

(2011) 08 MAD CK 0309

In the Madras High Court

Case No : Writ Petition No. 13710 of 2011

M. Asiya Banu

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 22(2)
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 11
General Clauses Act, 1897 — Section 21
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : (2011) 08 MAD CK 0309

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : M. Krishnappan for G.R.M. Palaniappan, in W.P. No. 13710 of 2011, R. Thiagarajan and S.D.S. Phillip, in W.P. Nos. 15292 to 15294 of 2011 and R. Thiagarajan and S.D.S. Philip, in W.P. Nos. 15295 to 15297 of 2011, for the Appellant; L. Ganesh, for R1, R. Thiagarajan, for R3 to R5 and S.V. Jayaraman for R. Meenalochini, for R7 in W.P. No. 13710 of 2011, L. Ganesh, for R1, S.V. Jayaraman for R. Meenalochini, for R3, R.S.Jeevarathinam for T.D.K. Govindarajan, for R4 to R6, R. Karthikeyan, for R7 in W.P. Nos. 15292 to 15294 of 2011 and L. Ganesh, for R1 W.P. Nos. 15295 to 15297 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

D. Murugesan, J.—As the issues raised in all the writ petitions are same, they are taken up together for disposal by this common order.

2. M/s Maharaja Timber Traders, Chennai availed loan of Rs. 150 lakhs from Nedungadi Bank Limited, presently known as Punjab National Bank, Mylapore branch during the year 1998. Thiru V.M.S.Jafarullah was the proprietor of the said firm. The writ Petitioners, numbering four, stood as guarantors and they deposited the original title deeds pertaining to the secured asset. In the year

1999, the firm availed additional loan facility to the tune of Rs. 50 lakhs. The firm, thereafter, availed additional loan facility of Rs. 75 lakhs in the year 2000 and ultimately the total loan availed by the firm was Rs. 300 lakhs and all the Petitioners stood as guarantors for the entire amount of Rs. 300 lakhs and necessary deeds of mortgage were also executed.

3. Thiru V.M.S.Jafarullah, the proprietor of the firm defaulted in repayment of the loan. On the above averments and the default, the first Respondent bank filed the original application before the Debts Recovery Tribunal-I, Chennai u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of a total sum of Rs. 1,29,72,700/-and Rs. 48,86,890/-together with interest at the rate of 20% per annum with quarterly rests due in respect of Import Letters of Credit and Rs. 96,73,619/-together with interest at the rate of 20% per annum with quarterly rests due in respect of Cash Credit from the date of application till the date of realisation and for sale of the Schedule "A" to "E" properties mentioned thereunder. On the ground that the writ Petitioners, who were the Defendants in the O.A., remained absent, they were set ex parte on 19.2.2008 and ultimately the Debts Recovery Tribunal-I, in its final order dated 4.4.2008 decreed the suit as prayed by the bank. Thiru V.M.S.Jafarullah, the proprietor of the firm alone contested the suit.

4. On the ground that No. summons were served on the Petitioners in the Original Application and they were not aware of the order setting them ex parte and consequently final orders having been passed against them, they filed individual applications before the Debts Recovery Tribunal-I, Chennai seeking to set aside the ex parte final order together with the applications for condoning the delay. For more details as to the number of days delay, we may point out that the Petitioner in W.P. No. 13710 of 2011 filed an application to condone the delay of 480 days in filing the application to set aside the ex parte decree. Likewise the Petitioners in W.P. Nos. 15292 to 15297 of 2011 filed applications to condone the delay of 480, 479 and 480 days respectively in filing the applications to set aside the ex parte decree during July, 2009. All the applications were dismissed by the Debts Recovery Tribunal-I in its order dated 13.7.2010. Hence, they filed appeals before the Debts Recovery Appellate Tribunal challenging the order of dismissal of the applications for condoning the delay. The Debts Recovery Appellate Tribunal has also dismissed the appeals by its order dated 31.5.2011. The above orders are questioned by the Petitioners in these writ petitions.

5. We have heard Mr. M.Krishnappan, learned senior counsel for the Petitioner in W.P. No. 13710 of 2011, Mr. R.Thiagarajan, learned Counsel for the first and second Petitioners in W.P. Nos. 15292 to 15294 of 2011 and for the Petitioners in W.P. Nos. 15295 & 15297 of 2011 and for the Respondents 3 to 5 in W.P. No. 13710 of 2011, Mr. S.D.S.Philip, learned Counsel for the third Petitioner in W.P. Nos. 15292 to 15294 of 2011 and for the Petitioner in W.P. No. 15296 of 2011, Mr. L.Ganesh, learned Counsel for the first Respondent bank, Mr. S.V.Jayaraman and Mr. R.S.Jeevarathinam, the respective learned senior counsel for the

Respondents-auction purchasers and Mr. R.Karthikeyan, learned Counsel for the seventh Respondent in W.P. Nos. 15292 to 15294 of 2011.

6. The first contention raised by the respective learned Counsel for the Petitioners is that none of the Petitioners were served with the summons as required by Section 19(4) of the Recovery of Debts Due to Banks and Financial Institutions Act read with Rule 11 of the Debts Recovery Tribunal (Procedure) Rules. The second contention is that the Petitioners were not served with the copy of the final order as required by Section 19(21) of the Act read with Rule 16 of the Rules. The Petitioners have averred that they have not created equitable mortgage as guarantors by depositing the title deeds for the loan availed by M/s Maharaja Timber Traders and therefore they lodged a complaint alleging that the documents relating to their properties were forged documents. Based on their complaint, a case was registered by the Central Bureau of Investigation and the charge sheet was also filed in which Thiru V.M.S.Jafarullah was shown as one of the accused. The Petitioners were interrogated by the Investigating Officers of C.B.I., who recorded their statements, in which they have denied the execution of any document in respect of the loan/credit facility availed by the said Thiru V.M.S.Jafarullah. The pendency of the above criminal proceedings were known to the first Respondent bank. In view of the above, the decree obtained by the bank on the basis of forged and fake documents is a nullity and therefore the delay should be condoned and the Petitioners should be given opportunity to contest the case on merits. In support of the above contentions, the respective learned Counsel relied upon number of judgments and contended that when the Petitioners have valid grounds for contesting the original application filed by the bank, the order of the Debts Recovery Tribunal-I and the order of the Debts Recovery Appellate Tribunal for rejecting their applications for condoning the delay are liable to be set aside.

7. The learned Counsel for the first Respondent bank would submit that summons were duly served by the Debts Recovery Tribunal-I as to the hearing of the Original Application and the Petitioners were represented by a counsel and though they have been set ex parte, they did not file any application to set aside the same and they allowed the Tribunal to pass final orders. The contention of the Petitioners that the copy of the order has not been served is totally false when the Petitioners had the knowledge of pendency of the Original Application even in the year 2005 when they filed writ petitions by making averments as to the pendency of the O.A., and also enclosing the copy of the original application in the typed-set of papers. The Petitioners have not explained the delay with sufficient reasons and hence the orders of the Debts Recovery Tribunal-I and the Debts Recovery Appellate Tribunal require No. interference.

8. We have considered the rival submissions. In matters of condonation of delay, the Court must primarily consider as to whether the Petitioners have shown sufficient cause for the delay. To find out as to whether the Petitioners have shown sufficient cause, we may refer to certain dates and events. On the ground

that Thiru V.M.S.Jafarullha, the proprietor of M/s Maharaja Timber Traders defaulted in repayment, the first Respondent bank issued legal notices dated 9.5.2003 demanding the payment not only to the said Thiru. V.M.S.Jafarullah, the borrower but also to all the Petitioners, the guarantors. Those notices were served and they were acknowledged, as could be seen from the records placed before us. As the legal notices were not honoured by the said Thiru V.M.S.Jafarullah and the Petitioners, the bank filed the Original Application on 20.5.2003. One Thiru Vijay, Advocate filed vakalath on behalf of the said Thiru V.M.S.Jafarullah on 6.4.2004. He represented all the Defendants in the O.A., namely, the Petitioners. Nevertheless, the said Vijay did not file vakalath on behalf of the Petitioners. The contention of the respective learned Counsel for the Petitioners was that the summons were not served on each of the Petitioners. They did not engage the said Advocate Thiru.Vijay nor gave him vakalath to represent them before the Tribunal. On the one hand the Petitioners claim that summons were not served and on the other hand the Respondent bank claims that summons were served. On the question of service of summons, both the Debts Recovery Tribunal-I and the Debts Recovery Appellate Tribunal factually found that summons were served on the Petitioners who are the Defendants in the O.A. In order to satisfy ourselves, we directed the Debts Recovery Tribunal-I to make available the records for our perusal. Accordingly, records were produced and we perused the same. A perusal of the records would show that summons were served on each of the Petitioners on 2.7.2003 and they were acknowledged. The contention of the Petitioners is that these summons were not served on them and were served on somebody. In our opinion, the said argument cannot be accepted, as it is the duty of the Tribunal to send the summons to the Defendants in the O.A., to the addresses given in the deeds of mortgage through postal authorities and if the postal authorities return the acknowledgments with endorsement evidencing the service of summons, it would constitute sufficient service. In the event the summons were not served on each of the Petitioners, each of the Petitioners could have adduced evidence to show that they were not served with the summons by making specific averments in the applications. Factually, both the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal found that summons were served on each of the Petitioners as early as on 2.7.2003 and the proof of services were also filed before this Court. On perusal of the records, we do not find any reason to hold that summons were not served on the Defendants in the O.A. There is No. specific provision either under the Recovery of Debts Due to Banks and Financial Institutions Act or under the Debts Recovery Tribunal (Procedure) Rules to file an application to set aside an ex parte decree and consequently for condonation of delay as well. Hence, the provisions of Section 21 of the General Clauses Act, 1897 shall be made applicable, whereby the power to issue orders includes the power to amend, vary or rescind as well. Likewise, for the purpose of condonation of delay, the Limitation Act will apply. In that view of the matter, the judgments conferring the discretionary power on the Court to condone the delay must be considered. In this context, we may refer to the judgment of the

Supreme Court in Popat and Kotecha Property Vs. State Bank of India Staff Association, , wherein the Supreme Court, after referring to its earlier judgment in R.D. Bhatia (Mrs) Vs. Rajinder Kaur (Smt), , held in paragraphs-8 & 10 as follows:

8. The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e., Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable.

It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal.

10. 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 life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revist. 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 ut sit finis litium (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time.

The Supreme Court also referred to its earlier judgment in V. Subba Rao and others Vs. Secretary to Govt. and Panchayat Raj and Rural Development, Government of A.P. and others, , holding that bar of limitation does not obstruct the execution. It bars the remedy.

9. The Supreme Court in Balwant Singh (Dead) Vs. Jagdish Singh and Others, , while considering the term "sufficient cause" has observed as follows:

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given

case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

The above judgment was quoted with approval by the Supreme Court in *Lanka Venkateswarlu (D) by LRs v. State of A.P.*, and Ors. 2011 (2) SC 174. In the event, on the basis of a judgment/order of the competent Court/Tribunal, certain rights accrue on a person who approaches such Court/Tribunal, such valuable rights cannot be deprived of at the instance of the opponent who was not vigilant to approach the Court seeking for setting aside such judgment/order on the ground that it was passed without hearing them as they were set ex parte. That is the basis on which the period of limitation is prescribed for a person who has visited with an ex parte order affecting him to approach the Court/Tribunal which passed the order within the given time. In the event such an application to set aside the ex parte judgment/order could not be made within the time prescribed by the relevant provisions, it is the bounden duty of such person to explain the cause as to why he could not approach the Court/Tribunal in time. In the absence of such explanation, the delay in approaching the Court must be considered to be only due to the inaction or negligence or default on the part of such person in approaching the Court/Tribunal and in that event, they are not entitled to the benefit of hearing on merits after the ex parte judgment/order is set aside and if such petition is ordered, it would amount to depriving the valuable right accrued on the litigant who has obtained such a judgment/order.

10. The Supreme Court in *Sunil Poddar and Others Vs. Union Bank of India*, observed that for the purpose of discharging their functions under the Act, the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal are having the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 and therefore Clause (g) of Sub-section (2) of Section 22 has to be read with Rule 13 of Order 9 of the Code which provides for setting aside ex parte decree passed against a Defendant. The Supreme Court thereafter considered the question as to whether an ex parte decree can be set aside on the ground of non-service of summons in case the Defendant had otherwise knowledge of the proceedings. The Supreme Court, in paragraph 19, aptly observed as follows:

19. It is, therefore, clear that the legal position under the amended Code is not whether the Defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the Plaintiff.

Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the Defendant had otherwise knowledge of the proceedings and he could have appeared and answered the Plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the Appellants could not be upheld. It is not even contended by the Appellants that though they had knowledge of the proceedings before the DRT, they had No. sufficient time to appear and answer the claim of the Plaintiff-Bank and on that ground, ex parte order deserves to be set aside.

11. We may also refer to the fact that after the Respondent bank filed O.A., it invoked the provisions of the Securitisation and Reconstructon of Financial Assets and Enforcement of Security Interest Act and issued the notice u/s 13(2) dated 21.2.2004 followed by notices dated 14.2.2005 and those notices were served on each of the Petitioners. Except the Petitioner in W.P. No. 15296 of 2011, all other Petitioners had earlier challenged the demand notice dated 21.2.2004 and the consequential notice dated 14.2.2005 issued under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act by filing W.P. Nos. 7934, 8229 and 8367 of 2005 questioning those notices. In paragraph-3 of the affidavits filed in support of the writ petitions, it is stated that "the Petitioners have been advised to file a detailed counter in O.A. No. 137 of 2003" indicating that the Petitioners were aware of the pendency of the O.A., during March, 2005 itself when they had sworn to the affidavits in order to challenge the demand notices. That apart, in ground (b) of the affidavit, they stated that "the impugned notice is again most illegal, arbitrary and void ab initio and against principles of natural justice since the Respondent bank for the same claim has already initiated proceedings in O.A. No. 137 of 2003 on the file of the Debts Recovery Tribunal, Chennai and in law there cannot be any two parallel proceedings with respect to the same debt." The above averment of the Petitioners makes it clear that they were aware of the pendency of the O.A., even sometime during March, 2005. Each of the Petitioners had also enclosed the copies of the O.A., in the typedset of papers as well in support of the above contentions in the earlier writ petitions.

12. We are also inclined to point out that in the stereotyped affidavit filed by each of the Petitioners seeking for condonation of delay, except stating in paragraph-2 that they were told by friends and relatives on 24.7.2009 that the Recovery Officer is taking steps to auction the properties based on the recovery certificate issued they came to know of the final order passed by the Tribunal in the O.A., on 4.4.2008, No. explanation is offered. The fact remains that each of the Petitioners was served with the summons as early as on 2.7.2003 and the proof of service was also filed before the Tribunal. In the affidavit filed in support

of the applications seeking for condonation of delay of 480, 480, 479 and 480 days respectively, the Petitioners have misrepresented that they were not served with the summons. Further, though they had the knowledge of the pendency of the O.A., even as early as during March, 2005, they have deliberately suppressed the said fact in their affidavit filed in support of the applications seeking for condonation of delay. In that event, there is absolutely No. explanation at least from March, 2005 and they had filed the applications for condoning the delay sometime during July, 2009. In this context, we may refer to the recent judgment of the Supreme Court in *Amar Singh v. Union of India and Ors.* 2011 (4) SC 262, wherein the Supreme Court has held as follows:

53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

13. That apart, copies of the final order passed by the Debts Recovery Tribunal-I were sent to each of the Petitioners. Though the Petitioners were left with an intimation by the postal authorities, they never chose to collect the copy of the final order from the postal authorities and hence, they were returned to the Tribunal as could be seen from the acknowledgment cards and the returned covers dated 17th, 18th, 19th December, 2008. In order to ascertain the above facts, as it was disputed by the Petitioners, we again perused the records produced by the Debts Recovery Tribunal and we find that intimation as to the furnishing of copies to each of the Petitioners was made by the Debts Recovery Tribunal and they could not be served only for the default of the Petitioners. For the sake of arguments, even assuming that the above dates 17th, 18th, 19th December, 2008 on which the postal acknowledgments were returned with endorsement "left" and thereafter the postal covers were returned, the Petitioners should explain as to why they did not file petitions before the Tribunal in time. However, they filed the applications to set aside the ex parte decree with condonation of delay only on 28.7.2009, after nearly a period of seven months. Further, the fact that intimations were left as to the service of copies of the order to each of the Petitioners was also not disclosed in the affidavit filed in support of the applications seeking for condonation of delay to set aside the ex parte decree. On the above ground, the applications for condonation of delay should be dismissed. In this context, we may also refer to the judgment of the Supreme Court in *Pundlik Jalam Patil (D) by Lrs. Vs. Exe. Eng. Jalgaon Medium Project and Another*, wherein the Supreme Court has held that incorrect statements made in the affidavit would be sufficient cause to reject the application for condonation of delay. On this ground alone, all the writ petitions must fail.

14. For the purpose of condonation of delay, in the given facts of the case, we do not find any sufficient cause adduced by the Petitioners to condone the enormous delay of 479/480 days. Further, they have suppressed the service of summons and the knowledge of the pendency of the O.A., when they filed the writ petitions

in the year 2005 itself and on this ground, they are not entitled to the indulgence of the Court for condonation of delay. Mr. M.Krishnappan, learned senior counsel would place reliance on the provisions of Section 19(4) to contend that the Tribunal shall issue summons and serve the same on the Defendants to show cause within thirty days of service of summons as to why the relief prayed for should not be granted. As the service of summons were made to the addresses given in the deeds and for the discussion on factual aspects made in the earlier portion of this order, we hold that the provisions of Section 19(4) have been complied with. The learned senior counsel would also rely upon Rule 11 of the Rules to contend that copy of the application and paper book should be served on each of the Defendants as soon as they are filed, by registered post. When the Petitioners had been intimated by the postal authorities as to the tapals, it is for them to explain as to why they did not claim the tapals and allowed them to be returned. The Petitioners have also suppressed the very fact of intimation and the argument on Rule 11 cannot be appreciated. Accordingly, the said contention is rejected.

15. Insofar as the reliance placed on Section 19(21) which contemplates that the Tribunal shall send the copy of the final order passed by it to the applicant and the Defendants and the Rule 16 of the rules requiring the communication of every order passed on the application to the Defendants either in person or by registered post free of cost is concerned, as we have found factually that such orders have been sent and though intimations were left to each of the Petitioners, they never cared to receive the copies of the orders as early as during December, 2008 and allowed the tapals to be returned. In view of the factual findings, the provisions of Section 19(21) and Rule 16 of the Rules are also complied with.

16. So far as the Petitioner in W.P. No. 15296 of 2011 is concerned, it is an admitted case that he did not file writ petition in the year 2005 as that of the other Petitioners. Nevertheless, for our reasoning as to the service of summons during March, 2005 and further the intimation as to the tapals communicating the order during December, 2008 itself, he has not whispered anything about the same in the affidavit filed in support of the application to condone the delay and in the absence of any explanation, much less on the ground of suppression of fact, his application is also liable to be rejected.

17. For all the above reasons, we are of the considered view that there are No. merits in any of the writ petitions and they are liable to be dismissed. Accordingly, they are dismissed. Consequently, the connected M.P. Nos. 1 & 2 of 2011 are also dismissed. No. costs.