

(2005) 04 MAD CK 0083

In the Madras High Court

Case No : O.S. Appeal No"s. 44 and 64 of 2005, CMP No"s. 4666 and 6072/05
and VCMP No"s. 5446 and 5447 of 2005

Mohammed Aslam and Others

APPELLANT

Vs

C.N.A. Gowdhaman

RESPONDENT

Date of Decision : 20-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 43 Rule 1, Order 49 Rule 3, 104
Limitation Act, 1963 — Section 5

Citation : (2005) 2 CTC 766 : (2005) 2 LW 376 : (2005) 3 MLJ 357

Hon'ble Judges : S.K. Krishnan, J;P. Sathasivam, J

Bench : Division Bench

Advocate : K. Doraisamy for Muthumani Doraisamy, for the Appellant; V. Raghavachari, for the Respondent

Judgement

P. Sathasivam, J.—O.S.A.No.44 of 2005 has been filed against the order of the learned single Judge dated 10.03.2005 made in

Application No.4607 of 2004, in and by which the learned Judge condoned the delay of 1251 days in filing the application to set aside the ex

parte decree dated 21.03.20 01 made in C.S.No.703 of 1996, subject to payment of costs of Rs.10,0 00/- to the State Legal Services Authority,

Chennai, within 15 days from that date.

2. O.S.A.No.64 of 2005 is filed against the order dated 01.04.2005, granting restricted stay in Application No.1671 of 2005 in E.P.No.23 of

2005. Since, OSA.No.64 of 2005 is against the consequential order passed by the learned single Judge, it depends on the outcome of

OSA.No.44 of 2005.

3. The brief facts which are required for the disposal of the above appeals are

stated hereunder:

(a) The respondent herein entered into an agreement of sale in respect of his property at No.12-B, 4th West Cross, Shenoy Nagar, Chennai 600

030 with one S.K.M. Ibrahim, husband of the second appellant herein for a sum of Rs.18,50,000/- and received a sum of Rs.6,80,000/- during

the period 1995-96. But subsequently, the respondent refused to execute the sale deed. So, the said S.K.M. Ibrahim, instituted a suit in

C.S.No.703 of 1996 on the file of Original Side of this Court against the respondent for specific performance. The said suit was decreed on

21.03.2001 in favour of S.K.M. Ibrahim. Pursuant to the decree, he also deposited the balance sale consideration of Rs.11,70,000/- on

11.07.2001 to the credit of the said suit as directed by this Court. The said money is lying in the Court deposit for the past more than four years.

The said S.K.M. Ibrahim died on 27.02.2002, leaving the appellants herein as his legal heirs. They filed Application Nos.5418 and 5419 of 2002

for rescinding the contract and for refund of money. The respondent opposed the said applications and they were dismissed. Thereafter, the

appellants filed E.P.No.42 of 2004 for execution of the decree and the same was ordered on 21.10.2004. Consequently, the sale deed was

executed by the Assistant Registrar-I of this Court on 15.02.2005 and registered as Document No.512 of 2005 in the Office of the Sub-Registrar,

Anna Nagar.

(b) In the meantime, the respondent herein filed applications to condone the delay in filing the petition to set aside the ex parte decree and for stay

of the execution proceedings. The application to condone the delay of 1251 days has been numbered as Application No.4607 of 2004. The only

reason stated by the respondent was that he came to know about the ex parte decree passed on 21.03.2001 in April, 2004 , after receipt of

notice in E.P.No.42 of 2004. The appellants filed a counter affidavit opposing the said application. The learned single Judge by order dated

10.03.2005, allowed the application to condone the delay on the sole ground that the amount involved in the suit is huge. Questioning the same, the

respondents therein/ appellants filed OSA.No.44 of 2005.

4. Heard Mr. K. Doraisamy, learned senior counsel for the appellants and Mr. V. Raghavachari, learned counsel for the respondent.

5. At the outset, Mr. V. Raghavachari, learned counsel appearing for the respondent raised an objection that the order of the learned single Judge

condoning the delay is not a ""Judgment"" in terms of Clause 15 of the Letters Patent and hence, the present original side appeal is not maintainable.

Even otherwise, according to him, since the respondent has shown sufficient cause, the learned Judge is perfectly right in condoning the delay of

1251 days. With regard to maintainability, Mr. K. Doraisamy, learned senior counsel for the appellants would submit that though the impugned

order was passed in an interlocutory application, since the respondent has not approached the Court with clean hands and suppressed the material

events, namely, participation in the execution proceedings and since the impugned order of the learned Judge passed in the interlocutory application

caused prejudice, as there was no reason for condoning the long delay of 1251 days, the present appeal is maintainable. On merits, learned senior

counsel submitted that the respondent has not shown any reason, much less sufficient cause explaining the inordinate delay, even though he

participated in the earlier execution proceedings and filed objection, etc.

6. We have carefully considered the rival contentions.

7. There is no dispute that the present appeal (OSA.No.44 of 2005) has been filed invoking Clause 15 of the Letters Patent. As per that Clause,

an appeal shall lie to a Division Bench from the ""Judgment"" of a Single Judge of this Court subject to certain exceptions mentioned in the very same

clause. Though Mr. Raghavachari, learned counsel appearing for the respondent relied on several judgments to show that the order of the learned

single Judge condoning the delay is not a ""Judgment"" within the meaning of the term ""Judgment"" referred to in Clause 15 of the Letters Patent, let us

consider the judgment of the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, . While considering Section

104, Order 43 Rule 1, Order 40 Rule 1 and Order 49 Rule 3 CPC as well as Clause 15 of Letters Patent, their Lordships have held as under:-

106. Whenever a trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgment

within the meaning of the Letters Patent.

Their Lordship further held as under:-

115. Every interlocutory order cannot be regarded as a judgment but only those

orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned.

They also held as under:-

119. (1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate Court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice. (2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

After holding so, they concluded that an order of the trial Judge refusing to appoint a Receiver or to grant ad-interim injunction is undoubtedly a judgment within the meaning of the Letters Patent because Order 43 Rule 1 applies to internal appeals in the High Court and apart from it, such an order even on merits contains the quality of finality and would therefore be a judgment within the meaning of Clause 15 of the Letters Patent.

8. The principle laid down in the above said decision makes it clear that an order vitally affects the valuable rights of any of the party will undoubtedly be treated as a "Judgment" within the meaning of Letters Patent, so as to be appealable to a Larger Bench.

9. With the above principle, now let us consider whether the order of the learned Judge condoning the delay in filing application to set aside the ex parte decree vitally affects the valuable right of the appellants. If the answer is in the affirmative, as observed by the Supreme Court, even if the order is on an interlocutory application, it is an appealable order before a Division Bench. In order to decide the above question, certain factual

aspects have to be referred to. It is the case of the appellants, who are none else than the legal heirs of the plaintiff in C.S.No.703 of 1996, that the

said suit was filed by S.K.M. Ibrahim, against the defendant/respondent herein for specific performance. The suit was decreed on 21.03.2001. It

is also their claim that pursuant to the decree, the said S.K.M. Ibrahim deposited the balance of sale consideration of Rs.11,70,000/- even as early

as on 11.07.2001 to the credit of the said suit on the file of this Court as directed in the decree. It is also their claim that the said money is lying in

Court deposit for the past more than four years.

10. After the death of said Ibrahim on 27.02.2002, the present appellants were impleaded as his legal heirs. It is relevant to note that due to

financial crisis, the appellants herein filed two applications, viz., Application Nos.5418 and 5419 of 2002 for rescinding the contract and for refund

of money. It is also relevant to note that on the objection raised by the respondent herein, those applications were dismissed, which necessitated

the appellants to file E.P.No.42 of 2004 for execution of the decree and the same was allowed on 20.10.2004. It is also the case of the

appellants that consequent to the said order, a sale deed was executed by the Assistant Registrar of this Court on 15.02.2005 and also registered

as Document No.512 of 2005 in the Office of the Sub-Registrar, Anna Nagar.

11. The learned senior counsel appearing for the appellants by drawing our attention to the common counter affidavit of the respondent C.N.A.

Gowthaman in Application Nos.5418 and 5419 of 2002 and also another counter affidavit of the very same person in E.P.No.42 of 2004 would

contend that the reasons stated for condoning the delay of 1251 days are false and cannot be accepted. According to him, the learned Judge has

lost sight of this vital aspect. In the light of the said serious objection, we verified the common counter affidavit of C.N. A. Gowthaman, filed in

Application No.5418 and 5419 of 2002, which is dated 20.01.2003. The counter affidavit of the very same respondent filed in E.P.No.42 of

2004 is dated 19.07.2004. A perusal of the above mentioned counter affidavits show that the respondent herein / applicant in 4607 of 2004 was

aware of the ex parte decree and the subsequent developments. In such a circumstance, it is but proper for the Court to consider whether there

was sufficient and bona fide cause in his explanation. A perusal of the order of

the learned Judge shows that the learned Judge has not considered the said reasons, however, after noting that ""stake involved is very huge amount"" and in order to give an opportunity to the applicant, condoned the delay by directing him to pay a sum of Rs.10,000/- to the State Legal Services Authority, Chennai. In such a circumstance, particularly when the respondent herein was aware of the subsequent proceedings, viz., filing of petition for rescinding the contract and the filing of the execution petition, the mere fact that the stake involved is very huge amount cannot be a valid ground to condone the delay. As stated earlier, the said S.K.M. Ibrahim, after obtaining decree, deposited the balance sale consideration of Rs.11,70,000/- and the same is lying in Court deposit for more than 4 years. Further, by filing execution petition, with the assistance of this Court, sale deed has also been executed on 15.02.2005. In such a circumstance, considering the peculiar facts of this case, viz., subsequent developments after the ex parte decree dated 21.03.2001, we hold that the present order of the learned Judge vitally affects the valuable rights of the respondents in that application / appellants herein and if it is so, as observed in Shah Babulal case (cited supra), the impugned order is to be treated as a "" Judgment"" within the meaning of Letters Patent. Accordingly, we hold that the present OSA is maintainable.

12. In the impugned order, as said earlier, the learned Judge has not considered the explanation offered by the applicant for the delay of 1251 days. Though the learned Judge was conscious of the fact that by condoning the inordinate delay, the respondents therein (appellants herein) will be put to great hardship, instead of compensating them, directed for the payment of Rs.10,000/- to the State Legal Services Authority, Chennai, admittedly, which is not a party in this proceedings. We are unable to share the above view. Having found that by condoning the inordinate delay only on the ground that the applicant should be given an opportunity and having found that the said act will cause great hardship to other side, viz., respondents therein, it is but proper to compensate them by awarding reasonable costs to them. The learned Judge has not resorted to such recourse. It is not in dispute that the Courts are here to render justice to both parties. We are unable to understand how the respondent s will be compensated by payment of Rs.10,000/- to the State Legal Services Authority,

Chennai. Equally, we are conscious of the fact that the length of delay is no matter, and acceptability of the explanation is the only criterion. Sometimes the delay of shortest range may be uncondonable due to want of acceptable explanation, whereas in certain other cases, delay of a very long range can be condoned as the explanation therefore is satisfactory. In every case of delay, there may be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. If the explanation does not smack the 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 not lean towards acceptance of the explanation. We are also aware that refusal to condone the 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. Now, even the higher court of this land have interpreted that the words ""sufficient cause"" u/s 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. Accordingly, in order to give one opportunity to the respondent/applicant and at the same time, to compensate the appellants/respondents, we intend to modify the order of the learned Judge dated 10.03.2005. Though it is stated that the applicant had paid a sum of Rs.10,000/- to the State Legal Services Authority, Chennai as ordered, in addition to the said amount, the applicant/respondent is directed to pay a further sum of RS.20,000/- (Rupees twenty thousand only) to the appellants/respondents within 15 days from today, failing which the order of the learned Judge dated 10.03.2005 shall stand set aside. OSA.No.44 of 2005 is disposed of accordingly.

13. In view of modifying the order under challenge in OsA.No.44 of 2005, as said earlier, OSA.No.64 of 2005, which is filed against the consequential order of the learned single Judge, no further order is required in OSA.No.64 of 2005.

Net result, both the original side appeals are disposed of accordingly. No costs. Consequently, connected CMPs., and VCMP. are closed.