
(2007) 01 GAU CK 0044
In the Gauhati High Court

Tripura Gramin Bank

APPELLANT

Vs

Laxmi Nag and Others

RESPONDENT

Date of Decision : 04-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Section 5

Citation : (2007) 2 GLR 645 : (2007) 1 GLT 846

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

H.N. Sarma, J.—Refusal to condone the delay in applying for final decree, after expiry of 3 years from the final decree as per provision Section 137 of the Limitation Act, 1963, by the petitioner Bank, vide order dated 29.6.2000 in Misc. Case No. 8(A)/2000 by the Civil Judge (Sr. Divn.), West Tripura, Agartala, is the subject-matter for adjudication of this revision petition.

2. I have Mr. Sekhar Deb, learned senior counsel assisted by Mr. Section Dutta, learned Counsel for the petitioner and Mr. D.R. Choudhury, learned Counsel for the respondents/judgment debtor.

To put in short the necessary facts for the purpose of disposal of this revision petition are, inter alia, that the predecessor in interest of the present respondent No. 1 took a loan from the petitioner Bank for the purpose of business and the respondent Nos. 2 and 3 stood as guarantors thereof. On failure to repay the loan amount by the loanee, the Bank/petitioner instituted a Mortgage Suit bearing No. T.S. 184 (Mort) of 1987 for realization of the defaulted amount with costs and interest by selling the mortgaged property kept as security by the respondents for due payment of the loan amount. After hearing the suit the learned trial court passed a preliminary decree on 31.5.1990 decreeing the suit of the plaintiff petitioner for a sum of Rs. 90,945.90 including the interest and cost and directed the judgment debtor/respondent to pay the said decretal

amount within a period of six months, providing further that in the event of failure of the respondent to satisfy the decree, the plaintiff petitioner would be entitled to apply for final decree for realisation of the decretal amount by selling the mortgaged property, mentioned in the schedule.

3. The judgment debtor defaulted to pay the decretal amount as directed in the preliminary decree, for which the plaintiff petitioner filed an application for passing final decree, on 4.1.1995. Objections were raised by the judgment debtor on the said prayer for passing the final decree on different grounds including the ground of limitation. An application for condonation of delay was also filed at latter point of time praying for condoning the delay of about two years in filling the application for final decree. The learned trial court after hearing the parties rejected the prayer of the petitioner to condone the delay in filling the application praying for passing final decree vide impugned order dated 29.6.2000, which is the subject matter of scrutiny in this revision petition.

4. Learned senior counsel appearing for the petitioner submits that infact the application for final decree, so filed by the petitioner, could not have been rejected on the ground of limitation. The contention of the learned senior counsel is that a preliminary decree was passed by the learned trial court in favour of the plaintiff and the judgment debtor having failed to satisfy the decree what now remains is only to sell the mortgaged property and that can be done in the manner as provided under Order 21 of the CPC, as such, the petition could not be dismissed on the ground of limitation as it is a petition in the suit itself.

Alternatively, submission of the learned Counsel for the petitioner is that the petitioner being a banking institution acted as per the advise of their lawyer and due to incorrect and/or wrong advise of the lawyer of the petitioner, the delay in filing the application has been caused and the learned trial court without considering the true scope and purport of Section 5 of the Limitation Act mechanically passed the impugned order, dismissing the prayer of the petitioner.

5. Learned Counsel for the respondent, on the other hand, submits that on the face of the averments made in the application for condonation of delay, this petitioners has failed to make out any case for exercising the jurisdiction of the court to condone the delay in filling the application. Learned Counsel for the respondent vehemently opposes the contention of the petitioner submitting that the delay has been caused due to wrong advise of the lawyer of the petitioner and it is contended that such delay was caused only to latches and in-action on the part of the petitioner Bank.

Refuting the contention of the petitioner, the learned Counsel for the respondent further submits that after passing the preliminary decree and on account of its non-satisfaction, the petitioner is legally bound to apply for a final decree in terms of Order XXXIV of the CPC to seep the benefit of the decree and as such, the application cannot be treated as one under the provision of law to be a execution petition as submitted on behalf of the petitioner.

The learned Counsel for the respondent has also raised the maintainability of this revision petition u/s 115 of the Code of Civil Procedure.

6. I have heard the learned Counsel for the rival parties and considered their respective submissions.

7. It is an undisputed fact that the plaintiff petitioner obtained a preliminary decree in the suit on 31.5.1990 and in terms of the said preliminary decreed the respondent/judgment debtor did not pay the decretal amount within six months. The preliminary decree itself disclose at para 3 that in default of payment of the decretal amount by the respondent/judgment debtor within six months, the plaintiff would be entitled to apply to the court for a final decree for the sale of the mortgaged property. Although there are certain conditions in the preliminary decree, those are not relevant for the purpose of disposing the revision petition.

8. Mr. S. Deb, learned senior counsel submits that under Order XXXIV, Rule 4 of the CPC, there is a provision for passing final decree in a suit for sale. In passing such preliminary decree, the learned trial court is empowered under the provision of Order XXXIV, Rule 4 CPC to stipulate the period for payment of the decretal amount and on failure of the same the court is also empowered to allow the plaintiff to apply for final decree by sale of the mortgaged property for realisation of the decretal amount. Thus, filing of an application for passing a final decree is not the same status of an execution petition, nor the same can be treated as an execution petition. The execution of the decree can be done by way of sale of the mortgaged property only after passing the final decree, which transpires from the language of the decree itself. The period of limitation for filing such an application is 3 years as per provision of Article 137 of the Limitation Act. Accordingly the contention of Mr. S. Deb, learned senior counsel to the effect that such an application being an application of the suit itself is not acceptable and, hence, rejected.

9. Learned Counsel for the respondent though raised an objection that the provision of Section 5 of the Limitation Act is not applicable in such an application for final decree in view of the applicability of the provision of the residuary Article 137 of the Limitation Act in such cases, the provision of Section 5 of the Limitation Act is very much applicable.

In the case of Monotosh Kumar Mitra (Dead) By Lrs. Vs. Amarendranath Shaw (Dead) and Others, relied on by the learned Counsel itself disclose that the said provision of Article 137 of the Limitation Act is applicable in such case. Consequently the contention of the learned Counsel for the respondent does not hold good and it is held that such an application u/s 5 of the Limitation Act is maintainable.

10. Scrutinizing in the merit of the impugned order it is found that learned trial court rejected the prayer to condone the delay in filing the application on the ground that the petition does not disclose any sufficient cause for delay and it only states that due to ignorance of the lawyer about the nature of the petition

and about the time specified for final prayer, the delay was caused. Learned trial court further held that the ignorance of law cannot be excused and it is not sufficient ground to condone the delay.

11. Learned Counsel for the respondent contended that infact the petitioner has failed to disclose any such sufficient cause justifying the condonation of delay and the learned trial court rightly rejected the prayer. The delay in filling the application for final decree in the instant case was about one year and six months, as the period of limitation started in the month of December, 1990, after expiry of dead line of six months to pay the decretal amount fixed in the preliminary decree. The learned trial court dismissing the case due to ignorance of the learned lawyer and incorrect advise of the lawyer and failed to consider the distinction between this two concept in the instant case. The pleaded case of the petitioner in the application for condonation of delay, inter alia, is that the conducting lawyer of the petitioner due to his ignorance and incorrect advise the delay in filling the application for final decree was caused. It is also stated that there have been a bona fide mistake that inadvertence the condonation petition was not filed with the application. It is further averred that on receipt of the certified copy of the preliminary decree, the Branch Manager/petitioner failed to file the condonation petition as he forwarded the records to the Head Office and the Head Office returned the file directing the petitioner to file an application for final decree in the month of December 1994.

12. The Apex Court has reiterated the principle of law regarding the condonation of delay time and again in various cases. The recent trend of the judicial opinion, is for liberal consideration of the petition filed u/s 5 of the Limitation Act, and also that sufficient cause should be considered with pragmatism in justice oriented approach rather than technical detection of sufficient cause for explaining every day's of delay. The Apex Court in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, has reiterated such liberal approach to be adopted by the court and laid down certain principles of such consideration, which are quoted below:

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing of the parties.

(3) Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's day, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) 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 non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) 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.

13. Again in another recent decision of the Apex Court reported in State of Nagaland Vs. Lipok AO and Others, the Apex Court held in paragraph 15, as follows:

It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay-international or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is common feature. Therefore, certain amount of latitude is not impermissible. If the appeal brought by the State are lost for such default no persons is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors, which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach injustice-oriented process. The court should decide the matters on merit unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while the State is an impersonal machinery working through its officers or servants.

14. The aforesaid principles of law which are enunciated by the Apex Court in dealing with the application for condoning the delay has been ignored in passing the impugned order in the present case. In may considered opinion that in rejecting the prayer of the petitioner, which is a public financial institution, rendering to the people of the State the learned trial court did not consider this aspect of the matter. The finding of the learned trial court is not elaborate so as to disclose the grounds as to why the grounds taken by the petitioner do not disclose the sufficient cause to condone the delay under the relevant provisions

of law. Apparently, the learned trial court in passing the impugned order did not take note of the law in the field, and arrived at an incorrect decision. Although, the learned Counsel for the respondent, in the light of his submission, stated that the revision petition filed u/s 115 of the CPC is not maintainable under the provision of the amended CPC, the facts of the case as disclosed in the petition is that the delay in filling the application for final decree was caused for non-filing of the application within the period of limitation. The decree was passed calculating the interest at the rate of 15% thereon. Whatsoever the rate of interest, it is made clear that the plaintiff petitioner cannot be entitled to claim any decree for the period of delay so caused in filing the application, and the learned trial court in passing the final decree shall exclude the said period of delay from calculating the interest.

15. In view of the aforesaid discussion, the impugned order stands set aside and quashed and the learned trial court is directed to take up the application for final decree in accordance with law.

16. Accordingly, this petition is allowed subject to cost of Rs. 2,000 to the respondent.

17. The amount of cost shall be deposited before the learned trial court and without depositing the said cost, the plaintiff petitioner would not be allowed to permit in the proceeding.