

(2017) 07 BOM CK 0115
In the Bombay High Court
Case No : 78 of 2016

Rajkumar Singh s/o Ramlakhan Singh	APPELLANT
Vs	
Madhukar s/o Akhaduji Barwad, & Anr.	RESPONDENT

Date of Decision : 25-07-2017

Acts Referred:

[Limitation Act, 1963](#), [Section 5](#) -
Extension of prescribed period in certain cases

Citation : (2017) 07 BOM CK 0115

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : G. M. Shitut, M. B. Agasti

Judgement

1. This Revision is preferred, challenging the order dated 30.8.2016 passed by the District Judge¹³, Nagpur, below Exh.32 filed in Miscellaneous Civil Application No. 281/12, whereby the learned District Judge has rejected the said application which was filed for dismissal the Miscellaneous Civil Application No. 281/12.

2. Brief facts of the Revision can be stated as follows: Respondent no.2 was the owner of the land bearing survey no.26, area 1.94 H.R., situated at Mouza Hardoli, Tah. Kalmeshwar, District Nagpur. By virtue of an agreement of sale executed on 20.7.1998, respondent no.2 has agreed to sell the said land to the applicant. However, subsequently respondent no.2 avoided to execute the sale deed. Hence, the applicant had filed Spl.Civil Suit No. 376/2000 on 26.5.2000 against respondent no.2 for specific performance of agreement of sale and for possession of the land.

3. Respondent no.2 appeared in the said suit and filed his written statement, admitting the execution of the agreement of sale but contending that it was executed as security for the handloan obtained from the applicant.

4. On the basis of the rival contentions raised by both the parties, the trial Court has framed issues at Exh.24. The parties, applicant and respondent no.2

examined themselves and also adduced the evidence of the witnesses. The suit was accordingly fully contested and decided on merits by the judgment and order dated 31.7.2007. By the said judgment, the decree for specific performance of agreement was granted in favour of the applicant. Respondent no.2 has not challenged the said judgment and decree till the date and thus, it has attained finality.

5. However, as respondent no.2 failed to comply with the said judgment and decree, applicant was constrained to file Special Darkhast No. 251/2008. In the said execution proceeding, respondent no.2 failed to remain present though duly served with notice. Hence, the saledeed came to be executed through Court on 24.6.2010 thereby the applicant has become absolute owner of the said land. The possession of the said land was also delivered to the applicant through Bailiff on 20.4.2012. As per the case of the applicant, since then he is in actual and lawful possession of the suit land in his capacity as owner.

6. However, subsequent thereto, on 24.4.2012 respondent no.1 appeared in execution proceeding and raised an objection, claiming himself to a bona fide purchaser of the suit land, having purchased it, vide saledeed dated 21.3.2001 from respondent no.2. As per the applicant, as the said saledeed was executed by respondent no.2 in favour of respondent no.1 during the pendency of the suit, it was hit by the principle of lis pendens. Along with raising objection in the execution proceedings, respondent no.1 also preferred an appeal on 26.4.2012 in the District Court challenging the judgment and decree passed in Spl.Civil Suit No. 376/2000, claiming that he has purchased the property during the pendency of the suit and as original defendant has not challenged the said judgment, by filing appeal, he was entitled to prefer such appeal. However, as there was delay of about four years and eight months, in preferring the appeal, respondent no.1 had filed an application bearing Misc.Civil Application No. 281 of 2012 for condonation of delay under Section 5 of the Limitation Act. Along with the application for condonation of delay, he has also filed an application for grant of leave to file the appeal. The learned District Judge allowed both the applications by common order dated 17.7.2012.

7. Against the said order of condonation of delay, the present applicant preferred C.R.A. No. 73 of 2012 in this Court. After hearing both the parties, the said revision application was allowed and the order of the District Court passed on 17.7.2012 allowing condonation of delay came to be set aside. The matter was remanded to the District Court with a direction to grant an opportunity to both the parties to lead evidence in support of their contentions.

8. Applicant has, also in the meantime by filing a separate Writ Petition No. 5395/12 challenged the remaining part of the common order passed by the District Court of granting leave to respondent no.1 to file the appeal. However, the said writ petition came to be dismissed by this Court, vide order dated 20.3.2013, holding that, as no appeal was preferred by the original defendant i.e. respondent no.2 and as interests of respondent no.1 were prejudicially

affected by the judgment and decree passed in Special Civil Suit No. 376 of 2000, respondent no.1 can file appeal against the judgment and decree in that suit.

9. In the meantime, respondent no.1 has also filed Reg.Civil Suit No. 160 of 2012 on 30.4.2012 before Civil Judge, Jr. Division, Kalmeshwar against the present applicant and respondent no.2 for declaration of ownership and permanent injunction in respect of the suit land. That suit came to be dismissed by the trial Court and against that decision, no appeal is preferred.

10. In this backdrop of these facts, as the present applicant came to know that respondent no.1 has sold the suit property to some third person vide saledeed dated 27.3.2014, the applicant filed, therefore, an application at Exh.32 before the District Court pointing out that as respondent no.1 was allowed to file an appeal, on the pretext that he has purchased the suit property from respondent no.2 and he was in actual possession of the same, now in view of the saledeed of the said property executed by respondent no.1 in favour of some third person, he is no more the owner of the suit property, nor he is in actual possession of the said property; therefore, his cause of action to file the appeal against the judgment and decree in Spl.Civil Suit 376/2000 has come to an end.

11. Respondent no.1 resisted this application vide his reply dated 30.4.2016 whereas respondent no.2 chose not to file any reply to this application.

12. During pendency of hearing on this application, the applicant served notice to respondent no.1 to admit the saledeed dated 27.3.2014 which he has executed in favour of some third person. Respondent no.1 admitted the said saledeed, thus, leaving no manner of doubt that he has sold the suit property to some third person.

13. In view of these admitted facts on record, the grievance of the applicant is that respondent no.1 was no more entitled to file the appeal against the judgment passed in Spl.Civil Suit No. 376/2000. However, the learned District Court was after hearing the counsel for both the parties, pleased to reject his application and hence, applicant is constrained to prefer this Revision challenging the said order.

14. According to learned counsel for applicant, the very right or entitlement on the basis of which the respondent no.1 was granted leave to file the appeal was, he being the purchaser of the suit land and claiming to be in possession thereof, on the basis of saledeed executed during the pendency of the suit. However, as now he no more remains to be the other owner or in possession of the suit land, in view of the saledeed executed by him on 27.3.2014 in favour of some third person, he has no right to file the appeal and hence, on this very ground itself, the application filed by him for condonation of delay and for leave to appeal should have been dismissed. Allowing respondent no.1 to continue the said proceeding will not only cause prejudice to the applicant but it is as good as granting permium on illegal act of respondent no.1. It is submitted by learned

counsel for the applicant that, learned District Judge has rejected his application only on the count that this Court has remanded the matter to the said court for deciding the same afresh and therefore, it would not be proper on his part to dismiss the said proceeding. It is urged that this order of learned District Judge, therefore, is not considering the actual controversy and hence it needs to be quashed and set aside.

15. Per contra, learned counsel for respondent no.1 has supported the said order by submitting that during pendency of Spl.Civil Suit No. 376/2000 or even thereafter during the pendency of the Misc.Civil Application No. 281 of 2012, no stay order was operative restraining respondent no.1 from creating third party interest in the suit property. Therefore, if he has created such interest, it cannot be said that he has committed any illegality. Therefore, his right to appeal cannot be forfeited which is already granted by this Court. Thus, according to learned counsel for respondent no.1, the learned District Judge has rightly rejected the application for dismissal of the proceedings in Misc.Civil Application No. 281 of 2012 and no interference is warranted in the said order, within the limited scope of revisional jurisdiction of this Court.

16. I have given my thoughtful consideration to the submissions advanced by learned counsel for both the parties and on the basis of the same having regard to the conspectus of facts, elaborated above, in my considered opinion, it has to be held that respondent no.1 has lost his right or the cause of action to seek leave to file appeal. It is pertinent to note that the very cause for giving him the leave to file appeal as per the order passed by this court in W.P. No. 5395 of 2012 was respondent no.1 claiming to be a bona fide purchaser of the suit land during the pendency of the suit and respondent no.2 having not preferred any appeal against the decree for specific performance passed in Spl.Civil Suit 376 of 2000. Another reason was that respondent no.1 claimed himself to be in possession of the suit property.

17. However, now by executing the sale deed dated 27.3.2014 in favour of the some third party and admitting the said fact on record, it is clear that respondent no.1 is no more the owner of the suit property and as can be seen from the recitals in the sale deed, he is also no more in possession of the suit property as he has delivered the possession to third party on 27.3.2014. Thus, he has lost whatever interest he has in the suit property by executing the sale deed and disposing of the suit property during the pendency of the proceedings which were initiated by him, for seeking leave to file appeal and for that purpose filing of application for condonation of delay in seeking such leave.

18. Thus, whatever right respondent no.1 has in the suit property, having been voluntarily given up by him, in favour of some third person, there remains no more cause of action for him to file the appeal. He was considered as interested party, only because he was having sale deed of the suit property in his favour and as he was claiming to be in possession of the suit property. Now he has already sold out the suit property and also parted with the possession of the suit

property. Hence, the very basic foundation for him for seeking leave to file appeal no more remains and therefore, his application, either for condonation of delay or for seeking leave to appeal should have been dismissed by District Court.

19. As regards the contention of the learned counsel for respondent no.1, that there was no stay order passed by any of the Courts restraining him from creating third party interest and therefore, he cannot lose his interest merely on account of such saledeed executed in favour of third party and hence his right to appeal cannot be forfeited on that count, needless to state that this submission cannot be accepted for the simple reason that it is as good as granting premium to respondent no. 1 for his inequitable act. Even if it is accepted that there was no stay order or injunction granted against respondent no.1 restraining him from creating third party interest, the fact remains the saledeed executed by him in favour of third person is hit by the principle of *lis pendens*. This act on his part is against the principle of equity and justness. A person who seeks the discretion of the Court for leave to appeal against the decree, though he was not a party to the suit, must come before the Court with clean hands. He cannot take the benefit of absence of injunction or stay order to contend that though he has transferred the property in favour of the some third person, he still enjoys the right to challenge decree, which is passed in favour of the applicant and which is already executed through the Court. Such conduct on the part of respondent no.1 cannot be approved by the Court, by permitting him to continue with his challenge to the said decree.

20. Otherwise also, respondent no.1 has lost interest in the suit property and therefore, he can no more be said to be having any cause of action for filing the application for condonation of delay in filing the application for leave to file appeal against the judgment and decree in Spl.Civil Suit No. 376/2000. It appears that learned District Court has rejected the application of applicant for dismissal of the proceeding only on the count that this Court has remanded the matter for deciding the application for condonation of delay after recording evidence of the parties. However, it does not mean that the learned District Judge, could not have exercised its discretion in the light of the facts brought to his notice that application for leave to file appeal itself is not maintainable as respondent no.1 has lost his interest, right, title and possession in the suit property by his own act of transferring the suit property in favour of third person.

21. The impugned order therefore passed by District Court needs to be quashed and set aside. Accordingly the revision is allowed. The impugned order passed by District Court on application Exh.32, filed by applicant in Miscellaneous Civil Appication No. 281/2012 is hereby set aside.

As a consequence, the application at Exh.32 filed in Miscellaneous Civil Appication No. 281/2012 is allowed. The said Miscellaneous Civil Appication No. 281/2012 stands dismissed as respondent no.1 is having no more cause of action to file the said proceeding.

Revision application is thus disposed of.