

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.04.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.Nos.18076 & 18077 of 2014
and
M.P.Nos.1 & 1 of 2014

Mr.K.N.Moorthy ..Petitioner in both WPs.

vs.

1. Indian Bank,
Rep. by is Assistant General Manager,
Regional Office,
Kothawal Bazaar Branch
No.136, Audiappa Naicken Street,
Chennai - 600 001.

2. A.Illamparithi

3. The Registrar,
Debts Recovery Appellate Tribunal,
Chennai

..Respondents in both WPs.

WRIT Petitions filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the records pertaining to the Order passed by the Hon'ble DRAT, Chennai dated 11.04.2014 in M.A.Nos.117 & 116 of 2008, respectively.

For Petitioner : A. Prabhakaran
in both W.Ps.

For Respondents: Mr.Jeyesh B Dolia (for R1)
in both W.Ps. for M/s.Aiyar & Dolia
Mr.V.Sivalingam (for R2)

COMMON ORDER

(Order of the Court was delivered by S.MANIKUMAR, J)

Material on record discloses that M/s.Sri Venkateshwara Industries Ltd., availed Open Cash Credit facility from 1st respondent bank and defaulted in payment. Respondent Bank filed OA.No.1023 of 2001, before Debts Recovery Tribunal-II, Chennai, for recovery of a sum of Rs.27,83,257.79p, being the amount due under Open Cash Credit Account and a further sum of

Rs.44,20,911.87p, being the amount due under supply bills purchased together with interest at the rate of 18.50%, on the failure for the sale of schedule mentioned A, B & C properties.

2. Petitioner herein is the purchaser of the property [Item 2] in Schedule 'C'. As the borrowers did not appear, Debts Recovery Tribunal-II, Chennai, passed final exparte decree on 31.10.2003 for a sum of Rs.72,04,169.66p with future interest @ 18.50% p.a. with quarterly rests against the defendants 1 to 7 / borrowers. Pursuant to the exparte decree, the respondent bank has brought the properties for auction, including the one purchased by the petitioner. Therefore, petitioner filed I.A.No.814 of 2007 to set aside the exparte decree dated 31.10.2003 made in O.A.No.1023 of 2001 with a delay of 1352 days. Along with the said application, two other applications viz., I.A.S.Nos.6355 & 6356 of 2007 were filed to condone the delay and stay, respectively. Debts Recovery Tribunal-II, Chennai, vide order dated 15.02.2008, dismissed the applications, by holding that the defendants/borrowers have already filed set aside application in I.A.No.1106 of 2002 and that, conditional order has not been complied with. The said order is extracted hereunder.

"4. I have heard the arguments of both the sides and also gone through the proceedings of the Tribunal. As seen from the proceedings dated 20.06.2002, the summons taken out against the 8th defendant (petitioner) has been duly served and therefore, he was called absent and set exparte. Subsequently, an application (IA 1106/2002) was filed by Sri.M.Muthukumaran, Advocate representing all the defendants including the petitioner herein, to recall the exparte order. The said application was allowed with a condition that the defendants should pay Rs.50,000/- towards their loan liability with the respondent bank within four weeks from 20.12.2002. However the said order was not complied with. Therefore, the exparte order remain unaltered. Further, the petitioner has not given any proper explanation for the delay in filing the application condoning 1352 days, which is mandatory under Section 5 of the Limitation Act. Therefore, I am not convinced that the delay should be condoned without any proper reasons. It is correct to say that only after the property under mortgage is brought for auction by the Recovery Officer, these applications have been filed which clearly indicates the malafide intention of the petitioner to protract the proceedings. When the petitioner who is the defendant No.8 in OA as a subsequent purchaser impleaded in the OA, the onus lies on him to appear before the Tribunal and to substantiate his case by way of a reply along with documentary proof if any. However, the said D8 remained absent and did not

choose to contest the case and came forward now at the 11th hour which is not a bonafide one.

5. For the reasons stated above, I do not find any merit in the applications IA.814/07 and accordingly, the same stands dismissed. Consequent upon the aforesaid dismissal, the applications vide Sr.Nos.6355 and 6356/07 also stand dismissed. No order as to the costs. Ordered accordingly."

3. Subsequently, the borrowers' application was dismissed by DRT-II, Chennai and Recovery certificate was issued. Therefore, petitioner has filed appeals before Debts Recovery Appellate Tribunal, Chennai in M.A.Nos.116 & 117 of 2007 and M.A.No.248 of 2010, impleading the auction purchaser as the 2nd respondent. However, placing reliance on the earlier order passed in I.A.No.1106 of 2002, Debts Recovery Appellate Tribunal, Chennai, has dismissed all the appeals.

4. Challenging the orders dated 11.04.2014, made in M.A.Nos.117 & 116 of 2008, respectively, dated 11.04.2014, on the file of Debts Recovery Appellate Tribunal, Chennai, instant writ petitions are filed. The orders impugned are extracted hereunder.

"MA.No.117 of 2008 11.04.2014

Ld. Counsel appearing on behalf of the respondent bank took this tribunal through the facts of the case and explained paragraph 4 of the order of the Ld. Presiding Officer and stated that the Ld. Presiding Officer has properly seen the records and that he has come rightly to the conclusion that the delay of 1352 days in filing the application to set aside the exparte order has not been properly explained. Ld. Counsel further stated that the Ld.Presiding Officer has also properly appreciated that the defendants who had filed I.A.No.1106 of 2002 failed to comply with the order of the tribunal below wherein they were directed to pay Rs.50,000/- towards their liability. Ld. Counsel further stated that the order of the Ld.Presiding Officer is proper and is based on his finding made in paragraph 4 of the order and that no proper reasons have been set out by the petitioner to condone the delay of 1352 days in filing the application to set aside the exparte order. Ld. Counsel further stated that the matter has been pending from the year 2008 onwards for the last over 5 years and that it should not be kept pending any further and prayed that orders may be passed today itself.

Ld. Counsel appearing on behalf of the appellant stated that the order of the Ld. Presiding Officer is not proper and correct and

that it is liable to be set aside and prayed that orders may be passed allowing this appeal.

Heard both sides.

It is seen that a reading of paragraph 4 of the order passed by the Ld. Presiding Officer in IA No.814/2007 reveals that the appellant herein had been duly served with summons and that he was called absent and was set exparte. It is further revealed that all the defendants in OA had filed IA No.1106/2002 to set aside the exparte order and that the same was allowed by the tribunal below on condition that the defendants deposit Rs.50,000/- and that the defendants did not comply with the conditional order and that IA No.1106/2002 therefore came to be dismissed. It is further seen that the appellant has not given any reason before the tribunal below for the delay that had occurred and it is also revealed that the Ld.Presiding Officer was unable to find any reason in the averments made by the appellants before the tribunal below to enable the condonation of delay in filing the application for setting aside the exparte order. Therefore as it can be seen from the above, the appellant has not shown that he was prevented by sufficient cause from filing the application to set aside the exparte order within the time prescribed and has also not explained the delay of 1352 days that had occurred thereafter in filing the application and such being the case this tribunal is driven to conclude that the order of the Ld. Presiding Officer, DRT-II, Chennai is proper and correct and requires only to be confirmed. Accordingly the following order is passed:

"The order of the Ld. Presiding Officer, DRT-II, Chennai dated 15.2.2008 made in IA No.814/2007 in OA No.1023/2001 is hereby confirmed"

In the result the appeal is dismissed.

I.A.No.1339/2010 (Stay):

Orders have been passed in MA. Hence this IA is closed.

MA.No.116 of 2008

11.04.2014

MA 117/2008 is dismissed. Therefore this appeal is also dismissed.

5. The impugned orders are assailed on the following grounds:

(a) The appellate tribunal, being the appellate authority contrary to the scope and power vested upon it dismissed the appeal filed, simply placing reliance upon the earlier order passed in I.A.1106/2002, by DRT.

(b) The Debts Recovery Tribunal and Appellate Tribunal without taking note of the final order passed in O.A.No.1023/2001 and recovery certificate issued thereon, passed orders dismissing the application filed by the petitioner whose property right described Item-2 in 'C' schedule mentioned property, is infringed.

(c) The Lower Tribunal perfunctorily without analysing the facts and circumstances involved in the case in a mechanical manner, by simply holding that the petitioner having not complied with the earlier order, dismissed the application filed by the petitioner.

(d) The Tribunal neglected to take note that by virtue of the final order and recovery certificate issued in O.A.No.1023/2001, the recovery officer is not clothed with any power to bring the property purchased by the petitioner, viz., Item No.2 in 'C' Schedule described property for auction sale.

(e) The order passed by the Tribunal is ex facie illegal and erroneous, and by virtue of the dismissal order passed, the petitioner's right in the property is endangered and he has been deprived of his valuable right.

(f) The conduct of the recovery officer in bringing the property of the petitioner for public auction, leaving other properties which are mortgaged with the 1st respondent is unwarranted.

(g) The Tribunal rather acting in consonance of the DRT Act, in a mechanical manner, dismissed the application filed.

6. This this Court also deems it fit to consider the decision of the Hon'ble Supreme Court, on the aspect of condonation in H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another, reported in 2015 (1) Supreme Court Cases 680, wherein the Hon'ble Supreme Court, after considering the Hon'ble Division Bench judgment of this Court in Tamilnadu Mercantile Bank Ltd., Vs. Appellate Authority, reported in (1990) 1 LLN 457 and decision of the Hon'ble Supreme Court in Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649 at paragraph Nos.23 and 24, held as follows:

"23. We may also usefully refer to the recent decision of this Court in Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649], where several principles were culled out to be kept in Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCC pp.658-59)

"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.

21.8. (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 weight 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.

24. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bonafides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the Respondents from not paying the Court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bonafides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to

weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the Respondents not deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the suit for specific performance and when the trial Court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the Respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

7. Considering the principles of law, laid down in the above decision, we do not find any infirmity in the impugned orders of the tribunal, warranting interference. Writ petitions are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Assistant General Manager,
Indian Bank, Regional Office,
Kothawal Bazaar Branch
No.136, Audiappa Naicken Street,
Chennai - 600 001.

2. The Registrar,
Debts Recovery Appellate Tribunal,
Chennai, Chennai - 600 017.

+ 1 cc to M/s. Aiyar & Dolia, Advocate Sr.27744

+ 2 ccs to Mr.A. Prabhakaran, Advocate Sr.27567

W.P.Nos.18076 & 18077 of 2014

and

M.P.Nos.1 & 1 of 2014

MR (CO)

EU (10/05/2018)

<https://hcservices.ecourts.gov.in/hcservices/>