

(2015) 09 DEL CK 0318
In the Delhi High Court
Case No : CS(OS) 3339/2011

GE Capital Services India

APPELLANT

Vs

Prayag Scanning Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 14-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 37 Rule 3(1), Order 37 Rule 37, Order 37 Rule 4, 151

Citation : (2015) 09 DEL CK 0318

Hon'ble Judges : Hima Kohli, J.

Bench : Single Bench

Advocate : Deepika V. Marwaha, Worthina Kasar, Advocates and Atul Bansal, AR and Party-in-Person, for the Appellant; Himanshu Pathak, Advocate, for the Respondent

Judgement

Hima Kohli, J.

IA No. 17878/2012 (by the u/O XXXVII R-4 r/w Sec. 151 CPC) and IA No. 17879/2012 (for condonation of delay), R.A. NO. 388/2015 and I.A. No. 16543/2015

1. IA No. 17878/2012 has been filed by the defendants praying inter alia for setting aside the judgment and decree dated 16.7.2012, passed in the suit and I.A. 17879/2012 is for seeking condonation of delay of 33 days in filing the leave to defend application.

2. Review Application No. 388/2015 has been filed by the defendants No. 1 and 3 to 7 for seeking review of the order dated 28.4.2015, whereunder it was observed that the decree dated 16.7.2012 is final against all the defendants, except for the defendants No. 1 and 4. Accompanying the said application is I.A. No. 16543/2015, for seeking condonation of delay of 65 days in filing the review application.

3. Before dealing with the present applications, it is considered necessary to

recapitulate the brief facts of the case.

4. The plaintiff/GE Capital Services India had instituted the present summary suit in December, 2011, praying inter alia that a decree for a sum of Rs. 49,87,082.56 paise be passed against the defendant No. 1/company and the defendants No. 2 to 7, as guarantors of the defendant No. 1/company.

5. Summons in the prescribed form were issued in the suit, vide order dated 3.5.2012. On the said date, Mr. R.S. Kundra, Advocate had entered appearance for the defendant No. 4 and he was granted time to take appropriate steps. Despite service, none of the defendants filed their memo of appearance. Since the suit remained uncontested, it was decreed vide order dated 16.7.2012 in favour of the plaintiff against all the defendants jointly and severally. Pertinently, counsel for the defendant No. 4 was present in Court when the decree was passed. Thereafter, the defendant No. 4 filed I.A.'s 17878-79/2012 on 11.9.2012. A perusal of said applications reveals that the same has been signed by defendant No. 4 for self and as the Managing Director of the defendant No. 1/company, praying inter alia for setting aside the ex parte decree dated 16.7.2012 and for being granted leave to defend the suit.

6. Notice was issued on the captioned applications on 25.9.2012, returnable on 1.2.2013. On 22.5.2013, counsel for the defendants No. 1 and 4 had stated before the Court that his clients would deposit the title documents of some immovable property equivalent to the decretal amount. Seven weeks' time was for the said purpose and the defendants were directed to produce the original title deeds of the immovable property in question on 05.8.2013, for the satisfaction of the Registrar General. On 5.8.2013, counsel for the defendants No. 1 & 4 had stated that they had filed original title deeds of some other property bearing No. 84/82, Vake Mohalla, Leader Road, District & Tehsil Sadar, Allahabad City, UP. However, the title deeds revealed that the Government valuation of the said property is for a sum of Rs. 6,70,809/-, whereas the decretal amount was to the tune of Rs. 49,87,082.56 paise. At the request of counsel for the defendants No. 1 & 4, the case was adjourned by the Registrar General to 10.9.2013.

7. On 10.9.2013, counsel for the defendants No. 1 & 4 had submitted a valuation certificate of the captioned property obtained from a private valuer, which showed the valuation as Rs. 33.95 lacs. At the request of counsels for the parties, the case was placed before the Court on 9.10.2013. On 9.10.2013, counsel for the defendants had sought an adjournment to enable his clients negotiate a settlement with the plaintiff through mediation and the case was adjourned to 13.12.2013.

8. On 13.12.2013, counsel for the defendants had claimed that they had secured the outstanding loan by depositing the title deeds in respect of a residential property situated in Allahabad. As the said submission was disputed by the counsel for the plaintiff, vide order dated 13.12.2013 the defendants No. 1 and 4

were directed to file an affidavit and place on record the relevant documents to establish creation of a mortgage in respect of the residential property in favour of the plaintiff and file a valuation report obtained from a Government valuer in respect of the captioned property. The case was then adjourned to 25.3.2014.

9. On 25.3.2014, none had appeared on behalf of the defendants No. 1 & 4 and resultantly, I.A. 17878-79/2012 were dismissed. After one month, the defendants filed IA No. 7949/2014, praying inter alia for setting aside the order dated 25.3.2014. Notice was issued on the said application on 29.4.2014, returnable on 19.8.2014. Finally, vide order dated 26.11.2014, IA No. 7949/2014 was allowed and the dismissal order dated 25.3.2014, was set aside and the defendant No. 4 was permitted to argue IAs No. 17878-79/2012 on merits.

10. Aggrieved by the aforesaid order, the plaintiff had filed an intra court appeal, registered as FAO(OS) No. 3/2015, which was allowed by the Division Bench vide order dated 22.4.2015, and the order dated 26.11.2014 was set aside. However, the case was remitted back to the Single Judge for a fresh consideration.

11. It is in the light of the said order that I.A. 17878-79/2012 were taken up for arguments by the predecessor Bench on 28.4.2015. On the said date, counsel for the defendants No. 1 & 4 had stated that he had filed a valuation report got prepared from a private valuer wherein the immovable property had been valued at Rs. 33.00 lacs. He had also sought time to file a report from a Government approved valuer for the valuation of the suit property. While granting three weeks' time to the defendants to do so, the case was adjourned for today. It was also clarified on the said date that as the present applications had only been filed by the defendants No. 1 & 4, the decree had attained finality qua the other defendants.

12. On 12.8.2015, the review application filed by the defendants, (RA No. 388/2015), was taken up for consideration along with the application for condonation of delay, and notice was issued to the non- applicant/plaintiff directly as also through counsel, returnable on 9.10.2015.

13. Ms. Marwaha, learned counsel for the plaintiff states though the review application states that it has been filed by all the defendants, except for the defendant No. 2, a perusal of the affidavit filed in support of the said application reveals that the same has been signed and sworn only by Mr. Manoj Kumar Yadav, defendant No. 4 as the Managing Director of the defendant No. 1/ company.

14. An examination of the review application bears out the submissions of counsel for the plaintiff that it is not supported by the affidavit of any of the other defendants except for defendant No. 4. Further, a perusal of the authorization letter dated 1.5.2012, which learned counsel for the defendants No. 1 & 4 relies on to claim that it authorizes the said defendant to appear on behalf of all the defendants, reveals that the Board of Directors of the defendant No. 1 have authorized the defendant No. 4 as its Managing Director to take steps

in the suit. The said letter does not authorize the defendant No. 4 to appear for or on behalf of the remaining defendants. Even the power of attorney filed by the counsel for the applicants with the review application reveals that it has been signed by the defendant No. 4 in his personal capacity and not as a Director of the defendant No. 1.

15. In these circumstances, the review application cannot be treated as one that has been filed by all the defendants, excluding the defendant No. 2, as stated by learned counsel for the defendant No. 4. The said application and the condonation of delay application shall have to be treated as having been filed by the defendants No. 1 & 4 alone. Ordered accordingly.

16. In view of the fact that I.A.'s 17878-79/2012, filed by defendant No. 1 and 4 are still pending consideration and no adverse orders were passed against the said defendants on the relevant date, i.e., on 28.4.2015, the review application filed by them for seeking review of the order dated 28.4.2015 is found to be misconceived and is accordingly disposed of along with the condonation of delay application.

17. Coming back to IA No. 17878/2012 filed by the defendants No. 1 & 4 for setting aside the judgment and decree dated 16.7.2012, learned counsel for the plaintiff opposes the said application and states that the defendants No. 1 & 4 have used every tactic under the sun to delay the execution of the judgment and decree, which had to be placed on the back burner for the past three years, thus leaving the plaintiff high and dry.

18. As for the merits of the present applications, the explanation offered by the defendant No. 1 and 4 for their failure to enter in appearance within the stipulated period of ten days prescribed under Order XXXVII Rule 3(1) CPC, is that the defendant No. 4, Managing Director of the defendant No. 1/company was unwell and suffering from hepatitis and diabetes and the other Directors were unaware of the service of summons on them and therefore, no effective steps could be taken to file the memos of appearance within the prescribed timeline.

19. It has been further averred in the application that on 11.5.2012, the defendants had filed an application for condonation under Order XXXVII Rule 3 CPC, but the same had remained under objections and no steps were taken by the clerk of the counsel to cure the defects pointed out by the Registry and re-file the same. The defendant No. 4 came to know about the passing of the decree in the present suit on 16.7.2012 whereafter he took steps to file the present application along with an application for condonation of delay of 33 days.

20. Counsel for the plaintiff stresses the fact that no explanation has been offered by the defendants 1 to 3 for non-filing of the memo of appearance, when they were admittedly served with the summons in the suit along with the defendant No. 4. She submits that though the remaining defendants have been impleaded by the plaintiff as guarantors of the defendant No. 1/company, they

also happen to be the Directors in the defendant No. 1/company and in that capacity, they were all along aware of the institution of the present suit and the consequences of non-filing of the memo of appearance within the prescribed timeline. She contends that there is no explanation offered by the defendants No. 1 & 4, signatories to the present applications for moving the same so belatedly more so when their counsel was present on 16.7.2012, the date when the judgment and decree came to be passed.

21. Counsel for the plaintiff seeks to clarify that contrary to the submission made by the counsel for the defendants on 13.12.2013, to the effect that the plaintiff had secured the outstanding loan on the basis of an equitable mortgaged created by the defendant No. 2 in respect of a residential premises, the same is an incorrect position and this fact was duly clarified before the Division Bench in the appeal.

22. The Court has considered the rival contentions of the parties and perused the material placed on record. Before dealing with the submissions of the parties, it would be useful to refer to Rule 4 of Order XXXVII CPC, which is reproduced hereinbelow:

"Order XXXVII -Summary Procedure

1. to 3. - xxx

(4) Power to set aside decree-After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court to do so, and on such terms as the Court thinks fit."

23. A glance at Rule 4 reveals that the court may under special circumstances set aside an ex-parte decree under Order XXXVII CPC or set aside the execution or grant leave to defend to the defendant. In the case of Rajni Kumar Vs. Suresh Kumar Malhotra and Another, , the Supreme Court had held as below:

"Para 9: The expression "special circumstances" is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly by a special circumstances. In an application under Order 37, Rule 4 , the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit."

24. The very object of Order XXXVII CPC is to ensure expeditious hearing and disposal of the suit filed under a special provision. Rule 4 empowers the court to grant leave to the defendant to appear to the summons and defend the suit if the court considers it reasonable to do so, on such terms as it may think fit in addition to setting aside the decree. Where an application is filed under Order XXXVII Rule 4 CPC praying inter alia for setting aside a decree either because the defendant did not appear in response to the summons and the limitation had expired, or after entering appearance did not apply for leave to defend in the suit within the prescribed period, not only is the defendant required to demonstrate special circumstances that prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts that would entitle him to leave to defend the suit.

25. A glance at the sequence of events after filing the present applications make it abundantly clear that several opportunities were granted to the defendants No. 1 & 4 to offer an immovable property as security for the decretal amount only with the idea that conditional leave could then be granted to them, but to no avail. After the passage of three years, the position remains the same even today. It is apparent from their conduct that the defendants No. 1 & 4 have been deliberately stalling the proceedings by offering title deeds of properties that are far below the mark or of those that they do not own. The explanation offered by the counsel for the defendants No. 1 & 4 for setting aside the order dated 16.7.2012 can by no stretch of imagination be termed as an extraordinary or special ground as envisaged under Order XXXVII Rule 4 CPC. Not only were the defendants No. 1 and 4 served with the summons in the suit, records reveal that all the remaining defendants were contemporaneously served with the summons in the suit, but they have elected to stay away from the suit proceedings with no explanation worth the while offered for the same. Furthermore, the defendants No. 1 & 4 were duly represented through counsel on the date of passing of the judgment and decree, i.e., on 16.7.2012 and no justification has been offered by the said defendants for having waited for about three years to file the present applications when they were apprised of the orders passed in the suit through their counsel long before.

26. Even today, the defendants No. 1 & 4 have not complied with the order dated 22.5.2013, whereunder they were directed to file the title documents of the immovable property equivalent to the decretal amount. The submission made by the counsel for the defendants No. 1 & 4 to the effect that the sale deed dated 11.8.2011 produced by him is in respect of the second and third floors of premises bearing No. 84/82, Vake Mohalla, Leader Road, District & Tehsil Sadar, Allahabad City, UP, is not borne out from a perusal thereof. Quite clearly, the sale deed is with respect to the second floor of the property in question and therefore any valuation report filed by the defendants No. 1 & 4, giving the value of the second and the third floors at Rs. 49.92 lacs, cannot be accepted. Incidentally, even the valuation report dated 1.7.2015, stated to have been filed by the defendants No. 1 & 4 is not on record. However, a copy thereof has been

furnished to the Court for scrutiny and it reveals that only the second floor is in the name of the defendant No. 4 whereas the third floor is in the name of his son, Shri Utkarsh Yadav, who is not even a party to the present proceedings.

27. This Court is of the opinion that sufficient time has been given to the defendant No. 1 and 4 to comply with the order dated 22.5.2013 and demonstrate their bonafides, but they have miserably failed and have been dragging their feet. There is no justification for granting further time to them to make compliances and at the same time keep in abeyance the judgment and decree dated 16.7.2012.

28. In view of the aforesaid facts and circumstances, this Court is of the opinion that the defendants No. 1 and 4 do not deserve any further indulgence. This Court is not inclined to exercise its discretion in their favour under Order XXXVII Rule 4 CPC as no exceptional circumstances have been pointed out by them. Resultantly, the present applications are dismissed as being devoid of merits.

R.A. No. 388/2015 & IA No. 16543/2015 (for condonation of delay)

29. In view of the order passed above, the date fixed in the applications, i.e., 9.10.2015 is cancelled.