

(2009) 08 DEL CK 0382

Delhi High Court

Case No: I.A. No. 4175 of 2007 in CS (OS) No. 99 of 2004

Sh. Tarlochan Singh and Others

APPELLANT

Vs

Union Bank of India and Others

RESPONDENT

Date of Decision: Aug. 13, 2009**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 9 Rule 6, Order 9 Rule 7, 151
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Manmohan Singh, J**Bench:** Single Bench**Advocate:** Manish Sharma, Amit Bhardwaj and Vishal Malhotra, for the Appellant; J.K. Chaudhary and Aditya Madan for D-1, for the Respondent

Judgement

Manmohan Singh, J.

I.A No. 4175/2007 was filed on April 16, 2007 by the defendant No. 1 herein under Order IX Rule 7 read with Section 151 of the Civil Procedure Code, 1908 read with Section 5 of the Limitation Act, 1963 for recalling of the order dated September 8, 2004. By this order, I propose to dispose of the above-mentioned applications.

2. The present suit was filed by the plaintiffs for declaration and specific performance for execution of the agreements to sell dated September 12, 1994 and September 13, 1994. The facts leading up to the suit and the present application are as follows.

3. Vide two agreements to sell dated September 12th and September 13th, 1994, defendant Nos. 2 and 3 handed over the physical and vacant possession of property No. A-6/2 Vasant Vihar, New Delhi admeasuring 209 sq. metres (hereinafter referred to as the "suit property.) along with common passages etc. and undivided ownership to the plaintiff for a total sale consideration of Rs. 36,00,000/-. Defendant Nos. 2 and 3 also have separate receipts acknowledging the payment made to them

by the plaintiff. Prior to the execution of the said two agreements, the plaintiff verified the freehold status of the aforesaid property with the DDA, MCD and office of the sub- registrar in order to ensure that there is no charge, lien, mortgage or encumbrance on the said property. As per the said authorities, there were no encumbrances in the suit property. The plaintiffs have been in possession and enjoyment of the suit property as their residential house since then.

4. After a lapse of eight years, on December 7, 2002, the plaintiffs came across a notice of attachment in respect of the suit property addressed to defendant Nos. 2 and 3 amongst others. As per the notice, the Certificate Debtors were liable to pay Rs. 2,05,21,047/- with respect to Certificate Nos. 573/1997 and 1385/1997 drawn on them by the Recovery Officer DRT, Delhi. The Certificate Debtors were further prohibited from transferring or creating any charge on the suit property. The plaintiff made investigations into the said attachment order and found that the suit property had been mortgaged with the defendant No. 1/bank. The plaintiff had no knowledge of this transaction previously. Further, the plaintiff was apprised of the fact that though the defendants had various correspondences inter se, the same had always been concealed from the plaintiff.

5. The plaintiff brought to the DRT's notice that he was a bona fide purchaser of the suit property and the same had been sold to him by defendant Nos. 2 and 3 against duly acknowledged receipts. Further, the plaintiff stated that the attachment of the suit property is a violation of natural justice as the plaintiff owns and possesses the same and the plaintiff has nothing to do with the money owed by the defendant Nos. 2 and 3 to the bank. The persons owing the money are not in possession of or the owners of the suit property.

6. The defendant No. 1/bank, in the present application, has prayed for recalling/setting aside of the ex-parte order dated September 8, 2004 and taking on record of the written statement filed on its behalf. The present suit was listed before this Court on May 11, 2004 when it was held that the defendant No. 1 should be served. By order dated August 23, 2004 it was noted that the defendant had been served on June 8, 2004 and as none appeared for the same, by order dated September 8, 2004 the defendant bank was proceeded against ex-parte.

7. The defendant bank has stated that in I.A No. 9318/2005 under Order 39 Rule 1 and 2 read with Section 151 CPC, 1908 for ex-parte ad-interim injunction restraining the defendants from dispossessing the plaintiff from the suit property, notice was accepted on behalf of the defendant bank by one Mr. Hemal Kumar Seth and in fact, on February 23, 2006 the said Mr. Hemal Kumar Seth appeared on behalf of the defendant bank. The defendant bank has submitted that Mr. Hemal Kumar Seth is neither a panel advocate engaged by the defendant bank nor in any other way known by the same and that the said Mr. Seth has appeared on behalf of the defendant bank without having any authority to do so from the latter. Further, it is also submitted that the defendant bank had been served at the Gandhi Nagar

Branch at Bangalore instead of its Regional office at New Delhi and it is because of this reason that no one appeared on its behalf.

8. The defendant bank has averred that though an execution proceeding was pending in DRT-I Tribunal, Delhi and was being taken care of by the Delhi office of the defendant bank, the notice of the present suit was served upon the defendant bank in its Bangalore office. Due to this act of the plaintiff, the Delhi office was under the assumption that the Bangalore office would take care of the matter whereas the Bangalore office assumed that as the matter was listed in Delhi, the Delhi office would be dealing with the same. The Bangalore office even sent a letter in this regard to the Delhi office but unfortunately, nothing of the sort was received by the Delhi office.

9. The defendant bank contended that if it is not allowed to defend itself, it being a body under the Banking Companies Act, the present matter would adversely affect a huge amount of public funds. Further, as this Court has already passed orders dated November 21, 2005 directing the parties to maintain status quo, if the defendant is allowed to defend itself by setting aside of the ex-parte order it would not amount to prejudice.

10. The plaintiff in its reply to the present application has contended that the same is time barred as it is delayed by nearly 27 months. The plaintiff continues to state that the defendant bank knew of the present proceedings but did not appear. The submissions made by the bank are vague and after thoughts as both the Delhi and Bangalore offices knew of the suit and knowingly abstained from appearing in the proceedings thereof. The plaintiff has also questioned that if the said Mr. Hemal Kumar Seth was not known to the defendant bank and acted on its behalf without its authority, why did it not take any appropriate action with the Bar Council of India? Allegedly, the court records were inspected at the end of March 2007. Clearly, the defendant bank's non-appearance is due to sheer negligence. In light of these contentions, the plaintiff has contended that the defendants are collusively harassing him.

11. I have perused the contentions of both parties. By order dated February, 2004, summons were directed to be served on the defendants. Again, by order dated May 11, 2004 it was held that defendant No. 1 be served afresh and the written statement be filed by all defendants within a period of four weeks. By order dated August 23, 2004 this Court noted that the defendant bank had been served on June 8, 2004. Since a period of 60 days had elapsed from the date of the above-mentioned service, the matter was put up before the court for appropriate orders. On the next date of hearing, i.e. on September 8, 2004, it was observed that as the defendants had still not filed the written statement, the same would be proceeded ex- parte. The plaintiff was directed to lead his evidence by affidavit and for this purpose, the matter was listed before the Joint Registrar on October 14, 2004. It is the setting aside of this last order that the defendant bank is seeking. The

direction to parties to maintain status quo was made by order dated November 21, 2005. It was on this date and on the next hearing on February 23, 2006 that a counsel appeared for Defendant No. 1, i.e. the defendant bank. Thereafter, the present matter was listed seven times before this Court from May 23, 2006 to January 19, 2007 wherein adjournments/observations were made and wherein no one appeared on the defendants' behalf. Thereafter, from March 21, 2007 up to now, the defendant bank has been represented by its counsel and the same has been actively participating in the present suit proceedings.

12. As far as the legal position on the defendant bank's application for setting aside of the order dated September 8, 2004 is concerned, the same has been set out comprehensively in [Finolex Cables Ltd. Vs. Finolux Auto Private Limited](#), wherein it has been observed as follows:

10. The legal position which is not in dispute and which can be extracted from the conjoint reading of the Supreme Court Judgment in the case of [Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya](#), and Division Bench judgment of this Court in [Lotus International Vs. Chaturbhujadas Karnani Textiles \(P\) Ltd.](#), is this:

(a) if the defendant does not appear on the date of hearing fixed by the court, the court has power to proceed ex parte against him;

(b) when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross examine the plaintiff's witnesses, provided such cross examination has not already been foreclosed. In that event, the court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set ex parte under Order IX Rule 6 CPC and at what stage he has chosen to seek permission to participate in the proceedings;

(c) the defendant can appear later and move application for setting aside the ex parte order by showing sufficient cause for non appearance on the date the defendant was proceeded ex parte. If sufficient cause is shown, the court can set aside the ex parte order and in that case it shall restart the proceedings from the stage when the defendant was proceeded ex parte on the premise that no proceedings were held at all on the date when the defendant was proceeded ex-parte and/or on subsequent dates; and

(d) even if the defendant is not able to show good cause, he has right to participate in the proceedings from the stage when he started appearing.

However, in that event he has no right to set back the clock and, therefore, if any advantage accrued to the plaintiff on the dates when the defendant had not appeared, that advantage would continue to accrue in favour of the plaintiff.

13. In consideration of the facts of the present suit and the circumstances under which I.A No. 4175/2000 has been filed, I am of the opinion that the defendant

bank's application for setting aside order dated September 8, 2004 cannot be allowed. The defendant bank was served summons on June 8, 2004. Thereafter, on November 21, 2005 and February 23, 2006 one Mr. Hemal Kumar Seth appeared on behalf of the defendant bank and the latter has denied authorizing the former's appearance on its behalf. It was on and after March 21, 2007 that the defendant bank has been represented by its duly authorized counsel. The evidence of the plaintiff has already been taken on record by way of affidavit. The counsel on behalf of defendant No. 1 appeared after a period of almost three years since it was first served. The submission of defendant No. 1 as regards the confusion between the Delhi and Bangalore office does not seem to me to be a satisfactory or sufficient cause for the 3 year delay.

14. In light of the above-mentioned judgment as well as the apparent facts of the present case, I.A No. 4175/2000 is disposed of as not allowed as the defendant No. 1 has been unable to show good or sufficient cause for non- appearance and hence I find no reason to re-initiate the ex-parte proceedings. However, I am of the opinion that defendant No. 1 may be allowed to participate in the proceedings at the stage at which they are presently proceeding as they not only possess the right to do so but have also been appearing since March 21, 2007.

The applications is disposed of in the above terms.

CS (OS) No. 99/2004

List before Joint Registrar on 29th October, 2009.