

GAHC010123832014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1986/2014

HADIM JIGDONG KACHARI
S/O- FORENDRA JIGDONG KACHARI, 1ST BYE-LANE, HOUSE NO. 2, NEAR
A.G. RESIDENTIAL COMPLEX, BORSAJAI BEHARBARI, GHY- 22.

VERSUS

UCO BANK and 3 ORS
SILPUKHURI BRANCH, SILPUKHURI, GHY- 3 AND ALSO HAVING ITS
REGD. OFFICE AT 10 B T M SARANI, BRABOURNE ROAD, KOLKATA- 1.

2:M/S KENIK ENTERPRISE
27
FIRST FLOOR
BORA COMMERCIAL COMPLEX
DISPUR
BASISTHA ROAD
GHY- 23
KAMRUP M
ASSAM.

3:GEJU NGOMDIR
S/O- SHRI TAGE NGOMDIR
GUMIN NAGAR
NEAR E.M. SCHOOL
P.O. and P.S.- ALONG
ARUNACHAL PRADESH
WEST SIANG DIST.
-OR- C/O- ROOM NO. 1
2ND FLOOR
BASER COMMERCIAL COMPLEX
NARAPANI BAZAR
NAHARLAGAN

DIST. - PAPUN PARA
PIN- 791110
ARUNACHAL PRADESH.

4:DONGJI SORANG
S/O- SHRI TAPAN SORANG
R/O VILL.- TALI
SORANG
P.S.- ZERO
DIST.- KRUNG KURMEY
ARUNACHAL PRADESH

Advocate for the Petitioner : MD.A KHAN

Advocate for the Respondent : MR.P C GOSWAMI

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

ORDER

06.02.2023

Considering that this writ petition is pending since the year 2014 and the pleadings having been completed, the same is taken up for disposal at the admission stage.

2. I have heard Shri N Alam, learned counsel for the petitioner whereas Shri PC Goswami, learned counsel has represented the respondent-UCO Bank.

3. None has appeared for the respondent nos. 2, 3 and 4. So far as the respondent nos. 3 and 4 are concerned, there is endorsement from the Lawazima Court that service is complete. As far as the respondent no. 2 is concerned, though no such direct endorsement is there, the petitioner by means of an additional-affidavit has stated that in none of the previous proceedings connected between the parties, those three respondents have ever appeared.

4. The instant petition has been filed against an order dated 21.06.2023 by which the application for condonation of delay of the petitioner which was filed against an *ex parte* judgment dated 04.05.2011 passed by the learned DRT Tribunal in OA No. 39/2009 has been rejected.

5. Before going into the issue involved, it would be convenient if the facts of the case are briefly narrated hereunder.

6. The petitioner claims to be an owner and possessor of a plot of land measuring 2 katha covered by Dag no. 422, Patta No. 130 situated at Village-Borsajai, Mouza-Beltola in the district of Kamrup (M). The petitioner claims that there is a two-storied building constructed over the aforesaid plot of land having Holding Nos. 267A and 267B of Ward no. 17 of the Guwahati Municipal Corporation.

7. It is the specific case of the petitioner that at no point of time, the petitioner had ever created any equitable mortgage/charge/lien of the aforesaid property, both land and building. On 27.02.2009, some persons of the respondent Bank had come to the house of the petitioner and had demanded an amount of Rs. 63 lakhs for debts taken in connection with a loan by the private respondents. The petitioner being nowhere connected had explained the matter to the Bank and thereafter had also lodged an FIR which was ultimately registered as Chandmari PS Case No. 21/2009 under Section 420/468/406 of the IPC. Thereafter, on proper advice, the petitioner had filed an application under the SARFAESI Act, being Application No.9/2009 which was filed on 08.04.2009. In the said proceeding, the petitioner had contended that he was not connected with the loan at all and therefore, necessary relief was directed to be granted.

8. After hearing the parties, the learned Tribunal vide judgment dated 17.02.2012

had allowed the aforesaid Application No. 9/2009. Though the petitioner had expected that the matter had come to a final resolution, on 30.11.2012 again, the officials of the DRT had visited the house of the petitioner and tried to attach the same. The petitioner came to know that the action was in consequence of a judgment dated 04.05.2011 passed by the learned DRT, Guwahati in OA No. 39/2009.

9. The petitioner claims that he was not at all aware of such proceeding and having come to know about the same had applied for the certified copy and obtained the same on 04.12.2012. Thereafter on 28.12.2012, he had filed the present application for setting aside the *ex parte* order and as a matter of abundant caution, had also filed a delay condonation application.

10. Shri Alam, learned counsel for the petitioner submits that if the date of knowledge is taken into account, there was no actual delay in filing the application for setting aside the *ex parte* order. However, if the said aspect is even ignored, he has filed the application for condonation of delay. He submits that at no point of time, summons was served upon him. On the aspect that a paper publication was there, the petitioner had tried to explain that at the relevant time, he was at Dimapur attending his father who was suffering from serious ailments and had ultimately passed away on 13.07.2012. He further submits that the publication was made in the Assam Tribune which does not have wide coverage and circulation at Dimapur as, it was at that crucial time when the petitioner was at Dimapur along with his father.

11. Shri Alam, learned counsel has submitted that all he prays for is an adjudication on merits of the application filed for setting aside the *ex parte* order by invoking this Court's power under Article 226/227 of the Constitution of India by interfering with the same and accordingly the matter be remanded back to the Tribunal for a decision on merits. In support of his submissions, the learned counsel has relied upon a decision

in the case of ***Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil***, reported in **(2010) 8 SCC 329** wherein, the Hon'ble Supreme Court had, once again, laid down the principles in exercising jurisdiction under Article 227 of the Constitution of India which is distinct from the powers under Article 226.

12. *Per contra*, Shri Goswami, learned counsel appearing for the respondent Bank submits that the present action of the petitioner lacks *bona fide*, as the petitioner was all along aware of the fact of institution of OA No.39/2009 by the Bank. He submits that in the same Tribunal, the application submitted by the petitioner under SARFAESI Act was pending since April, 2009 and the present OA which is connected with the same subject matter was also filed in the year 2009 and was disposed of only in May, 2011 and in the said period of about 2 years, it is not believable that the petitioner was not aware of the institution of OA No. 39/2009. Shri Goswami, learned counsel submits that the petitioner was a fence sitter and was watching the proceeding and has simply taken his chance by choosing not to contest the same and therefore, the present application should not be entertained. Lastly, Shri Goswami, learned counsel submits that the order is an appealable one wherein, the statute itself provides for an appeal and instead preferring such an appeal, this Court has been approached by invoking its writ jurisdiction and therefore, the same should be dismissed.

13. The rival submissions of the learned counsel for the contesting parties have been considered and the materials placed before this Court have been duly examined.

14. The matter which has arisen for consideration is within a limited compass. The grievance of the petitioner is only with regard to the rejection of his application on the ground of limitation. The learned Tribunal had come to a finding that the reasons assigned in the application for limitation are not acceptable and after the notices were published in the news paper, the assumption that notices are served is always in

favour of the parties publishing such publication. The learned Tribunal had also observed that when both the proceedings were there simultaneously, it is difficult to accept the projection made on behalf of the petitioner that he was not aware of the proceeding for recovery instituted by the Bank.

15. The projection made by the petitioner which is also supported by certain documents is that he is not at all connected with the transaction of the Bank which forms the foundation of various proceedings instituted. To demonstrate his *bona fide*, the petitioner had also lodged an FIR in the concerned police station in which a police case, being Chandmari PS Case No. 21/2009 was registered. The adjudication by the Tribunal in the application under the SARFAESI Act which had culminated in a judgment dated 17.02.2012 in Application No. 9/2009 is also a relevant factor. The said proceeding was an *inter parte* one. However, in no documents connected with the said proceeding, there is even a hint given by the Bank that an OA is pending in the same Tribunal. Though Shri Goswami, learned counsel for the Bank would be correct in contending that once a paper publication is made, the service of notice can be presumed, the petitioner has also come up with an explanation regarding his absence from Guwahati at that particular time regarding serving his ailing father at Dimapur who was eventually expired on 13.07.2012. Though ordinarily, any explanation after paper publication may not be acceptable, in the instant case, what transpires is that the present case is pending since the year 2014 in which *prima facie*, it appears that the petitioner has an arguable case on merits. It is also seen that this Court while issuing notice vide order dated 09.04.2014 had passed an interim order not to proceed with the Sale Notice which is continuing till date. The aspect of condonation of delay is to be dealt in a pragmatic and justice oriented approach. Though it is correct that expiry of limitation gives rise to third party rights, the following factors are generally required to be looked into while adjudicating an application for condonation of delay:

- i) The length of delay;
- ii) The explanation put forward to explain such delay; and
- iii) The sufficiency of such explanation.

16. Over and above, the aforesaid three factors which may not be exhaustive, the guidelines of the Hon'ble Supreme Court that a pragmatic and justice oriented approach are required to be taken while adjudicating such an application. The Tribunal itself had taken note of the case of the Hon'ble Supreme Court in the case of ***State of Nagaland Vs. Lipok Ao & Ors.***, reported in **(2005) 3 SCC 752** wherein, it has been laid down that technicalities should give away to substantial justice. Taking the aforesaid facts and circumstances into consideration, this Court is of the opinion that interest of justice would be served if the matter is remanded to the learned Tribunal for adjudication of the application for setting aside the *ex parte* judgment on merits.

17. In view of the above, the order dated 21.06.2013 by which the MA No. 121/2012 for condonation of delay was dismissed is set aside. This Court holds that the petitioner has been able to make out a case for condonation of delay and the delay having been sufficiently explained, the same stands condoned and the matter is, accordingly remanded back to the learned Tribunal for deciding the application, being MA No. 121/2012 in accordance with law.

18. Since the contesting respondent Bank is represented by its learned counsel, no fresh notice is required to be issued and the parties may appear before the Tribunal on 01.03.2023 from which date, the learned Tribunal would take charge of the matter and proceed with the same in accordance with law.

19. The interim order passed by this Court shall continue till the next date i.e.,

01.03.2023. The petitioner is also given liberty to pray for necessary interim order by the Tribunal, if there is further delay in hearing of this matter.

20. The writ petition is, accordingly disposed of.

JUDGE

Comparing Assistant