

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CM No.16305/2008 in RFA(OS) No.78/2008

C.E. Constructions Ltd.

.....Appellant through
Mr.Jayant Bhushan, Sr. Adv.
with Mr. Mohit Chaudhary &
Mr. Gautam Talukdar, Advs.

versus

Durga Builders Pvt. Ltd.

.....Respondent through
Mr. Amit S. Chadha, Sr. Adv.
with Ms. Pushpa Dayal, Advs.
for Respondent No.4

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Date of Hearing: August 27, 2010

Date of Decision: September 10, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether reporters of local papers may be
allowed to see the Judgment? | Yes |
| 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. The Regular First Appeal assails the Order of the learned Single Judge dated 16.5.2007 whereby the Defendant's application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) came to be allowed and consequently the Suit was dismissed. The Appeal has been filed on 18.11.2008 along with the subject application under Sections 5 and 14 of the Limitation Act, 1963 read with Order XLI Rule 3A and Section 151 of the CPC praying therein that the delay of 507 days may be condoned.

2. In order to give a perspective to the contentious issues that arise in the application, the facts of the dispute between the parties should be succinctly stated. Admittedly, a Consent Decree was passed in CS(OS) No.749/1994 on 23.3.2003 in respect of the suit property, viz. S-23, Panchsheel Park, New Delhi which was a suit for specific performance and possession filed by the contesting Respondent herein. The Appellant was not a party to those proceedings and asserts that they were collusive in nature. In Execution Petition No.321/2003, a Local Commissioner had been appointed and he visited the suit property on 27.7.2004. The Appellant asserts that he gained knowledge of the alleged collusive proceedings between the Respondent as a consequence of the visit of the Local Commissioner. The Appellant has filed Objections in the Execution Proceedings on 30.10.2004. During the pendency of those Objections, CS(OS) No.1358/2008 was filed on 20.9.2005 by the Appellant praying for the following Reliefs:-

- a) Pass a decree of declaration to the effect that the agreement to sell dated 30.4.1993 executed between the defendant No.1 to 3 and defendant No.4 is null and void.
- b) Pass a decree of declaration in favor of the plaintiff and against the defendants declaring that the decree dated 28.3.2003 passed in Suit No.749 of 1994 is a nullity in the eyes of law and the same is not binding upon the plaintiff in any manner and the said decree be cancelled. A direction may also be issued to the Revenue Authorities to de-mutate the mutation if any effected in favor of the Defendant No.4 in respect of the suit property.

c) Pass a decree of permanent injunction permanently restraining the defendants and/or every other persons acting on their behalf including their agents, attorneys, accomplices and servants from interfering with the actual possession and renovation/construction of the plaintiff in respect of the suit property and restraining them from creating any further any charge, encumbering or third party right pursuant to the passing of the decree dated 28.3.2003, in respect of the suit property bearing Nos. S-23, Panchsheel Park, New Delhi.

d) Pass a decree of mandatory and permanent injunction restraining the defendants from not to use the suit property same except for residential purpose and in accordance with the sanctioned lay out plans.

3. The Suit and the Objections in the Execution Petition came up together before the same learned Single Judge and vide Order dated 16.5.2007 the Suit was dismissed under Order VII Rule 11 of the CPC. In the impugned Order dated 16.5.2007, the framing of the following Issues in the Execution Proceedings were noted and the learned Single Judge expressed his view that – “all aspects that are required to be examined insofar as the claim of the plaintiffs about their right of possession of the first floor (which in turn is arising from the alleged mortgage of the property) as also about the plea of fraud would be adjudicated in those execution proceedings after trial. The nature of reliefs claimed by the plaintiffs and the issues framed in the execution proceedings leave no manner of doubt that it is in the execution proceedings that the

enquiry about the objections and claims of the plaintiffs would have to be carried out and a separate suit for the reliefs as claimed is not maintainable”.

4. The Appellant pursued its Objections in the Execution Proceedings, but in the event, unsuccessfully. As it has transpired, the Objections of the Appellant in Execution Petition No.321/2003 were rejected by the learned Single Judge by Order dated 4.1.2008. The following extracts from the Judgment of the learned Single Judge make it evident that the grounds and submissions made by the Appellant (who was styled as ‘Obstructionist’ in those proceedings) had been considered and discussed threadbare:-

30. The aforesaid submissions advanced by learned Counsels for the parties, in my considered view, had to be considered within the parameters of the present proceedings. The present proceedings are not one of a trial between the claim of title of the obstructionist and that of judgment debtors 5 to 7. The decree has been passed in favor of the decree holder and against judgment debtors 5 to 7. It is not in dispute that the obstructionist stake its claim only from judgment debtors 5 to 7. Thus, the onus was put on the obstructionist to show that they had any right in the suit property.

31. I am thus unable to accept the plea of the learned Counsel for the obstructionist that the testimony of the decree holder has to be looked at with any greater degree of scrutiny than for the said purpose. It is not for the decree holder to answer queries in respect of transactions alleged between judgment debtors 5 to 7 and the

obstructionist. The decree holder would have no knowledge of such transactions. It is the obstructionist who was claiming right to occupy the property and for that had to establish that some interest had been acquired in the suit property.

32. The obstructionist other than claiming possession of the original documents has not been able to substantiate any of its pleas and thus has miserably failed to discharge the onus. The transaction thus pleaded by the obstructionist is vague. No exact amount has been stated in the testimony of the witness. The amount is stated to be at the relevant stage varying between Rs. 2.00 to 3.00 crore. There is no document evidencing such dues owned from M/s. Durga Builders to the obstructionist.

33. Learned Counsel for the decree holder was rightly able to point out that none of the balance sheets reflected such amount as due and owing. The plea of the obstructionist that the accounts were being maintained on cash basis is contrary to the legal requirement as stipulated under Section 209 of the Companies Act whereby the making of a balance sheet on accrual basis was made mandatory from 1988. Not only that at least for the relevant financial year 1992-93 there would have been a reflection of the dues payable. The obstructionist failed to produce either the books of accounts or the balance sheet. It is the decree holder who produced the certified copies of the balance sheets obtained from the Office of the Registrar of Companies to establish that the dues were not reflected in the same. Other than the oral statement the obstructionist has not produced even any books of accounts to establish that amount. There is also no compliance of the mandatory requirement of Section

125 of the Companies Act of the charge on the assets of the company to be compulsory created with the Registrar of Companies failing which it would not be enforceable. The charge was never created by M/s. Durga Builders nor was it insisted upon to be so done by the obstructionist. Thus the very sub-stratum of the claim is absent.

34. The second important aspect is that on the one hand it is pleaded that the transaction was in the nature of a security of immovable property and on the other hand in the oral submission the learned senior counsel for the obstructionist has sought to emphasise some sharing arrangement. There is no such sharing arrangement placed on record. If the property was taken as a security there was a mandatory requirement under the Companies Act to file relevant documents in that behalf which have undisputedly not been filed. The claim of the obstructionist not being borne out from either any account books (not produced) or the balance sheets (filed by the decree holder), it would not be really open even for the obstructionist to plead a case contrary to the same in view of the observations in Liberty Sales Services case (supra). I am also unable to accept the plea of the learned Counsel for the obstructionist that there are any attending circumstances or conduct of parties in the absence of written documents, which would give rise to a conclusion that the terms and conditions alleged by the obstructionist were so arrived at.

35. The other aspect which stands as a wall in the way of the obstructionist is that even assuming that there was such transaction the legal requirements for the same in respect of the requirement of a registered mortgage has not been fulfilled. This is apparent from the reading of

Sections 58 and 59 of the TP Act. The only escape route for the obstructionist was to have established that it was an equitable mortgage by deposit of title documents not requiring such registration. However, in that eventuality the requirement in writing is necessary to show such deposit of title documents, which is absent. The witness of the obstructionist stated that there was such writing but no such writing has ever been produced. The obstructionist actually was required to file appropriate proceedings for recovery of the amount and for foreclosure of the mortgage, in case such a mortgage had been created. The obstructionist failed to take steps within the prescribed period of time to enforce the payment of money. The obstructionist cannot exercise its right in this indirect fashion in view of the observations in Ramesh Kumar and Ors. case (supra). Thus, on this account also the obstructionist has failed to establish the nature of transaction.

36. The obstructionist has really not been able to establish the date from which they came into possession because there is no writing and evidence for the same. The Local Commissioner who went to visit the premises during the pendency of the suit found no such possession. No doubt the visit of the Local Commissioner is stated to be not for verifying possession but on his visit the status of possession has been put in the report. There were no boards or any other material to show such user by the obstructionist. It is the own case of the obstructionist that after the initial use, the room was used only as a storage space. The bills for electricity, water, telephone, etc. have also not been produced to establish any user or occupation of the same at the relevant period of time. The

only defense of the obstructionist is that it is M/s. Durga Builders, which was paying the same pre-2000. This plea is difficult to accept.

37. The only conclusion which, thus, has to be arrived at is that though the obstructionist did come into possession, the same was only at some subsequent stage after the injunction order restraining the handing over of possession was passed. It is apparent that the obstructionist derived their claim from judgment debtors 5 to 7, they have to go with judgment debtors 5 to 7. The present proceeding is not for settlement of inter se claims between judgment debtors 5 to 7 and the obstructionist.

38. I am thus of the considered view that the issue has to be answered against the obstructionist.

5. So far as the second Issue is concerned, the learned Single Judge had opined that it is unnecessary for parties to keep fighting endlessly and go in Trial. Since the Suit had carried on for nine years, the learned Single Judge concluded that no collusion or fraud has been established by the Obstructionist. The Objections were dismissed. Dissatisfied with that Judgment, the dispute was carried in an Appeal to the Division Bench which is still pending. However, while disposing off CM No.1773/2008 in the said EFA(OS) No.5/2008, the Division Bench had, in terms of its Orders dated 7.4.2008, fixed a schedule of mesne profits which were to be paid by the Appellant. Conditional on these payments being made, the operation of the said Judgment dated 4.1.2008 was stayed.

6. The legal regime which must exist, or should be absent, as the case may be for condoning delay in taking a particular action, have been enunciated by the Supreme Court on several occasions. Mr. A.S. Chadha, learned counsel for the Respondent, has relied on *Concord of India Insurance Co. Ltd. -vs- Nirmala Devi*, (1979) 4 SCC 365 which appositely also deals with the alleged mistake of counsel. Their Lordships laid down that the explanation proffered for condoning the delay should not be tainted by malafides or recklessness or ruse. Learned counsel for the Respondent have also relied on *Jamshed Hormusji Wadia -vs- Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214 in which the exposition of the law is to the effect that if it appears to the Court that a party has accepted and acted upon the part of the order being cross objected to cannot be permitted to disown that part of the order by filing cross objection. Their Lordships had also opined that the appellate jurisdiction under Article 136 of the Constitution is altogether different to Order XLI of the CPC. Since the Respondents, whose endeavour was to file cross objections, had allowed their rights to approach the Supreme Court to lapse by laws of prescription their endeavour to assail the Judgment of the High Court by means of Cross Objection should not be countenanced.

7. We shall now set out the chronology of events pertaining to the present Appeal as well as to the fate of the Objections filed by the Appellant. According to the Appellant, it became aware of the

passing of the said Consent Decree dated 28.3.2003 in favour of the Respondent/Decree Holder only when the Local Commissioner visited the suit premises on 31.10.2004. Objections, however, appear to have been filed by the Appellant one day earlier, that is, on 30.10.2004. The Suit in which the impugned Order has been passed was filed almost one year later, that is, on 20.9.2005. The Appeal against the Order dismissing the Appellant's Objections was filed on 31.1.2008. Initially, only Notice was issued on the stay application but by Order dated 7.4.2008, the Appellant's dispossession was stayed, subject to his depositing mesne profits. This Appeal came up for hearing on 18.11.2008. As has already been mentioned, the impugned Order is dated 16.5.2007 and takes note of the pendency of the Appellant's Objections filed in the Execution Proceedings. These Objections were dismissed, on their merits, by Order dated 4.1.2008 of the same learned Single Judge. Since the impugned Orders are dated 16.5.2007, the present Appeal ought to have been filed not later than July, 2007 but the Appellant preferred to prosecute only his Objections. It may even have been reasonable for the Appellant to file the Appeal on 31.1.2001, that is, immediately upon the Objections being dismissed, but this is not what has transpired. It is, therefore, logical to infer that the impugned Judgment had indeed been accepted by the Appellant. This is also manifest from the fact that the Appellant had assailed the Order dismissing its Objections

within the period of limitation. Keeping these events in perspective, we are in no manner of doubt that the decision to file the present Appeal was malafide and unquestionably recklessly negligent.

8. We shall now consider the reasons pleaded by the Appellant for condoning the delay in filing the present Appeal. Significantly, it stands admitted that the Appellant's Advocate had tendered legal opinion that the contentions "could be decided in the execution petition and that the Appellant should concentrate on persuading (sic. pursuing) their case in the said execution petition. Thus under the said advice the Appellants diligently and bonafide pursued the proceedings in the execution petition with the hope and expectation that the issues raised by the Appellants would be decided in the execution". We must immediately observe that the Objections in the Execution have been dismissed not on technicalities, but on merits. The Appeal against their dismissal is still pending. Thereafter, it is conceded in the application that -"in the aforesaid execution appeal an interim order dated 07.05.2008 was passed, vide which a status quo order as regards to the possession of the Appellants in respect of the suit property was passed. However, the aforesaid Order was made conditioned on the Appellants depositing certain sum of money before the Hon'ble Court. That as the Appellant felt the aforesaid condition onerous, against the said order dated 07.05.2008 the Appellant preferred a

Special Leave Petition (Civil) bearing no 11619/2008 in the Hon'ble Supreme Court. However the said special leave petition of the Appellant was dismissed vide order dated 13.05.2008, however three months time was granted to the appellants to comply the said order".

9. In this backdrop, it is wholly irrelevant that the Appellant had sought fresh legal opinion in May, 2008. In our opinion, it is also of no avail that the Managing Director of the Appellant was allegedly out of the country between May and August, 2008 for business activities. The filing of the present Appeal is as important a business activity as any that may have been transacted by the Managing Director while he was abroad. IT seems to us that the said demise of Shri R.S. Ohri on 2.7.2008 is palpably being exploited by the Appellant since the Complaint has been filed by Shri Parabjit Jauhar; the impugned Order records that the Appellant was represented by Shri Jayant Mehta. In any event, this Appeal ought to have been filed in July, 2007. The Objections were filed through S/Shri Rakesh Mehra and Jaspreet S. Rai and were argued by Shri Aman Lekhi, Senior Advocate with Mr. Rakesh Kumar and Mr. Jaspreet S. Rai Advocates on behalf of Obstructionist. Late Shri Ohri had no role to play in these legal actions. While the Appellant encountered no difficulty, whatsoever, in pursuing his Objections right upto the Hon'ble Supreme Court, so far as the present Appeal is concerned, he would have us believe that he had not received

legal advice. It is our considered opinion that sufficient grounds have not been disclosed which would justify condoning of the delay of 507 days in filing the present Appeal. Therefore, on this count also, the application deserves to be dismissed.

10. In the above analysis, we dismiss the application since it is malafide and vexatious and endeavours only to open another legal front. It is dismissed with costs of ₹ 50,000/- to be paid within four weeks to the Prime Minister Relief Fund. It may be sardonic but we are repeating the words of Mr. Jayant Bhushan, learned Senior Counsel for the Appellant, (but to the Appellants' disadvantage), that the Appellants are attempting to 'have two bites at the cherry'.

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11. We have dismissed the application seeking condonation of delay of 507 days in filing the Appeal. Consequently, the Appeal is also dismissed being barred by limitation.

(VIKRAMAJIT SEN)
JUDGE

(A.K. PATHAK)
JUDGE

September 10, 2010
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