06.2011. The appellants have filed I.A. No.78 of 2012 to set aside the ex-parte decree alongwith application to condone the delay of 382 days under Section 5 of the Limitation Act. The said application was allowed by the Principal District Judge, Thanjavur by order dated 4.12.2012 imposing condition to deposit a sum of Rs.10,00,000/-.

5. The appellants filed I.A.No.77 of 2012 and I.A. No.78 of 2012 in both the suits praying for condonation of delay of 355 days and 382 days respectively in filing the

A applications under Order IX Rule 13 CPC, for setting aside the ex-parte decrees. The appellants averred that they came to know about the ex-parte decrees only on 13.07.2012, when they saw a public notice in the daily newspaper regarding the attachment of the suit property. The Principal District Judge, Thanjavur vide separate order dated 4.12.12 condoned the delay of 355 days and 382 days in filing the applications under Order IX Rule 13 CPC for setting aside the ex-parte decree and allowed the applications in IA No.77 of 2012 and I.A. No.78 of 2012 but subject to condition that the appellants should deposit Rs.1,50,00,000/- and Rs.10,00,000/- respectively in the court on or before 3.01.2013, failing which the applications will automatically stand dismissed. Being aggrieved by the stringent condition, the appellants filed revision petitions before the High Court. The High Court vide impugned order dated 16.04.13 upheld the order imposing condition to deposit Rs.1,50,00,000/- and Rs.10,00,000/- as a condition precedent to condone the delay in filing application to set aside the ex-parte decrees and thereby dismissed the revisions which are under challenge in these appeals.

6. Learned counsel for the appellants contended that the direction to deposit the entire decretal amount of Rs.1,50,00,000/- in O.S. No.3 of 2011 and the decretal amount of Rs.10,00,000/- in O.S. No.6 of 2011 as a condition precedent to set aside the ex-parte decrees is onerous and unreasonable and prayed to set aside the impugned order. In support of his contention, learned Senior Counsel Mr. Brijender Chahar for the appellants placed reliance upon the judgment of this Court in *V.K. Industries and Ors. vs. M.P. Electricity Board, Rampur, Jabalpur, (2002) 3 SCC 159*.

7. Learned Senior Counsel for the respondents Ms.

Nalini Chidambaram submitted that the trial court was constrained to impose the said condition in view of the dilatory tactics adopted by the appellants deliberately not being present for hearing in the trial court on several occasions when the suits were posted for trial. Learned Senior Counsel further submitted that even after *ex-parte* decrees dated 5.07.2011 were brought to the notice of the appellants by a series of telegrams (Annexures-R5/R1), the appellants did not file the applications to set aside the *ex-parte* decree within the period of limitation and waited for more than a year. It was submitted that the respondents are more than seventy years old and had borrowed sum of Rs.1,50,00,000/- and Rs.10,00,000/- from the bank and paid the said amount to the appellants under the agreements for sale and the appellants are paying interest on that amount to the bank. It was contended that even though the appellants sold away their property, they did not choose to refund the sum paid towards part of sale consideration and if the suits are decreed, the appellants have no assets to execute the decrees and the rights of both the parties should be balanced and therefore the impugned order does not warrant interference by this Court under Article 136 of the Constitution.

8. It is well settled that the expression 'sufficient cause' is to receive liberal construction so as to advance substantial justice. When there is no negligence, inaction or want of *bonafide* is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is to see whether the applicant has acted with due diligence.

9. While exercising the discretion for setting aside

- A the ex-parte decrees or condoning the delay in filing the application to set aside the ex-parte decrees, the court is competent to direct the defendants to pay a portion of the decretal amount or the cost. In *Tea Auction Limited vs. Grace Hill Tea Industry And Anr.*, (2006) 12 SCC 104: (2006) 9 SCALE 223, this Court has held as under:

C **“15.A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith.....”**

- F 10. In *Vijay Kumar Madan and Ors. vs. R.N. Gupta Technical Education Society and Ors.*, (2002) 5 SCC 30, this Court has held as under:

G **“8. Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the court may direct may take care of the time or mode of proceedings required to be taken pursuant to the order under Rule 7.the court cannot exercise its power to put the defendant-applicant on such terms as may have the effect of**

prejudging the controversy involved in the suit and virtually decreeing the suit though ex parte order has been set aside or to put the parties on such terms as may be too onerous..... That condition in the order of the trial court having been set aside by the High Court, we are inclined to sustain the order of the High Court but subject to certain modification. In our opinion the High Court was justified in setting aside the condition imposed by the trial court in its order which was too onerous, also vague, uncertain and suffering from want of clarity. The order of the High Court to the extent of setting aside the ex parte proceedings and directing the expeditious trial of the suit has to be sustained as it serves the ends of justice....”

The same view was reiterated in *V.K. Industries case* (supra).

11. In the present case, while the trial court has exercised the discretion to condone the delay in filing the applications to set aside the ex-parte decrees, in our view, the trial court should not have imposed such an unreasonable and onerous condition of depositing the entire suit claim of Rs.1,50,00,000/- and Rs.10,00,000/- respectively in the suits when the issues are yet to be decided on merits. While considering the revision, the High Court should have kept in view that the parties are yet to go for trial and the appellants ought to have been afforded the opportunity to contest the suits on merits. When the S.L.Ps came up for admission on 1.08.2013, this Court passed the conditional order that subject to deposit a sum of Rs.50,00,000/- before the trial court, notice shall be issued to the respondents. In compliance with the order dated 1.08.2013, the appellants have deposited Rs.50,00,000/- before the trial court. Since

A the appellants have satisfactorily explained the reasons for the delay and with a view to provide an opportunity to the appellants to contest the suit, the impugned order is liable to be set aside.

B 12. The order dated 16.04.2013 of the High Court passed in C.R.P. (NPD) (MD) No.4/2013 and C.R.P. (NPD) (MD) No.5/2013, is set aside and these appeals are allowed.

Delay in filing the applications to set aside the ex-parte decrees is condoned and the ex-parte decrees passed in

C O.S. No.3 of 2011 and O.S. No.6 of 2011 are set aside and the suits are ordered to be restored to file. The appellants shall file their written statements within a period of six weeks if not already filed. Since the suits are of the year 2011 and

D the respondents are stated to be senior citizens, the trial court is directed to take up the suits at an early date and dispose of the suits expeditiously. It is made clear that we have not expressed any opinion on the merits of the matter.

E The amount of Rs.50,00,000/- deposited by the appellants before the trial court shall be invested in a Nationalized Bank so that the accrued interest may enure to the benefit of either party. In the facts and circumstances of the case, we make no order as to costs.

F Nidhi Jain

Appeals allowed.