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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ FAO 7/2016

ICICI BANK LTD ..... Appellant

Through: Ms. Chetna Bhalla, Advocate

versus

UPDESH NAGAR ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

O R D E R

% **05.01.2016**

CM No.126/2016 (Exemption)

1. Allowed subject to just exceptions.

CM No.127/2016 (condonation of delay in re-filing)

2. This is an application seeking condonation of delay of 24 days in re-filing the appeal.

3. For the reasons given in the application, the delay is condoned and the application is allowed.

FAO 7/2016

4. This is an appeal filed by the appellant / plaintiff against order dated 19.09.2015 whereby the court has, in effect, refused to appoint a receiver, at the exparte stage.

4.1 By virtue of the aforementioned order, summons were issued in the suit, which was made returnable on 19.10.2015.

4.2 I am informed by the learned counsel for the appellant / plaintiff that the next date of hearing fixed in the matter is 05.02.2016. It is the learned counsel's contention that the matter has been fixed for evidence. I am further informed that since the respondent/ defendant has been served, evidence has to be led by the appellant/ plaintiff.

4.3 The appellant / plaintiff is, however, aggrieved by the fact that it is not able to secure possession of the vehicle in respect of which loan was given to the respondent/ defendant.

5. Briefly, it is the appellant's / plaintiff's case that the respondent / defendant had sought a loan for purchase of vehicle described as : Eicher 10.59 / Eicher 10.59 Cab Chassis, bearing Registration No.UP-16BT 8093 (in short the subject vehicle).

5.1 The learned counsel for the appellant / plaintiff avers that the aforementioned vehicle was hypothecated to it, in accordance with the terms and conditions agreed to with the respondent/ defendant. Reliance in this behalf is placed on the credit facility form and unattested deed of hypothecation. It is submitted that the appellant / plaintiff sanctioned a loan to the respondent / defendant in the sum of Rs.7,64,000/-, out of which Rs.7,61,256/- was disbursed on 24.10.2013 via a dealer, namely, Ajit Automobile Services Pvt. Ltd.

5.2 According to the appellant/ plaintiff, a sum of Rs.6,37,680.70 is due and payable by the respondent / defendant as on 22.01.2015.

5.3 It is further submitted before me, that since, the respondent/ defendant failed to adhere to the financial discipline, the loan was recalled vide notice dated 26.11.2014. It is the appellant's / plaintiff's case that no response was given by the respondent/ defendant to the recall notice.

5.4 The learned counsel for the appellant / plaintiff avers that it is, in this background, that a suit was instituted in the trial court, on 19.09.2015, alongwith an application for appointment of a receiver.

5.5 To be noted, the trial court vide the impugned order, has, as indicated above, refused to appoint a receiver at the exparte stage.

5.6 The only discernible reason, based on which the trial court has come to the conclusion that a receiver ought not to be appointed at an exparte stage, appears to be, that no proof of recall notice was filed. The learned counsel for the appellant / plaintiff in this behalf has drawn my attention to the document appended at page 48 of the paper book, which is suggestive of the fact that the recall notice was despatched to the respondent/ defendant.

5.7 I may also indicate that the observation by the trial court that no prejudice will be caused if, summons simplicitor are issued in the suit and notice is issued in the application, is untenable, for the reason that if, what the appellant says is correct, each day's delay in repayment of the loan is causing prejudice to the appellant. The appellant / plaintiff is a bank which, essentially, deals with public funds and therefore, cannot be left at a loose-end to protect its security. The only security, as contended by the counsel for the appellant/ plaintiff, qua the loan disbursed to the respondent/ defendant, is the aforementioned vehicle.

6. Therefore, the fact that the trial court failed to appoint a receiver, at an exparte stage when, the situation so demanded, had given rise to an order, which, if not appealable, was, certainly revisable. See : the following observations of the Supreme Court in ***A Venkatasubbiah Naidu vs S. Chellappan and Ors., 2000 7 SCC 695.***

The Supreme Court, in that case, enunciated the position of law in the background of the provisions of Order 39 Rule 1, 2, 3A and 4 of the CPC. The Supreme Court observed that the pendency of an application on account of inaction of the court or its omission to act according to the procedure established by law would give rise to a remedy by way of an appeal under Order 43 Rule 1 of the CPC. The relevant observations of the court are extracted hereinafter :-

> "…It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rule 1, 2, 2-A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 CPC. It cannot approach the appellate or revisional court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party which does not get justice due to the inaction of the court in following the mandate of law must have a remedy…"

6.1 In my opinion, issuance of a mere notice can, in certain set of circumstances, cause prejudice to the applicant; the present matter is one such case.

6.2 On the aspect as to how a court is to proceed where a request, for appointment of a receiver, is made by a bank or a financial institution – the following observations of the Full Bench of the Bombay High Court, in the case of ***State Bank of India vs Trade Aid Paper and Allied Products (India) Pvt. Ltd. & Ors. AIR 1995 Bom 268,*** being instructive are required to be noticed.

6.3 Briefly, the court in its judgment exhorts adoption of a practical approach while exercising power of appointment of a receiver in the case of banks and financial institutions having regard to the fact that they deal in public funds :-

> "…Indeed, it is the duty and function of the Court entertaining the suits instituted by Banks and financial institutions to ensure that efforts are made to dispose of the suits as early as possible and even during the pendency of the suits, ensure that not only the properties are protected but the defendant is made to repay the amount, if desirous of enjoying the benefits secured by obtaining the loan. The powers of the Court under Order 40, Rule 1 of the Code of Civil Procedure are to be exercised to advance cause of justice and what is 'just and convenient' depends upon the nature of the claim and the surrounding circumstances. The Court should not close eyes to the realities and blindly follow the principles laid down 50 years before when the suits by Banks and financial institutions were a novelty. The economic liberalization and the policy of the Government to grant loans for various activities have increased the number of suits by Banks and financial institutions and in this Court every year more than 2,000 suits are instituted. It would not be difficult to imagine how much public money is involved in these suits and how long the Nationalised Banks and financial institutions are deprived of their dues. The Court should be conscious of these facts and should be more pragmatic in exercising powers under Order 40, Rule 1 of the Code of Civil Procedure."

(Emphasis is mine)

6.4 To be noted, the abovementioned Full Bench judgement of the Bombay High Court in ***State Bank of India vs Trade Aid Paper and Allied Products (India) Pvt. Ltd. & Ors.*** case was taken up in appeal to the Supreme Court only on one issue which was qua the embargo put in place by the court on the aspect of sale of the property by the receiver prior to a decree being passed in the suit. The Supreme Court over-ruled the Full Bench judgement on this aspect and stated, in no uncertain terms, in its judgement in the case of ***ICICI Ltd. & Ors. vs Karnataka Ball Bearings Corpn. Ltd. & Ors. (1999) 7 SCC 488***, that no such fetter is contemplated on the powers of the receiver appointed under the provisions of Order 40 Rule 1 of the CPC. In other words, the Supreme Court went as far as to observe that a receiver, pursuant to the directions issued by the court in that behalf, is empowered to sell the property even before a decree is passed in the suit. This, according to the Supreme Court, is discernable on a plain reading of provisions of Order 40 Rule 1 of the CPC. (See : ***ICICI Bank Ltd. v. Collage Estates Pvt. Ltd. & Ors., 2015 SCC Online Del 12143***)

7. Having regard to the above, to the extent, the impugned order declines the prayer made for an exparte appointment of a receiver; that part of the order, is set aside. Consequently, Mr. Rajesh Lavania is appointed as a receiver.

7.1 The receiver, while taking possession of the subject vehicle will ensure that the due courtesies are extended to the respondent/ defendant.

7.2 The receiver will also keep in mind the time and the place where the subject vehicle is taken possession of. If, at the time of taking possession, the respondent/ defendant were to pay the sums, which are due and payable then, the receiver, will issue a receipt in that behalf to the respondent/ defendant and release the vehicle on superdari to him.

7.3 In case the police assistance is required, the receiver will approach the Station House Officer manning the nearest police station, who, in such an eventuality, shall render due assistance to enable compliance in the matter.

7.4 The receiver will file his report with the trial court within ten days of taking possession of the subject vehicle.

7.5 In case the receiver is successful in obtaining possession of the subject vehicle before the next date of hearing, the trial court will pass appropriate orders on the next date of hearing.

7.6 However, in case the subject vehicle is not traced till the next date of hearing, the trial court will, accordingly, extend the period for locating the vehicle and, in that behalf, pass appropriate orders in the pending application.

8. With the aforesaid observations in place, the captioned appeal is disposed of.

RAJIV SHAKDHER, J

JANUARY 05, 2016

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