

Jayaverchand Vs. Balan

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Court : Chennai

Decided On : Jan-19-1998

Reported in : (1998)1MLJ701

Appellant : Jayaverchand

Respondent : Balan

Judgement :

ORDER

S.S. Subramani, J.

1. Landlord in R. CO.P. No. 2857 of 1990, on the file of XVI Judge, Court of Small Causes, Madras, is the revision petitioner.

2. Petitioner herein filed R. CO.P. No. 2857 of 1990 against the respondent for eviction. An ex parte order was passed on 3.5.1991. The matter came up for first hearing on 20.12.1990. Since service could not be completed, it was adjourned, and the Rent Controller ordered fresh notice. Rent Controller also ordered substituted service by publication, returnable by 30.4.1991. On 30.4.1991, respondent was called. Since he was absent, he was set ex parte, and the matter was posted to 3.5.1991 for ex parte evidence. On 3.5.1991, evidence was taken and an order of eviction was passed.

3. Alleging that he came to know about the ex parte order after a long time, respondent filed an application to set aside the ex parte order, as M.P. No. 110 of 1992. He did not file any application to condone de-lay even though the Rules provide that such application has to be filed within 30 days from the date of decree. Respondent relied on the date of knowledge and said that the application was filed within 30 days from that date.

4. Rent Controller took cognizance of the same and ordered notice to be served on the petitioner. Neither the notice was served on the petitioner, nor the respondent took notice. Consequently, the petition was dismissed for default.

5. Petitioner sold not only the property in question to Messrs. Shenoy Nagar Benefit Funds Limited but also adjoining portion which is occupied by Civil Supplies Corporation. As against that Corporation also, petitioner herein has filed an eviction petition and obtained an order. It is after getting possession from the Civil Supplies Corporation, the sale of the entire property was effected.

6. After knowing about the same, respondent herein filed R. CO.P. No. 2657 of 1993 against the purchaser compelling to receive rent from him. The allegation was that the purchaser has refused to receive rent in spite of earnest requests made by him. It is said that an order was passed in his favour.

7. Thereafter, the purchaser filed E.P. No. 385 of 1996. After getting notice of the same, a further application was filed by respondent herein as M.P. No. 742 of 1996 in M.P. No. 110 of 1992, to restore the earlier application which had already been dismissed for default. It is alleged in that petition by the respondent that after the ex parte order of eviction, and after he filed M.P. No. 110 of 1992, he met the petitioner herein who assured him that he will not be dispossessed and his intention is only to sell the property. The respondent further averred that he believed the words of the petitioner and therefore, did not take steps to have the notice served on the petitioner. Only when the purchaser initiated action, he knew that he has been de-frauded and, therefore, wanted the delay of 1,650 day to be condoned and the miscellaneous petition re-stored to file.

8. A detailed counter affidavit was filed by petitioner that he never met the respondent at any time, nor did he tell him that he will not execute the order. The reasons stated for condoning the delay are false. It is his case that he never made any representation to the tenant as alleged in the affidavit.

9. The respondent did not think of adducing any evidence to have the delay condoned. Both parties re-lied on the affidavit which they have filed, and, by the impugned order, lower court condoned the delay and restored M.P. No. 110 of 1992 to its file. While restoring that application, the Rent Controller further observed that the Execution Petition is not maintainable. The purchaser has also acted without any bona fides since the purchaser has initiated action four years after the sale, the case put forward by the respondent must be true and that sufficient grounds have been made out for condonation of delay. The said order is challenged in this revision petition under Article 227 of the Constitution of India.

10. I ordered notice of motion, and, after receipt of notice, respondent also entered appearance.

11. Learned Counsel appearing for both parties were heard in detail.

12. Learned Counsel for respondent challenges even the very maintainability of the revision under Article 227 of the Constitution. His case is that a discretion has been exercised by the lower court and the same should not be upset while exercising Judicial supervisory jurisdiction under Article 227 of the Constitution of India. According to learned Counsel, 'sufficient cause' referred to in Section 5 of the Limitation Act has received a liberal construction, and when once the court has exercised that power, the High Court should not up-set that finding under Article 227 of the Constitution of India.

13. Learned Counsel relied on the decision reported in *Lonard Gram Panchayat v. Ramgiri Gosavi and Anr.* : (1967)IILLJ870SC , wherein their Lordships followed an earlier decision of our High Court reported in *Krishna v. Chathappan*, I.L.R. (1890) Mad 269, wherein it was held thus:

We think that Section 5 gives the courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant.

14. Reliance was also placed on the decision reported in Trimbek Gangadhar Telang and Anr. v. Ramchandra Ganesh Bhide and Ors. : AIR 1977 SC1222 , wherein it has been held thus:

It is only when an order of a Tribunal is violative of the fundamental basic principles of justice and fair play or where a patent or flagrant error in procedure or law has crept in or where the order passed results in manifest injustice, that a court can justifiably intervene under Article 227 of the Constitution.

15. In Sukhbir Narain (dead) by L. Rs. v. Deputy director of Consolidation : AIR 1987 SC1645 , their Lordships held thus:. The High Court could not have interfered with this order under Article 227 of the Constitution of India unless there was any error apparent on the face of the order. It has not been shown that the impugned orders manifest any such error which would warrant the exercise of the powers of the High Court under Article 227 of the Constitution of India....

16. Learned Counsel also relied on the decision of our High Court reported in E.K. Venkai Marban v. Dakshinamurthy 94 L.W. 243, in support of the contention that the provision applies even to Rent Control Courts. Learned Counsel also brought to my notice the decision of K.A. Swami, C.J. reported in Raju v. Senior Officer, 1993 T.L.N.J. 169, holding that the Rent Controller is a court having power to condone delay under Section 5 of the Limitation Act.

17. As against the said contention of the respondent, learned Counsel for petitioner submitted that on the facts of this case, an inference under Article 227 of the Constitution is required. Admittedly, the respondent filed an application to set aside the ex parte decree in the year 1992, which was dismissed for default. Thereafter, as against the purchaser, the very same respondent filed an application under Section 5 of the Rent Control Act, which was also allowed. When

notice of the Execution Petition was received by respondent, he has filed this application only for impleading the petitioner on certain allegations which have not been proved or substantiated. According to learned Counsel, it is a case where a decision has been arrived at by the lower court on no evidence and, therefore, interference under Article 227 of the Constitution of India is called for.

18. While extracting the facts, I have already said that both parties did not adduce any evidence, and they were satisfied with the allegations made in the affidavits. The delay of nearly five years is explained by the respondent (tenant) by stating that he met the petitioner (landlord) herein who represented that he is not interested in evicting him, and, therefore, he did not take steps to serve notice on the petitioner. The same is specifically denied in the counter-affidavit. When it is denied, a duty is cast on the respondent to prove the same at least by swearing to that effect He did not care to do so. When there is no evidence on his side to support his case, can it be said that the order of the lower court is legal? Is it is not a finding without evidence? The lower court assumed on sequences of facts that the case pleaded by the respondent might be true. I do not think the said assumptions have any place when the parties have a definite case, as stated in their affidavit and counter affidavit.

19. One big circumstance which was taken note of by the lower court is that the Execution Petition was filed four years after the dismissal of the earlier restoration application. I do not think that it is a circumstance which could not be taken note of by the court. The Execution Petition was filed not by the purchaser. The purchaser is not before court, nor are the details of the Execution Petition available among the records. On what basis, Rent Controller took note of the Execution Petition, which is not among the records, is not explained. Apart from the same, the Rent Controller has commented on the maintainability of the Execution Petition which is alleged to have been filed by the purchaser. The respondent did not want the purchaser to be made a party to any of these proceedings and, therefore, he cannot rely on any action taken by the purchaser. That apart, the very same tenant has filed a Rent Control Petition under Section 8(5) of the Rent Control Act against the purchaser and got it allowed.

20. Admittedly the respondent filed an application as M.P. No. 110 of 1992 to have the ex parte order of eviction set aside. That was taken cognizance of by the Rent Controller and notice was directed to be issued to the petitioner. The respondent failed to take steps. I have already said that the reason submitted by the respondent cannot be accepted. If that is not substantiated by any evidence, there is no ground to excuse the delay of more than four years.

21. Now I come to the decisions cited by learned Counsel for respondent, which, according to me, go against his case. The decisions reported in E.K. Venkai Marban v. Dakshinamurthy 94 L.W. 243 and Raju v. Senior Officer, 1993 T.L.N.J. 169 are relied on, to show that the Rent Controller has got power to condone the delay. I do not deny the correctness of those decisions. Here, the only question to be considered is, whether Article 227 of the Constitution of India could be invoked or not. In Lonand Gram Panchayat v. Ramgiri Gosavi : (1967)IILLJ870SC . Their Lord-ships were very cautious while declaring the law under what circumstances the powers under Article 227 could be invoked. In paragraphs 5 and 6, Their Lord-ships said that,

The power of superintendence over tribunals vested in the High Court under Article 227 of the Constitution is not greater than the power under Article 226 and is limited to seeing that the Tribunal functions within the limits of its authority. The High Court will not review the discretion of the authority judicially exercised, but it may inter-fere if the exercise of the discretion is capricious or perverse or ultra vires. The High Court may refuse to interfere under Article 227 unless there is grave miscarriage of justice. The court cannot interfere merely because it might take a different view of the facts and exercise the discretion differently. ' [Italics supplied]

I have already said that Their Lordships have approved the decision of this Court reported in Krishna v. Chathappan, I.L.R. (1890) Mad. 269. In that decision also, this Court only held that Section 5 of the Limitation Act has to be liberally construed so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. Their lordships accepted the principle that interference under Article 227 of the Constitution of India is

necessary only when there is grave miscarriage of justice. In *Sukhbir Narain (dead) by L. Rs. v. Deputy Director of Consolidation* : AIR 1987 SC1645 , Their Lordships have held that the power under Article 227 of the Constitution of India could be invoked only when there is an error apparent on the face of the records. The decision reported in *Poosariar Ekambaram Pillai v. Visalakshi and Ors.* : (1990)2MLJ90 is also to the same effect. In a very recent decision reported in *Achutananda Baidya v. Prafulla Kumar Gayen and Ors.* (1997) 3 Supp 673, Their Lordships have considered as to what is meant by 'perverse order'. Paragraphs 10 and 11 of the judgment (at page 676) are relevant in this context. They read thus:

The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and Tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse.

If the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior court or Tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High court will be competent to quash such perverse finding of fact.

Taking into consideration the above law, I only hold that when the reason for condonation is not proved by adducing any evidence, believing the case of the petitioner will amount to an order on no evidence. There are no circumstances which warrant the Court to believe the case of the respondent. Even though 'sufficient cause' mentioned in Section 5 of the Limitation Act requires a liberal construction, the discretion must be judicial discretion. The judicial discretion can only be on the basis of some materials. If there are no materials to exercise the discretion, the order can only be treated as perverse, which enables the Court to invoke the powers under Article 227 of the Constitution.

22. There is a patent or flagrant error in the procedure adopted by the lower court by assuming certain facts, which are specifically denied. When the petitioner specifically denies the allegations in the affidavit of the respondent, without proof, they cannot be relied on. They stand only as mere allegations. When an order is passed on no evidence, such order will cause manifest injustice.

23. I do not find any justification to sustain the order of the lower court. Consequently the same is set aside. The revision petition is allowed. No costs. C.M.P. No. 10967 of 1997 for stay is closed.

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