(2009) 12 DEL CK 0403

In the Delhi High Court

Case No : FAO No. 365 of 2009

HDFC Bank Limited APPELLANT

Vs

Kanhaiyalal Lal Chib RESPONDENT

Date of Decision : 11-12-2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2009) 12 DEL CK 0403

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Rajat Katyal, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Since common question of fact and law is involved in both these appeals, these appeals are being disposed of by this common judgment.

2. Brief facts are that at the request of respondent, appellant granted Higher Purchase cum Loan Facility, vide Loan cum Hypothecation cum Guarantee Agreement dated 30th November, 2006 for purchase of vehicle by respondent. The loan amount was to be repaid in 36/35 equated monthly instalments.

3. However, respondent defaulting in making payment of these instalments and despite repeated request did not clear the dues. Appellant sent a legal notice to respondent and in spite of that, respondent did not pay any heed.

4. Appellant, thereafter filed recovery suit under Order 37 of the CPC (for short as ''Code.). Along with it, an application under Order 40 Rule 1 of the Code was also filed for appointment of receiver.

5. Trial court, vide impugned order dated 12th November, 2009 refused to appoint the receiver to take possession of vehicle in question and instead issued notice to respondent. Aggrieved with the impugned order, appellant has filed the present appeal.

6. It is contended by learned Counsel for appellant that under the agreement executed between the parties, appellant has all the rights to take over the possession of the vehicle as financed by it to the borrower, in case of any default in the payment of monthly instalments.

7. Other contention is that respondent is hell bent upon misappropriating/selling the vehicle, which is corroborated by the conduct of respondent, since he has failed to pay the monthly instalments, in spite of repeated request and after service of legal notice.

8. In support of its contention, learned Counsel cited decision of this Court;

(i) Kotak Mahindra Finance Limited v. Ashok Kumar and Ors. FAO(OS). 262/02 decided on 21st August, 2002 and

(ii) Citicorp Finance (India) Limited v. Neeraj Jain and Anr. FAO No. 283/05 decided on 20th September, 2005.

9. Relevant portion of impugned order reads as under;

Issue summons of the suit on prescribed performa Under Order 37 CPC along with notice of the application Under Order 40 Rule 1 CPC on filing of PF and RC for 19.12.2009.

10. As per appellant''s own case, Loan cum Hypothecation cum Guarantee Agreement was executed on 30th November, 2006 and amount was to be paid by way of 36/35 monthly instalments. Now three years after the execution of the agreement, appellant has filed suit for recovery.

11. Order XL of the Code deals with appointment of receivers. This provision reads as under;

1. Appointment of receivers.-(1) Where it appears to the Court to be just and convenient, the Court may be order-

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorise the Court to remove from the possession of custody of property any person whom any party to the suit has not a present right so to remove.

12. Principles regarding the appointment of receivers are well-settled, that is;

(i) It is discretionary;

(ii) plaintiff must show that he has a very excellent chance of success;

(iii) He must show a case demanding immediate action;

(iv) No order will be made to deprive the defendant of de facto possession and;

(v) Court will usually refuse to interfere unless the conduct of the party is free from blame.

13. In S. Saleema Bi v. S. Pyari Begum and Anr. AIR 2000 Sc 3513 it was observed;

We find that the defendant is in physical possession of the property in dispute. The Receiver can only be appointed when it is just and convenient and also when there is a prima facie case in favour of the plaintiff- respondent and the case calls for taking of urgent measure like appointment of a Receiver. The High Court has not gone into these questions while appointing Receiver for the property in dispute.

14. In the present case, there is no urgency for ex parte appointment of receiver, as appellant itself is to be blamed, as it did not approach the court earlier for recovery of the monthly instalments. As stated above, the agreement was executed more than 3 years back and suit for recovery has been filed by the appellant just before expiry of period of limitation. Keeping in view delay and latches on the part of appellant, there is no urgency in the matter.

15. Secondly, apprehensions of appellant that respondent will dispose of the vehicle are wholly unfounded, since vehicle is already hypothecated with the appellant. Respondent has already executed Loan cum Hypothecation cum Guarantee Agreement with the appellant.

16. The judgments cited by learned Counsel for appellant are not applicable to the facts of present case, as there has been delay and latches, on the part of appellant in seeking the relief for appointment of ex parte receiver.

17. There is no merit in these appeals and both these appeals are dismissed.

18. Copy of this judgment be sent to trial court.