

(2013) 08 MAD CK 0288

In the Madras High Court

Case No : C.R.P. (PD) No. 1613 of 2009 and M.P. No. 1 of 2009

M/s. Ravi Steels, Mohanlal Ojha, Om Prakash Ojha and Ravi
Sankar Ojha

APPELLANT

Vs

M/s. Sultan Steel Industries

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17
Limitation Act, 1963 — Section 5

Citation : (2013) 08 MAD CK 0288

Hon'ble Judges : K. Ravichandrabaabu, J

Bench : Single Bench

Advocate : Gowrishankar for G. Jeremiah, for the Appellant; S. Shyamala, for the Respondent

Final Decision : Dismissed

Judgement

K. Ravichandrabaabu, J.—The present Civil Revision Petition is filed by the petitioners challenging the order of the Court below in dismissing the application filed u/s 5 of the Limitation Act. The petitioners as defendants in O.S. No. 3921 of 2003 on the file of the XIII Assistant Judge, City Civil Court, Chennai filed an appeal before the lower appellate Court in A.S. No. 96 of 2007. The said appeal was dismissed on 8.4.2008. The petitioners filed C.M.P. No. 30 of 2009 seeking to condone the delay of 266 days in filing the petition to set aside the judgment and decree made on 8.4.2008 in the above said appeal.

2. The respondent herein as the plaintiff filed the above said suit seeking for recovery of a sum of Rs. 3,50,000/-. It is the case of the plaintiff that the defendants are the tenants under the plaintiff. They were running a factory containing machinery with the sanctioned electricity power load of 80 HP. It is their further case that there was a sudden inspection by the Electricity Department and it was deducted that there was an unauthorised load as against the sanctioned load of 80 HP. On that basis, an enquiry was held and the use of

unauthorised power of 122 HP was proved. Aggrieved against the same, the first defendant filed W.P. No. 2320 of 1991, wherein this Court directed him to deposit a sum of Rs. 50,000/- with liberty to file an appeal before the appellate authority. The first defendant filed an appeal before the appellate authority who directed the 1st defendant to make the balance payment of Rs. 7,26,780/- payable to the Electricity Department. Aggrieved against the said order, the first defendant filed writ Petition in W.P. No. 11936 of 1992 before this Court and the same was also dismissed against which he filed W.A. No. 465 of 2000 wherein the first defendant was directed to make a payment of Rs. 3,50,000/- by way of an interim order. In the mean time, the defendants vacated the premises on 30.3.1993. The plaintiff therefore issued a legal notice on 11.7.2000 calling upon the defendants to make the said payment of Rs. 3,50,000/-. It is the case of the plaintiff that the defendants neither paid the money nor cared to reply to the said notice. As there was immediate threat of disconnection of electricity supply to the premises, the plaintiff paid the said sum of Rs. 3,50,000/-. Finally, the said writ appeal also came to be dismissed. Thus, the plaintiff filed the above said suit claiming Rs. 3,50,000/- from the petitioners herein. The trial Court decreed the suit. Aggrieved against the same, the petitioners filed an appeal in A.S. No. 96 of 2007 before the City Civil Court, Chennai. On 8.4.2008 when the appeal was taken up for hearing neither the petitioners nor their counsels appeared before the Court and the lower appellate Court upon hearing the arguments of the respondent and considering the matter on merits rejected the appeal by its judgment and decree dated 8.4.2008.

3. The petitioners by construing the said judgment and decree as an ex-parte one, sought to set aside the same by filing an application, however, with a delay of 266 days. The Court below rejected the said application filed u/s 5 of the Limitation Act by holding that even though sufficient opportunity was given to the petitioners' side, the counsel on record not represented or not argued the matter. The counsel for the petitioners therein before the court below also urged that due to his ill health, he could not appear on the day, when the matter was called. The Court below has rejected the said reason as not acceptable because the other counsel on record has not represented or argued the matter. Apart from those reasonings, the Court below has also found that the appeal was disposed of not as an ex-parte order but on merits after considering all the facts and circumstances. Aggrieved against the same, the present Civil Revision Petition is filed before this Court.

4. Learned counsel appearing for the petitioners submits that the petitioners have explained before the Court that only due to the counsel's ill-health, he was not in a position to attend the Court on the said day when the matter was called and therefore for the fault of the counsel, the party should not be made to suffer. He also invited the attention of this Court to the averments made in the affidavit filed before this Court in support of the stay application to contend that the proper reasons have been explained for the non-appearance on the particular day.

5. Per contra, learned counsel appearing for the respondent submitted that the order passed by the Court below is not an ex parte order and therefore the question of condoning the delay does not arise and the remedy of the petitioners is only to file an appeal against the said judgment and decree. She also further submitted that the petitioners have not shown and proved sufficient cause before the Court below for their non-appearance.

6. Heard the learned counsels on either side.

7. The petitioners suffered a decree for recovery of money and challenging the same they filed an appeal before the lower appellate Court. The appeal came to be dismissed on 8.4.2008. According to the learned counsel for the petitioners, it is an ex parte judgment and decree and therefore they are entitled to file an application to set aside the same. On the other hand, it is the contention of the learned counsel appearing for the respondent that it is the judgment made on merits and therefore, such contention is not maintainable.

8. No doubt, the learned counsel for the petitioners relied on a decision of the Apex Court reported in Ghanshyam Dass Gupta Vs. Makhan Lal, to contend that the appellate Court ought not to have decided the matter on merits in the absence of the appellant's counsel. A perusal of the said decision would show that the Apex Court has considered the scope under 41 Rule 17(1) CPC and observed that if the appellant does not appear before the Court below, when the matter is called for hearing, the Court has to dismiss the appeal but not on merits, in view of the explanation given to sub-rule (1) of Rule 17 of Order 41, CPC.

9. No doubt as per the decision of the Apex Court, the petitioners are entitled to file an application to set aside the said judgment and decree provided they approach the Court within time. If such approach was made after a considerable period, then it is their bounden duty to explain the delay with sufficient cause. That is why they filed an application u/s 5 of the Limitation Act to condone the delay of 266 days. Therefore, the only question that arises for consideration before this Court is as to whether the plaintiffs have made out a case u/s 5 of the Limitation Act to condone the delay of 266 days.

10. I have perused the affidavit filed in support of the application by the petitioners before the Court below. It is stated by them that the appeal was lastly posted on 8.4.2008 and due to non-representation of the case, the Court below was pleased to dismiss the above appeal. It is further stated therein that the counsel has totally forgotten by inadvertently not noting down the correct hearing dates of the case and therefore the matter could not be followed periodically. Except saying this reason, the petitioners have not stated any other reason, more particularly, with regard to the so-called illness of the counsel as projected by them before the court below at the time of argument. Even such contention raised by the petitioners was rejected by the Court below by holding that the other counsel on record did not represent or argue the matter on the

day when the matter was called. In my considered view, the petitioners cannot project a new case before the court at the time of arguing the matter than the one stated in the pleadings, thereby taking the other side by surprise. As stated already, there is absolutely no reference about the so called illness of the counsel in the affidavit filed before the Court below. On the other hand, it is their case that the counsel had totally forgotten inadvertently in noting down the correct hearing dates. Even to prove such contention, the petitioners have not examined anybody nor marked any document to substantiate the case. Merely filing an affidavit would not be sufficient to hold that the reasons for the delay have been proved. In this case in total deviation of the reasons stated in the affidavit, the petitioners have contended at the time of the arguing the matter and projected the illness of the counsel as the reason. Therefore, the Court below rejected the said contention and came to the conclusion that the matter was not argued in spite of granting sufficient opportunity given to the petitioners. The Court below has also rejected the contention of the petitioners with regard to the delay as not acceptable. I find that the said order of the Court below passed by exercising its discretion does not warrant any interference in this Civil Revision Petition, more particularly under the facts and circumstances that the petitioners have not stated the reason of illness of the counsel in their affidavit filed in support of the application. They cannot improve their case by filing any other affidavit before this Court while filing the Civil Revision Petition. In my considered view, such affidavit cannot be taken into consideration for deciding the issue as to whether the petitioners have shown sufficient cause for condoning the delay before the court below. Thus, I find that there are no merits in the Civil Revision Petition and accordingly the same is dismissed. Consequently, the connected M.P. is closed. No costs.