

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ EFA(OS) No.32/2009 & CM No.12711/2009

Deutsche Ranco GmbH

.....Appellant through
Ms. Tasneem A. Ahmadi with
Mr. Anuj Kumar Ranjan &
Ms. Raheela Habib, Advs.

versus

Mohan Murti

.....Respondent in person

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Date of Hearing: November 24, 2010

Date of Decision: November 30, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE G.P. MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. Confusion and complexities have been particularly confounded in the circumstances of this case, as a concise account thereof will disclose. Execution proceedings have been initiated by Deutsche Ranco GmbH against the Respondent, Shri Mohan Murti, who appears before us in person. On the hearing held on 20.3.2007, in EA No.356/2006 in Ex. No.58/1994, it has been minuted that – “Counsel for the decree holder submits that he has instructions to withdraw from the case. He submits that

he would be moving an application for seeking discharge. At this request, adjourned to 07/08/2007". On the next date of hearing, EA No.356/2006 was once again listed for appropriate consideration of the Court. The Order passed on that date reads thus:-

On the last date of hearing i.e. 20/03/2007 counsel for the decree holder had informed the court that he had instructions to withdraw from the case for which he wanted to file the application seeking discharge from the case.

No such application has been filed. Neither the counsel nor the decree holder is present. Hence the execution is dismissed in default.

2. Placed in this predicament, learned counsel for the Decree Holder filed EA No.36/2008 under Order IX Rule 4 of the Code of Civil Procedure, 1908 (CPC for short) for restoration of the Execution Petition. On 25.1.2008, the learned Single Judge was pleased to recall the Order dated 7.8.2007, taking support from *H.K. Goods Transport Pvt. Ltd. -vs- Ramesh Chander Bammi*, 126 (2006) DLT 404 as well as *Babu -vs- L. Dewan Singh*, AIR 1952 All. 749. The Dismissal Order was recalled without issuing notice to the Respondent/Judgment Debtor. Notice of EA No.356/2006 was thereupon ordered to be issued.

3. The Judgment Debtor/Respondent thereupon filed an Application seeking a Review of the Order dated 25.1.2008 by

which the Dismissal had been recalled. The Review has been allowed by Order dated 28.7.2009, and it is these Orders which have been assailed before us.

4. The confusion, which we have first mentioned above, is because although the Review has been heard and allowed, an application for substitution of the Decree Holder, Deutsche Ranco GmbH by Invensys Deutschland GmbH has not been decided; it remains in suspended animation. This has created a piquant situation as the Respondent/Judgment Debtor has endeavoured to impress upon us that the Appeal is improper as the proper party/petitioner has not been adjudicated. In this regard, learned counsel for the Appellant has submitted that the erstwhile Decree Holder has merged with Invensys Deutschland GmbH and hence, by operation of law, Invensys Deutschland GmbH is competent to step into the shoes of the former. As no decision has been returned by the learned Single Judge on this legal nodus, we think it proper not to make any further observations. However, we think that if the Appeal is dismissed on this ground, it will result in a miscarriage of justice. When the learned Single Judge was seised with the Review, he ought to have first decided the *locus standi* of the parties before him. We clarify that the matter is left open so as to enable the

learned Single Judge to come to a judicial conclusion as expeditiously as possible.

5. We have already noted that the learned Single Judge had proceeded under Order IX Rule 4 of the CPC on being convinced that notice of that application was not required to first issue to the non-applicant, and secondly on his being satisfied that there was sufficient cause for recalling the Dismissal Order and thereby restoring Execution Proceedings. The learned Single Judge has held that Order IX Rule 4 of the CPC does not apply and in this regard we completely concur with his conclusion.

6. We, however, are unable to affirm the analysis of the learned Single Judge to the effect that Rules 105 and 106 of Order XXI of the CPC had come into play at the stage when on 7.8.2007 Execution Proceedings had been dismissed in default as well as for non-prosecution. Our attention has been drawn to the decisions of the learned Single Judges in *Suka Mukhi -vs- Nata Mukhi*, 70(1990) CLT 776, *Padmavati Devi -vs- J.D.A. (Jaipur)*, RLW 1997(1) Rajasthan, 682, **Veera Boyan -vs- Ponnusamy Gounder** decided on 2.3.1998 and *Dambarudhar Mohanta -vs- Mangulu Charan Naik*, AIR 2004 Orissa 126. Respondent has endeavoured to rely on *Damodaran Pillai -vs- South Indian Bank Ltd.*, (2005) 7 SCC 300, but mistakenly. We say this for the reason that their Lordships had proceeded on

the assumption that Rule 106 of Order XXI was incontrovertibly attracted to the situation which had arisen there. Their Lordships were called upon to decide the proper manner in which the period of limitation was to be calculated. What is extremely pithy, so far as the factual matrix before us is concerned, is the specific recording that the “execution petition had been set down for hearing” on the date on which it came to be dismissed. In this conspectus, we are of the view that the Single Benches referred to above, have correctly analysed the law on the subject. Accordingly, since the Execution Petition had not been “set down for hearing” on 7.8.2007, it should not have been dismissed in default. The proper course would have been to list the Petition, or for that matter any of the pending applications, for consideration and disposal on a future date. If only an application had been fixed for disposal on the future date, only that application could have been dismissed in default if the applicant remained unrepresented. Of course, in the event of the listing of all the pending applications as well as Execution an omnibus order dismissing all of them would also have been legally possible if there was none to press them.

7. Where no provision of law can be located for alleviating a grievance, resort to Section 151 of the CPC is the available recourse with the Civil Courts. The learned Single Judge has

poignantly mentioned that the caption of an application, or to say it differently, the provisions of law which have been invoked in an application should not deter the Court from applying the correct legal provision. This amply finds enunciation in *Ram Sunder –vs- Union of India*, (2007) 13 SCC 255, *J. Kumaradasan Nair –vs- Iric Sohan*, (2009) 12 SCC 175 and *Vijaya Bank –vs- Shyamal Kumar Lodh*, (2010) 7 SCC 635. Having said so, the Court ought not to have felt inhibited or circumscribed in any manner in applying the correct law. In the present case, the learned Single Judge has, in our opinion, incorrectly applied Rule 106 of Order XXI of the CPC whereas he ought to have proceeded under Section 151 of the CPC.

8. There is yet one more aspect of the Appeal which calls for consideration. Learned counsel for the Appellant has contended that after the detailed Order passed by the learned Single Judge, predicated on Order IX Rule 4 of the CPC, the Execution Petition had been restored, the remedy available to the Respondent was only by way of an Appeal. Even though an Order under Order IX Rule 4 of the CPC does not find specific mention in Order XLIII of the CPC, which deals with Appeals from Orders, assuming such an Order to be one of “moment”, we think that an appeal under Section 10 of the Delhi High Courts Act, 1996 could have been filed.

9. A reading of Order XLVII of the CPC makes it obvious that a Review would be maintainable provided that the Applicant (a) has discovered any new or important matter or evidence which was within his knowledge or could have been produced despite his due diligence or (b) it is palpably clear that a mistake or error apparent on the face of the record has occurred or (c) any other sufficient reason. We find that none of these three elements have transpired so far as “sufficient reason” is concerned which has to be construed *ejusdem generis*. Often times, an order is predicated on a provision of law which is neither relevant nor attracted. Such an order is amenable for the purposes of rectification not by a Review but through the avenues of an appeal.

10. For these manifold reasons, we are of the opinion that the impugned Order deserves to be set aside inasmuch as the learned Single Judge has first proceeded under Order IX Rule 4 of the CPC and thereafter under Order XXI Rule 106 of the CPC. We remand the Execution to the Board of the learned Single Judge requesting him to consider whether sufficient reason has been made out firstly for the invocation of Section 151 of the CPC and secondly for granting or denying relief thereunder. Keeping the uniqueness and singularity of the circumstances in perspective, it seems to us that the learned Single Judge should

first dispose off the application for substitution of the Decree Holder, namely, Deutsche Ramco GmbH by the transferee, namely, Invensys Deutschland GmbH. Depending on the conclusions arrived at, the learned Single Judge would thereafter, or even simultaneously, consider the conundrum of whether Execution Proceedings deserve to be restored. The Remand is necessary and proper since it would be inappropriate for the Appellate Court to return a finding as to whether the relief could have been granted or denied under Section 151 of the CPC, an exercise which has not been undertaken by the learned Single Judge.

11. There shall be no order as to costs.

(VIKRAMAJIT SEN)
JUDGE

November 30, 2010
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(G.P. MITTAL)
JUDGE