

Jit Singh and anr. Vs. Central Bank of India and ors.

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Court : DRAT Delhi

Decided On : Oct-15-2007

Reported in : (2008)141CompCas209NULL

Judge : M Jain

Appellant : Jit Singh and anr.

Respondent : Central Bank of India and ors.

Judgement :

1. The appellants have preferred this appeal against the order dated October 1, 2003, passed by the Presiding Officer, Debts Recovery Tribunal, Chandigarh, dismissing the Miscellaneous Application No. 188 of 2003 for setting aside the ex parte decree dated March 27, 1996. The said application was made under Order 9, Rule 13 of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure.

Appellants Nos. 1 and 2 herein, namely, Mr. Jit Singh and Mr. Jaspal Singh were defendants Nos. 7 and 4 respectively in the suit in question whereas appellant No. 3, Mr. Baldev Singh (son of appellant No. 1 Mr.

Jit Singh) was allowed to be impleaded by the hon'ble Punjab and Haryana High Court vide order dated September 25, 2006 in C. M. No.13433-CII of 2003 in Civil Revision No. 5233 of 2003.

The relevant facts are stated hereunder. The first respondent-Central Bank of India had filed Suit No. 182 of 1993 for the recovery of Rs. 12 lakhs and odd against the defendants including appellants Nos. 1 and 2 herein. The defendants appeared before the civil judge (sr. division), Ludhiana. However, the proceedings were adjourned several times on the request of the defendants to enable them to file written statement.

Ultimately vide order dated September 19, 1994, last opportunity was afforded to them to file written statement by October 24, 1994. They did not file written statement and on October 24, 1994, the case was ordered to proceed ex parte. Ex parte evidence was recorded and the suit was decided finally ex parte vide Judgment and decree dated March 27, 1996.

2. Appellants Nos. 1 and 2 herein filed an application under Order 9, Rule 13 of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure for setting aside ex parte decree before the civil judge, sr. division, Ludhiana, on September 1, 1997. The copy of the restoration application is annexure H to the present appeal. The ground for restoration advanced by them was that on January 24, 1995, they were directed through their counsel by the court of Senior Sub Judge, Ludhiana, to appear before the Debts Recovery Tribunal, Jaipur, as after passing of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the said Act") which came into force on June 25, 1993, the civil court had ceased to have the jurisdiction to proceed further with the case. Thereafter, they never received any notice either from DRT, Jaipur, or from the civil court, Ludhiana, to appear in the above-noted suit. After the setting up of Debts Recovery Tribunal, Jaipur, they were informed by their counsel that the civil court had no jurisdiction to proceed further with the recovery suit of more than Rs. 10 lakhs. As such, their absence on October 24, 1994, was neither wilful nor intentional. On October 24, 1994, the case was adjourned to January 24, 1995. On January 24, 1995, they appeared in the court along with their counsel and they were directed to appear before the Debts Recovery Tribunal, Jaipur. So, there was sufficient cause to set aside the ex parte decree passed on March 27, 1996. The ex parte judgment and decree passed on March 27, 1996, were allegedly illegal and without jurisdiction. They allegedly came to know about passing of ex parte

judgment and decree only on August 6, 1997, when notice of the Recovery Officer, Debts Recovery Tribunal, Jaipur, was published in the newspaper "The Tribune". The restoration application was then made promptly on September 1, 1997.

3. The respondent-bank opposed the restoration application, contending that on September 19, 1994, the case was adjourned to October 24, 1994, for filing of written statement by the defendants, subject to payment of cost of Rs. 200 and this was the last opportunity given to them.

They did not appear on October 24, 1994, and the case proceeded ex parte against them. On January 24, 1995, the civil court ordered for the transfer of the case to the Debts Recovery Tribunal, Jaipur, with a direction to the parties to appear there on March 6, 1995. However, the defendants had already been ordered to be proceeded ex parte on the previous date, i.e., October 24, 1994. It was denied that the judgment and decree passed by the civil court were without jurisdiction. The bank submitted that operation of the said Act was stayed by the hon'ble Punjab and Haryana High Court and various other High Courts.

Consequently, the jurisdiction of the civil court continued. Further, it was admitted by the defendants that they appeared in the civil court with their counsel on January 24, 1995. They, therefore, then came to know of the order dated October 24, 1994, whereby they were proceeded ex parte. Their contention was, thus, palpably wrong that they came to know about the passing of the ex parte decree on August 6, 1997.

4. As the restoration application of the defendants/appellants did not find favour with the Tribunal below, the same was dismissed. However, instead of filing an appeal thereagainst before this Appellate Tribunal, they filed a Civil Revision No. 5233 of 2003 before the hon'ble Punjab and Haryana High Court, copy of which is on record. It was dismissed as withdrawn on September 25, 2006, with liberty to file an appeal before this Appellate Tribunal against the rejection of restoration application. It was also observed that in case of their preferring the appeal within 15 days from the date of receipt of certified copy of the order, the respondents would not take any objection about limitation and the Appellate Tribunal (this Tribunal) would decide the appeal on the merits. Thereafter, the present appeal

has been filed.

The relevant facts and grounds in support of the restoration application/ appeal and as to its opposition from the side of the bank have already been set forth above.

5. As the recovery proceedings had proceeded ahead, the mortgaged property was put to auction on December 16, 1999, and after the dismissal of the application for setting it aside, the sale in favour of the auction purchaser was confirmed on October 7, 2003. Respondent No. 2 herein is the auction purchaser who has opposed the appeal, filing written reply. He came to be impleaded as a party on his application, in the civil revision which was filed before the hon'ble Punjab and Haryana High Court, referred to earlier.

6. Learned Counsel for the appellants has argued that the appellants were advised by their counsel that the civil court had no jurisdiction to proceed further after the passing of the said Act; they did not receive any notice after the suit was transferred to the Debts Recovery Tribunal, Jaipur, and they having come to know of the ex parte judgment and decree dated March 27, 1996 and order dated October 24, 1996, only on August 6, 1997, should not be made to suffer for the lapses of counsel.

7. On the other hand, learned Counsel for the respondent-bank has urged that in the restoration application, there was not even a whisper regarding any negligence on the part of the lawyer. According to him, it has become a fashion to attribute lapses, carelessness and negligence on the part of the lawyer by one of the litigating parties to arouse the sympathy of the court on the premise that a party should not suffer owing to fault of its lawyer.

8. Learned Counsel for the auction purchaser has contended that he is a-bona fide purchaser for consideration and the auction sale having been confirmed in his favour, the same cannot be set aside. In a nutshell, he opposes the unsettling of the auctioned sale in his favour in any eventuality.

9. On consideration of the matter and threadbare analysis, I find that the appellants are harping on the alleged negligence or carelessness of their counsel without any basis at all. It is not disputed that the operation of the RDDBFI Act was stayed by the hon'ble Punjab and Haryana High Court, meaning thereby that the jurisdiction of the civil court continued during the period of operation of stay. Indeed, there could not be a vacuum. When the operation of the RDDBFI Act was stayed, it could not be said that the civil court also did not have jurisdiction in respect of recovery suits of over Rs. 10 lakhs of the banks and the financial institutions. In the case at hand, admittedly the appellants had put in appearance in the suit before the civil court. It is also an undenying fact that they did not appear there on October 24, 1994. It was this day by which they were to file written statement. As they neither appeared nor filed written statement on October 24, 1994, the suit was ordered to proceed ex parte against them. It is admitted by the appellants/defendants that they appeared before the civil court with their counsel on January 24, 1995. It, thus, cannot be denied that on January 24, 1995, they acquired knowledge of the earlier order dated October 24, 1994, whereby the suit had been ordered to proceed ex parte against them. On January 24, 1995, the civil court ordered for the transfer of the case to Debts Recovery Tribunal, Jaipur, but no transfer took place de facto or de jure, because the operation of the RDDBFI Act was stayed by the hon'ble Punjab and Haryana High Court and the jurisdiction continued with the civil court during the period of operation of stay. No application for setting aside the order dated October 24, 1994, was made by the appellants/defendants, in spite of having come to know of it on January 24, 1995. The fact that they acquired knowledge of the order dated October 24, 1994, on January 24, 1995, runs counter to their contention that they actually acquired knowledge of ex parte judgment and decree dated March 27, 1996, and order dated October 24, 1994, only on August 6, 1997.

10. Article 123 of the Limitation Act, 1963, prescribes a period of limitation of 30 days to set aside an ex parte decree and the time begins from the date of the decree, but where the summons or notice was not duly served, the period of limitation begins to run from the date when the applicant acquires the knowledge of the decree. In the instant case, summons had been served on the defendants. Rather, they had appeared also before the civil court on several dates, lastly on

January 24, 1995, as per their own version. Therefore, the Tribunal below rightly concluded that in the instant case, the limitation would start running from the date of decree dated March 27, 1996, as per Article 123 of the Limitation Act, 1963. The restoration application for setting aside the ex parte decree dated March 27, 1996, was hopelessly barred by time having been moved as late as on September 1, 1997.

11. Otherwise also, the restoration application was bereft of any merit. It is crystal clear from the fact that the order to proceed ex parte had been passed on October 24, 1994. Though the defendants appeared on January 24, 1995, but they never moved any application for setting aside the ex parte order dated October 24, 1994, despite the fact that operation of the RDDBFI Act had been stayed by the superior court and the jurisdiction continued to be vested with the civil court which dealt with the matter and ultimately passed the ex parte decree on March 27, 1996. To say in other words, they allowed the case to proceed ex parte. It is notorious that a defendant with a weak case allows the case to proceed ex parte and then belatedly applies for restoration to linger on the litigation. The appellants/defendants have chosen the same course here too.

12. No notice at all was necessary to be issued afresh to the defendants when the jurisdiction continued to be with the civil court which could proceed further in the matter till the vacation of the stay as to the operation of the RDDBFI Act by the superior court. The civil court rightly proceeded ahead and passed the ex parte decree dated March 27, 1996. The defendants/appellants have to blame themselves for the same. The ground advanced by them to set aside the ex parte decree is not backed by any justifiable cause or sufficient reason and the appeal has to fail. *Sushil Kumar Sabharwal v. Gurpreet Singh* 14. I have gone through them. It has been held by the hon'ble Supreme Court in the first mentioned ruling that the expression "was prevented by any sufficient cause from appearing" must be liberally construed where the defendant approaches the court for setting aside ex parte decree within statutory period and non-appearance is not mala fide or intentional, ex parte decree should be set aside. This ruling hardly helps the appellants/defendants in the setting of the facts and circumstances of the case discussed in detail above. The hon'ble Supreme Court has ruled this too that no

hard and fast guidelines can be prescribed. It means that each case is to be judged on its own facts, though the expression aforesaid is to be construed as an elastic expression.

15. The second ruling is besides the facts and circumstances of the present case. In that case, the defendants were trying to negotiate settlement with the plaintiff-respondent by setting out fortuitous circumstances which had resulted in the defendants having fallen in arrears but the proposal for settlement was not evoking any favourable response from the plaintiff. On the facts of that case, the hon'ble apex court held that the setting aside of the ex parte decree could not be refused.

16. The third ruling was also given on an entirely different set of facts where the LR of the deceased defendant was admittedly working in another district at the relevant time, but notice regarding impleadment of LRs addressed to his permanent residential address was returned with the endorsement "refused". On the facts of that case, it was held that the outcome was not a mere irregularity in service of summons but rather a case of non-service of notice.

17. The fourth ruling is not at all applicable to the present case. In the said case, the hon'ble Supreme Court has held that the defendant's knowledge about pendency of the suit does not amount to his knowledge about the date of hearing. The said view was expressed by the hon'ble apex court with reference to second proviso to Order 9, Rule 13 of the Code of Civil Procedure (added by the 1976 amendment) which provides that no court shall set aside the decree passed ex parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendants had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. The hon'ble apex court held that it is the knowledge of the "date of hearing", not the knowledge of "pendency of suit" which is relevant for the purpose of proviso aforesaid. This proviso is not applicable to the present case, because it is not a case of any irregularity in the service of summons. Rather, admittedly the defendants had appeared in the suit and even on January 25, 1995, after ex parte order had been passed on October 24, 1994.

18. In view of the above discussion, I find no merit in the appeal and the miscellaneous appeal being devoid of merit, is hereby dismissed. No costs.

Copy of this order be supplied to the parties and another copy sent to the Tribunal below.

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