

(2009) 08 MAD CK 0213

In the Madras High Court

Case No : C.R.P. (PD) No. 1659 of 2009 and M.P. No. 1 of 2009

Bhaskaran

APPELLANT

Vs

R. Annadurai and The Chairman Tamil Nadu Housing Board

RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2009) 08 MAD CK 0213

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : V. Lakshminarayanan, for the Appellant; S.V. Jayaraman for A. Chenchurama Reddy, for R1, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—This civil revision petition is directed against the order dated 10.4.2008 in I.A. No. 17104 of 2007 in O.S. No. 2171 of 2003 on the file of VII Assistant City Civil Court, Chennai, whereby and whereunder the application preferred by the revision petitioner to set aside the ex parte decree was dismissed.

2. The suit in O.S. No. 2171 of 2003 was preferred by the first respondent against the revision petitioner and Tamil Nadu Housing Board with the following reliefs.

(i) Directing the first defendant herein to obtain a sale deed with respect to the schedule mentioned property bearing door No. Q-217, M.M.D.A. Colony, Arumbakkam, Chennai-106 from the second defendant and thereafter execute the sale deed with respect to the schedule mentioned property in favour of the plaintiff within one month.

(ii) Directing the second defendant to execute the sale deed with respect to the schedule mentioned land in favour of the plaintiff, if the first defendant fails to obtain the sale deed in his favour with respect to the schedule mentioned land.

(iii) For a permanent injunction restraining the first defendant, his servants, agents and his men from interfering with the peaceful possession and enjoyment of the schedule mentioned property by the plaintiff.

3. In the plaint in O.S. No. 2171 of 2003 it was the contention of the first respondent that he has entered into an agreement with the revision petitioner on 5.12.1985 in and by which, the suit property was agreed to be sold to him for a total consideration of Rs. 35,000/-. The entire amount was paid at the time of execution of the document itself and the first respondent was put in possession of the suit property. However there was no follow up action on the side of the petitioner to get the sale deed executed from the Tamil Nadu Housing Board in his favour. Therefore he was constrained to file the suit.

4. The suit was decreed ex parte on account of the non appearance of the revision petitioner. As per the judgment and decree dated 22.3.2006 the learned trial Judge has granted the relief as prayed for.

5. Subsequently the petitioner filed an application to set aside the ex parte decree after condoning the delay of 93 days.

6. In the affidavit filed in support of the application u/s 5 of the Limitation Act, the revision petitioner contended that he was not served with the summons in the suit in O.S. No. 2171 of 2003 and as such he was not in a position to appear before the Court. According to the petitioner he has already obtained a decree against the brother of the first respondent in O.S. No. 4728 of 1999. The said suit was for a decree of declaration and recovery of possession. Subsequent to the said decree, he also filed E.P. No. 1283 of 2005 to execute the said decree and it was only during the pendency of the said execution proceedings before the IX Assistant Judge, City Civil Court, Chennai he came to know of the ex parte decree passed in O.S. No. 2171 of 2003. Immediately he filed the application to condone the delay and to get the ex parte decree set aside.

7. The application was opposed by the first respondent by filing counter. According to the first respondent, the application was filed in July, 2006 itself. However the petitioner did not pursue the said application for more than a year and ultimately served notice to the first respondent through his counsel only on 24.10.2007. The first respondent also contended that he has filed an application in E.P. No. 1283 of 2005 to implead him as a party. Subsequently E.P. No. 1283 was not pressed and accordingly it was dismissed on 28.7.2006. Therefore it was the contention of the first respondent that the revision petitioner was in the know of things at an earlier point of time and as such there was no justification in filing an application to condone the delay.

8. The learned trial Judge found that summons was not served on the revision petitioner. However publication was taken subsequently by showing the very same address which is now found in the application filed by the petitioner to condone the delay. According to the learned trial Judge, the petitioner was informed as early as on 7.4.2006 about the ex parte decree and as such he

should have filed an application immediately. However the application was filed only after three months and therefore no sufficient cause was made out by the revision petitioner to condone the delay. Accordingly the application was dismissed. It is the said order which is impugned in the civil revision petition.

9. The learned Counsel for the revision petitioner contended that the first respondent has filed a suit in O.S. No. 2171 of 2003 only after the disposal of the suit filed by the petitioner in O.S. No. 4728 of 1999 against his brother. The petitioner was able to get a decree in the said suit on 25.9.2002 and an Execution Petition was also filed to execute the said decree. It was only to defeat the execution of the said decree, false agreement was created, on the basis of which a false suit was laid before the trial court by the first respondent. According to the learned Counsel, no notice was served on the petitioner as well as his counsel with respect to the suit in O.S. No. 2171 of 2003. The notice referred to was only a notice given to the counsel in E.P. No. 1283 of 2005 and as such the said notice served on the counsel in E.P. No. 1283 of 2005 cannot be termed to be a notice to the petitioner with respect to the suit in O.S. No. 2171 of 2003. The learned Counsel also justified the delay in filing the application, as according to him the petitioner was outside the state during the material time and admittedly no summons was served on him.

10. The learned Senior Counsel appearing on behalf of the first respondent submitted that an ex parte decree was passed as early as on 22.3.2006 and in effect it was not an ex parte decree as it was contested by the second respondent. The petitioner also received notice about the ex parte decree as early as on 7.4.2006. However he has not chosen to file an application at the earliest point of time. The earlier application filed by him was dismissed on 10.4.2008. However very strangely the petitioner sold the property to a third party on 21.5.2008. Therefore the sale was made during the currency of the decree passed against the petitioner and as such while deciding the application of the present nature the conduct of the party has also to be taken into consideration. In such circumstances the learned Senior Counsel justified the order passed by the trial court.

11. The petitioner was allotted an area of 1500 sq.ft. of land in M.M.D.A. Colony, Arumbakkam by the second respondent. The petitioner has filed a suit against one Selvaraj, who is stated to be the brother of the first respondent. The said suit was for a decree of declaration and possession. The suit was decreed after contest and to execute the said decree dated 25.9.2002 the petitioner appears to have filed E.P. No. 1283 of 2005.

12. Subsequently, the first respondent filed the present suit in O.S. No. 2171 of 2003. In the said suit, notice was not served on the revision petitioner. Therefore publication was taken and it was only by way of the said substituted service, notice was stated to have been served. In effect, it was a deemed service on account of publication. It was not the case of the first respondent that notice was served on the revision petitioner or he was not receiving the summons in spite of

the knowledge about the pendency of the suit. The petitioner has stated in his affidavit filed in support of the application that for the first time, the counsel for the first respondent served notice to his counsel on 7.5.2006 informing about the decree obtained in O.S. No. 2171 of 2003. However the said counsel was not appearing for the petitioner in O.S. No. 2171 of 2003 and as such the notice issued to the counsel in another proceedings cannot be taken as the notice received by the petitioner, unless it can be demonstrated that the said information was immediately conveyed to the revision petitioner.

13. In the affidavit it was expressly stated that the petitioner was away from Chennai for a period of two months and it was only when he came to Chennai in the month of June, 2006, he was made known about the decree passed in O.S. No. 2171 of 2003. Immediately he filed an application to set aside the ex parte decree with an application to condone the delay.

14. The trial Court was mainly carried away by the fact that the petitioner has sold the property subsequently to a third party on 21.5.2008. The trial Court was also of the view that the petitioner had the knowledge as early as on 7.4.2006 through his counsel and as such there was no justification to condone the delay.

15. The notice stated to have been given to the counsel for the petitioner on 7.4.2006 in E.P. No. 1283 of 2005 cannot be termed as a notice received by the revision petitioner. The learned Counsel for the petitioner in E.P. No. 1283 of 2005 was not authorised to take notice in respect of a decree in O.S. No. 2171 of 2003 as the said counsel has no vakalath in the said suit. It was also not the case of the first respondent that the counsel has intimated the ex parte decree to the revision petitioner on a particular day. In fact the notice given to the counsel on 7.4.2006, was stated in the affidavit by none other than the petitioner himself. The learned Counsel for the petitioner was perfectly correct in his submission that in case the intention of the petitioner was to suppress the material particulars, he would not have disclosed about the information received by his counsel on 7.4.2006.

16. The other reason which appears to have weighed with the trial court and which was vehemently argued by the learned Senior Counsel pertains to the sale made by the revision petitioner subsequent to the decree. The property was sold to a third party as per sale deed dated 21.5.2008. According to the learned Senior Counsel the petitioner has no subsisting interest in the suit property which entitled him to maintain the application to set aside the ex parte decree.

17. The ex parte decree was passed only against the revision petitioner. Subsequent assignment of the property would in no way take away the right given to the petitioner to file an application to set aside the ex parte decree or to condone the delay in filing the said application.

18. While considering an application to condone the delay, the court was concerned only about the explanation given by the party. The petitioner has detailed the reasons for the delay in filing the application. In fact it was nobody's

case that the petitioner was in the know of things and he was evading summons. Admittedly summons was not served on the petitioner and it was deemed to have been served by way of substituted service. The petitioner has also stated about the information which was received by his counsel in the connected Execution proceedings and the receipt of the said information by him after his arrival in Chennai. However the court has taken a very technical view of the matter and rejected the application.

19. When a litigant approaches the court with an application to condone the delay, the court is expected to consider the delay as well as the explanation given for such delay. The number of days delay is immaterial. The explanation given by the party to condone the delay alone is material.

THE LAW:

20. "Sufficient cause" in the light of Section 5 of the Limitation Act was considered by the Supreme Court in N. Balakrishnan Vs. M. Krishnamurthy, , wherein it was 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. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

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 reipublicae up sit finis litium (it is for the 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 of 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 v. Kuntal Kumari and State of W.B. v. Administrator, Howrah Municipality*.

21. In *R.B. Ramlingam Vs. R.B. Bhvaneswari*, the Supreme Court again interpreted the word "sufficient cause" thus:

The test of "Sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the court as such.

22. In *Krishnamoorthy's* case cited supra it was observed by the Supreme Court that in every case of delay there can be some lapse on the part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides and it is not put forth as a part of dilatory strategy, the court must show utmost consideration to the suitor. But when there is a 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.

23. In the decision reported in *R.N. Jadi and Brothers and Others Vs. Subhashchandra*, , the Supreme Court held thus:

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 or 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.

24. The petitioner has explained the delay in a satisfactory manner and there was nothing to suspect his bonafides. The learned trial Judge was not correct in his finding that the petitioner had knowledge about the ex parte decree as early as on 7.4.2006. The Execution Petition in E.P. No. 1283 of 2005 was for a different purpose and as such notice received by the counsel in the said execution petition cannot be construed to be a notice received by the revision petitioner unless there were materials to show that the information was given to the petitioner immediately by his counsel. In any case, nothing was indicated in the order to the effect that the counsel for the petitioner in E.P. No. 1283 of 2005 was authorised to take notice on behalf of the petitioner in all the other proceedings or he was informed about the notice which he has received on 7.4.2006 to the revision petitioner at an early point of time.

25. In such circumstances, I am of the view that the learned trial Judge was not correct in his finding that no sufficient cause was made out by the revision petitioner to set aside the ex parte decree after condoning the delay.

26. In the result, the order dated 10.4.2008 in I.A. No. 17104 of 2007 is set aside and the civil revision petition is allowed. Consequently the connected MP is closed. No costs.