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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7006 OF 2015

Bank of India ... Petitioner
Vs.
Sharedeal Financial Consultants
Pvt. Ltd. and ors. ... Respondents

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Mr. S.U. Kamdar, Senior Advocate a/w. Mr. O.A. Das for the Petitioner.
Mr. Rabindra Hazari a/w. Khozem Mukhtiar for the Respondents.

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CORAM : V. M. KANADE, AND
M. S. SONAK, JJ.
DATE : JULY 12, 2016

P. C.

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The petitioner bank challenges the order dated 28 January 2015 made by the Debts Recovery Appellate Tribunal (DRAT), Mumbai, dismissing the petitioner's Miscellaneous Application Nos. 81 of 2011 and 897 of 2014 seeking restoration of Appeal No. 129 of 2005, which came to be dismissed for default on 20 January 2011. It is pertinent to note that the application for restoration was made by the petitioner on 24 January 2011, i.e., on the third day since the date of dismissal of the appeal for default.

3] Mr. S.U. Kamdar, learned senior advocate for the petitioner bank, has taken us through the Roznama, which has been placed on record and submitted that in fact, the petitioner bank had taken the necessary steps to effect service upon all the respondents. Despite the same, at a later stage, the petitioner bank was required to serve the respondent Nos.2 and 3 to appeal No. 129 of 2005 afresh and there was some difficulty in the matter of such service. Mr. Kamdar has submitted that the difficulty was basically on account of communication gap between the bank officials and the advocate engaged by the bank who appeared in the matter. Ultimately, the said advocate was replaced by another and necessary steps were being taken to effect fresh service. Mr. Kamdar pointed out that despite service, the respondents were almost never present before the DRAT and therefore, taking into consideration such circumstance, the DRAT ought not to have made the impugned order. Mr. Kamdar submitted that the impugned order directs initiation of departmental proceedings against the Chief Manager and the recovery of amounts from such Chief Manager alongwith interests. Mr. Kamdar submitted that in the facts and circumstances of the present case, such an order was extremely harsh and ought not to have been made. Mr Kamdar submitted that the appeal was dismissed for default on 20 January 2011 and the application for restoration was filed immediately, i.e., on 24 January 2011. Sufficient cause was shown for the absence of the petitioner bank or the officers of the bank on the said date. The DRAT has not considered such cause at all, but rather commented upon the alleged failure on the part of the petitioner bank to take steps to serve the respondent Nos.2 and 3.

4] Mr. Kamdar, learned senior advocate submitted that in the present case the petitioner bank, at the behest of the respondents, had offered a bank guarantee, which was since encashed. The respondents are consequently due and payable to the petitioner bank an amount of Rs. 78,43,945,51. The DRT has only partly allowed the original application instituted by the petitioner bank and directed the respondents to jointly and severally pay a sum of Rs.8,52,483.85 with simple interest at the rate of 17.5% p.a.. In order to recover the balance amount, the petitioner bank had instituted the appeal. For all these reasons, Mr. Kamdar submitted that the impugned order is liable to be set aside and the appeal filed by the petitioner bank, restore to the file of the DRAT.

5] Mr. Rabindra Hazari, learned counsel for the respondents, vehemently opposed the grant of any reliefs in the present petition. Mr. Hazari submitted that the petitioner bank was guilty of gross negligence in the matter of service upon the respondents. Although, Appeal No. 129 of 2005 was instituted some time in the year 2005, for a period of almost five years the service was not effectively made upon the respondents. Besides, the matter was adjourned on several dates so as to enable the petitioner bank to take steps to effect service. However, neither any steps were taken nor did the petitioner's advocate or the petitioner's officers remain present before the DRAT. In such circumstances, Mr. Hazari submitted that the DRAT had no option but to dismiss the appeal for default. The impugned order has rightly taken into consideration the gross negligence on the part of the petitioner bank and therefore, refused to restore the appeal. There is no jurisdictional error in the making of the impugned order and therefore, this Court should not interfere with the impugned order.

6] The rival contentions now fall for our determination.

7] In this case, the petitioner's appeal came to be dismissed for default on 20 January 2011 and within hardly three to four days, i.e., on 24 January 2011, the petitioner bank filed an application for restoration. The reasons set out in the application seeking restoration was that the date noted by the advocates in their diary was 21 January 2011 instead of 20 January 2011. It is stated that on 21 January 2011, the advocates for the petitioner bank attended the office of the DRAT and made enquiries, since the matter did not appear on the cause list. It is on 21 January 2011 itself that the petitioner's advocate came to know that the matter was posted on 20 January 2011 and dismissed for default. The application seeking restoration has been filed almost immediately, i.e., on 24 January 2011. In our judgment, sufficient cause was indicated in the application seeking restoration and the DRAT failed to exercise the jurisdiction vested in it by refusing to restore the appeal.

8] We have perused the Roznama on record. The Roznama indeed indicates that respondent Nos.2 and 3 to the appeal had been duly served prior to 11 June 2007, on which date, the Chair Person of DRAT once again required the petitioner bank to serve the said respondents personally. The record also indicates that respondent No.1 has been served by way of publication. It is possible to say that the petitioner bank should have either contested the directions for re-service upon the respondent Nos.2 and 3 or in any case, acted with greater dispatch in the matter of service upon the said respondents. However, the Roznama also indicates that the respondents, despite earlier service, have failed to remain present before the DRAT. In such circumstances, there was no reason to advert to these antecedent circumstances and refuse restoration of the appeal, particularly when the petitioner applied for restoration within hardly three to four days from the date of dismissal of the appeal for default.

9] In the facts and circumstance of the present case, although it is true that the petitioner bank should have acted with greater dispatch, we cannot accept the contention of the learned counsel for the respondents that the petitioner bank has been grossly negligent in the matter of service upon the respondents and therefore, must suffer dismissal of their appeal for default. We are also satisfied that this was not a fit case to direct any disciplinary proceedings against the Chief Manager of the bank or recovery of the amounts from the Chief Manager. Although, on some occasions, the advocate for the petitioner bank or their officer failed to remain present, it is not on these occasions that the matter came to be dismissed for default. In any case, the material on record does not make out a case of gross lethargy on the part of the petitioner bank.

10] For the aforesaid reasons, we set aside the impugned judgment and order dated 28 January 2015 and restore the Appeal No. 129 of 2005 before the DRAT. The DRAT is directed to expeditiously dispose of Appeal No. 129 of 2005, in accordance with law and on its own merits.

11] Rule is made absolute to the aforesaid extent. There shall, however, be no order as to costs.

[M. S. SONAK, J.] [V. M. KANADE, J.]