

(2008) 12 DEL CK 0040
In the Delhi High Court
Case No : FAO No. 107 of 2004

Sh. Kulvinder Singh and Another

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2009) 156 DLT 534

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : J.C. Mahindro, for the Appellant; Rajesh Kumar, for the Respondent

Judgement

Sudershan Kumar Misra, J.—The respondent, State Bank of India instituted a suit for recovery of Rs. 3,33,854.52 against the appellants Sh. Kulvinder Singh and Smt. Harjeet Kaur. On 3.12.2001, the trial court passed an ex parte decree against the appellants who were the defendants in that suit. After about 2 years, i.e., on 24.11.2003, the defendants moved an application under Order 9 Rule 13 CPC for setting aside the exparte decree. They also moved an application u/s 5 of the Limitation Act for condonation of delay in moving the application under Order 9 Rule 13 CPC. There the appellants contended that they were not aware of the passing of the decree because they were away to Ludhiana and that they came to know of this fact only on 15.11.2003 from the officials of the plaintiff bank. Thereafter, defendant No. 1 inspected the court file on 17.11.2003 and moved the application under Order 9 Rule 13 on 24.11.2003. According to the appellants, there was no intentional or deliberate lapse on their part in moving the applications for restoration and condonation of delay. The respondent traversed these assertions and contended that the applications failed to disclose relevant material particulars since it is not stated how long the appellants remained in Ludhiana or even the name of the employee of the respondent bank who had allegedly informed them of the passing of the ex parte decree. After hearing the matter, the learned Trial Court declined the prayer of the appellants

and dismissed the applications. Whilst doing so, learned Additional District Judge was of the view that the entire effort of the appellants seems to be to prolong the proceedings as long as possible by avoiding appearance and that only flimsy grounds are being put forth for setting aside the decree. It also held that even in the application u/s 5 of the Limitation Act, no good ground for condonation of delay in moving the application under Order 9 Rule 13 CPC has been made out. The assertion of the appellant to the effect that they came to know about passing of the decree only on 15.11.2003 has also been disbelieved. In addition, learned trial court has taken a view that if the appellants had changed their address for any reason, they were supposed to inform the bank about this immediately and it cannot be said that the defendants/appellants were not aware of the consequences of non-payment of the bank's installments. For these reasons, the learned Additional District Judge refused to condone the delay in filing the application under Order 9 Rule 13 CPC and consequently, both the applications u/s 5 of the Limitation Act as well as the application under Order 9 Rule 13 CPC were dismissed. Before this Court, counsel for the appellants has urged one main ground, which is, that in fact the appellants were never served with summons in suit because the address furnished by the respondent/plaintiff to the trial court was not correct. It is also averred that as a matter of fact, no loan at all was disbursed to the appellants and therefore, there could be no obligation on the part of the appellants/defendants to have kept the bank apprised of any further change in their address. It is also averred that as a matter of fact, the categorical statement made by the respondent/plaintiff that the address of the appellants mentioned in the plaint was correct, was palpably false, and that therefore the exparte decree which came to be passed behind the back of the appellants/defendants, could not be sustained. Counsel for the appellants further contends that as a matter of fact, learned Trial Court overlooked its own record where, on 3.8.2001, the reports of the postman and of the process server are to the effect that the house was lying locked and that the addressee was not available, along with another report on 25.8.2001 to the effect that no such person was available at that address. A similar report is stated to have been given on 7.9.2001 also. It is submitted that looking to the nature of the reports submitted by the postman as well as the process server of the court, the learned trial court ought not to have relied merely on the statement of the plaintiff/respondent to the effect that the address furnished by it in the suit was correct. According to counsel for the appellants, even the affixation had been done at places where the appellants did not reside. In addition, defendant No. 2 in the suit is stated to have already died. It is further urged before this Court by the learned Counsel for the appellants that the possession of the Maruti Vehicle was not taken by his client because it was not in a satisfactory condition. In response to a direction given by this Court, the appellant Kulvinder Singh also filed an affidavit on 12.5.2004 stating that he had not taken delivery of any car on the basis of the alleged loan for which the suit in question had been filed. He has also stated that he did not own any car as on that date and that there is no hypothecation made in respect of any car which could be connected to him. The

respondent bank had sued the defendants/appellants for recovery of money stated to be owed by them to the bank. One of the oldest principles of civil law is that the creditor must seek out the debtor. It was for the plaintiff to give the correct current address of the defendants when it instituted the suit claiming that they owed money to the plaintiff. To my mind, the pertinent facts with regard to the due service in the suit as well as those mentioned in the application u/s 5 of the Limitation Act are such that the matter could not be disposed of by the learned court below without taking evidence in the matter. Furthermore, it has been held by the Supreme Court in the Case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, as follows:

3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
 3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay? The doctrine must be applied in a rational common sense pragmatic manner.
 4. When substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.
2. The court has further held that what is required is a justice oriented approach from this perspective. Looking to their averment that the delivery of the car was not taken and that the loan was also not disbursed, prima facie, it is obvious that

the appellants/defendants could not stand to benefit by resorting to delay. On the contrary, avoiding court process in such a matter would obviously visit the appellants with serious consequences. The court ought not to take a pedantic approach in such matters and what is necessary is to see that litigants are not deprived of an opportunity to obtain substantial justice on the merits of their case. Here, the appellants/defendants alleged that in fact the loan was never disbursed and that the delivery of the car for which the loan was applied, was also not taken by them. In addition, the fact that the appellants were not residing at the address given by the respondent bank in its suit has also not been seriously contested. Consequently, there is force in the contention of the appellants/defendants that they were never served with notice of the suit and that the affixation of notice was obviously done at a premises where they did not reside. Under the circumstances, this appeal deserves to be allowed.

3. The impugned order dated 21.2.2004 passed by the learned Additional District Judge is set aside subject to the condition that the appellants shall deposit the entire decretal amount before the trial court within such time as may be granted by the trial court in this behalf.