

(2024) 03 CAL CK 0042

In the Calcutta High Court

Case No : C.O. No. 4004 Of 2023, IA No. CAN 1 Of 2023

Jai Badrinath Niketan Pvt. Ltd. & Anr.

APPELLANT

Vs

Mandipa Properties Private Ltd. & Ors.

RESPONDENT

Date of Decision : 12-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Section 9, Order 29, Order 29 Rule 2
Recovery of Debts and Bankruptcy Act, 1993 — Section 17, 18, 19

Citation : (2024) 03 CAL CK 0042

Hon'ble Judges : Subhendu Samanta, J

Bench : Single Bench

Advocate : Krishnaraj Thaker, Chayan Gupta, Suvranil Saha, Saptansu Basu, Soumya Mazumder, Pranit Bag, Rahul Poddar, Dip Jyoti Chakraborty, Amit Parekh, M. Rahaman

Final Decision : Disposed Of

Judgement

Subhendu Samanta, J

I.A. NO. CAN -1 of 2023

1. This is an application for recalling of an order passed by this court on November 1st, 2023. This instant application was preferred by respondent No. 10 of the original CO No. 4004 of 2023.

2. The brief fact of the case is that the CO has been preferred against the order dated October 2023 passed by the Learned Additional District and Sessions Judge, Fast Track 4th Court in MISC appeal No. 133 of 2023 wherein the Learned Additional Sessions Judge, has refused to pass an interim order of injunction in favour of the petitioner. After filing of the CO, a direction was made to serve upon the Ops, accordingly service was affected.

3. After service the matter was again placed before this court along with the affidavit of service. This court on taking note of affidavit that service has effected

upon the OP 10 and 11, has passed an impugned order on restraining the OP 10 to issue any sale certificate, in respect of the ground and top floor of the building situated at Kazi Najrul Islam Sarani, Calcutta 700052 , if not already issued by them.

4. Now the OP 10 appeared before this Court along with an application for recalling of impugned order dated 1st November 2023.

5. Heard the Learned Advocate for the parties at length. It appears that the grounds for recalling the order is mainly two fold-

Firstly : the impugned order was passed ex parte without serving proper and effective notice upon the respondent No. 10.

Secondly : the respondent No.10 may be allowed to be heard regarding the merits of the CO.

6. In considering the first ground it is contended by Mr. Basu, Learned Advocate for OP 10 that the notice of the CO was sent to the head office of OP No. 10 in Chennai, whereas the concern office of the respondent No. 10 with regard to the present issue is pending in Mumbai Office, the notice should have been addressed to the Mumbai Office. So, the service made by the petitioner cannot be termed as "proper service". It is the further contention of the OP 10 that they came to know about the impugned order firstly on November 20th, 2023 when the present petitioner filed the copy of the order before the Recovery Officer, Debt recovery Tribunal Mumbai, thereafter they made an enquiry and found that said application was served in the Chennai Office instead of Mumbai Office.

7. It is the argument on behalf of the Mr. Basu that the petitioner has purposefully served a notice upon the Chennai Office instead of knowing the fact that the concern office regarding the said proceeding before the Debt Recovery Tribunal is concern to the Mumbai Office. It is further argued that the plaintiff only intend to get an order of injunction OP Financial Institution, has mislead the court by serving an improper notice upon the office at Chennai.

8. Learned Advocate Mr. Thaker, appearing on behalf of the petitioner submits that the present OP 10 has admittedly has his registered office head office at Chennai. The petitioner served the application upon the office of Respondent No. 10 at Chennai Office.

9. He further argued that, according to the law laid down for the provisions of Order 29 Rule 2 CPC summons has to be served by post addressed to the corporation to its Registrar office. It is further argued by Mr. Thaker that the order of the recalling has been sought was passed on 1st November 2023; the instant application for recalling was filed on 20th December 2023 i.e. after the period of 30 days; the application for recalling is appeared to be barred by limitation but the applicant has not filed a separate application for contention of delay. Thus the application is not maintainable.

10. Refuting the contention of the petitioners, Mr. Basu argued that the provision of Order XXIX CPC is applicable in respect of suits only; it is an application in respect of a proceeding under Article 227 of the Constitution of India, where the rules of CPC is not applicable.

11. Heard the Learned Advocate perused the pleading of the parties it appears that an application for recalling of the order passed by this court on 1st November 2023 was preferred on 23rd December 2023. Before passing the impugned order, this court has taken note regarding service upon the OP 10 and 11. It is true that the service was effected upon the Registrar Office of OP 10 but it is also a fact that the proceeding before the DRT is pending at Mumbai. Whatever may be the circumstances the Registrar Head office of a Financial Corporation must not seat ideally after receiving a process issued by this court.

12. The attitude of the Financial Institution dealing with public money, after receiving the service from this court, appears to me very reluctant and not according to the promptness as required under the law. Thus, in my view explanation of the Respondent No. 10 regarding loath response to the service of this court is not accepted. However, the first ground for recalling the impugned order may not appears to me reasonable in the attending facts and circumstances of this case.

13. Considering the second ground it appears that the respondent No. 10 seeks to argue on merit, which in my view cannot be denied.

14. This court has passed the impugned order in favour of the petitioner by observing the prima facie case as argued/cavassed by the petitioner in the petition itself.

15. Mr. Basu Submits that the instant suit filed before the Learned Trial Court is barred under the provisions of Section 18 of the Recovery of Debts and Bankruptcy Act, 1993. He submits that no Court or other authority shall have any jurisdiction in respect of a loan and recovery proceeding initiated by Financial Institution before the concern Tribunal; in this case a huge amount of public money (Thirty Crores) of loan has been obtained by the other defendants and the respondent No. 10, the Financial Institution has initiated the proceeding. The proceeding has been finalised by issuing certificate, and to execute the proceeding one sale notice was issued by the Tribunal itself.

16. Mr. Basu further submits that the instant suit was initiated by the present petitioner/plaintiff having information of all the proceeding. The plaintiff has suppressed the material fact. When the Civil Court has no jurisdiction to entertain the proceeding, the suit as well as the instant CO is itself barred.

17. Mr. Thaker submits that the plaintiff is not a Borrower, Guarantor or Creditor of such loan. The Certificate in question is not issued against the plaintiff/petitioner. So the certificate or the proceeding is not binding upon the petitioner.

18. Mr. Thaker further submits that in conjoint reading of Section 17,18 and 19

of the said Act 1993, it would be revealed that there is no total ouster of jurisdiction of Civil Court the ouster by virtue of Section 18, it set to be no Court or other authority can try matters for Recovery of Debts. Other relieves are completely beyond the ambit of the said Act 1993.

19. Mr. Thaker further argued that the plaintiff/petitioner filed the suit before the appropriate Civil Court for declaration and injunction enumerated u/s 34 of specific relief Act. He further argued that Section 9 of Code of Civil Procedure has given the Civil Court an ample jurisdiction to try all the matters except specifically barred by any Statute. So the argument advanced by OP 10 is not correct proposition of law.

20. Heard the Learned Advocates also perused the provisions of law in the Recovery Debts and Bankruptcy Act 1993 as well as the relevant ratio of Hon'ble Apex Court in this matter.

21. This is a revision initiated against an order of Additional District Judge in a Misc-appeal refusing the order of ad-interim injunction to the petitioner. A Very limited scope is there in this Civil Revision to determine propriety of the impugned order. The suit is pending before the Jurisdictional Civil Judge concerned. The matter of bar to the suit enumerated under the provisions of the Recovery Debts and Bankruptcy Act, 1993 must have to be dealt with by the Learned Civil Judge concerned. This Civil Revisional Application must not put in imbroglio to determine the jurisdiction of Civil Court at present. Thus I refrain myself from entertaining the argument made by the parties regarding the bar of jurisdiction of Civil Court over the dispute in question.

22. I make it clear that the matter be kept open to be decided by the Jurisdictional Civil Judge concerned if raised by the parties at the appropriate stage by appropriate application.

23. In considering the merit of the instant CO, after hearing the respective parties of this case it appears to me that, before passing any ad-interim order there are three basic principals/parameters to be dealt with

First: prima facie case

Second: balance of convenience and inconvenience.

Third: irreparable loss and injury.

24. In considering the prima facie case it appears that, the plaintiff pleaded that he entered into an agreement with the other defendants/Ops by virtue of which he claimed his declaration over the ground-floor and top-floor of the building in question. In support of his pleading he submitted the document i.e. a written agreement. The merits of the document, and whether it has been entered into legally, without compulsion, or induced by undue-influence or not, cannot be ascertained at the stage. So the plaintiff has successfully made a prima facie case to have an order of ad-interim injunction in respect of the ground-floor and

top-floor on the building in question.

25. In considering the balance of convenience and inconvenience, it appears to me that, plaintiff/petitioner has convenience to have an order of injunction so that disputed floors in question could not be alienated or third party interest may not be created during the pendency of this suit. On the other hand, it would be inconvenience for the OP 10, Financial Institution to carry out or execute the final order of the tribunal. So, it would be inconvenience to OP 10 that they are restrained to enjoy the fruit of the litigation which was successfully concluded by the Learned Tribunal. The petitioner's right though, is an extraneous consideration of Learned Tribunal but the Financial Institution shall not be precluded to proceed as per order of a competent tribunal. Considering the same the inconvenience by the order of injunction would be higher to the OP-10 than the convenience of the petitioner in this case. The ultimate conclusion is that, the balance of convenience and in convenience of this case is tilting in favour of the OP 10.

26. In considering the irreparable loss and injury, it appears that the plaintiff may have the injury if the property was alienated to a third party during the pendency of this case, but at the same time the plaintiff has the opportunity to pray before the jurisdictional Civil Court in the same suit against any party repudiating the sale in respect of the floors in question; moreover, principles of "Litis-Pendence" shall always applicable.

27. Thus the injury proposed to be suffered by the petitioner for not allowing the order of injunction cannot said to be irreparable. On the other hand if the sale procedure initiated by the OP 10 by virtue of the decision of the Learned Tribunal is stayed during the pendency of the entire suit, the OP 10, the Financial Institution shall suffer irreparable loss and injury which cannot be compensated in terms of money. Thus in this case the OP 10 shall suffer irreparable injury if an order of injunction is passed.

28. Considering the above aspect, after the hearing of both the parties, I am of a considered view that the order passed by this court on 1st November 2023, is hereby recalled.

29. On the basis of the above observations I find no justification to interfere with the impugned order passed by the Learned Appellate Court concerned.

30. This order is passed in the ad-interim stage, the Civil Judge (Senior Division) concerned, shall disposed of the injunction matter independently, without being influenced by the order of this Court after giving reasonable opportunity of both the parties of being heard.

31. Accordingly the CAN 1 of 2023 is disposed of.

32. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.