

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO. 477 of 2015

IN

SUIT NO. 2349 OF 1995

The Official Liquidator, High Court, Bombay
Liquidator of Rossel Finance Ltd. ...Applicant

and

The Official Liquidator, High Court, Bombay.
Liquidator of Rossel Finance Ltd. ...Plaintiff

Vs.

Ross Murarka (India) Pvt. Ltd. ...Defendant

Mr. J.P. Sen, Sr.Adv. a/w. Mr. Omkar Chandurkar for the Applicant / Plaintiff.
Mr. Swanand Ganoo i/b. Kanga and Company for the Defendant.
Mr. S. Ramakantha, OL, present.

CORAM : S.J. KATHAWALLA, J.

DATED : 19th NOVEMBER, 2015

P.C. :

1. By the above Notice of Motion, the Plaintiff Official Liquidator seeks to challenge an order of the Prothonotary and Senior Master dated 18th November, 2014 dismissing Chamber Order No. 487 of 2014 taken out by the Official Liquidator for restoration of Suit No. 2349 of 1995. He also seeks restoration of the said Suit to file as well as condonation of any delay in filing the present Application. For the sake of convenience, prayer clauses (a) and (b) of the Notice of Motion are reproduced hereunder :

“(a) that the Hon'ble Court be pleased to set aside the order dated 18th November, 2014 passed by the learned Prothonotary and Senior Master Shri D.V.Sawant dismissing Chamber Order No.487 of 2014 filed by the Plaintiffs for restoration of Suit No.2349 of 1995;

(b) that the Hon'ble Court be pleased to restore Suit No.2349 of 1995 on file by condoning the delay in filing the said Application if any”;

2. The Notice of Motion has been filed in the following circumstances:

2.1 The present Suit being number 477 of 2015 between Rossel Finance vs. Ross Murarka was filed in 1995 by Rossel Finance Ltd, now in liquidation, for a declaration that certain documents purporting to effect a transfer of Flat No.271-A Twin Tower Premises Co-Op Society Ltd, 27th and 28th Floor, Prabhadevi, Mumbai (the Suit flat) together with four car parking spaces are illegal, null and void and not binding on the Plaintiffs. The Defendants were served with the Writ of Summons in the suit as evident from the Affidavit dated 28th April, 1997 to this effect filed by the Special Bailiff.

2.2 The Plaintiff Company was wound up by an order dated 7th May, 1999 of this Court and the Official Liquidator took charge of its affairs.

2.3 The Official Liquidator appears to have been informed of the present suit for the first time by a letter dated 30th October, 2000 of the Prothonotary and Senior Master.

2.4 Pursuant to directions issued by the Court, the Official Liquidator appointed one Mrs. Suvarna Rajesh as Advocate to act on his behalf in the suit.

2.5 The suit was on board before the Prothonotary and Senior Master on 19th September, 2001 and 3rd October, 2001 for directions when the said Advocate appeared on behalf of the Official Liquidator. However, when the suit appeared on the board of the Prothonotary and Senior Master on 31st October, 2001 she did not remain present. The suit was dismissed for default on that date. Both the said Advocate and the Official Liquidator appear to have been unaware of the dismissal.

2.6 In fact, the Official Liquidator, by a letter dated 25th June, 2003 addressed to the said Advocate, sought information regarding the status of the matter. By her reply dated 13th July, 2003, the said Advocate referred to an earlier letter dated 17th February, 2003 by which she claimed to have informed the Official Liquidator that she was withdrawing her vakalatnama in the matter. She also informed the Official Liquidator that the matter had not appeared on the Board of the Prothonotary and Senior Master till 17th February, 2003. The Official Liquidator has been unable to trace the letter dated 17th February, 2003 in his record.

2.7 Thereafter, in view of the earlier Advocate withdrawing her appearance, the Official Liquidator took steps to engage a new Advocate to appear on his behalf in the suit. The Official Liquidator continued at this time to be under the impression that the suit was on file. He filed an Affidavit dated 7th February, 2006

stating so in Criminal Writ Petition No. 960 of 1997 filed by the Defendant herein for quashing a complaint filed by the Company in liquidation under Section 630 of the Companies Act, 1956 which eventually came to be dismissed.

2.8 After the dismissal of the Criminal Writ Petition, the Official Liquidator filed a Report before the Company Court for directions to take forcible possession of the flat and to sell it by public auction. In that report, an Affidavit came to be filed by Defendant No.3 herein recording that the above suit had been dismissed for default on 31st October, 2001.

2.9 In view of this, the Official Liquidator appears initially to have filed Notice of Motion No.4077 of 2008 before this Court for setting aside the order dated 31st October, 2001 of the Prothonotary and Senior Master for restoration of the suit. By an order dated 16th September, 2011, this Notice of Motion was permitted to be withdrawn with liberty to take out an appropriate application before the Prothonotary and Senior Master. This was on account of the view then prevailing that the appropriate remedy in respect of an order by the Prothonotary and Senior Master dismissing a suit for default was to apply to the Prothonotary for restoration.

2.10 While a praecipe appears to have been drawn up by the Official Liquidator's office to move before the Prothonotary and Senior Master for restoration, it does not appear in fact to have been filed. Instead, a fresh Notice of Motion No. 715 of 2012 was filed by the Official Liquidator before this Court

challenging the order dated 31st October, 2001 of the Prothonotary and Senior Master. By an order dated 2nd April, 2014, this Notice of Motion was also permitted to be withdrawn with liberty to approach the Prothonotary and Senior Master in view of the prevailing law.

2.11 On 14th July, 2014, the Official Liquidator filed Chamber Order No. 487 of 2014 before the Prothonotary and Senior Master for restoration of the suit. This Chamber Order came to be dismissed by an order dated 18th November, 2014 of the Prothonotary and Senior Master. It was this order that is sought to be challenged in the present application.

2.12 However, in the interregnum, there have been some developments as to the legal position regarding the power of the Prothonotary and Senior Master to restore a suit dismissed by him for default. A division bench of this Court, by an order dated 9th September, 2015 in *Lawrence Fernandes v. The State of Maharashtra and Ors.*¹ differed from the view expressed by an earlier Division Bench in *Bank of Baroda v. Deepak Raghuvir Wagle and Anr.*² that the Prothonotary and Senior Master has the power to restore a suit dismissed by him or her for default. This conflict was brought to the notice of another Division Bench of this Court in the course of the hearing of *Prem Siddha Co-Op Housing Society and Anr. v. The High Power Committee-II and Ors.*³ and other connected matters. By its order dated 12th

¹ Unreported order dated 9th September, 2015 passed in Writ Petition(L) No. 2396 of 2014

² 2008(2)Mh.L.J. 381

³ Unreported order dated 12th October, 2015 passed in Writ Petition(L) No. 3016 of 2014

October, 2015, the Division Bench requested the Hon'ble Chief Justice to refer the issue as to the power of the Prothonotary and Senior Master to restore a suit dismissed for default to a larger bench.

3. Mr. Sen, learned Senior Advocate appearing for the Official Liquidator, submits that while there may be some doubt as to whether the Prothonotary and Senior Master has the power to restore a suit dismissed for default, there can be no doubt as to the power of the Court to do so. He points out that the Division Bench, in its order dated 12th October, 2015 by which the issue was referred has itself restored to file the Writ Petition before it which had been dismissed by the Prothonotary and Senior Master for failure to remove office objections. He has accordingly moved a draft amendment to add a prayer to the Notice of Motion for setting aside the order dated 31st October, 2001 of the Prothonotary and Senior Master dismissing the suit. I am in agreement with the submission made. There can be no doubt as to the inherent power of a Court, on grounds being made out, to restore a suit dismissed for default by the Prothonotary and Senior Master. Accordingly, leave granted to amend the Notice of Motion in terms of the draft tendered. The amendment to be carried out within three weeks.

4. Mr. Sen submits further that, a case for restoration of the suit has been made out. He contends that while there does appear to have been some missteps on the part of the Official Liquidator's office as to the appropriate remedy to be adopted, the intention to challenge the order dismissing the suit for

default was manifest from the very outset. It was only on 12th November, 2008 that the Official Liquidator first learnt of the dismissal of the suit and almost immediately thereafter on 1st December, 2008 the first Notice of Motion No. 4077 of 2008 was filed by the Official Liquidator for setting aside the order and for restoring the suit to file. He further contends that in the present case, the Writ of Summons had already been served upon the Defendants and there were no further steps that were required to be taken at that stage by the Plaintiff. As such, the failure of the Plaintiff to appear before the Prothonotary and Senior Master ought not to have entailed a dismissal. He submits that, there are a large number of creditors of the company in liquidation whose dues are yet to be repaid and the suit property is a valuable asset that is potentially available for sale in the event of the outcome of the suit being positive. He submits that it would therefore be in the interest of justice that the order dated 31st October, 2001 be set aside and the suit restored to file.

5. Mr. Ganoo, Learned Counsel for the Respondent, sought to resist the Application on the grounds that the Application was not maintainable on account of Rule 133 of the Original Side Rules, and that, in any event, the Official Liquidator had not made out any case for the exercise of discretion in his favour by explaining satisfactorily his failure to appear before the Prothonotary and Senior Master and the delay thereafter in challenging the dismissal of the suit.

6. In support of his submission that Rule 133 precluded a challenge to the order. Mr. Ganoo also relied on a Judgement of this court in *Suresh Lachhmandas Raheja v. Ferrani Hotels Pvt. Ltd. and Ors.*⁴

7. Rule 133 of the Original Side Rules reads:

“Rule.133- Adjournment of matter to Judge - Any party desiring to have any question decided by the Prothonotary and Senior Master, whether disputed or not, adjourned to a Judge, may apply to the Prothonotary and Senior Master for such adjournment within four days from the passing of the order complained of. If the application is within time, the Prothonotary and Senior Master shall adjourn the matter put and put it on the board of the Judge in Chambers. If the party makes the application after the said period of four days, the Prothonotary and Senior Master may adjourn the matter to the Judge in Chambers if he is satisfied that the party had sufficient cause for not making the application in time.”

It is the Defendant's contention that the Official Liquidator is required, in the event of being aggrieved by the order dated 31st October, 2001, to first apply to the Prothonotary and Senior Master to have the matter adjourned to the Judge in Chambers. It is urged that, not having done so, the Official Liquidator is not entitled to file the present Application challenging the order in Court. I am not persuaded by this submission. Rule 133, on plain reading, is not meant to limit in any way a party's recourse to Court nor does a request to the Prothonotary and

⁴ Unreported Judgement dated 26th November, 2010 passed in Application Under Rule 133 of the Bombay High Court (Original Side) Rules in Appeal No. 270 of 2007

Senior Master under Rule 133 appear to be a jurisdictional pre-requisite to an application being made to court. The judgement relied upon by the Defendants is not an authority for the proposition that a party has no remedy save to apply to the Prothonotary and Senior Master under Rule 133. It is merely a case where a party happened to have taken recourse to the procedure provided for in Rule 133 which allows a party to have a question decided by the Court merely on a praecipe without having to file a more formal Application.

8. On the merits of the Application, while the Defendants have some reason to be aggrieved by the time that has elapsed since the order under challenge, I am inclined to allow the Official Liquidator's prayer for restoration of the suit. The Official Liquidator appears to have become aware of the dismissal of the suit only on 12th November, 2008 when an Affidavit was filed to that effect by Defendant No.3 in a collateral proceeding. He appears thereafter to have immediately taken steps by filing Notice of Motion No. 4077 of 2008 to set aside the order dated 31st October, 2001 of the Prothonotary and Senior Master. The Affidavit in Support of the present Notice of Motion has set out at some length the events that transpired thereafter which culminated in the filing of the Chamber Order and its dismissal. For the reasons set out in the Affidavit, I am satisfied that it would be in the interest of justice, of the Company in liquidation and of its creditors that the order dated 31st October, 2001 be set aside and the suit restored to file.

9. The Notice of Motion is accordingly made absolute in terms of prayer clauses (a) and (b). There shall be no order as to costs. The Defendants shall file their Written statement on or before 23rd December, 2015.

Stand over to 23rd December, 2015 for Directions.

(S.J. KATHAWALLA, J.)