

(2010) 03 DEL CK 0127
In the Delhi High Court
Case No : C.R.P. 190 of 2008

V.K. Tours and Transport

APPELLANT

Vs

Mafatlal Finance Co. Ltd.

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 26, Order 9 Rule 13, 151

Citation : (2010) 3 BC 701 : (2011) 1 CivCC 149 : (2011) 7 RCR(Civil) 1977

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Arshdeep Singh, for the Appellant; None, for the Respondent

Judgement

Hima Kohli, J.—The present petition is directed against an order dated 18th September, 2008 passed by the learned ADJ in Ex. Petition No. 85/1999 filed by the respondent/DH for execution of the judgment and decree dated 13th May, 1999 for Rs. 1,84,760/- with interest @ 18% per annum and costs in Suit No. 441/1998 entitled Mafatlal Finance Company Ltd. v. V.K. Tours and Transport and Anr.

2. In a nutshell, the facts of the case are that the respondent instituted a suit against the petitioner for recovery of Rs. 1,84,760/- along with interest @ 24% per annum and costs, on account of recovery of amounts due to the respondent/DH against a lease agreement dated 26th February, 1997 executed by the petitioner, in respect of a Maruti Esteem car bearing No. DL 6CB 6066. The petitioner did not appear in the aforesaid proceedings and was directed to be proceeded against ex-parte, whereafter an ex parte judgment and decree came to be passed on 13th May, 1999.

3. The respondent/DH filed an execution petition bearing Ex. Petition No. 85/1999 before the learned ADJ, seeking execution of the aforesaid judgment and decree. On 22nd December, 1999, the petitioner filed an application under Order 9 Rule 13 read with Section 151 of the CPC in the suit proceeding, praying

inter-alia for setting aside the ex parte judgment and decree dated 13th May, 1999. The records reflect that the said application was ultimately dismissed by the Civil Judge vide order dated 9th August, 2005. However, contemporaneously, the petitioner also filed an application before the Execution Court under Order 21 Rule 26 of the CPC seeking stay of the execution proceedings. Vide order dated 23rd December, 1999, notice was issued on the aforesaid application to the decree holder and the execution proceedings were stayed subject to the petitioner submitting a Bank guarantee for Rs. 1,52,000/- in Court.

4. On 27th January, 2000, in compliance of the aforesaid orders, the petitioner furnished a Bank guarantee to the Court, through Canara Bank for the sum of Rs. 1,52,000/- which was valid for a period of one year i.e. till 27th January, 2001. As the respondent/DH failed to appear in the execution proceedings, vide order dated 16.2.2001, the learned ADJ dismissed the Execution Petition No. 85/1999 and the file of the case was directed to be consigned to the Record Room. However, the original Bank guarantee dated 27th January, 2000 for a sum of Rs. 1,52,000/- was not discharged.

5. Instead of filing an application for restoration of the first execution petition, the respondent/DH filed a second execution petition seeking execution of the same judgment and decree dated 13th May, 1999, registered as Ex. Petition No. 419/2006. A certified copy of the aforesaid execution petition is handed over by the Counsel for the petitioner in the course of arguments and is taken on record.

6. During the pendency of the second execution petition, the petitioner arrived at a settlement with the respondent and issued a cheque for Rs. 1,52,000/- to it on 6th July, 2007. The statement of the officer appearing on behalf of the respondent/decreed holder was duly recorded by the Executing Court on 6.7.2004. In the statement, the said officer deposed that he had received from the petitioner/judgment debtor a cheque dated 3rd July, 2007, for a sum of Rs. 1,52,000/- in full and final settlement of the dues of the judgment debtor and that after receiving the said amount nothing was payable by the judgment debtor and the execution petition stood satisfied. Accordingly, leave was sought to withdraw the execution petition as satisfied. In view of the statement made by the authorized officer of the decree holder, on the same date, the execution petition was disposed of as satisfied and the file was consigned to the Record Room.

7. Thereafter, as the matter was settled between the parties, the petitioner herein filed an application u/s 151 of the CPC in Ex. Petition No. 85/1999 seeking cancellation of the endorsement on the Bank guarantee dated 27th January, 2000 and for release of the same. Along with the application, the petitioner also enclosed a copy of the statement of the Officer of the decree holder as recorded in the Ex. Petition No. 419/2006 on 6.7.2007 and the order of even date passed by the Execution Court disposing of the execution petition. However, the aforesaid application was dismissed by the impugned order by observing that there was no material on the record to show that the decree holder and the

judgment debtor had compromised or settled the matter in respect of Ex. Petition No. 85/1999. Consequently, the prayer for cancellation of the endorsement on the Bank guarantee was declined.

8. Counsel for the petitioner submits that though there was no specific averment made in the application filed before the Execution Court that the matter had been settled between the parties, fact of the matter was that the application was duly supported with the relevant documents, particularly the statement of the officer of the decree holder and the order dated 6th July, 2007 disposing of Execution Petition No. 419/2007 and hence the conclusion arrived at by the Court below was erroneous and contrary to the material placed on the record.

9. A comparison of the first execution petition filed by the respondent, registered as Ex. Petition No. 85/1999 and the second petition registered as Ex. Petition No. 419/2006 shows that the names of the parties as well as the date of the judgment and decree is identical. In fact, in column No. 6 of the second execution petition, it was specifically mentioned that an earlier execution petition was filed by the respondent seeking execution of the judgment and order dated 13th May, 1999. It is also pertinent to note that the sum of Rs. 1,52,000/- mentioned in the Bank guarantee and offered by the petitioner in Execution Petition No. 85/1999, was the exact amount which was finally paid by the petitioner to the respondent in Ex. Petition No. 419/2006 towards full and final settlement of the judgment and decree dated 13th May 1999. Hence there is no manner of doubt that the subject matter of Ex. Petition No. 85/1999 was identical to Ex. Petition No. 419/2006. As Ex. Petition No. 419/2006 was disposed of as satisfied in terms of order dated 6th July, 2007, there was no impediment in allowing the application filed by the petitioner in Execution Petition No. 85/1999, seeking cancellation of the Bank guarantee and its release in favour of the petitioner.

10. The Court below ought to have taken into consideration the fact that the Bank guarantee furnished in Execution Petition No. 85/1999 was not required any more in the light of the settlement arrived at between the petitioner and the respondent in Execution Petition No. 419/2006. As the cause of action in Execution Petition No. 85/1999 did not survive, there was no reason for the Bank guarantee not to be discharged and released, the same having been rendered infructuous.

11. Accordingly, the present petition is allowed. The impugned order dated 18th September, 2008 is set aside. The Execution Court is directed to cancel the endorsement made on the Bank guarantee of Rs. 1,52,000/- offered by the petitioner, and release the same in its favour, subject to the condition that the petitioner shall place on the record of the Execution Court, a certificate issued by HDFC Bank, that cheque bearing No. 174151 dated 3rd July, 2007 issued by the petitioner in favour of the respondent for a sum of Rs. 1,52,000/- in satisfaction of Ex. Petition No. 419/2006, was duly encashed.

12. The petition is disposed of.