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Court : DRAT Madras

Decided On : Sep-08-2006

Reported in : I(2007)BC128

Judge : K Gnanaprakasam

Appellant : Zeron Electronics (P) Ltd. and

Respondent : State Bank of India

Judgement :

1. This Miscellaneous Appeal is directed against the Order dated 24.3.2006 passed in MA-134/2003 I OA-1639/ 1998 by the DRT-I at Chennai. The defendants in the OA are the appellants. The OA filed by the respondent Bank was decreed ex parte on 13.7.1999. The defendants 1, 2 and 4 have filed an application to set aside the ex parte order and also to condone the delay in filing the appeal and for stay. The application to condone the delay in MA 134/2003 came to be dismissed by the DRT by its order dated 24.3.2006, and the same is under challenge in this Appeal.

2. Before this Tribunal, S.R. Baskaran, the 2nd defendant in the OA, filed the Affidavit for himself and on behalf of other defendants 1 and 4, wherein he has stated that they were carrying on business at No.69/9, Aryagowda Road, West Mambalam, Chennai, and they were not served with any summons from the Tribunal, but however, they were served with the notice from the Bank through their Advocate to the correct address at No. 69/9, Aryagowda Road, West

Mambalam, Chennai-33, on 14.3.1998 calling upon them to pay the dues to the Bank and except the said notice, they were not in receipt of any other notice from the Tribunal.

All of a sudden the 4th defendant in the OA, received a letter from the respondent Bank to her place of working informing about the decree passed by the Tribunal stating that the amount due was around Rs. 15,19,405/- and after adjusting the sale proceeds of an amount of Rs. 3,05,000/-, still there was a balance of Rs. 7.14,405/- payable by the defendants to the Bank and the said letter was received by the 4th defendant on 20.3.2003, and thereafter, the 2nd defendant approached the respondent Bank for particulars and it did not furnish any particulars and hence he filed necessary copy of Application before the DRT to get the particulars and got the same on 21.4.2003 and on 24.4.2003, and therefore, he has filed the application to set aside the decree on 9.5.2003. It is further stated that the address furnished in the proceedings of the DRT is No. 69/3, Aryagowda Road, but whereas the 1st defendant was carrying on business at No. 69/9, Aryagowda Road and the Bank had furnished a wrong address with a view to get an ex parte order from the Tribunal and also got an ex parte order. As the respondent Bank has not furnished the correct address, the appellants were not in receipt of the notice and the summons from the Tribunal and only in the said circumstances, they were set ex parte and the ex parte decree passed against them works hardship and their properties were also sold pursuant to the ex parte decree. There was delay of 20 days in filing the application to set aside the ex parte order dated 13.7.1999, and prayed to condone the said delay.

3. The respondent Bank filed a detailed counter wherein they denied the statement of the appellant that they came to know of the order only on 20.3.2003, when the 4th defendant received the letter about the case in her place of work viz. Queen Marys College, Chennai. But on the other hand, as early as on 21.2.2001 and 24.2.2001, the Bank wrote a letter to the 4th defendant in connection with the Order passed by the DRT in the OA, and she was called upon to furnish certain clarifications as Recovery Certificate was issued by the DRT. The respondent also sent a letter on 21.2.2001 about the order passed against the 4th defendant to Queen Marys College. That apart, the 2nd defendant by his letter dated 20.3.2001

sent a detailed letter to the Bank proposing to settle the matter and also offered to pay Rs. 1.50 lakh immediately and the balance of Rs. 6.50 lakh within six months. It is, therefore, stated that as early as on 21.2.2001, the defendants were aware of the decree and hence their contention that they came to know of the case only on 20.3.2003 is not correct. It is also stated that the order of attachment was delivered personally to the defendants on 22.3.2001. The respondent Bank also referred to certain correspondence between them and the defendants, to establish that the appellants/defendants had knowledge of the decree prior to 20.3.2003 itself, but they have not taken any diligent steps to set aside the decree and to contest the OA.4. The Tribunal was of the view that after the issuance of the Recovery Certificate, the Presiding Officer becomes functus officio to probe into the legality or validity and the question of nullity or the jurisdiction of the Civil Court which passes the decree cannot be gone into by the Presiding Officer and by relying upon the decision rendered in the case of Kumar v. Indian Bank III (2002) BC 35, and also the decision of the DRAT in I (1999) BC 317, dismissed the Petition.

I have heard the learned Advocate for the Appellants and the respondent.

5. The learned Advocate for the appellants submitted that the respondent Bank has not taken notice in the OA to the correct address of the appellants, which resulted in passing of an ex parte decree and, therefore, the said decree is liable to be set aside. During the course of the argument, the appellants relied upon the Postal acknowledgements of the receipt of the suit notice and they were sent to the address 69/9, Aryagowda Road, Chennai-33, but whereas the respondent Bank furnished a wrong address in the OA as 69/3, Aryagowda Road, Chennai-33. That only in the said circumstances, the appellants were not in receipt of the notice in the OA and they came to know of the decree only when they received a notice on 20.3.2003, and thereafter, they applied for the copies before this Tribunal and got the copies and filed the application to set aside the ex parte decree. It is further stated that though the applications to set side the decree and also to condone the delay and stay were filed in the month of May, 2003, as no stay was granted, sale of the property had taken place and the properties were sold in the auction. It is, therefore, submitted that because of the wrong address furnished by the

respondent Bank, they have not received notice from the Tribunal, which resulted in passing of the ex parte decree. Though there is a delay in filing the application to set aside the decree, it should have been allowed as the appellants were not given an opportunity to defend their case. That in the absence of proof of proper service, the decree is liable to be set aside for which the appellants relied upon the case of C.A. Balu v. C.Joseph Pal and Anr. 1990-2-L.W. Page 27, wherein it was held,"....At least there must be an indication that adequate and convincing materials were placed before the Court for it to arrive at the satisfaction that the defendant was keeping out of the way for the purpose of avoiding service or the summons could not be served in the ordinary way. Without the satisfaction of the condition, namely, that the defendant is keening out of the way to avoid service, the Court will not be in order to direct substituted service....Hence, the rigour with regard to fulfilment of the condition before ordering substituted service cannot be lost sight of...." It is further submitted that the substituted service were taken to a wrong address and, therefore, the defendants were precluded from attending the Court. The appellants also relied upon the case of N. Balakrishnan v. M. Krishnamurthy 1999-1-L.W.739, wherein the Hon'ble Supreme Court held that, "It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion....Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammeled by the conclusion of the lower Court." 6. Or the contrary, the learned Advocate for the respondent Bank submitted that the appellants had knowledge prior to 29.3.2003, and they were not diligent enough to file an Application to set aside the ex parte decree dated 13.7.1999, and their contention that they had knowledge only 20.3.2003 is untenable on the face of the record, as they had prior knowledge and, therefore, filing of the application in the month of May, 2003, was highly belated and the delay was abnormal and not properly explained. The respondent Bank has also taken me through certain correspondence between the parties such as the letter dated 21.2.2001, sent by the Bank to the 4th respondent viz. B.Sundari, wherein it is stated, "Suit Filed Account M/s. Zeron Electronics Pvt. Ltd., O.A. 1693/98-DRT, Chennai-Recovery Certificate dated 19.9.2000-Order for Rs. 16,30,228.71 with future interest at 14.79% p.a." There is another letter dated 24.2.2001, addressed to the 4th respondent to her working place wherein also it is stated, "Suit Filed Account". That thereafter, the 2nd defendant viz. S.R. Bhaskaran, gives a letter dated 20.3.2001 to the respondent Bank for compromise wherein it is stated, "Without Prejudice" and in the body of the letter also it is stated that after discussions, which he had with the officials of the respondent Bank, they have decided to make a compromise proposal and also set forth certain terms and conditions.

The respondent also relied upon the letters dated 16.4.2001, 6.6.2001 and 21.6.2001, addressed to S.R. Bhaskaran, and in all these letters also it is stated, "Suit Filed Account" and in the letter dated 16.4.2001, the Bank also referred to the letter given by Bhaskaran dated 20.3.2001. The respondent Bank heavily relies upon these correspondence and submit that the appellants were aware of the OA proceedings and also the decree passed against them on 13.7.1999, and they were not diligent either in defending the OA or in filing the application to set aside the decree at the earliest point of time.

7. Now the only question that arises for consideration of this Tribunal is whether the appellants had knowledge of the OA proceedings prior to 20.3.2003, and whether the appellants have made out a case to condone the delay.

I have carefully considered the rival submissions and also perused the appeal papers and the correspondence between the parties.

It is the case of the appellants that the respondent Bank has not furnished the correct address of the appellants in the OA and by furnishing wrong address, notices were taken and even the publication was also taken only to the wrong address and only in the said circumstances, they were not aware of the proceeding in the OA and remained ex pane. It is their case that only when the 4th defendant received a notice in her office address on 20.3.2003, they came to know of the decree, and thereafter, they have taken steps to set aside the decree and only in the said circumstances, there was a delay of only 20 days from the date of knowledge and the delay was neither wilful nor wanton and the same was beyond their control also. But, however, the respondent Bank was able to substantiate that the appellants had knowledge prior to 20.3.2003, by relying upon the correspondence dated 21.2.2001, 20.3.2001, 16.4.2001 and 6.2.2001. In fact, S.R. Bhaskaran the 2nd Appellant had also submitted a letter dated 20.3.2001 to the Bank for One Time Settlement and in the said letter it is stated "without prejudice". The respondent Bank attributes knowledge of the OA to the appellants and based upon the earlier correspondence, the appellants have given letter "without prejudice". It is also pointed out that even after filing of the application to set aside ex parte decree before the DRT, they have not chosen to obtain any stay or decree, which shows that the appellants were not at all diligent enough in defending/prosecuting the case and only in the said circumstances, their properties were brought to sale and it was sold and 3rd party interest was also created and only in the said circumstances, if the delay is condoned and the decree is set aside, it would jeopardise the 3rd party's interest created in this matter.

8. Of course, it is no doubt true that the pre-suit notice was taken to the address, viz. 69/9, Aryagowda Road, but whereas in the OA, the address furnished was 69/3, but the name of the Road and the Postal zone were furnished the same. Even assuming that wrong address was furnished in the OA and the respondent had obtained a decree on the basis of the wrong address, the respondent Bank was able to make out a case that there was correspondence between the parties after filing of the OA i.e. fetters dated 21.2.2001 addressed to the 4th defendant, viz. B. Sundari. wherein it is stated that Suit Filed Account and OA-1693/1998-DRT, Chennai-Recovery Certificate dated 19.9.2000, Order for Rs. 16,30,228.71 with future interest at 14.79% p.a. The receipt of this letter is not in dispute and at least in the year 2001, it can easily be concluded, that the appellants had knowledge of the decree, but whereas they have not chosen to take any steps in the year 2001 itself, but they have filed the application only in the year 2003. That apart the 2nd defendant viz. S.R. Bhaskaran, has also given a letter dated 20.3.2001 to the

Bank for One Time Settlement and on that date also, he had knowledge of the decree passed against them or atleast he could have asked for the particulars from the Bank about the stage of the OA filed by the respondent Bank, as the respondent Bank has indicated about the filling of the OA in their letter dated 21.2.2001.

It is not known what prevented the appellants from getting particulars of the OA proceedings in 2001 itself and in the absence of the same, I am unable to accept the case of the appellants that they had knowledge about the decree only on 20.3.2003. Of course, I am conscious of the fact that the parties must be given an opportunity to defend their case, provided the defendants make out a case that they were not aware of the decree. In this case, the respondent Bank is able to make out a case that the appellants had knowledge of the OA proceedings in the year 2001 on more than one occasion, but whereas they have chosen to file the application only in the year 2003, as if they had knowledge only on 20.3.2003, which I am unable to accept. Even after filing of the application to set aside the decree, the appellants could have been diligent enough to obtain the stay of further proceedings and they have not done so. But they have simply stated that the proceedings got adjourned and that may not be an acceptable reason for not having taken necessary steps to get an order of stay. Now the properties have already been sold out and 3rd party interest has been created and it is stated that the Auction Purchasers also had taken possession of the properties and, therefore, the prejudice that would be caused to the auction purchaser would weigh more, than to the appellants.

9. For all the reasons stated above, I am unable to accept the reasons set forth by the appellants to condone the delay and the appeal is dismissed for different reason than the one stated by the DRT.

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