

(2007) 01 DEL CK 0065

In the Delhi High Court

Case No : FAO 97 of 2004

Punjab National Bank

APPELLANT

Vs

Leo Electronics and Allied Industries and Sh. Pawan Kumar
Gandhi

RESPONDENT

Date of Decision : 19-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, 151
Limitation Act, 1908 — Article 163
Limitation Act, 1963 — Article 122, 5

Citation : (2007) 2 BC 237 : (2007) 137 DLT 43 : (2007) 94 DRJ 483 : (2007) 1 ILR Delhi 44

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : Purnima Maheshwari, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Malik, J.—At the centre of the controversy is the question whether the appellant offered sufficient and reasonable cause for not filing

application under Order 9 Rule 9 within the leeway granted by law. This is the first appeal filed against the order of the Learned Additional District

Judge dated 28.01.2004, wherein the proceedings under Order 9 Rule 9 C.P.C. and u/s 5 of the Limitation Act were dismissed. The sequence

and genesis of the instant case is this. A suit was filed for recovery of Rs. 4,88,714.09/- by the then New Bank of India, which ultimately merged

with Punjab National Bank against the respondents before this Court in the year 1987. Vide order dated 04.11.1996, the case was transferred to

the court of learned Additional District Judge due to enhancement of pecuniary jurisdiction of the District Court. The suit was dismissed in default

vide order dated 03.03.1997.

2. The plaintiff/appellant moved an application under Order 9 Rule 9 C.P.C. on 24.09.1997. The said application to set aside order dated

03.03.1997 was dismissed in default vide order dated 26.04.1999. On 24.05.1999, counsel for the appellant filed an application under Order 9

Rule 9 read with Section 151 C.P.C. for setting aside the order dated 26.04.1999 and restoring application under Order 9 Rule 9. The learned

court of Additional District Judge vide order dated 24.05.1999 allowed the said application and restored the application under Order 9 Rule 9

C.P.C. to its original position. Thereafter, notice was sent to defendants/respondents on the application under Order 9 Rule 9. The case was

adjourned to 18.08.1999, 03.11.1999, 11.11.1999, 20.12.1999, 04.01.2000, 24.02.2000 and 26.04.2000. Since nobody appeared on behalf

of the plaintiff/appellant, Therefore, application under Order 9 Rule 9 C.P.C. dated 24.09.1997 was dismissed in default.

3. Thereafter, the appellant moved an application under Order 9 Rule 9 read with Section 151 C.P.C. on 16.07.2003. The plaintiff/appellant set

up the following grounds in its application. Mr. H.S. Parihar, Advocate for the Bank by mistake had noted down wrong date in his Court diary and

accordingly non-appearance of the appellant as well as its counsel was neither intentional nor deliberate, but happened due to bona fide mistake.

Mr. Parihar also submitted his affidavit along with his application. Again, counsel for the appellant Mr. H.S. Parihar did not intimate the bank

regarding the status of the present case and the bank was under bona fide impression that the proceedings in the above said suit were continuing

and their counsel is taking due care of the case. Thereafter, the appellant engaged a new counsel, Mr. Alok Gupta, to pursue the case. Mr. Alok

Gupta inspected the file on 04.07.2003 and the above said facts transpired. It was argued that the Bank has been pursuing this case and dismissal

of the instant case due to noting down of the wrong date by the previous counsel for the appellant bank, constitutes a reasonable and sufficient

ground. The appellant bank is a nationalised bank and since public funds are involved, Therefore, it was prayed that the ex-parte order should be

set aside and the suit be restored to its original position.

4. I have heard the learned Counsel for the appellant. She vehemently argued

that the absence of the appellant is neither willful nor intentional. She argued with vehemence that public funds are involved and as such delay should be condoned. In support of her case, she has cited authorities reported in Bajrang Rai and Others Vs. Ismail Mian and Others, ; Bhajan Singh v. Ganeshi Devi AIR 1978 P& H 257 ; Dulal Chandra Ojha Vs. Banamali Guchait and Others, ; Nathu Prasad Vs. Singhai Kapurchand, ; Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another, ; Shyamsundar Mantri Vs. Land Acquisition Collector, Cuttack, ; Mahabir Parshad Vs. Des Raj, , Deshbandhu Gupta & Co. v. K.B. Malik & Co. 1972 RLR 18.

5. The learned Counsel for the appellant kept on veering from the main topic and cited the above detailed far fetched authorities which do not create propitious conditions for the appellant. In B.S. Lamba Vs. M.A. Kanth and Others, the facts were these. A suit filed by the plaintiff for declaration with consequential relief of injunction was dismissed for default of appearance and non-prosecution by the plaintiff vide Court order passed on 24.05.1988. The application for restoration of the said suit was filed in the Court on 30.08.1988, which was dismissed for default of appearance on 30.01.1989. Another application was filed in the Court on 07.03.1989 for restoration of application and the suit. While dismissing the application, it was held :

Where an application for restoration of a suit is dismissed for default of appearance, a second application u/s 151 C.P.C. for restoration of such dismissed application would be maintainable if it is filed within 30 days i.e., within the period of limitation prescribed for filing original application under Article 163 of the Act.

It was further held :

Accepting the plea of the learned Counsel for the petitioner that no period of limitation is prescribed for such an application would defeat the ends of justice and may follow absurd results. Every litigant is supposed to be vigilant of his rights and avail of the remedy expeditiously in accordance

with the provisions of law and within the time prescribed under the limitation Act. If the original application for restoration of the suit has to be filed

within thirty days, an application u/s 151, C.P.C. for restoration of such application dismissed for default cannot be permitted to be filed at any

time according to the whim and choice of the plaintiff.

It may be mentioned that Article 163 of the Limitation Act, 1908 stands substituted by Article 122 of the Limitation Act, 1963.

6. In *Nalu Subba Row v. Gauti Venkataratnam* AIR 1914 Mad 438, Tyabji, J. held that a second application to restore a suit, which had been

dismissed in default, was time barred because it was made two months after the dismissal of the suit. Under Article 163 of the Limitation Act, an

application to set aside a dismissal for default should be made within 30 days of the dismissal.

7. Similar view was taken in *Nanak Chand Vs. Paras Ram*, .

8. The above said application was dismissed in default on 26.04.2000 and the application for restoration was moved on 16.07.2003. There is

delay of more than three years and two months. It must be borne in mind that limitation for filing the suit for recovery of amount is three years. This

application was moved after the expiry of three years. I am of the considered view that this application is hopelessly barred by time. In case this

application is permitted, a litigant may go on forever and apply to restore in an uninterrupted stream of unsuccessful application.

9. Now, I turn to the merits of this case. On the one hand, the appellant stated that the counsel for the appellant could not appear on 26.04.2000

on the ground of wrong noting of the date and on the other hand, it was pointed out that the appellant's counsel failed to convey the next date of

hearing and the present status of the case to the appellant and consequently, the appellant had engaged a new counsel, who brought all these facts

to their notice. The above said stand set up by the appellant establishes the ambivalent character of the story. Both the grounds are poles apart and

heterogeneous. Again, it was never explained from which period i.e. from one particular day to another particular day, the status of the case was

not disclosed by the previous counsel. No evidence in this case was ever adduced. No action was ever initiated against the previous counsel. The

records of the previous counsel did not see the light of the day. No complaint was lodged against him before the Bar Council of Delhi. It appears

that the bank slept over the case for a period of more than three years. The appellant has not furnished reasonable Explanation of delay in filing of

this application. In absence of sufficient cause and non Explanation of inordinate

delay in filing the application, the application for condensation of delay has to be rejected. The appeal is without merit and the same is, Therefore, dismissed in liming.