

(2008) 02 MAD CK 0170

In the Madras High Court

Case No : Writ Petition No's. 15155 and 15156 of 2007 and M.P. No. 1 of 2007

Ammani Ammal

APPELLANT

Vs

Dhanalakshmi Bank Ltd. and Others

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, Order 9 Rule 6

Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 16

Evidence Act, 1872 — Section 73

Limitation Act, 1963 — Section 5

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(21)

Citation : (2008) 3 BC 229

Hon'ble Judges : P.K. Misra, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : R. Gandhi for P. Valliappan, for the Appellant; S.N.S. Jayaprakash and T.R. Rajagopalan for N. Mani, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—In these Writ Petitions, the petitioner has impugned the order of the seventh respondent dated 14.3.2007 in M.A.

No. 12 of 2007 confirming the order of the sixth respondent dated 4.1.2006 in I.A. No. 504 of 2006 in T.A. No. 729 of 2002 (W.P. No. 15155

of 2007) and the order dated 14.3.2007 in M.A. No. 13 of 2007 confirming the order of the sixth respondent dated 4.1.2006 in I.A. No. 505 of

2006 in T.A. No. 729 of 2002 (W.P. No. 15156 of 2007).

2. The factual matrix necessary for disposal of the Writ Petitions are as below:

The first respondent herein preferred O.A. No. 277 of 2000 before the Debts Recovery Tribunal-I, Chennai against the petitioner herein and

respondents 2 to 4 for a decree directing them to pay a sum of Rs.

1,15,81,537.77 along with subsequent interest and the said O.A. was later transferred to Debts Recovery Tribunal-II, Chennai and renumbered as O.A. No. 834 of 2001. From the records, it is found that Vakalat was filed on behalf of all the defendants and reply statement was also filed contesting the claim of the Bank. Subsequently, when the matter was pending for filing proof affidavit by the Bank, the matter was transferred to Debts Recovery Tribunal, Coimbatore and as such, the matter was transmitted to the Registrar, Debts Recovery Tribunal, Coimbatore and as per the printed notice found in the case records, the parties were directed to appear in person or through their Counsel before the Debts Recovery Tribunal, Coimbatore on 18.6.2002. Subsequently, the matter was taken on file before the Debts Recovery Tribunal, Coimbatore as T.A. No. 729 of 2002 and the petitioner who was arrayed as defendant No. 4 as well as the other defendants were set ex parte and finally an ex parte order was passed on 26.10.2004.

3. The petitioner filed applications in LA. Nos. 504 and 505 of 2006 before the Debts Recovery Tribunal, Coimbatore for setting aside the ex parte order dated 26.10.2004 made in T.A. No. 729 of 2002 and also to condone the delay of 541 days in filing the application to set aside the ex parte order. Those applications were dismissed as per order dated 4.12.2006 which culminated in filing Appeal by the petitioner before the seventh respondent in M.A. Nos. 12 and 13 of 2007 and those Appeals were also dismissed as per order dated 14.3.2007. The present Writ Petitions are directed against the said common order dated 14.3.2007 on the file of the seventh respondent.

4. In the affidavit filed in support of the application to set aside the ex parte order as well as to condone the delay in filing the said application, the petitioner contended that the third respondent herein was working at her residence and without her knowledge, he removed the document of title in respect of her property and appears to have deposited the same with the first respondent. It is the case of the petitioner that she has not executed any document much less mortgage deed in favour of the first respondent-Bank, and she came to know of the ex parte order and the proceedings pertaining to the same only on 28.3.2006, when one Mr. Duraisamy and others came to the property to take possession alleging that he has

become the owner of the property having purchased the same in public auction on 8.12.2005. Immediately the petitioner preferred Police

Complaint and also filed the application to set aside the ex parte order along with an application to condone the delay.

5. The first respondent-Bank filed counter and opposed the application to set aside the ex parte order as well as the application to condone the delay and in the said counter, the first respondent denied the various allegations made by the petitioner and contended that the property was mortgaged by the petitioner by deposit of title deeds and the petitioner was having knowledge about the proceedings and, as such, prayed for dismissal of the application.

6. The Debts Recovery Tribunal, Coimbatore, as per order dated 4.12.2006, dismissed the application to condone the delay in filing the ex parte order and consequently the application to set aside the exparte order was also rejected.

7. The Debts Recovery Tribunal, Coimbatore, relied on certain factual aspects, while rejecting the applications preferred by the petitioner. The Tribunal found that on behalf of the petitioner, her Counsel was represented before the Debts Recovery Tribunal at Coimbatore. According to the Tribunal, there is no evidence to show that the signature of the petitioner in the documents were forged and the self-serving statement of the petitioner cannot be believed, and having found that the intention of the petitioner is only to overcome the ex parte order, the Tribunal dismissed the applications.

8. The order of the Debts Recovery Tribunal was taken up in before the Debts Recovery Appellate Tribunal, Chennai in M.A. Nos. 12 and 13 of 2007. The Appellate Tribunal, as per order dated 14.3.2007, dismissed the Appeals on various grounds found against the petitioner.

9. We have heard Mr. R. Gandhi, learned Senior Counsel appearing for the petitioner, Thiru Jayaprakash, learned Counsel appearing for the first respondent and Thiru T.R. Rajagopalan, learned Senior Counsel appearing for the fifth respondent.

10. The learned Senior Counsel appearing for the petitioner contended that the whole transaction is a fraud played by the third respondent and the first respondent Bank also knowingly or unknowingly assisted in the fraudulent

transaction. According to the learned Senior Counsel, the petitioner has not executed any Vakalat in favour of any of the Counsel to defend her case and notices issued by the Tribunal were, in fact, received only by the third respondent as the address shown in the cause-title is only the company address of the third respondent and as such, there was no occasion for the petitioner either to appear before the Tribunal or to engage Counsel, as she was not having knowledge both in respect of the transaction's well as in respect of the proceedings before the Debts Recovery Tribunal.

11. The learned Senior Counsel further contended that the order being an ex parte order and as the petitioner has substantial contention in the matter and her property being the sole item mortgaged in favour of the first respondent, the petitioner should have been given an opportunity to contest the case on merits and the reason stated by the Debts Recovery Tribunal as well as the Debts Recovery Appellate Tribunal in dismissing the Appeal appears to be too technical and in fact the Debts Recovery Appellate Tribunal took up the task of comparing the signature of the petitioner as found in the Vakalat and disputed documents and, gave a finding that signatures were, in fact, made by the petitioner, which is unwarranted and therefore, the learned Senior Counsel prayed for setting aside the order of the Tribunal as confirmed by the Appellate Tribunal and consequently prayed for setting aside the ex parte order.

12. Thiru T.R. Rajagopalan, learned Senior Counsel appearing for the purchaser as well as Thiru Jayaprakash, learned Counsel appearing for the first respondent-Bank contended that the story now put forward by the petitioner is clearly the result of an afterthought and she was a party to the entire proceedings and the petitioner was having knowledge about the whole transaction and executed the mortgage deed and, as such, it is too late for the petitioner to contend that everything was done behind her back and without her knowledge and, as such, prayed for dismissing the Writ Petition.

13. We have considered the rival submissions and we have also perused the case records summoned from the Tribunal.

14. The proceedings were originally filed before the Debts Recovery Tribunal-I, Chennai in O.A. No. 277 of 2000 and it is found that Mr. A.

Natarajan along with his juniors appeared for the petitioner herein and in the Vakalat stated to be executed by the petitioner, there is no attestation

of her signature. The very same Counsel has also filed Vakalat for the third respondent and also on behalf of the other contesting respondents. On

1.11.2000 Thiru S.K. Raghunathan, learned Counsel filed a change of Vakalat on behalf of all the respondents in O.A. including the petitioner

herein and there was no attestation of the signature of the petitioner in the said Vakalat also. Subsequently, when the matter was transferred to

Coimbatore, though there is a printed notice available in the case records to show that the parties were directed to appear before the Debts

Recovery Tribunal, Coimbatore on 18.6.2002, no such order is found in the notes papers and there is nothing on record to show that either the

parties or their Counsel were aware of the said direction and, as such, it cannot be said that the parties were aware of the factum of transfer of the

case to Coimbatore and the direction to appear before the Debts Recovery Tribunal, Coimbatore on 18.6.2002. It is also found that neither the

Counsel for the Bank nor other defendants appeared before the Debts Recovery Tribunal on 18.6.2002 which is also a pointer to show that the

parties and their Counsel were not put on notice of the direction to appear before the Tribunal at Coimbatore on 18.6.2002. On 30.8.2002, the

Counsel for the applicant Bank filed proof of service with respect to defendant Nos. 1,2 and 4 and notice sent to the third defendant was returned

with endorsement ""left"" and there was a direction to effect paper publication and to file proof of service on 28.10.2002. Proof of publication was

produced on 28.10.2002.

15. The matter was posted before the Tribunal on 13.12.2002 and since the defendants did not appear, they were set ex parte and the matter was

adjourned to 6.2.2003. On the adjourned date of hearing, Ms. Sobha Devi, representing Thiru N.V. Nagasubramaniam, Counsel for the Bank

was present along with the representatives of Bank. However, none appeared for the defendants and accordingly the matter was adjourned to

9.5.2003. On 9.5.2003 Thiru Kamalakannan representing Thiru N.V. Nagasubramaniam appeared for the Bank along with the representatives of

Bank. It is seen as per the noting of the Presiding Officer that Ms. Sobha Devi, who earlier appeared on behalf of Mr. N.V. Nagasubramaniam,

representing the applicant-Bank appeared for the defendants on 9.5.2003 and the Counsel for the Bank undertook to serve copies of the proof

affidavit to the Counsel for the defendants during the course of the day and accordingly the matter was adjourned to 30.7.2003. On the said date,

nobody appeared for the defendants and, as such, the matter was passed gyetand later it was taken up at 1.30 p.m., at the request of the Counsel

for the Bank.

16. At this stage, Mr. S. Ravi, learned Counsel entered appearance on behalf of Ms Sobha Devi, who is stated to be the Counsel for the

defendants. As per the notes paper, at the request of the Counsel for the defendants, the matter was adjourned to 23.10.2003 for filing counter

proof affidavit. On the date so adjourned, Thiru Veeramani representing Ms. Sobha Devi represented the defendants and time was extended upto

22.1.2004 for filing counter proof affidavit subject to payment of Rs. 500/- as cost. When the matter came up on 22.1.2004, Ms. Sobha Devi,

appeared on behalf of the defendants and since the counter proof affidavit was not filed and the cost was also not paid, the right of the defendants

to file counter was forfeited and their defence was struck off. However, at the request of the Bank, the matter was adjourned to 7.4.2004 for filing

written submission. On 22.7.2004 there was no representation on behalf of the defendants and as the counter proof affidavit was not filed and also

on account of failure to comply with the conditional order dated 22.1.2004, the defendants were called absent and they were set ex parte. The

matter was adjourned to 26.10.2004 and finally the original application was allowed as prayed for.

17. We have also gone through the documents executed on the side of the first respondent Bank in the proceedings before the Debts Recovery

Tribunal. It is seen that the address of the petitioner, who is arrayed as defendant No. 4 in the original application, is shown as Srimathi S.

Ammaniammal, wife of Senniappa Gounder, No. 5, Serivelampalayam, Rakkiyapalayam Taluk, Perundurai Taluk, Periyar District in the records of

the Bank and a copy of the lawyer notice is also found in the documents filed by the Bank and in the said notice also, the very same address

referred above " is found. However, very strangely, in the proceedings before the Debts Recovery Tribunal, the address of the petitioner is shown

as No. 7, K.G. Layout, Tiruppur which is the address of the third respondent herein against whom fraud is alleged by the petitioner. It is not

known as to why the Bank has chosen the address of the third respondent to take process to the petitioner, when they are aware of the residential

address of the petitioner as borne out by their own records.

18. If really there was an attempt on the part of the Bank to obtain an order to recover 4fie amount in the presence of all the defendants, they

should have shown the correct address of the parties as per the records and in fact the entire controversy has arisen because of the wrong address

given by the Bank in the proceedings before the Tribunal. It is seen from the records that some of the notices taken out by the first respondent as

applicant before the Debts Recovery Tribunal to the petitioner as fourth defendant in the original application was served on the address at 7, K.G.

Layout, Tiruppur. Admittedly, the petitioner is not residing at 7, K.G. Layout, Tiruppur, which is the business address of the third respondent even

as per the version of the Bank in the original application and, as such, prima facie we are satisfied with the contention of the petitioner that the

summons taken by the first respondent-Bank was not, in fact, served on the petitioner and it was received by somebody else at the address given

in the notice

19. The Debts Recovery Appellate Tribunal appears to have compared the Signature of the petitioner in the memorandum of Appeal and Vakalat

with that of the disputed signature in the promissory note marked as Ex. A.1, the signature in the overdraft agreement in Ex. A.4 and the signature

in the confirmation letter dated 15.6.1994 in Ex. A.11 and observed that there is no variation between the admitted signature and the disputed

signature. The Appellate Tribunal rejected the Appeal mainly on the ground that the mortgage was executed in the year 1994 and the so-called

complaint with regard to the forged documents were made only in the year 2006 and, as such, according to the Tribunal, the whole story appeared

to be unbelievable. The Appellate Tribunal also found fault with the petitioner for her objection in sending the admitted signature for comparison in

Crime No. 73 of 2006.

20. The order of the Tribunal as well as the Appellate Tribunal proceeded on \$ the basis that all the parties to the transaction were made parties in

the original application before the Debts Recovery Tribunal and, as such, it cannot be said that the petitioner was not given the reasonable of opportunity to contest the matter. For arriving at the said conclusion, the Tribunal as well as the Appellate Tribunal relied on the Vakalat filed on behalf of the petitioner before the Debts Recovery Tribunal, Chennai and the appearance made by the petitioner through Counsel in the said proceedings before the sixth respondent.

21. The Debts Recovery Tribunal as well as the Appellate Tribunal appears to have overlooked certain material aspects with regard to the so-

called appearance of the petitioner through Counsel before the Debts Recovery Tribunal at Chennai as well as at Coimabatore. The Vakalat filed by

Thiru A. Natarajan, Advocate on behalf of the petitioner herein before the Debts Recovery Tribunal, Chennai is found to be not attested. Similarly,

the subsequent change of Vakalat filed by Advocate, Thiru S.K. Raghunathan on behalf of all the defendants including the petitioner is also not

attested by a Counsel. Before the Debts Recovery Tribunal, Coimbatore, the Counsel Ms. Sobha Devi originally appeared for the Bank, of

course, representing the Standing Counsel for the Bank. The said appearance was made on 6.2.2003. On 9.5.2003 the very same Counsel

appears for the defendants. There is no Vakalat filed by Ms. Sobha Devi, representing any of the defendants and, as such, we failed to understand

as to how the Tribunal could arrive at a conclusion that the petitioner was represented by a Counsel before the Debts Recovery Tribunal,

Coimabatore. There is no acknowledgement for receipt of the summons from the Debts Recovery Tribunal taken in the residential address of the

petitioner. Therefore, it is evident that somebody has received the notice on behalf of the petitioner at Door No. 7, K.G. Layout, Tiruppur and

there is no material available to show that the petitioner was aware of the pendency of proceedings before the Tribunal.

22. The Debts Recovery Tribunal also found fault with the petitioner for non-examination of Mr. Ravi, the Counsel who appears to have

represented the petitioner before the Debts Recovery Tribunal. However, there is no Vakalat found in the Debts Recovery Tribunal executed by

the petitioner engaging Thiru Ravi as an Advocate and, as such, when the petitioner has got a consistent case that she has not received notice in the

proceedings and that she has not engaged anybody to appear on her behalf, the petitioner cannot be found fault with for not examining the so-

called Counsel, who is stated to have appeared on behalf of her before the Tribunal. On the other hand, if the first respondent Bank was really

interested in exposing the petitioner, they could have summoned either Ms. Sobha Devi or Mr. Ravi as a witness or at least they could have

obtained their affidavits to show that they were in fact engaged by the petitioner only and her Present attempt to disown her acts are all result of

afterthought, just to overcome the order passed against her.

23. The learned Senior Counsel appearing for the purchaser as well as the learned Counsel appearing for the first respondent Bank vehemently

contended that the Investigating Officer in Crime No. 73 of 2006 filed an application in M.P. No. 5034/2006 before the Magistrate Court

requesting the Court to summon the petitioner to obtain her signature for the purpose of forwarding the same to the handwriting expert for the

purpose of getting expert opinion and the said application was opposed by the petitioner tooth and nail, as the petitioner is afraid of comparing her

signature and, as such, prayed for rejecting the contention of the petitioner. The learned Senior Counsel appearing for the petitioner justified the

said act of the petitioner in opposing the prayer to compare the signature and it is his contention that the objection of the petitioner is only against

the move to compare the signature in the disputed documents with that of her present signature and the petitioner is always ready and willing to

send her admitted signature for comparison.

24. The learned Senior Counsel for the petitioner contended that the auction conducted by the Recovery Officer is also tainted with illegalities

inasmuch as originally the property was sold to the successful bidder, by name Mr. R. Paulraj in the auction conducted on 30.11.2005 and

subsequently he was permitted to withdraw the bid and his earnest money was also returned. Later the property was sold to one K. Duraisamy for

a sum of Rs. 33,07,000/- by declaring him as the successful bidder. The property was subsequently purchased by the fifth respondent from

Duraisamy as per document No. 783 of 2006. According to the learned Senior Counsel, there was no proper notice to the petitioner in the

recovery proceedings also and the property was ultimately given to a person,

even without conducting auction and, as such, the fifth respondent, who is only a subsequent purchaser, is not entitled for any kind of equity. However, we do not propose to deal with the issue relating to the so called illegality in the recovery proceedings as the only issue to be decided is as to whether the ex parte order is liable to be set aside after condoning the delay.

25. The original application filed by the first respondent herein before the Tribunal was in respect of a claim for a sum of Rs. 1,15,81,537.77 and the only property shown in the said application to realise the amount by way of sale is the property belonging to the petitioner. In the original application, the address of the fourth defendant is shown as 7, K.G. Layout, Tiruppur and in fact the said address is mentioned as the office address of the defendants. On the other hand, in all the documents alleged to have been executed by the petitioner, it is only her residential address as referred to in earlier paragraphs, which is found mentioned. Before the Debts Recovery Tribunal at Chennai, written statement of the defendants are also found filed through Thiru S.K. Raghunathan, Advocate and in the said written statement, it is the case of the defendants that their signatures were taken only in blank papers which were subsequently used by the Bank to appear as though a document was executed. It is also the contention of the petitioner that the paper publication was not effected in the Edition where the petitioner is residing and address in the paper publication is also the office address of the third respondent and, as such, there is nothing on record to show that notice was actually served on the petitioner and that she was aware of the proceedings. As such, it cannot be said that there was a wilful act on the part of the petitioner in her non-appearance before the Debts Recovery Tribunal in spite of notice.

26. The point to be decided is as to whether the delay has to be condoned for y the purpose of setting aside the ex parte order so as to enable the petitioner to contest the matter on merits. Though the learned Senior Counsel appearing for the petitioner made elaborate contentions both in respect of the illegality in the procedure adopted by the Tribunal as well as the material irregularity in the auction conducted by the Recovery Officer, we are not inclined to deal with those aspects, as the original application has not been contested on merits, and the final order being an ex

parte one and any observation made herein with regard to the merits of the case would have a barring on the disposal of the case by the Debts

Recovery Tribunal on merits.

27. It is the contention of the Senior Counsel for the petitioner that the petitioner was not aware of the proceedings and only when the auction

purchaser came to the property to take possession of property, the petitioner came to know of the proceedings and, as such, it is only by way of

abundant caution, the petitioner filed the application to condone the delay, as according to the learned Counsel, there is no delay at all, as the

petitioner had no knowledge of the proceedings and the limitation has to be counted only from the date of such knowledge.

28. As per Section 19(21) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any order passed by the Tribunal shall be

communicated to the applicant and the defendant. Admittedly, in this case, the petitioner herein was set ex parte on two occasions, one on

13.12.2002 before filing proof affidavit by the first respondent Bank and on 22.7.2004 due to her failure to file the counter proof affidavit and to

comply with the conditional order passed on earlier occasion. Both these orders prejudicially affected the cause of the petitioner inasmuch as her

defence in the Suit was struck off consequent to the said order. Since no Vakalat was filed by any of the Counsel on her behalf before the Debts

Recovery Tribunal, Coimbatore, it cannot be said that the petitioner was represented by a Counsel and, as such, the, Tribunal should have

communicated a copy of the order to the petitioner.

29. Similarly, the ex parte order dated 26.10.2004 also should have been communicated to the petitioner and there is no material available on

record to show that either the ex parte order dated 22.7.2004 or the final order allowing the original application dated 26.10.2004 were

communicated to the petitioner. Rule 16 of the Debts Recovery Tribunal (Procedure) Rules, 1993 also mandates that every order passed on an

application shall be communicated to the applicant and to the defendant either in person or by registered post free of cost. Therefore, reading the

said rule along with Section 19(21) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 makes the position clear that the

Tribunal is bound to communicate the orders passed by it to the respective

parties by registered post. Hence, unless and until, it is shown that either the order making the petitioner ex parte or the ex parte order dated 26.10.2004 was communicated to the petitioner, it cannot be said that the petitioner was aware of the proceedings. As such, with regard to the application to condone the delay in filing the application to set aside the ex parte order, it has to be seen as to whether, there is any delay at all.

30. When it is found that the order making the petitioner herein ex parte or the final order dated 26.10.2004 were not communicated to her, it cannot be said that she had knowledge about the proceedings. There is another aspect which is very material, so far as the present dispute is concerned, the same being the issue of notice to the petitioner in the address of the third respondent at 7, K.G. Layout, Tiruppur. When there is no evidence to show that the petitioner was actually served notice in the address given in the mortgage deed and other material documents, it cannot be said that the petitioner received notice and appeared before the Tribunal and took part in the proceeding through Counsel culminated in passing an ex parte order ultimately.

31. There is also no record to show that the petitioner executed Vakalat in favour of either Ms. Sobha Devi or in favour of Mr. Ravi to represent her before the Debts Recovery Tribunal, Coimbatore. Even if the Vakalat filed before the Tribunal at Chennai is taken as a valid Vakalat filed on behalf of the petitioner, there is no material to show that consequent to the transfer of the proceeding from Debts " Recovery Tribunal, Chennai to Coimbatore, petitioner or her Counsel were put on notice about the transfer of case and the date of appearance before the Tribunal at Coimbatore. Therefore, it can be safely concluded that there was no occasion for the petitioner to know about the requirement to appear before the Tribunal at Coimbatore, although the main grievance of the petitioner also appears to be the non-receipt of notice even in the original proceedings initiated before the Debts Recovery Tribunal, Chennai.

32. In the case of Sri Naresh Chandra Agarwal Vs. Bank of Baroda and Others, , the Apex Court considered the issue relating to non-service of notice on a party to the proceeding and held thus:

10. From the facts narrated hereinabove, it is clear that the appellant is one of the legal heirs of deceased 8th defendant and an application to bring

him on record was made. Having made such application, it was the bounden duty of the plaintiff as also that of the Court to see that all the legal heirs, the proposed legal representatives (including the appellant), were duly served. It is not in dispute that at the relevant point of time when the notice of application was issued by the Trial Court, the appellant was serving in Gonda District and was not in Pilibhit to which address the notice of substitution was sent. It is not even the case of the plaintiff that at the time of service of notice the appellant in fact was present in the address to which the notice was sent even on a visiting basis. Therefore, it is reasonable to presume that the appellant was not served with the notice of substitution and the endorsement made therein as to the refusal of the service cannot be attributed to any act of the appellant. When a party is sought to be impleaded in a legal proceeding service of notice on such party cannot be a mere formality but should, in fact, be a reality. In the instant case, neither the Trial Court nor the High Court gave any definite finding as to the service of notice on the appellant. The mere fact that when the appellant made an application for setting aside the ex parte decree, he happened to give his permanent residential addresses which incidentally happened to be the address to which notice of substitution was sent by the Court will not ipso facto lead to the conclusion that the notice of substitution was in fact served on the appellant. No inquiry or attempt was made by the trial Court to find out the truth of the fact whether the notice of substitution was in fact served on the appellant. Even the plaintiff in its affidavit filed in opposition to the appellant's application did not deny the fact that the appellant was working in Gonda Dist. at the relevant time.

33. There is a duty cast on the first respondent-Bank to state the address of the borrowers and the guarantors correctly and as per records maintained by the Bank, while filing Suit or O.A. for realisation of the amount due to the Bank. The parties, who availed the loan or guarantors, who deposited the title deeds, must be in the know of things about the action taken by the Bank for realisation of the dues and the Bank is expected to recover the amount only by getting a decree in the manner known to law. When admittedly the residential address of the petitioner is found mentioned in all the documents maintained by the Bank, it is quite surprising to note that the Bank has chosen to mention a different address

in the original application filed before the Debts Recovery Tribunal. The first respondent-Bank has conveniently ignored the fact that the other defendants in the suit being the borrowers do not have any property and they have not mortgaged anything to the Bank and it is only the property of the petitioner which is found mortgaged and, as such, the Bank should have put the petitioner on notice of the proceedings. If the correct address of the petitioner is mentioned in the original application before the Debts Recovery Tribunal, things would have been different.

34. The course of conduct adopted in this case, at least, prima facie shows that somebody has received the notice on behalf of the petitioner in the address shown in the original application and the same was used as if the notice was received by the petitioner. The said fact coupled with the other contention raised by the petitioner that she has not executed any document at all should have been taken seriously by the Tribunal, while considering the application to condone the delay and to set aside the ex parte order. The amount involved in the matter and the ultimate liability on the petitioner to discharge the decree is also relevant factor to be considered by the Tribunal in an application to condone the delay in filing an application to set aside the ex parte order. It is not as if the petitioner will be absolved from the liability in case the ex parte order is set aside, it will only enable the petitioner to put forth her case before the Tribunal and it is for the Tribunal to come to a definite conclusion as to the falsity or otherwise of the contentions raised by the petitioner.

35. The Court or Tribunal while making an order to hear the suit ex parte should "be convinced that the summons was duly served on the said defendant. Unless and until it is shown that the defendant was served in the correct address, it cannot be said that in spite of the notice the said defendant failed to appear before the Court. The issue of notice and making a party ex parte are all important steps in a legal proceeding and as such, the Court or Tribunal cannot mechanically declare a party ex parte without making an attempt to see as to whether the summons was really served. In the present case, there appears to be no such attempt on the part of the Tribunal to confirm the receipt of notice by the petitioner. The Tribunal also failed to note that the correct address of the petitioner was not given in the O.A. as found in the records of the Bank, The Bank also

failed to furnish the correct address of the petitioner and all these contributed for the present controversy.

36. The Apex Court in *G.P. Srivastava Vs. Shri R.K. Raizada and Others*, , considered the question of sufficient cause for non-appearance and

held thus:

The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be

stretched to rely upon there circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed

for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked

and thereby condoned earlier. In a case where the defendant approaches the Court immediately and within the statutory time specified, the

discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the

other side can be compensated by adequate costs and the lis decided on merits.

37. In *Sushil Kumar Sabharwal Vs. Gurpreet Singh and Others*, , the Apex Court reiterated the requirement on the part of the Court to satisfy

itself with regard to the service of summons and held thus:

The provision contained in Order 9 Rule 6, C.P.C., is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff

appears and the defendants does not appear and three courses to be followed by the Court depending on the given situation. The three situations

are: (i) when summons. not duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first

situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the Suit be heard ex

parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense

of being ""proved"" that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit

be heard ex parte. The date appointed for hearing in the Suit for which the defendant is summoned to appear is a significant date of hearing

requiring a conscience application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on

the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex

parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscience

of its obligation cast on it by Order 9 Rule 6, C.P.C., the case would not have proceeded ex parte against the defendant-appellant and a wasteful

period of over eight years would not have been added to the life of this litigation.

38. It is useful to refer the judgment of the Supreme Court in *R.N. Jadi and Brothers and Others Vs. Subhashchandra*, wherein the Apex Court

observed that no party should ordinarily be denied the opportunity of participating in the process of justice dispensation and held thus:

9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent,

but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should

ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of

the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the Court

helpless to meet extraordinary situations in the ends of justice.

10. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

11. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure

should be the handmaid, not the mistress of legal justice, compels consideration of vesting a residuary power in Judges to act *ex debito justitiae*

where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence--processual, as much as substantive [see

Sushil Kumar Sen Vs. State of Bihar,].

12. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or

for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than proceed

according to the altered mode [see *Blyth v. Blyth* 1966 (1) All E.R 524 . A procedural law should not ordinarily be construed as mandatory, the

procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be

followed, [see Shreenath and Another Vs. Rajesh and Others,].

13. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not

the mistress, a lubricant, not a resistant in the administration of justice.

39. The Apex Court in the case of N. Balakrishnan Vs. M. Krishnamurthy, , considered the issue regarding delay in filing the application for setting

aside the ex parte decree and held thus:

9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion

can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion.

Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a

very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of

positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the

exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone

the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to

come to its own finding even untrammelled by the conclusion of the lower Court.

10. ...

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek

their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a

lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux

of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a lifespan must be fixed

for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is

thus founded on public policy. It is enshrined in the maxim interest republicae up sit finis litium (it is for general welfare that a period be put to

litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics

but seek their remedy promptly. The Idea is that every legal remedy must be kept alive for a legislatively fixed period or time.

12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that

delay in approaching the Court is always deliberate. This Court has held that the words "sufficient cause" u/s 5 of the Limitation Act should receive

a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari and Others*, and *The State of West Bengal*

Vs. The Administrator, Howrah Municipality and Others, .

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to

turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory

strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by

the party deliberately to gain time, then the Court should lean against acceptance of the explanation. While condoning the delay, the Court should

not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses.

40. In *Ram Nath Sao v. Gobardhan Sao* AIR 2002 SC 1201, the Apex Court held thus:

Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any

other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide

is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause or not will be dependent upon facts of

each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing

is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the" petition by a slipshod order in

over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning the delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

41. The Apex Court in *State of Nagaland Vs. Lipok AO and Others*, , considered the earlier judgments regarding "sufficient cause" for condoning the delay and summarised the legal position thus:

8. The proof of sufficient cause is a condition precedent for exercise of the extraordinary restriction (sic discretion) vested in the Court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In *N. Balakrishnan Vs. M. Krishnamurthy*, , it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the Court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

9. What constitutes sufficient cause cannot be laid down by hard and fast rules. In *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, ,

this Court held that discretion given by Section 5 should not be defined or crystallized so as to convert a discretionary matter into a rigid rule of

law. The expression "sufficient cause" should receive a liberal construction. In *Brij Indar Singh v. Kanshi Ram* AIR 1917 PC 156 : 1917 (6) LW

592 , it was observed that true guide for a Court to exercise the discretion u/s 5 is whether the appellant acted with reasonable diligence in

prosecuting the Appeal. In *Shakuntala Devi Jain Vs. Kuntal Kumari and Others* , , a Bench of three Judges had held that unless want of bona fides

of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any

delay cannot be refused to be condoned.

10. In *Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and Others* , , which is a case of negligence of the Counsel which misled a

litigant into delayed pursuit of his remedy, the default in delay was condoned. In *Lala Mata Din v. A. Narayanan* 1969 (2) SCC 770, this Court

had held that there is no general proposition that mistake of Counsel by itself is always sufficient cause for condonation of delay. It is always a

question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake

committed by the Counsel was bona fide and it was not tainted by any mala fide motive.

11. In *State of Kerala v. E.K. Kuriyipe and Ors.* , it was held that whether or not there is sufficient cause for condonation of delay is a question of

fact dependent upon the facts and circumstances of the particular case. In *Milavi Devi v. Dina Nath* 1982 (3) SCC 366, it was held that the

appellant had sufficient cause for not filing the Appeal within the period of limitation. This Court under Article 136 can reassess the ground and in

appropriate case set aside the Order made by the-High Court or the Tribunal and remit the matter for hearing on merits. It was accordingly

allowed, delay was condoned and the case was remitted for decision on merit.

12. In *O.P. Kathpalia Vs. Lakhmir Singh (Dead) and Others* , , a Bench of three Judges had held that if the refusal to condone the delay results in

grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In *Collector, Land Acquisition,*

Anantnag and Another Vs. Mst. Katiji and Others , , a Bench of two Judges

considered the question of limitation in an Appeal filed by the State and held that Section 5 was enacted in Order to enable the Court to do substantial justice to the parties by disposing of the matters on merit. The expression "sufficient cause" is adequately elastic to enable the Court to apply the law in a meaningful manner which sub serves the ends of justice—½that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. This Court reiterated that the expression "every day"s delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common-sense, pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of anon-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. Judiciary is not respect on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the Appeal.

42. The Debts Recovery Appellate Tribunal took the task of comparing the signature of the petitioner and observed that there is no variation between the admitted signature and the disputed signature. When there is a serious dispute with regard to the signature, it is always advisable for the Court or Tribunal to refer the matter to an expert. Of course, Section 73 of the Indian Evidence Act permits the Court to compare the signature. However in cases like the present one, where the signatures are found in so many documents, and execution of mortgage itself is in dispute, it is better to send those documents for expert opinion.

43. In O. Bharatan Vs. K. Sudhakaran and another, , the Apex Court, relying on an earlier judgment reported in The State (Delhi Administration) Vs. Pali Ram, , held that it is not advisable that a Judge should take upon himself

the task of comparing the admitted handwriting with the disputed

one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.

44. Even though Section 73 of the Indian Evidence Act permits the Court to compare the disputed signatures with that of the admitted signatures,

such signature can be compared only with admitted signatures available which are prior in point of time The Debts Recovery Appellate Tribunal

did not compare the signature with the admitted signatures which were contemporaneous and therefore, the learned Senior Counsel appearing for

the petitioner is right in his submission that there may be some difference in the signatures of a person by lapse of time and, as such, the petitioner

was justified in objecting to the comparison of her signatures in the disputed documents with that of her present signatures.

45. In view of our finding that the Debts Recovery Tribunal has not complied with the requirements of the Debts Recovery Tribunal Act and the

rules made there under with respect to furnishing the copies of the order to the parties, it cannot be said that there is exorbitant delay in filing the

application to set aside the ex parte order. There is no material available on record to show that the petitioner was aware of the ex parte order

passed against her which necessitates filing an application to condone the delay. Therefore, we do not find any reason to sustain, the order of the

Debts Recovery Tribunal, as confirmed by the order of the Debts Recovery Appellate Tribunal.

46. Accordingly, both the writ petitions are allowed as indicated above. The order of the seventh respondent dated 14.3.2007 in MA. No. 12 of

2007 and M.A. No. 13 of 2007 confirming the order of the sixth respondent dated 4.1.2006 in I.A. No. 504 of 2006 and I.A. No. 505 of 2006

respectively in T.A. No. 729 of 2002 are set aside and the application filed by the petitioner to condone the delay in preferring the application to

set aside the ex parte order is allowed. The sixth respondent shall consider the application to set aside the ex parte order on merits and in case the

Tribunal is of the view that, for deciding the application to set aside the ex parte order on merits, the signature of the petitioner has to be sent for

expert opinion, the Tribunal would be at liberty to send the disputed signatures and the admitted signatures which are contemporaneous. It is

needless to mention that none of the observations contained in this order or the findings of the seventh respondent shall be construed to be an expression of opinion on the merits of the case and the Debts Recovery Tribunal is at liberty to decide the application to set aside the ex parte order on its own merits and as per law. No costs. Consequently, the connected miscellaneous petition is closed.