

(2006) 11 MAD CK 0277

In the Madras High Court

Case No : Civil Revision Petition (NPD) No's. 1178, 1606 and 1646 of 2002

Kaliammal, Ardhanari, Valliammal and Kottathooran

APPELLANT

Vs

Sundharammal and Ramalingam
Ramalingam Vs
Sundharammal and Others

RESPONDENT

Date of Decision : 13-11-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 97
Limitation Act, 1963 — Section 5

Citation : (2006) 5 CTC 822 : (2007) 1 MLJ 577

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : N. Umapathy, for Silambanan, in C.R.P. Nos. 1178/02 and 35/2003 and A. Asha, for Sarvabhuauman Associates C.R.P. Nos. 1646/02 and 199/2003, for the Appellant; A. Asha, for Sarvabhuauman Associates for 2nd Respondent in C.R.P. No. 35/2003 and S. Baskaran, for 1st Respondent in C.R.P. Nos. 1178 and 1646/2003 and C.R.P. No. 199/2003, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Civil Revision Petition (NPD) Nos. 1178, 1646/2002 are directed against the order of delivery of possession, made in E.P. No. 66/1998 on the file of District Munsif Court, Paramathy.

2. Civil Revision Petition (NPD) Nos. 35 and 199/2003 are directed against the Order of dismissal made in I.A. No. 11/ 1995, declining to condone the delay of 32 days in filing the Petition to set aside the exparte Preliminary Decree.

3. Since common points for determination arise in these Revision Petitions, all the Revision Petitions were taken up together and disposed of by this common Order. For convenience, the parties are referred to as in their original rank in the suit.

4. The Suit and execution proceedings are fraught with several rounds of Interlocutory Applications in the lower Court. For proper appreciation of the

points raised and for disposal of these Revision Petitions, it is necessary to refer to the various proceedings in the trial Court and Executing Court.

5. The Respondent/Plaintiff filed O.S. No. 152/1992 on the file of the Sub Court, Namakkal for partition. Exparte Preliminary Decree was passed on 04.01.1995.

I.A. No. 11/1995 and I.A. No. 12/1995:

6. Defendants have filed the Petitions I.A. No. 264/95 and 265/95, Sub Court, Namakkal to condone the delay of 32 days and the Petition to set aside the exparte Preliminary Decree. Those applications were transferred to District Munsif Court, Paramathy and renumbered as I.A. Nos. 11 and 12 of 1995. Those applications were dismissed for default on 13.11.1995.

I.A. No. 1192/1996:

7. Plaintiff has filed I.A. No. 1192/2006 for passing the Final Decree. On 21.11.1997, Final Decree was passed. No appeal was filed against the Final Decree. Thereafter, the Plaintiff has filed E.P. No. 66/1998 for delivery of possession as per the Final Decree.

8. Defendants have filed E.A. Nos. 5/1999, 6/1999 and 7/1999 - applications under Order 21 Rule 106 CPC to set aside the exparte order passed against them in the Execution Proceedings. Applications R.E.A. Nos. 7/1999 and 9/1999 were allowed and exparte Order in the Execution Proceedings passed against the Defendants was set side. After hearing both parties, holding that the Defendants have not filed any appeal against Final Decree, the Court has ordered delivery of possession. Challenging that Order made in E.P. No. 66/ 1998, the Revision Petitioners have filed C.R.P. No. 1178/2002 and C.R.P. No. 1646/2002.

I.A. No. 573/1999:

9. The Defendants were served in the Execution Proceedings. At that time, the Defendants have filed I.A. No. 573/1999 to condone the delay of 1160 days in filing the Petition in restoring I.A. No. 11/1995. That application was allowed and the delay was condoned. Thereafter, the application for restoration was numbered as I.A. No. 456/2001 and the same was allowed on 20.03.2002, ordering restoration of I.A. No. 11/1995. After restoration, I.A. No. 11/1995 was dismissed by the Order dated 09.09.2002, which is challenged in C.R.P. Nos. 35 and 199 of 2003.

10. I.A. Nos. 11 and 12 of 1995 were dismissed by the impugned order mainly on the grounds - firstly that the Petitioners had not taken steps to implead the legal representatives of the Petitioners 1 to 8 and the Petition as against 1 to 8 abated. Secondly, it was observed that the Defendants have not produced any letter sent by their counsel informing about the date of hearing nor adduced any oral evidence.

11. Assailing the impugned order, the learned Counsel for the Revision Petitioners - Mr. Umapathy has submitted that having allowed I.A. No. 573/1999 and I.A.

No. 456/2001, there was no point in dismissing the I.A. No. 11/1995. It was further submitted that when I.A. Nos. 11 and 12 of 1995 were pending under Order 21 Rule 26 CPC, the Executing Court ought to have stayed the execution and erred in hurriedly passing the Order of Delivery of Possession. In support of his contention, the learned Counsel placed reliance upon 1999 (1) MLJ 747. It was further urged that since the Suit relates to partition, opportunity is to be afforded to the Revision Petitioners.

12. The learned Counsel Ms. Asha has submitted that there was only a short delay of 32 days and there was no reason to refuse condonation of that short range of delay. It was further submitted that the Suit being a partition suit, to advance substantial justice, an opportunity ought to have been given to the Revision Petitioners. Order of delivery was assailed contending that it was hastily passed, though I.A. No. 11/1995 was pending.

13. The learned Counsel for the Respondent submitted that when there is no challenge to the Final Decree, the application filed to set aside the Preliminary Decree is not sustainable. Drawing the attention of the court to the various proceedings, the learned Counsel for the Respondent/ Plaintiff submitted that the Defendants deliberately remained *ex parte* in all the proceedings and in the execution proceedings, the Defendants are only trying to protract the proceedings by filing one application or another.

14. In consideration of the submissions made and the materials on record, the following points arise for consideration in this Revision Petition:

(1) Whether the Order of delivery in E.P. No. 66/1998 is vitiated for not affording opportunity to the Revision Petitioners ?;

(ii) Whether there was improper exercise of discretion in dismissing I.A. Nos. 11 and 12 of 1995?

15. Preliminary Decree for partition was passed on 04.01.1995. Revision Petitioners appear to have taken vigorous steps only after Execution Petition was filed and delivery was ordered. It is to be noted that Final Decree was passed on 21.11.1997. Earlier, in Sub Court Namakkal, Section 5 Petition - I.A. No. 264/1995 and Order 9 Rule 13 Application - I.A. No. 265/1995 were filed and the applications were transferred to District Munsif Court, Paramathi and renumbered as I.A. Nos. 11/1995 and 12/1995. I.A. No. 11/1995 was dismissed for default on 13.11.1995. Thereafter, the Revision Petitioners have not taken steps. It is to be noted that I.A. Nos. 11 and 12 of 1995 were only relating to the Preliminary Decree, which the Revision Petitioners seek to set aside. Final Decree passed on 21.11.1997 has not been challenged. Section 97 CPC lays down omission to appeal from Preliminary Decree within the period of limitation precludes a party, disputing its correctness or raising any objection to it in appeal which may be preferred from the Final Decree. Preliminary Decree in a mortgage or partition suit embodies the final decision of the Court. Thereafter, final Decree has been passed which has become final. The case has also reached further stage by filing

E.P. Delivery was also ordered on 05.07.2002.

16. Only at the execution stage, the Revision Petitioners seek to challenge the Preliminary Decree. Sufficiency of cause is a condition precedent for exercise of discretionary jurisdiction for condoning the delay. The range of delay is no matter. But acceptability of the explanation is the only criterion. Some times, delay of short range may be uncondonable due to want of acceptable explanation. Whereas in certain other cases, delay of long range can be condoned, as the explanation therefore is satisfactory. Where there is reasonable ground to think that the delay was occasioned by the party, deliberately to gain time, then the Court should not show indulgence in accepting the explanation.

17. On behalf of the Revision Petitioners, the main point urged is that delay in filing application under Order 9 Rule 13 CPC was only 32 days, which is a short range of delay, and it ought to have been condoned by the trial Court. This contention has to be considered in the light of the conduct of the parties. I.A. No. 11/1995 was dismissed for default on 13.11.1995 and the Revision Petitioners/Defendants have not chosen to take care of the matter. It is to be noted that they have filed elaborate Written Statement and were hotly contesting the suit. While so, the Revision Petitioners ought to have been vigilant in pursuing the matter, particularly I.A. No. 11/1995, which they filed to set aside Preliminary Decree. Even at the stage of Final Decree, the Revision Petitioners did not appear. Only when notice was served upon them in the Execution proceedings, they have chosen to take further steps, which is suggestive of gross negligence on the part of the Defendant.

18. Though Notice was served in the Execution Proceedings, delivery was ordered on 06.01.1999. Thereafter, they have filed number of applications. Various applications R.E.A. Nos. 5 to 7/1999 were filed to set aside the exparte Order passed against them in the Execution Proceedings. The Revision Petitioners also filed I.A. No. 573/1999 to condone the delay of 1160 days in filing the Petition to restore I.A. No. 11/1995. It was allowed on 23.07.2001. Application to restore I.A. No. 11/1995 i.e. I.A. No. 456/2001 was allowed on 20.03.2002 on payment of cost of Rs. 150/-. The main contention urged is that when I.A. No. 573/1999 and I.A. No. 456 /2001 were allowed mainly for the purpose of granting opportunity to the Revision Petitioners, the Court ought to have allowed I.A. No. 11/1995 also. This contention does not merit acceptance. In I.A. No. 573/1999 and I.A. No. 456/2001, scope of enquiry was to consider whether to condone the delay in filing the restoration application. Allowing of I.A. Nos. 573/1999 and 456/2001, is not a passport for favourably considering the application I.A. No. 11/1995. While hearing I.A. No. 11/1995, the Court has considered whether there was reasonable ground for the delay and whether there was bonafide on the part of the Revision Petitioners. The short range of delay of 32 days does not stand in isolation; but coupled with subsequent inaction for a long time. Revision Petitioners had also not produced the letter sent by their counsel informing about the hearing. In consideration of the same,

the learned Subordinate Judge has rightly refused to condone the delay.

19. As noted earlier, Final Decree has been passed and in the E.P., delivery of possession was also ordered on 05.07.2002. If I.A. No. 11/1995 is to be allowed at this stage, it would unsettle the various proceedings of the Court. Interest of justice and enquiry requires that there must be an end to the litigation. Or otherwise, the right accrued to the opposite party would be unsettled by the uncertainties of the litigation.

20. The learned Counsel for the Revision Petitioners contended that to advance substantial justice, the Revision Petitioners ought to be given an opportunity. While considering this plea, the right accrued to the other side ought to be kept in view. When there is deliberate delay, the Petitioners cannot be heard to plead that substantial justice deserve to be preferred as against technical consideration.

21. In 2003 (1) LW 585 [Sundar Gnanaolivu rep. by his Power of Attorney Agent v. Rajendran Gnanavolivy rep. by its Power of Attorney Agent], a Division Bench of this Court has held as under:

14.A. In yet another Division Bench Judgment reported in 1990(10 LLN 457 [Tamil Nadu Mercantile Bank Ltd. Tuticorin v. Appelalte Authority under the Tamil Nadu Shops and Establishments Act, Madurai and Anr.], the principles relating to rule of limitation have been discussed and the legal position has been stated by His Lordship Mr. Justice M. Srinivasan as he then was, in paragraphs 14 and 17 which read as under:

14. ... If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that the records would not be relevant as there was no further proceeding in the matter. Hence to view a matter of condonation of delay with a presupposition that no prejudice will be caused by the condonation of delay to the Respondent in that application will be fallacious. In our view, each case has to be decided on the facts and circumstances of the case. Length of the delay is a relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed periods of limitation.

17. ... Once it is held that a party has lost his right to have the matter considered on merits because of his own inaction for a long time, it cannot be presumed to be non-deliberate delay, and in such circumstances of the case, he cannot be heard to plead that substantial justice deserved to be preferred as against technical considerations. We are of the view that the question of limitation is not merely a technical consideration. Rules of limitation are based on principles of sound public policy and principles of equity. Is a litigant liable to have a Damocles" sword hanging over his head indefinitely for a period to be determined at the whims and fancies of he opponent ?

The above decision squarely applies to the case on hand. This Court cannot lose sight of the right accrued to the opposite party.

22. Contending that while the application I.A. No. 11/1995 was pending, the Court ought not to have ordered delivery and must have stayed further proceedings of the execution, on behalf of the Revision Petitioners, reliance was passed upon M. Nazruddin Vs. The Idol of Arulmigu Navaneedha Krishnasami and Durgai Amman Vahaira Temples and Others, . In the said case, it was held as under:

14. ... Therefore the trial Court or the execution Court must grant stay for execution of exparte Decree for a limited period till the disposal of the applications filed u/s 5 of the Limitation Act and under Order 9 Rule 13 of CPC. In my view Order 21 Rule 26 of CPC will empower the execution Court or the transferor Court to grant stay of execution of exparte Decree for a reasonable time so as to enable the Judgment Debtor to get further orders from the trial Court either on the applications u/s 5 of the Limitation Act or under Order 9, Rule 13 CPC.

In the said case, the Court has directed the Execution Court to recall the Delivery Warrant till the disposal of the Petition u/s 5 of the Limitation Act and Order 9 Rule 13 CPC. The case on hand stands on a different footing. After Preliminary Decree, Final Decree was passed and Plaintiff's 1/6th share was also allotted. It was only thereafter, delivery of possession was ordered. After several years, the proceedings cannot be reopened much to the prejudice of the Respondents.

23. Contention that exparte Preliminary Decree would cause serious prejudice to the Petitioners has no force. The Suit is for partition. The parties are related as under:

Vellaiya Gounder Sengoda Gounder | | Subbanna Gounder Palaniappa Gounder [D-3] [D-2] | Ramalingam Goudner [D-4]

Kotta Gounder | ----- | | Kondappa Gounder Seerala Gounder [D-1] = Sundammal [Plaintiff]

The other Defendants are their descendants.

24. The Respondent being the widow of Seerala Gounder, her lawful 1/6th share has been decreed. The Revision Petitioners cannot be heard to contend that the Decree of the Respondents' lawful share has caused serious prejudice to them.

25. In consideration of the facts and circumstances of the case, and the inaction on the part of the Revision Petitioners, the lower Court has declined to condone the delay. When the trial Court has exercised its discretion refusing to condone the delay, the revisional Court would not interfere with it, unless it is perverse or illogical. The impugned order does not suffer from any perversity or serious infirmity calling for interference.

26. For the foregoing reasons, the order dated 03.06.2002, made in E.P. No.

66/1998 in O.S. No. 376/1996; and order dated 09.09.2002, made in I.A. No. 11/1995 in O.S. No. 376 /1996 on the file of the District Munsif cum Judicial Magistrate, Paramathy, Namakkal District, are confirmed and these revisions are dismissed. No costs.