

(2008) 10 KL CK 0030

In the High Court Of Kerala

Case No : C.R.P. No"s. 1474, 1475 and 1476 of 2004

Kshemanidhi Kuries and Loans (P) Ltd.

APPELLANT

Vs

Ashokan and Others

RESPONDENT

Date of Decision : 24-10-2008

Acts Referred:

Civil Procedure Code Amendment Act, 2002 — Section 32(2), 97(3)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 115, 151
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2009) 1 CivCC 148 : (2008) 4 ILR (Ker) 499 : (2008) 3 KLJ 692 :
(2008) 4 KLT 744 : (2009) 5 RCR(Civil) 362

Hon'ble Judges : Harun-UI-Rashid, J

Bench : Single Bench

Advocate : N. Subramaniam and M.S. Narayanan, for the Appellant; Renjith
Thampan and P.A. Anitha, for the Respondent

Judgement

Harun-UI-Rashid, J.—The short, but important questions of law relating to the scope and ambit of the power of review of the civil court under the CPC and the applicability of Section 5 of the Limitation Act, 1963 to review an order passed by the execution court are involved in these revisions.

2. The common order passed by the Principal Munsiff's Court, Irinjalakuda in E.A. Nos. 1843, 1844 and 1857 of 2001 in E.P. No. 1243 of 2000 in O.S. No. 239 of 1997 is under challenge in these revisions. The decree holder in the said suit is the petitioner in the above interlocutory applications and the revision petitioner herein. E.A. No. 1844 of 2001 is an application for review of the order dated 11.9.2001 in E.A. No. 335 of 2001. E.A. No. 1843 of 2001 is an application filed, u/s 5 of the Limitation Act to condone the delay of 8 days in filings E.A. No. 1844 of 2001. E.A. No. 1857 of 2001 is an application to review the order dated 11.9.2001 to set aside the sale. By the impugned order, the court below dismissed the applications.

3. The properties in depute were sold in court auction on 13.2.2001 in E.P. No. 1243 of 2000 the second respondent herein purchased the property in court auction for an amount of Rs. 50,000/-. On 16.2.2001, within three days of the auction, the petitioner filed E.A. 335 of 2001 to set aside the sale. The execution court posted the said application to 11.9.2001 for evidence. It is, the case of the petitioner that Sri. U.A. Chackunny, the Counsel engaged by the petitioner was hospitalized due to old age illness and hence he could not appear before the to court which resulted in the dismissal of E.A. No. 335 of 2001 on 11.9.2001. On coming to know about the order of dismissal of E.A. No. 335 of 2001, the petitioner filed E.A. No. 1844 of 2001 under Order XLVII Rule 1 C.P.C. to review the order of dismissal. Along with the above application, the petitioner also filed E.A. No. 1843 of 2001 u/s 5 of the Limitation Act to condone the delay of 8 days in filing E.A. No. 1844 of 2001. Another application, E.A. No. 1857 of 2001 was filed u/s 151 C.P.C. to review the order confirming the sale and to restore the application to set aside the sale. It is not necessary to state the circumstances under which the petitioner approached this Court by filing O.P. No. 5923 of 2002 and the orders passed therein since those are not necessary for the purpose of deciding the questions involved in these revisions.

4. The sum and substance of E.A. No. 1844 of 2001 is as follows: The petitioner filed E.A. No. 335 of 2001 to set aside the sale. The second respondent herein, who is the auction purchaser, in collusion with the other respondents, purchased the petitioner schedule property for an amount of Rs. 50,000/-. According to the petitioner, the property would have fetched Rs. 2,00,000/- and that the said property was attached in O.S. No. 15 of 1997, a suit pending between the same parties before the Sub Court; Irinjalakuda. It is contended by the petitioner that in the said case, the petitioner had obtained a decree for realisation of Rs. 1,52,363/-. It is the case of the revision petitioner that the auction purchaser in collusion with the other defendants in the suit purchased the property for a sum of Rs. 50,006/- to defeat the execution of the decree in O.S. No. 15 of 1997 and, therefore, the revision petitioner suffered severe loss. In such circumstances, the petitioner filed E.A. No. 335 of 2001 to set aside the sale. The execution court dismissed the application stating that the petitioner was absent and confirmed the sale. In order to facilitate, the petitioner to conduct the case on merits, the petitioner filed E.A. No. 1844 of 2001, to review the order passed in E.A. No. 335 of 2001 along with E.A. No. 1843 of 2001 to condone the delay in filing E.A. No. 1844 of 2001. The petitioner also filed E.A. No. 1857 of 2001 u/s 151 C.P.C. to review the order dated 11.9.2001 and to set aside the sale. The execution court considered all the three applications together and dismissed the same by a common order.

5. The execution court dismissed the application (E.A. No. 1843 of 2001) filed u/s 5 of the Limitation Act stating that the application filed u/s 5 of the Limitation Act is not applicable to the proceedings in execution and hence not maintainable. The first question to be considered is whether the execution court was justified in dismissing E.A. No. 1843 of 2001 filed for condonation of delay in filing E.A. No.

1844 of 2001 and secondly whether the reasons stated for dismissing the application as not maintainable is sustainable in law.

6. Section 5 of the Limitation Act reads as follows:

5. Extension of prescribed period in certain cases:

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

On a plain reading of Section 5 of the Limitation Act, it is clear that the said provision is applicable to appeals and other applications filed before a court of law, the only exception being applications filed under any of the provisions of Order XXI C.P.C. The finding of the execution court that Section 5 of the Limitation Act expressly excludes the proceedings in execution and consequently, the petition at the outlet is not legally maintainable is based on a misunderstanding of Section 5 of the Limitation Act and a misreading of E.A. Nos. 1844 and 1843 of 2001. The learned Munsiff did not notice the fact that E.A. No. 1844 of 2001 is an application for review filed under Order XLVII Rule 1 C.P.C. and not an application filed under any of the provisions of Order XXI C.P.C. If E.A. No. 1844 of 2001 is an application other than an application under any of the provisions of Order XXI C.P.C., Section 5 of the Limitation Act squarely applies and an application for condonation of delay in filing the review petition is maintainable in law. An application for review can be filed against "a decree or order". There is no restriction that the order should be on the trial side, in order that a review application may be filed against the order. Thus on the wording of Order XLVII Rule 1 C.P.C., like any petition on the trial side, a petition to review an order in execution is also equally maintainable. If that be so, E.A. No. 1844 of 2001 filed for review of the order passed in E.A. No. 335 of 2001 is not an application filed under any of the provisions of Order XXI C.P.C. Therefore, the order passed by the execution court dismissing the application for condonation of delay as not maintainable is illegal.

7. The next question to be considered is whether sufficient cause has been shown for not filing the application for condonation of delay in time. There is a delay of only eight days in filing the application. The Legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serves the ends of justice, that being the life purpose for the existence of the institution of Courts. The Apex Court in *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, stated reasons, one by one, for taking a liberal approach and held that making a justice-oriented approach from

this perspectives compelled the Court to take a justifiable and reasonable approach in condoning the delay. The Apex Court on more than one occasion reminded the courts in India that a party who, as per the present adversary legal system, has selected his advocate, briefed him and paid his fees can remain supremely confident that his lawyer will look after his interest and such an innocent party who has done everything in his power and expected of him, should not suffer for the inaction, deliberate omission or misdemeanor of his counsel.

8. I have stated the consistent stand of the Supreme Court which was again expressed in the question reported in Rafiq and Another Vs. Munshilal and Another, . The dismissal of E.A. No. 335 was for the reason that there was no representation. Another reason stated by the execution court is that the Counsel appearing for the petitioner who was unwell was not examined and that his affidavit is not acceptable. RW. 1 was examined on the side of the petitioner and Exts. A1 and A2 were marked. Ext.A1 is the affidavit filed by the advocate. I have perused the averments in Ext.A1. The learned Counsel has sworn to the fact that he was the Counsel appearing for the decree holder (revision petitioner), that illness due to old age (aged 73) has resulted in loss of memory and hence he was unable to inform the party about the posting of the case. Counsel had also sworn to the fact that he was admitted in the Jubilee Mission Hospital, Thrissur from 8.8.2001 and that only after leaving the hospital did he come to know about the confirmation of sale and that there was no negligence on his part or on the part of his client. The lawyer has also stated in Ext. A1 that he is going to stop practice on account of his old age and illness. PW.1 also gave evidence before the court stating the reasons for the delay and submitted that nonappearance of his Counsel on 11.9.2001 was neither wilful nor deliberate. In such circumstances, I find that there is no fault on the part of the petitioner who has done everything in his power and expected of him and hence should not suffer because of the default on the part of .the counsel. This Court cannot be a party to an innocent party suffering injustice merely because his chosen advocate has defaulted. I have absolutely no reason to doubt the truthfulness of the statements made by the revision petitioner. Taking into consideration the facts and circumstances of the case, I find that sufficient cause is shown for the non-appearance of the petitioner's Counsel before the execution court on the day on which E.A. No. 335 of 2001 was posted for trial.

9. In paragraph 13 of the order, the execution court stated that the affidavit itself shows that he Counsel was hospitalized only on 8.8.2001 whereas the sale took place on 13.2.2001 and so the explanation is totally insufficient to condone the delay. This observation was made by the execution court on a wrong understanding of the facts. What is stated in the petition as supported by the affidavit of the lawyer is the reason for the absence of the Counsel on 11.9.2001 and not 13.2.2001. This shows the non-application of mind on the part of the learned Munsiff while dealing with the case on hand. The execution court also repeated the very same reasons for the dismissal of E.A. No. 1844 of 2001 which

was filed for review of the order dated 11.9.2001 in E.A. No. 1843 of 2001 and 1844 of 2001 cannot stand. For the very same reason, the order passed in E.A. No. 1857 of 2001 also is no sustainable. I have not examined the merits of the petitioner's case that the sale is liable to be set aside. In the nature of the order passed in these revisions, it is for the execution court to decide E.A. No. 335 on merits.

10. Learned Counsel appearing for the second respondent contended that the revision petitions are not maintainable under the proviso to Section 115 C.P.C. Counsel submitted that no revision would lie unless the order sought to be revised, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding. A plain reading of Section 115 C.P.C. as it stands makes it clear that the stress is on the question as to whether an order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes", then the revision is maintainable, but if the answer is "no", then the revision is not maintainable. Therefore, it is contended that if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable.

11. Learned Counsel for the revision petitioner contended that the execution applications are of the year 2001 and, therefore, Section 115 C.P.C. as amended is not applicable to pending revisions. The Apex Court in *Shiv Shakti Co-operative Housing Society v. Swaraj Developers* reported in 2003(2) KLT 503 (SC) considered the question whether the amended Act operating from 1.7.2002 applies to revision petitions which were admitted before the amendment. The Apex Court held that no person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed, if by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation. The Apex Court further held that there is marked distinction in the language of Section 97(3) of the old Amendment Act and Section 32(2)(i) of the Amendment Act. It was also held that in a case where a particular provision in the statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving Clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that the pending proceedings shall continue but a fresh proceeding for the same purpose may be initiated under the new provision.

12. Going by the dictum laid down by the Supreme Court in the decision cited *supra*, I find that there is force in the submission made by the learned Counsel appearing for the second respondent. Assuming that the legal position contended by the learned Counsel for the second respondent is correct law, I have no doubt that I have jurisdiction under Article 227 of the Constitution of India to consider, in the interest of justice, whether the court below was right in refusing to grant relief to the revision petitioner. I have already held that the impugned orders have led to failure of justice and caused substantial injury to the party. Hence,

consideration of E.A. No. 335 of 2001 on merits is necessary in the interest of justice and for proper adjudication of the matters in controversy. I am satisfied that this is a fit case where the applications filed by the revision petitioner ought to be allowed. Accordingly, I set aside the impugned order, allow E.A. Nos. 1843 of 2001 and 1844 of 2001 and direct the execution court to consider and dispose of E.A. Nos. 335 of 2001 and 1857 of 2001 on merits.

13. In the result, the Civil Revision Petitions are followed.

14. There will be no order as to costs.