

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 25.06.2018
ORDER PRONOUNCED ON : 17.07.2018

CORAM:

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.P.Nos.10862 and 10863 of 2018
and W.M.P.Nos.10813 to 10815 of 2018

1. A.Ashok Kumar
2. Arunkumari
3. A.Nanda Kumar
4. A.Krishnakumar Petitioners in both W.Ps.

Vs.

M/s.City Union Bank,
Rep. by its Manager,
Mount Road Branch,
No.706, Anna Salai,
Chennai - 600 006. Respondent in both W.Ps.

PRAYER in W.P.No10862 of 2018: Writ Petition has been filed under Article 226 of the Constitution of India, praying in the nature of Writ of Certiorari, to call for the records pertaining to the common order dated 14.03.2018 made in M.A.No.95 of 2017 passed by the Debts Recovery Tribunal at Chennai and quash the same and consequently allow M.A.No.51 of 2011 in O.A.No.1771 of 1998 on the file of DRT-I, Chennai.

PRAYER in W.P.No10863 of 2018: Writ Petition has been filed under Article 226 of the Constitution of India, praying in the nature of Writ of Certiorari, to call for the records pertaining to the common order dated 14.03.2018 made in M.A.No.150 of 2017 passed by the Debts Recovery Tribunal at Chennai and quash the same and consequently allow M.A.No.101 of 2010 in O.A.No.1771 of 1998 on the file of DRT-I, Chennai.

For Petitioners: Mr.G.Ilangovan

For Respondent : Mr.S.Udhaya Kumar

C O M M O N O R D E R

SUBRAMONIUM PRASAD, J.

These Writ Petitions are directed against the common order dated 14.03.2018 passed by the Debts Recovery Tribunal, Chennai, in M.A.Nos.95 of 2017 and 150 2017.

2. The brief facts of these cases are as under:-

- (a) One Sudha Ammal, mother of the petitioners, gave a letter of guarantee and created an equitable mortgage by deposit of title deeds on 17.10.1996 for repayment of credit facilities availed by one M/s.Kalai Advertising Pvt. Ltd. from the respondent bank. After availing the loan, M/s.Kalai Advertising Pvt. Ltd failed to repay the loan.
- (b) The respondent filed Original Application in O.A.No.1771 of 1998 on the file of the Debts Recovery Tribunal-I, Chennai, for recovery of Rs.19,38,633.14 with interest at the rate of 18% per annum with quarterly rests from the date of application till the date of realization of the loan.
- (c) Summons were issued to M/s.Kalai Advertising Pvt. Ltd, the principal borrower and other guarantors. Sudha Ammal was arrayed as defendant No.5.
- (d) One Mr.K.S.Prabhakaran, Advocate filed vakalatnama for Sudha Ammal. Sudha Ammal was later set ex parte.
- (e) The Debts Recovery Tribunal, by its order dated 31.12.2003 declared that the bank is entitled for a Recovery Certificate against the defendants (including Sudha Ammal) for a sum of Rs.19,38,633.14 with future interest at the rate of 11% per annum from the date of application till the date of realization.
- (f) After about 6 ½ years, on 04.08.2010, Sudha Ammal filed M.A.No.101 of 2010 for setting aside the ex parte decree dated 31.12.2003 and condoning the delay of 2379 days in filing the petition.

3. In the affidavit, it was averred by Sudha Ammal that: (a) she has not mortgaged the property to the bank (b) defendant No.2, who was known to her, has provided a sum of Rs.1,00,000/- as hand-loan, towards the security of which, the property documents were given to defendant No.2 (c) she does not know about any transaction with the bank. The relevant paragraphs in her affidavit reads as under:-

"3. I submit that I never initiated steps to mortgage my property and I never visited the Banks

premises. Factually, I do not know where the bank is. I further do not know any transactions with the Bank. While this is so, I have received a notice from the respondent Bank calling me to pay a huge sum. I was shocked to see such letter I have immediately replied stating the facts and expressed my willingness to repay that Rs.1 lakhs with interest. The Bank did not reply to my said letters had initiated the above OA proceedings and I have received the summons from the Honourable Tribunal. Only at this stage, I came to understand that I was cheated by the said Mr. Mathialagan and I approached in for a remedy. The said Mr. Mathialagan undertook to contest the case on my behalf and promised to release my property to me. Believing his words, I have signed the Vakalat and handed over it to him as requested by him. Following this, the said Mr. Mathialagan who regularly informed me about the proceedings stating that the case is going on and the case will be decided in my favour. Believing his words, I did not follow it up

with the Court promptly.

4. I submit that one Mrs.Jaya who is residing adjacent to my property has recently informed that somebody from DRT had come and inspected her property and the said Jaya, told that they were mistakenly inspecting her property and factually, they have come to inspect my property only. Further with that Mrs.Jaya told that he had filed some applications before this Hon'ble Tribunal seeking certain relief's. On hearing this, I immediately rushed to Mr.Mathialagan, who is absconding and I am not able to find out his whereabouts. I do not know who was the Advocate who filed the vakalat on my behalf. Hence, with the help of the present Counsel, I have found out that I was set ex parte and the ex-parte decree was passed on 31.12.2003.

5. I submit that I have not mortgaged the property. With intention of securing the loan availed by the 1 to 3 defendants, one to 3 defendants have cunningly cheated me and defrauded me. Only if the decree is set aside and I also permitted to proceed with the full and fair trial, I will be in a position to establish my stand that

deposits of title deeds or not done by me with the bank. The set aside decree will in no way prejudice the respondent bank. If the same is not set aside, I will be put to irreparable loss and injury.

6. I submit that because of lack of knowledge and cheating made by the other defendants, I am not able to file this application in time to set aside and hence, the delay of 2379 days caused. The delay is neither wilful nor wanton, but because of lack of knowledge."

4. The said Sudha Ammal passed away after filing the application and the petitioners, who are the legal heirs of Sudha Ammal, continued with the application, for setting aside the ex parte decree dated 31.12.2003 and for condoning the delay of 2379 days in filing the petition.

5. The Debts Recovery Tribunal, by its order dated 29.06.2015, dismissed the application holding, that (a) Sudha Ammal had mortgaged the property (b) the properties had been sold by way of auction on 05.05.2008, by the recovery officer as per Rules (c) the delay has not been properly explained. The application for setting aside the ex parte decree dated 31.12.2003 and application for condoning the delay of 2379 days was dismissed by the Tribunal.

6. The order of the Debts Recovery Tribunal dated 29.06.2015 was taken up in appeal before the Debts Recovery Appellate Tribunal, Chennai. The Appellate Tribunal held that the case of Sudha Ammal that she had only taken loan of Rs.1,00,000/- from defendant No.2 and given title deeds to him and signed blank documents and that she was not aware of any transaction, cannot be believed. It is also held that the Debts Recovery Tribunal has not violated any principles of natural justice. The Appellate Tribunal did not find any reason to condone the delay of 2379 days. This order of the Appellate Tribunal, has now been challenged in the instant Writ Petition.

7. Heard the learned counsel appearing for both sides.

8. The counsel for the petitioners reiterated the facts stated in the affidavit filed by Sudha Ammal for condonation of delay. It was also submitted that the application for condonation of delay and setting aside the ex parte decree had

been heard on 18.03.2013 and 05.06.2013, but the orders were passed by different officers after more than 2 years i.e. on 29.06.2015 and therefore, there is violation of the principles of natural justice.

9. The undisputed facts are :-

(a) Deposit of title deeds of the property belonging to Sudha Ammal with the bank as guarantee to the credit facilities extended to M/s.Kalai Advertising Pvt. Ltd.

(b) Respondent No.1, M/s.City Union Bank, has filed O.A.No.1771 of 1998 against M/s.Kalai Advertising Pvt. Ltd. and all other guarantors, including Sudha Ammal, for recovery of the amount extended by it.

(c) On issue of summons by the Debts Recovery Tribunal, one advocate Mr.K.S.Prabhakaran filed vakalatnama for Sudha Ammal.

(d) The decree for a sum of Rs.19,38,633.14 with interest at the rate of 11% per annum from the date of application till the date of realisation has been passed.

(e) The recovery certificate for the said sum was issued.

(f) The property belonging to Respondent No.5 has been sold on 05.05.2008 in Court auction, to satisfy the decree.

(g) The application, to aside the ex parte decree dated 31.12.2003 with prayer to condone the delay of 2379 days in filing the said application, has been filed after a period of 6 ½ years i.e. after the decree and after the property has been sold in Court auction.

10. The case of Sudha Ammal that she had given her title deeds to defendant No.2 in O.A., because she has taken a loan of Rs.1,00,000/- and that she has not mortgaged the property as a guarantor for M/s.Kalai Advertising Pvt. Ltd. cannot be accepted. There is nothing to show that Sudha Ammal had taken any effort to repay the said sum of Rs.1,00,000/-. Further, an advocate had entered appearance on behalf of Sudha Ammal. The conduct of Sudha Ammal shows that she did not pursue the case after signing the vakalatnama. The present application has been filed for setting aside the ex parte decree after a period of 6 ½ years i.e. rounded about the time when the property was sold in auction.

11. A perusal of the application for setting aside the ex parte decree shows that complete absence of material particulars as to when she did come to know of the ex parte decree. There are only vague averments that she was informed by one Jaya that somebody from Debts Recovery Tribunal had come and inspected the property. Other than stating that she had trusted defendant No.2, who had assured that he would take care of the case, no reason has been given as to why the delay should be condoned. The conduct of Sudha Ammal shows that complete lack of diligence on her part to pursue the litigation.

12. The Hon'ble Supreme Court in the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others reported in (2013) 12 SCC 649, after examining previous decisions, has culled out the following decisions:-

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1 (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6 (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7 (vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8 (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10 (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11 (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12 (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13 (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2 (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3.(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4 (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

13. The said judgment has been quoted with approval in the subsequent judgment of the Hon'ble Supreme Court in the case of H.Dohil Constructions Company Private Limited Vs. Nahar Exports Limited and Another reported in (2015) 1 SCC 680. It is settled law that Court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Court helps those who are vigilant and "do not slumber over their rights". In view of the principles enunciated by the Hon'ble Supreme Court, there is no justification to condone the substantial delay of 2379 days.

14. As of today, the property stands sold. The records does not indicate that Sudha Ammal had filed any application challenging the auction sale held on 05.05.2008 and to recall the sale certificate. The present application has been filed after a period of two years of the sale. Third parties rights have been created and for this reason also the delay cannot be condoned as it will prejudice the rights of the auction purchaser. The delay has not been properly explained and the application does not contain any particulars or reasons explaining the delay.

15. The second submission that the Debts Recovery Tribunal had heard the case on 18.03.2013 and 05.06.2013, and orders were passed after more than 2 years on 29.06.2015, by a different presiding officer, who did not hear the arguments and therefore, there is a violation of the principles of natural justice does not merit consideration. In the affidavit of Mr.A.Nanda Kumar, who is petitioner No.3 in this Court, it has been stated as under:-

"11. While this being so, the 1st petitioner Mr.Ashok Kumar has been visiting the office of the DRT-I every month and has been enquiring about the matter. The Hon'ble Judge of DRT-I who had heard the parties in the above M.A.'s had not passed the order in the M.A.s, until his retirement in the month of May, 2015. And thereafter there was no presiding officer in DRT-I. Therefore the petitioners were under the bonafide impression that the M.A.s will be taken up for enquiry afresh only by the new presiding officer who would take charge of DRT-I. To our utter shock and surprise when the 1st petitioner approached the office of DRT-I on 02.07.2015 to know the position, he was given to understand that M.A.Nos.101 of 2010 and 51 of 2011 were already ordered as dismissed by the Hon'ble presiding officer of DRT-II who was incharge of DRT-I on 29.06.2015. The case was taken up by the learned presiding officer in charge of DRT-I without notice to the petitioners' and without conducting a personal enquiry into the matter and ordered as dismissed on 29.06.2015. The above said M.A.'s were taken up for enquiry without any notice to the petitioners by the presiding officer in charge of DRT-I on 04.06.2015 and held that "Both sides called absent. No representation. Arguments closed. Orders reserved" and the matter stood posted for orders on 29.06.2015."

16. Admittedly, the matter was called on 04.06.2015 and since there was no representation, orders were reserved. This once again shows that complete indifference on the part of the legal heirs also in not pursuing the application to set aside the ex parte decree.

17. The Tribunal could not have gone beyond the averments in the affidavit accompanying the applications for condonation of delay. The application does not contain any reasons as to why the delay should be condoned. In the absence of any reasons whatsoever put forth to justify as to why the delay should be condoned, no useful purpose would be served in remanding the matter to the Debts Recovery Tribunal for fresh adjudication. The Tribunal has considered the averments in the application filed for condonation of delay and has dismissed the application, since no justifiable reasons has been stated in the application for condonation of delay in filing the application to set aside the ex parte decree.

18. The Appellate Tribunal has affirmed the view of the Tribunal. We have also perused the records and in our opinion, no reasons have been given whatsoever to condone the delay of 2379 days.

19. The Writ Petitions are therefore dismissed. In the said circumstances, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

asi/gsp

+1 CC to Mr.S. Udayakumar, Advocate sr 47456.

+2 Ccs to Mr.G. Ilangovan, Advocate sr 47482,47483.

W.P.Nos.10862 and 10863 of 2018
and W.M.P.Nos.10813 to 10815 of 2018

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