

(2010) 08 MAD CK 0390

Madras High Court (Madurai Bench)

Case No: C.R.P. (NPD) MD No. 123 of 2010 and M.P. (MD) No. 1 of 2010

A. Krishnan

APPELLANT

Vs

K. Sankariammal, S.

Eswaravadivoo and C. Nataraj

Gurukkal

RESPONDENT

Date of Decision: Aug. 20, 2010

Acts Referred:

- Tamil Nadu Debt Relief Act, 1982 - Section 5

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: G. Prabhu Rajadurai, for the Appellant; V. Meenakshisundaram, for R. Murugan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R.S. Ramanathan, J.

Heard both sides.

2. Aggrieved by the order of the trial Court in rejecting the application for condonation of delay in filing the application to set aside the ex-parte decree, this civil revision petition is filed.

3. The 4th Respondent in O.S. No. 72 of 2007, on the file of the I Additional District Munsif, Nagercoil, is the revision petitioner herein.

4. The first respondent filed the suit O.S. No. 72 of 2007, on the file of the I Additional District Munsif, Nagercoil, for declaration that the mortgage deed, dated 09.07.1980 under document No. 1769 of 1980 is discharged and for recovery of possession of the mortgaged property from the defendants.

4. The case of the 1st respondent/plaintiff was that she mortgaged the property to one K. Gomathinayagam Pillai, the first defendant in the suit and she is a debtor as defined under the Tamil Nadu Debt Relief Act 50/1982 and as per Debt Relief Act, the entire mortgage amount has been discharged and therefore, she filed a suit for declaration and recovery of possession. In that suit, she further alleged that the 4th defendant came to be in possession of the property under the first defendant and he is only a tress-passer and he cannot claim any title and he is liable to be evicted.

6. The 4th defendant/revision petitioner filed a statement disputing the title of the plaintiff to the suit property and contended that he is in possession of the property in his own right and he is also the owner of the property and filed O.S. No. 771 of 1981 against the defendants 2 to 4 and that suit was dismissed and the appeal filed by the mortgagee, the first defendant was allowed and the 4th defendant and others in O.S. No. 771 of 1981 filed S.A. No. 56 of 1986 and that 2nd appeal was allowed and the matter was remitted to the First Appellate Court and the appeal is pending before the First Appellate Court and the plaintiff has no right to redeem the property. It was stated that when the suit was posted for trial there was no representation for the defendants and the suit was decreed ex-parte on 11.04.2007. Thereafter, the plaintiff filed E.P. No. 132 of 2007 for delivery of the property in execution of the decree passed in O.S. No. 72 of 2007 and in that E.P. also the revision petitioner and other defendants 2 and 3 appeared through counsel and filed counter on 01.02.2008 and delivery was ordered through court and the plaintiff was given possession of Item Nos. 1,2,4,5,6,7 and 8 of the suit property and the 3rd Item of the property was found locked and therefore, possession was not delivered and the other items of properties were delivered on 29.05.2008 and thereafter, on 09.06.2008, the defendants 2 to 4 filed I.A. No. 479 of 2008 for condoning the delay of one year and 25 days in setting aside the ex-parte decree passed against them stating that they were not properly advised by their counsel for filing application immediately and that petition was dismissed by the lower Court on 13.11.2009 and against the said order, the 4th defendant, who was the 3rd petitioner in I.A. No. 479 of 2008 alone filed the present revision.

7. Mr. G. Prabhu Rajadurai, the learned Counsel appearing for the revision petitioner submitted that admittedly, the first defendant in the suit was not in possession of the property as mortgagee and the defendants 2 to 4 are disputing the title of the plaintiff in respect of the suit property and she has no right to create any mortgage deed in favour of the first defendant and the first defendant also filed O.S. No. 771 of 1987 for injunction restraining the defendants 2 to 4 in this suit from interfering with his possession and enjoyment on the basis of the mortgage deed executed in his favour and that suit was dismissed holding that the said first defendant in the suit O.S. No. 72 of 2007 viz. the mortgagee, under the plaintiff was not in possession of the property and an appeal was filed in A.S. No. 34 of 1985, on the file of the Sub Court, Nagercoil and the Lower Appellate Court allowed the appeal and decreed the suit filed by the mortgagee, K. Gomathy Nayagam Pillai and against that, the

revision petitioner herein and 4 others filed 2nd appeal in S.A. No. 56 of 1986, on the file of this Court and this Honourable Court by judgment, dated 01.09.1998 allowed the 2nd appeal and remitted the matter to the First Appellate Court and the 1st appeal is pending before the First Appellate Court and therefore, it cannot be stated that the first defendant was in possession of the property and the revision petitioner in his independent capacity is in possession and enjoyment of the suit property and therefore, in the interest of justice, the ex-parte decree has to be set aside, otherwise, conflicting judgments will emerge. He further submitted that in the event the first appeal filed by the mortgagee, K. Gomathy Nayagam Pillai, is dismissed holding that he was not enjoying the possession of the property at the time of filing of the suit, then the plaintiff viz., the first respondent herein, cannot claim recovery of possession from the revision petitioner and therefore, the delay has to be condoned.

8. On the other hand, Mr. V. Meenakshisundaram, the learned Counsel appearing for the first respondent submitted that in the suit O.S. No. 771 of 1991, the plaintiff, the first respondent herein, was not a party and therefore, any decree passed in that suit, will not bind the first Respondent. He further submitted that no acceptable reason has been stated for condoning the delay and the only reason stated was that the petitioner was not properly advised by his counsel for setting aside the ex-parte decree and considering fact that the the revision petitioner had taken part in the earlier proceedings, it cannot be stated that the revision petitioner is ignorant of the Court proceedings or the effect of the decree passed against him and therefore, considering all these aspects, the lower Court has correctly appreciated the law on that aspect and dismissed the application and does not call for any interference.

9. I have given my anxious consideration to the submission made by both the counsels.

10. In this civil revision, we will have to see whether sufficient reason has been stated for condoning the delay to set aside the ex-parte decree. It is admitted that summons were served on the defendants in the suit O.S. No. 72 of 2007 and they did not appear and the suit was decreed ex-parte on 11.02.2007.

11. It is further admitted that the plaintiff viz., first respondent herein filed E.P. No. 132 of 2007 on 12.07.2007 and in that E.P., the defendants 2 to 4 viz., the petitioners in I.A. No. 479 of 2008, entered appearance through counsel and filed counter on 01.02.2008, but while filing the counter, they have not taken any steps to set aside the ex-parte decree passed against them and delivery was effected in respect of the suit properties except 3rd item on 29.05.2008 and even after filing the counter in the said E.P., the revision petitioner and two other persons, who filed Section 5 application in I.A. No. 479 of 2008 did not take any steps to set aside the ex-parte decree nor filed any application to condone the delay and sought for adjournments in that E.P. and filed I.A. No. 479 of 2008 only on 09.06.2008.

12. It is further admitted that on 05.09.2007 itself, the revision petitioner received summons in E.P. Therefore, having received the summons in E.P. on 05.09.2007 engaged counsel and filed counter on 01.02.2008 and obtained adjournments thereafter and they finally filed the application to set aside the ex-parte decree with an application to condone the delay only on 06.06.2008. The revision petitioner has not stated any acceptable reason for not filing the application to set aside the ex-parte decree immediately on receipt of the summons in E.P. No. 132 of 2007 and the only reason stated was that they were not properly advised by their counsel. As stated supra, the revision petitioner and other defendants are not new to the judicial proceedings and they were fighting the suit filed by the first defendant in O.S. No. 771 of 1981 and the case was taken up to this Court in the 2nd appeal and after remand the matter is pending before the First Appellate Court. Therefore, the revision petitioner is fully aware of the Court proceedings and ex-parte decree passed against him. Therefore, he cannot be heard to say that he was not properly advised by the Counsel to set aside the ex-parte decree. Further the lower court has taken into consideration the judgment reported in [C. Raghupathy Vs. C. Govindan, Uma Rani and B. Ranganathan](#), in the case of Union Bank of India v. V.K. and Ors. wherein this Court has held the petitioner has to prove sufficient cause for condonation of delay and mere allegation of negligence against counsel can not be a ground to condone the delay. Therefore, the reasons stated by the revision petitioner that he was not properly advised by his counsel cannot be accepted and the revision petitioner having kept quiet even after the receipt of the summons in the EP filed, the Respondent/plaintiff without taking any steps to file the application to set aside the ex-parte decree and such conduct on the part of the revision petitioner, in my opinion, would lead to the conclusion that the petitioner has deliberately kept quiet after being fully aware of the ex-parte decree passed against him and therefore, he cannot be heard to say that he was not properly advised by his counsel and on that ground, the delay has to be condoned. In my opinion, the trial court has considered all these aspects and rightly came to the conclusion and dismissed the application.

13. Hence, I do not find any reason to interfere with the order of the lower court and accordingly, this civil revision petition is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.