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HIGH COURT OF GUJARAT

Bhikhabhai Rasulbhai Chothiya
Versus
Decd Gandhi Gulabchand Chandulal

Date of Decision: 10 July 2009

Citation: 2009 LawSuit(Guj) 451

Hon'ble Judges: K A Puj

Case Type: Special Civil Application

Case No: 15801 of 2003

Subject: Civil, Constitution, Limitation

Acts Referred:
Constitution of India Art 227
Limitation Act, 1963 Sec 5

Final Decision: Petition allowed

Advocates: B B Naik, R C Jani

Cases Referred in (+): 2

K A Puj, J

[1] The petitioners have filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the judgment and order dated 29.09.2003 passed by the learned Assistant Judge, Sabarkantha Dist., Camp at Modasa dismissing Appeal From Order No. 26 of 2002 and the judgment and order dated 06.08.2002 passed by the learned Civil Judge (J.D.), Modasa dismissing the application for condonation of delay of three years and 10 days caused in filing restoration application under Order 9, Rule 9 of the Code of Civil Procedure. The petitioners have also prayed for the direction allowing the application for condonation application for restoring Regular Civil Suit No. 6 of 1992 which was dismissed for non-prosecution by the order dated 14.09.1998.

[2] This Court has issued rule on 11.11.2003.

[3] Heard Mr. B.B. Naik, learned Senior Counsel appearing for the petitioners and Mr. R.C. Jani, learned advocate appearing for the respondents.

[4] It is the case of the petitioners that the petitioners have filed Regular Civil Suit No. 6 of 1992 in the Court of the learned Civil Judge (J.D.), Modasa. The Trial Court framed issues by order dated 7.10.1996 and thereafter, the suit was placed for recording evidence. For a considerable long time, the petitioners were not called by their advocate for deposition in the trial Court and, therefore, the petitioners inquired in the trial Court and, therefore, they came to know that Regular Civil Suit No. 6 of 1992 was dismissed for non-prosecution by the trial Court vide order dated 14.09.1998. The advocate for the petitioners have submitted an application for adjournment on 14.09.1998 which was rejected by the trial Court and thus, Regular Civil Suit No. 6 of 1992 was dismissed by the Trial Court for non-prosecution.

[5] It is also the case of the petitioners that the petitioners thereafter submitted an application in the trial Court for restoration of Regular Civil Suit No. 6 of 1992 under Order 9, Rule 9 of Code of Civil Procedure. Since there was delay in filing the restoration application, an application was filed by the petitioners for condonation of delay.

[6] The Trial Court issued notice in delay condonation application to the respondents and after hearing the parties, by judgment and order dated 06.08.2002, the Trial Court dismissed the said application for condonation of delay of 3 years and 10 days caused in filing the restoration application, which amounts to dismissal of the restoration application for setting aside the order of the Trial Court dismissing Regular Civil Suit No. 6 of 1992 for non-prosecution.

[7] Being aggrieved by the said order of the Trial Court, the petitioners approached the learned District Judge, Sabarkantha, Camp at Modasa by filing Civil Misc. Appeal No. 26 of 2002. The said appeal came to be dismissed by the learned District Judge vide his order and judgment dated 29.09.2003.

[8] It is this order which is under challenge in the present petition.

[9] Mr. B.B. Naik, learned Senior Counsel appearing for the petitioners has submitted that the petitioners were always ready and willing to proceed with the suit and they have never abandoned the proceedings. The petitioners were inquiring about the progress of the suit with their advocate from time to time and they were relying upon the opinion given by their advocate and, therefore, they were not present on 14.09.1998 when the suit was kept for recording of evidence as their advocate has not informed them about the same. The suit was dismissed for default for which the petitioners were not at all responsible since they were not informed by their advocate.

He has further submitted that by not condoning the delay, both the Courts below have committed jurisdictional error because of which great injustice was caused to the petitioners and the petitioners' good case was never adjudicated upon on merits. Thereafter, plethora of judgments of various High Courts as well as of the Hon'ble Supreme Court were relied on. It is repeatedly held by the Courts that if there is delay in filing the application for restoration of the suit which is dismissed for default or for non-appearance of the plaintiffs, by compensating the defendants by awarding appropriate costs, suit should be restored to file and decided on merits and that the plaintiffs should not be defeated without rendering the decision on merits of the case. Therefore, both the Courts below have committed error which results into dismissal of the restoration application.

[10] He has further submitted that the Trial Court as well as Appellate Court both have come to the conclusion that the petitioners were responsible for causing delay in dismissal of the suit without there being any cogent and relevant material or evidence on the record of the case. The Trial Court while rejecting the petitioners' application for condonation of delay, has also taken into consideration the merits of the case and held that prima facie, it appears that there was no merit. This finding of the Trial Court is contrary to the settled legal position and the Court is not permitted to go into the merits at the time of considering the application for condonation of delay.

[11] In support of his submission that the petitioners were not at all responsible for causing delay in filing restoration application, Mr. Naik relied on the decision of the Hon'ble Supreme Court in the case of N. Balakrishnan v. M. Krishnamurthy, 1998 AIR(SC) 3222. He further invited the Court's attention to paragraphs 6 to 13 of the said judgment and submitted that in an identical situation, the Hon'ble Supreme Court has condoned the delay and after allowing the appeals as well as setting aside the impugned orders by restoring the order passed by the Trial Court, the appellant was directed to pay a sum of Rs. 10,000/- to the respondents. The Court has observed that rules of limitation are not meant to destroy the life of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The Court has also taken into consideration that during these days, when everybody is fully occupied with his own advocation of life an omission to adopt such extra vigilance need not be used as a grant to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences.

[12] Mr. Naik further relied on the decision of the Hon'ble Supreme Court in the case of Mr. M.K. Prasad v. P. Arumugam, 2001 AIR(SC) 2497 wherein it is held that the appellant tried to explain the delay in filing the application for setting aside the ex-parte decree as is evident from application filed under Section 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as

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vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. The Court was, therefore, of the opinion that inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court can be compensated by awarding appropriate costs in the interest of justice and under the peculiar circumstances of the case, the Court set aside the order impugned and condoned the delay in filing the application for setting aside the ex-parte order.

[13] Mr. R.C. Jani, learned advocate appearing for the respondents, on the other hand, has submitted that both the Courts below have given very sound and convincing reasons for rejecting the application for condonation of delay and/or the appeal filed against such rejection. He has further submitted that after framing of the issues for almost 2 years, the petitioners did not remain present and atleast 30 adjournments were granted. At last on 14.09.1998, application was rejected and the suit was dismissed for default. If the petitioners were so vigilant, they could have come to the Court immediately for restoration of the suit. For about 3 years and 10 days, no steps were taken and thereafter, the application was filed for restoration of the suit, which was rightly rejected by the Trial Court and such rejection order was rightly confirmed by the learned District Judge. He has further submitted that no evidence whatsoever was produced in support of the plea raised before the Courts below that the petitioners were not aware about the same nor any evidence was produced to that effect. He has submitted that all factual and legal positions were duly considered by the Courts below and findings arrived at after proper appreciation, should not have been disturbed by this Court while exercising its writ jurisdiction under Article 227 of the Constitution of India.

[14] Mr. Jani has further submitted that even the contention was raised before the Trial Court by application Exh.17 to the effect that there was no alternative way except disputed land. The learned Judge has observed that if there was no alternative way, then for the purpose of three years, the petitioners were without any alternative way. This fact itself shows that on factual aspect, submission made before the Court was false and rightly dealt with by the learned Trial Judge. The learned Trial Judge has also observed below application Exh.16/1 which was given for amendment/correction on 18.10.1997 and it was mentioned that the present respondent has covered the gate and, therefore, amendment may be granted to remove the same from the site. The

said application was rejected on 30.11.1997. Since the petitioners were knowing this fact, it could not be believed that the petitioners did not remain present at relevant point of time.

[15] Mr. Jani has further submitted that from the facts which were recorded by the learned Trial Judge clearly indicate that the petitioners were aware about the proceedings and there was sheer negligence on their part and hence, the judgments relied on by Mr. Naik do not apply to the facts of the present case. He has, therefore, submitted that no interference be called for and the petition deserves to be dismissed.

[16] After having heard learned advocates appearing for the respective parties and after having gone through the impugned orders passed by the Courts below and having considered the judgments of the Hon'ble Supreme Court cited before the Court, the Court is of the view that it is true that there was gross delay of 3 years and 10 days. It is also true that even before dismissal of the suit for want of prosecution, the petitioners did not lead their evidence for about 2 years and 30 adjournments were granted. However, on these facts, both the Courts below have come to the conclusion that the petitioners were negligent and delay caused in filing the restoration application was not properly explained and hence, the same should not have been condoned. If the reasoning given by the Trial Court is appreciated in light of the aforesaid judgments of the Hon'ble Supreme Court, it is clear that the petitioners were not supposed to remain constantly in touch with their advocate. It is the duty of the advocate to inform the petitioners about the progress in the matter. There is nothing on the record of the Trial Court which says that despite intimation given by the advocate, the petitioners could not remain present. It is also an admitted position that on 14.09.1998, an application for adjournment was given by the learned advocate for the petitioners and the said application was not granted and the suit was dismissed for default. There is nothing on record that this dismissal of the suit for want of prosecution was informed to the petitioners and despite such information, the petitioners have not taken any step for restoration. On the contrary, it is a specific case of the petitioners that they were never informed by their advocate and only when they inquired about the progress in the suit, they came to know that the suit was dismissed for default. The petitioners have thereafter changed their advocate and filed restoration application. If this is the situation then the ratio laid down by the Hon'ble Supreme Court in the aforesaid judgments would clearly apply and the Court should liberally construe the provisions regarding Limitation Act and if any prejudice is caused to the other side, the same can be compensated by imposing cost. Even in a given case, looking to the delay caused, it appears that the petitioners have not abandoned their suit. They were very much interested in those proceedings. However, because of the circumstances, they could

not proceed further. Ultimately, when they realized that their suit was dismissed for default, they take very prompt actions in the matter.

[17] Considering the entire facts and circumstances of the case and considering the provisions relating to Limitation Act and also in the interest of justice, the petition is required to be allowed by restoring the suit which was dismissed for default. However, since the delay is of more than 3 years, the petitioners are hereby liable to pay compensatory cost of Rs. 10,000/- to the respondents. On deposit of this amount of Rs. 10,000/- in the Trial Court, the suit is ordered to be restored. After deposit of the amount, the respondents are entitled to withdraw the said amount. Once the suit is restored, the Trial Court is directed to decide and dispose of the suit as expeditiously as possible, preferably within a period of six months from the date of receipt of writ or certified copy of this order, whichever is earlier.

[18] With this observation and direction, the petition is allowed. Rule is made absolute with no order as to costs.