

(2017) 08 MAD CK 0049
In the Madras High Court
Case No : 10047 of 2017

Mrs.Shalini Pai.

APPELLANT

Vs

State Bank of Mysore

RESPONDENT

Date of Decision : 02-08-2017

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Section 21, Section 21, Section 21, Section 21 - Deposit of amount of debt due, on

Citation : (2017) 08 MAD CK 0049

Hon'ble Judges : S.Manikumar, V.Bhavani Subbaroyan

Bench : DIVISION BENCH

Advocate : S.Manikumar, V.Bhavani Subbaroyan

Judgement

1. Writ petitioners have contended that after verifying the encumbrance from the Sub Registrar's Office, within whose jurisdiction, the subject property is situate, and the Registrar of Companies, they purchased the property on 05.12.2008. Petitioners have further contended that when they received a notice in O.A.No.611 of 2009, from the Debts Recovery Tribunal, Karnataka at Bangalore, they came to know that respondents 2 to 6 herein, had availed loan from State Bank of Mysore, Kottarechowki Branch, Mangalore, Karnataka, the 1st respondent. Petitioners have also contended that respondents 2 to 6 herein, had never whispered about the mortgage over the subject property, executed in favour of State Bank of Mysore, Kottarechowki Branch, Mangalore, Karnataka, the 1st respondent.

2. Though writ petitioners opposed the prayer sought for, in OA No.611 of 2009, by furnishing documents, in support of the contention that they were bonafide purchasers, the Debts Recovery Tribunal, Bangalore vide order dated 30.12.2013, allowed O.A.No.611 of 2009 and ordered as follows: ORDER The O.A. stands allowed with costs in the following manner: The defendant Nos.1 to 5 joints, severally and personally shall pay a sum of Rs.44,32,974/- together

with current and future interest at the rate of 12.75% p.a., compounded with monthly rests from the date of the O.A. till complete realisation. In the event of failure of the defendant Nos.1 to 5 to make payment of the O.A. Amount, the plaintiff Bank is at liberty to settle the Schedule A and B Properties except A(ii) and A(iii) as Defendant No.9, Syndicate Bank has got first charge on A(ii) and A(iii) movable properties and appropriate the sale proceeds towards the O.A. amount as required under law. However if any amount is left out after appropriating the sale in proceeds in the OA amount, the same shall be subjected to the 4 rights of the defendant Nos.9 to 11. In spite of Sale of the said properties, if the O.A. amount is not realized the plaintiff bank is at liberty to proceed against the person and other properties of the defendant Nos.1 to 5 as required under law. Schedule Property / Schedule Properties shown in Schedule / Schedules of present O.A., shall become part and parcel of final order of O.A and Recovery Certificate of present O.A and said Schedule Property / Schedule Properties shown in Schedule / Schedules of present O.A., shall be deemed to be part and parcel of final order of O.A and Recovery Certificate of O.A even if for any reason / reasons Schedule Property / Schedule Properties of O.A is/are not shown in final Order of O.A and Recovery Certificate. Issue Recovery Certificate as sought by the plaintiff Bank. The Registry is directed to communicate the copy of the Order to the parties concerned by Speed Post or Registered Post with AD.

3. Aggrieved by the same, writ petitioners, filed W.P.No.9068 of 2014 before the High Court of Karnataka. Vide order dated 15.03.2014, the High Court of Karnataka dismissed the writ petition, on the grounds that an alternate remedy, is provided under the statute. Thereafter, petitioners filed AIR No.315 of 2014 before the Debts Recovery Appellate Tribunal, Chennai and also filed, three interim applications.

4. On 02.06.2015, I.A.No.693 of 2014, filed to condone the delay of 30 days, was allowed by the Debts Recovery Appellate Tribunal, Chennai. I.A.No.344 of 2015, was filed seeking for waiver of pre-deposit.

5. Petitioners have further contended that Syndicate Bank, Kulai Branch-N.H.-17, Mangalore (Dakshina Kannada) was the 9th respondent in O.A.No.611 of 2009, on the file of Debts Recovery Tribunal, Karnataka, at Bangalore. While disposing of the said OA, the Debts Recovery Tribunal, Karnataka at Bangalore, held that for the subject property mortgaged, Syndicate Bank, Kulai Branch-N.H.-17, Mangalore (Dakshina Kannada)/9th defendant therein, would have the first charge, than State Bank of Mysore, Kottarechowki Branch, Mangalore.

6. Being aggrieved over the abovesaid portion of the order made in O.A.No.611 of 2009 dated 30.12.2013, State Bank of Mysore, Kottarechowki Branch, Mangalore, has filed AIR No.644 of 2015. Waiver Application, I.A.No.344 of 2015 in AIR.No.315 of 2014 filed by the writ petitioners and AIR No.644 of 2015 filed by State Bank of Mysore, Karnataka, 1st respondent, were listed on 20.12.2016.

7. Both AIR Nos.644 of 2015 and 315 of 2014 relate to the same subject

property. Waiver petition filed by the writ petitioners was argued. According to the writ petitioners, their counsel was under the bonafide belief that both the matters were adjourned to 22.02.2017. But when I.A.No.344 of 2015 in AIR No.315 of 2014 was subsequently listed on 31.01.2017, they came to know that the Debts Recovery Appellate Tribunal, Chennai, had already passed an order on 22.12.2016, directing the writ petitioners to deposit a sum of Rs.12 Lakhs within four weeks, from the date of the said order. As the learned counsel has inadvertently noted that I.A.No.344 of 2015 in AIR No.315 of 2014 as adjourned, petitioners could not deposit the amount, as ordered. Consequently, I.A.No.344 of 2015 in AIR No.315 of 2014 filed for waiver of pre deposit has been dismissed. Explaining the above, though subsequently, the petitioners filed I.A.No.338 of 2017, to restore the order made in I.A.No.344 of 2015 in AIR No.315 of 2014, the same has been dismissed.

8. Left with no other alternative, the petitioners have filed the instant writ petition praying for a writ of certiorarified mandamus to call for the orders relating to the proceedings of the Debts Recovery Appellate Tribunal in AIR No.315 of 2014 dated 30.01.2017 and the consequential proceedings in I.A.No.338 of 2017 in I.A.No.334 of 2015 in AIR No.315 of 2014 dated 23.02.2017, quash the same, and restore AIR No.315 of 2014 before the Debts Recovery Appellate Tribunal, Chennai.

9. Opposing the prayer sought for, in the writ petition, State Bank of Mysore, Kottarechowki Branch, Mangalore, 1st respondent has filed a counter affidavit contending inter alia that order dated 20.12.2016, directing the writ petitioners to deposit the statutory requirement under Section 21 of the Recovery of Debts Due to Bank and Financial Institutions, Act, 1993, has not been complied with. Bank has further submitted that order dated 20.12.2016, is a self working order, which clearly spells out that in the event of failure to deposit a sum of Rs.14 lakhs within four weeks, the appeal would stand automatically dismissed.

10. State Bank of Mysore, Kottarechowki Branch, Mangalore, the 1st respondent has further contended that for the reasons best known, petitioners have filed I.A No.338 of 2017, for restoration of I.A.No.344 of 2015 in AIR No.315 of 2014, contending that their learned counsel had failed to take note of the order dated 22.12.2016. According to the bank, it is a lame and untenable excuse, for not complying with the orders.

11. Mr.E.Venkatesh Babu, learned counsel on record submitted that it was he who appeared before the Debts Recovery Appellate Tribunal, Chennai and inasmuch as both the AIR Nos.315 of 2014 and 644 of 2015, were listed on the same date and due to over sight and inadvertence, he has noted the date of next hearing of both the AIR's as 22.02.2017, the condition to make pre-deposit of Rs.12 Lakhs was not noted, and consequently, he could not inform the writ petitioners to make the predeposit, as ordered on 20.12.2016. According to him, though there was bonafide mistake on his part, the same should not be put against the petitioners.

12. On 19.07.2017, Mr.E.Venkatesh Babu, learned counsel for the petitioner submitted a demand draft, though taken with some delay had to be revalidated and he required two weeks time. Mr.Sethuraman, learned counsel for the 1st respondent bank submitted that the said amount, if deposited with the Registrar, Debts Recovery Appellate Tribunal, be appropriated to the loan account of the borrower.

13. On this day, when the matter came up for further hearing Mr.E.Venkatesh Babu, learned counsel for the petitioners submitted that Demand Draft has been revalidated. He further submitted that if this Court is inclined to accept the contention of the petitioners, a sum of Rs.12 Lakhs, would be deposited with the Debts Recovery appellate Tribunal, Chennai, within such time as fixed by this Court.

14. Mr.Senthil Kumar, learned counsel on record, for the above bank submitted that if the amount is remitted with the Registrar, Debts Recovery Appellate Tribunal, Chennai, the said sum be permitted to be appropriated to the loan account of the borrower.

15. Mr.E.Venkatesh Babu, learned counsel for the petitioners submitted that as bonafide purchasers of the property in the year 2008, they have a good case before the tribunal, and therefore, prayed such direction, need not be issued.

16. We have gone through the entire materials and given our conscious consideration to the pleadings and submission of the learned counsel appearing for both parties.

17. On the one hand, the petitioners have contended that they are bonafide purchasers, of the property. On the other hand, for the properties mortgaged by the borrower, bank has taken steps to recover the dues. As between State Bank of Mysore, Kottarechowki Branch, Mangalore and Syndicate Bank, Kulai Branch-N.H.-17, Mangalore, (Dakshina Kannada), the 9th defendant in OA No.611 of 2009, the Debts Recovery Tribunal, Karnataka at Bangalore, vide order dated 30.12.2013, has declared that the first charge on the subject property would be with Syndicate Bank, Kulai Branch-N.H.-17, Mangalore, (Dakshina Kannada), the 9th defendant therein. At the instance of State Bank of Mysore, Kottarechowki Branch, Mangalore, the 1st respondent bank, by filing AIR No.644 of 2015, is, continues in Debts Recovery Appellate Tribunal, Chennai. Writ petitioners have filed AIR No.315 of 2014. Contention that both I.A.No.344 of 2015 in AIR No.315 of 2014 filed by the writ petitioner and AIR No.644 of 2015, filed by State Bank of Mysore, Kottarechowki Branch, Mangalore, the 1st respondent bank, were listed on 22.12.2016, has not been disputed.

18. Contentions of Mr.E.Venkatesh Babu, learned counsel for the petitioners that arguments were advanced simultaneously in both AIRs, have not been disputed. Also the contention that AIR No.644 of 2015, filed by the State Bank of Mysore, has been adjourned to 22.02.2017, has not been disputed by the said Bank.

19. The only contention of the petitioners is that their counsel has noted down the adjournment date both, in AIR Nos. 315 of 2015 and 644 of 2015, filed by the writ petitioners and State Bank of Mysore, Kottarechowki Branch, Mangalore, the 1st respondent Bank, respectively, to 22.02.2017 and due to oversight has failed to note down the order of the Debts Recovery Appellate Tribunal, Chennai, made in I.A.No.344 of 2015, directing deposit of Rs.12 Lakhs on or before 30.01.2017, and thus they could not comply with the directions, and whereas, State Bank of Mysore, Kottarechowki Branch, Mangalore, the 1st respondent bank has contended that it is lame excuse and that the conditional order has not been complied with.

20. Before us, Mr.E.Venkatesh Babu, learned counsel for the writ petitioners who had appeared before DRAT, Chennai, submitted that due to oversight, he has not noted down the order and for that matter the petitioners should not suffer. True that every mistake committed by the learned counsel for the party, should not be simply be condoned, unless and until, it is proved to be bonafide. Further, in matters of this nature, Courts should scrutinize the pleadings, to consider as to whether there could be a possibility of a lawyer, committing a bonafide mistake, and the irreparable hardship, caused due to the mistake.

21. When two AIRs, alongwith the I.A.No.344 of 2015 in AIR No.315 of 2014, were listed on the same day, the possibility of noting down only the adjournment date and by oversight there could be a failure on the part of the counsel to note down the directions to deposit, cannot be ruled out.

22. Writ petitioners are stated to be in possession of the property from 2008, even before State Bank of Mysore, Kottarechowki Branch, Mangalore, instituted the proceedings for recovery in O.A.No.611 of 2009 on the file of the Debts Recovery Tribunal, Karnataka at Bangalore, and they claim to be bonafide purchasers. For the bonafide mistake committed by the learned counsel in not noting down the order passed, directing the petitioners to make a pre-deposit, they should not be prejudiced in scuttling their statutory rights to pursue a right of appeal. When substantial justice and technicalities are pitted against each other, cause of substantial justice, deserves to be preferred. On the facts and circumstances of this case, in our considered view, failure to note down the orders made in I.A.No.344 of 2015 in AIR No.315 of 2015, is only a bonafide mistake, due to oversight.

23. It is a trite law that for the bonafide mistake committed, party should not suffer. Reference can be made to few decisions. (a) In Rafiq & Another Vs. Munshilal & Another, reported in 1981 AIR SC 1400, the counsel for the appellant did not appear, the appeal was disposed of. When the appellant was aware of the fact that his appeal had been disposed of, in the absence of his advocate, he moved an application to the High Court, to recall the order, dismissing the appeal and prayed to permit him to participate in the hearing. The said application was rejected by the High Court. On further appeal, the Hon"ble Supreme Court, at para No.3, held as follows: "The disturbing feature of the case is that under our

present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

(b) In *Goswami Krishna Murarilal Sharma v. Dhan Prakash*, reported in (1981) 4 SCC 574, the appellant's counsel withdrew from the case, stating that he had no instructions from his client. Granting permission to withdraw, the Hon'ble High Court, dismissed the appeal. The High Court declined to restore the appeal. On the above facts, at para "7 ", the Hon'ble Apex Court, held as follows

"Now, the appellant had engaged his advocate who withdrew, the reasons for

withdrawal being known only to the

learned Advocate and not ascertainable from the record. It is difficult to appreciate how the Court straight away proceeded to dismiss the appeal on the ground that the appellant in person is not present. It is all the more disquieting how the High Court declined to grant the application for restoration of appeal and to hear it on merits. Without dilating upon this point, relying on the decision of this Court in *Rafiq v. Munshilal* [cited supra], we think that the appellant's appeal which was admitted by the High Court should have been heard on merits after giving an opportunity to engage another advocate."

Ultimately, the Hon'ble Apex Court, set aside the order of the High Court, directed restoration of the appeal and hear the appeal on merits. (c)(i). In *Smt. Lachi Tewari & Others Vs. Director of Land Records and Others*, reported in AIR 1984 SC 41, the appellant engaged three Advocates. Rule nisi was issued and an interim order in favour of the appellant was granted. When the matter came up for first hearing, after the rule nisi was issued, there was no representation on behalf of the appellant. By observing that there was none to press the application, a Hon'ble Division Bench, discharged the rule, and vacated the interim order. Within 10 days, an application was moved to recall the order, on the grounds that when the case was posted on the reopening day, one of the learned counsel could not return on account of irregularity of Air services, and that the other two counsel were engaged in other courts. High Court did not accept this reason.

(ii). Testing the correctness of the order and following the judgments in *Rafiq & Another Vs. Munshilal & Another*, reported in 1981 AIR SC 1400 and *Goswami Krishna Murarilal Sharma v. Dhan Prakash*, reported in (1981) 4 SCC 574, the Hon'ble Apex Court, set aside the orders of the High Court, restored the matter, and further held that, the interim order, as revived.

(d) In *Tahil Ram Issardas Sadarangani Vs. Ramchand Issardas Sadarangani*, reported in AIR 1993 SC 1182, the counsel withdrew his appearance. Client was not aware of the hearing date. There was nothing on record to show that the petitioner therein, had the notice of hearing. He was not present. The petition was dismissed for default. Plea for restoration was rejected. On appeal, the Hon'ble Supreme Court, set aside the orders of the High Court.

(e) In *Sushila Narahari & Others Vs. Nand Kumari*, reported in 1996 (5) SCC 529, the Advocate engaged has derelicted in his duty to inform his client by registered post, if there was any non-cooperation on behalf of the appellants therein. When the suit came up for trial, he had withdrawn his vakalatnama, without notice to his clients/appellants. The trial court set the appellants exparte and decreed the suit. Application filed to condone was dismissed. On appeal, the Hon'ble Supreme Court, by observing that the appellant is justified, condoned the delay. Thus, in the above reported case, it could be inferred that for the fault of the lawyer, the party was not made to suffer.

(f) In *K. Balakrishnan v. The Special Tahsildar (L.A.), North Neighbourhood Project, Madura* reported in 1996 (2) MLJ 236, while considering sufficient cause, and the prejudice caused, due to the fault of the counsel, at paragraph 14, this court held thus:

"14. Even if the principle that because of the counsel's mistake the parties should not suffer, the mistake of the counsel should be a bona fide one. The mistake cannot be a wanton or wilful. In such cases, the court cannot come for the rescue of both the counsel as well as the litigant. Hence, I am of the opinion that the delay has not been properly explained and the explanation given by the petitioner will not amount to a sufficient cause as per Section 5 of the Limitation Act. I am fortified with the judgment of the Supreme Court reported in *G. Ramegowda v. Special Land Acquisition Officer, Bangalore*, in which it has been held as follows:

The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See *Ramlal v. Reva Coalfield Limited*, *Shakuntala Devi v. Kuntal Kumari*, *Concord of India Insurance Co. Limited v. Nirmala Devi*, *Mata Din v. A. Narayanan*, *Collector, Land Acquisition, v. Katiji*. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a timebarred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression "sufficient cause" in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. In *Katiji's* case, this Court said: When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

(g) A Hon'ble Division of this court in *Avvai Home v. Arulmighu Arunachaleswarar Devasthanam, Thiruvannamalai* reported in 1999 (1) MLJ 355, while considering a sufficient cause beyond the control of the party invoking the aid of Limitation Act, at paragraph Nos. 16, 18 and 19 held thus:

16. In the instant case, where the delay was not deliberate, but on entrustment to the clerk to file the vakalat, with a bona fide belief that he might have filed, the counsel did not follow the case, : not doing it, the lapse should not affect the party who did his part of the work bona fide believing his counsel. In such a situation, where the lapse was not deliberate or does not smack of mala fides or not intended to adopt any dilatory strategy, it would be a just case to condone

the delay, but without making the effort and time of the other side a waste. In other words, an adequate cost would meet the ends of justice to compensate the party for his loss.

18. Normally, sufficient cause must be a cause which is beyond control of the party invoking the aid of the section. For somebody else's negligence or fault, the party or the substantial justice should not be allowed to suffer; Where neither negligence nor want of bonafide is imputable to the party for the delay in filing, it would constitute sufficient cause. Where the party did everything at his command, but the lapse is on the part of the counsel, it affords a ground for condonation. But a slip due to accidental mistake or oversight by a pleader or on the ground of illness may be excused. These are all excusable oversight of a party's advocate, which at times require a liberal approach from the point of the party concerned, where there was no negligence on his part. Not following up the case after engaging a counsel, even assuming that it can

come within the ambit of honest mistake, even such mistake is entitled for excuse and comes within the meaning of "sufficient cause" for excusing the delay.

19. Keeping the nature of the order, the consequences and the conduct of the party and nonmentioning of the disposal in the suit register, all put together, it indicates a bona fide inaction imputable to the counsel. Therefore, we disagree with the reasoning of the learned trial Judge and we are of the opinion that the explanation constitutes sufficient cause to condone the delay. But for the mistake or inaction on the part of the counsel, the respondent should not be made to suffer for the fault of others.

(h) In *G.Krishnamoorthy v. Arulmighu Sri Pataleeswarar Devasthanam*, rep. By its Executive Officer, Thirupapuliyur, Cuddalore reported in 2010 (1) MWC 837 (Civil), a suit was decreed ex parte, for nonprosecution and non-filing the written statement. Execution proceedings were also launched. An application to condone the delay in setting aside the ex parte decree, was filed under Section 5 of the Limitation Act, on the ground that the Advocate did not inform him properly and that there was also no communication from the lawyer. Accepting the reasons stated and following *Rafiq Munshilal's* case (cited supra), a learned Single Judge of this Court has condoned the delay, on payment of costs.

24. In the light of the above discussion and decisions, this Court is of the view that the writ petitioners have made out a case for interference with the orders of the Debts Recovery Appellate Tribunal, Chennai in AIR No.315 of 2014 dated 30.1.2017 and the consequential proceedings in I.A.No.338 of 2017 in I.A.No.344 of 2015 in AIR No.315 of 2014 dated 23.02.2017. Accordingly, both the orders are set aside.

25. Today, three Demand drafts dated 30.03.2017 drawn in favour of the Registrar, Debts Recovery Appellate Tribunal, Chennai are produced and the details of the same, are as follows: Sl.No. D.D.No. Name of the Bank Amount 1 780766 Bank of Maharashtra, Mangalore Rs.4 Lakhs

2 780767 Bank of Maharashtra, Mangalore Rs.4 Lakhs

3 003392 IDBI Bank, Mangalore Rs.4 Lakhs

26. In view of setting aside the orders of the Debts Recovery Appellate Tribunal, Chennai, made in AIR No.315 of 2014 dated 30.01.2017, writ petitioners are permitted to deposit the above said three demand drafts, as expeditiously as possible, from the date of receipt of the copy of this order. We also make it clear that the sum of Rs.12 Lakhs deposited with the Registry, Debts Recovery Appellate Tribunal, Chennai, shall not be appropriated towards the loan account of the borrower. No sooner the deposit is made Debts Recovery Appellate Tribunal, Chennai is directed to restore AIR No.315 of 2014 to file and number the appeal, if it is otherwise in order. It is open to the writ petitioners to seek for appropriate interim orders, if so advised. Writ petition is allowed. No costs.