

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

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Decided on: 30.10.2017

+ **W.P.(C) 5615/2016 & CM No. 23330/2016**

M/S ROHINI STRIPS LIMITED & ORS

..... Petitioners

Through: Mr. Rajiv Khosla, Advocate along with
Mr. A.K. Roy, Advocate.

Versus

INDUSTRIAL DEVELOPMENT BANK OF INDIA & ORS.

..... Respondents

Through: Mr. Sanjay Bhatt, Advocate along with
Ms. Srishta Kapoor, Advocate.
Mr. Ved Chadha, AGM, IDBI Bank for
respondent No. 1.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

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1. The petitioners have assailed an order dated 28.10.2015 passed by the learned Debt Recovery Appellate Tribunal (DRAT) in Misc. Appeal No. 310/2014 filed by them against an order dated 06.06.2014 of the DRT-II, Delhi, dismissing their application (MA No. 179/2013) under Order 9 Rule 13 of CPC for setting aside of an *ex-parte* judgment and decree dated 18.10.2007 passed by the DRT-II in O.A. No. 293/2001.

2. At the outset, we may note that initially the petitioners sought adjournments on several occasions for a One Time Settlement with the respondent No. 1/Bank.

Thereafter, the matter was also referred to the National Lok Adalat for a settlement but was returned unsettled. On 08.04.2017, the Dy. General Manager and Assistant General Manager of the respondent No. 1/Bank had submitted before the National Lok Adalat that no proposal had been sent to them and that there was no chance of a settlement. It is only after permitting the parties to explore all avenues of settlement that arguments have been addressed on merits.

3. The brief facts of the case are that the respondent No. 1/Bank had sanctioned a term loan of Rs. 350 lakhs to the petitioner No. 1/Company. The petitioners No. 2 and 3 and the respondent No. 2 are the Directors of the petitioner No. 1/Company. When the loan remained unpaid, the respondent No. 1/Bank filed O.A No. 293/2001 before the DRT-II. The address of the petitioner No. 1/Company was given as that of Madhya Pradesh as well as premises no. 48/52, Punjabi Bagh West, New Delhi- 110026. One Sh. O.P. Sharma, Advocate had appeared on behalf of the petitioners for a few days and thereafter he had stopped appearing. Resultantly, the respondents were proceeded against *ex-parte* on 08.03.2004 and an *ex-parte* decree was finally passed on 18.10.2007.

4. Execution of the decree was sought by the respondent No.1 and a Recovery Certificate was issued. After the passage of six years reckoned from the date of passing of the *ex parte* decree, in the year 2013, an application under Order 9 Rule 13 CPC was filed by the petitioners in the captioned OA, for setting aside the *ex-parte* decree dated 18.10.2007, on the ground that they had come to know of the

ex-parte decree only when a notice was served upon them in RC No. 34/07, at premises no. 5, Osho Drive, Village Gadaipur, New Delhi.

5. The petitioners contended that as they had no details about the case, they had moved an application before the R.C on 09.09.2013, vide diary no. 6291 and had moved an application for inspection vide diary no. 277. They had also filed a vakalatnama in the OA, on 11.09.2013. However, neither the certified copies of the documents of the RC nor of the OA were made available to them till 27.10.2013. In between, the file was untraceable which fact was also brought to the notice of concerned Registrar of the OA Branch. On inspection of the records of the OA, the petitioners came to know that the respondent No. 1/Bank had manipulated the appearance of some Advocate on their behalf on 26.07.2002, although, no summons were served upon them at any point and thereafter had obtained an *ex-parte* decree. The proceedings revealed that Sh. O.P. Sharma, Advocate had filed his vakalatnama on behalf of petitioners and the matter was adjourned on 01.10.2002 and the learned counsel further appeared on 24.12.2002, 17.03.2003, 09.07.2003 and 08.09.2003. He had stopped appearing on the subsequent dates. It was contended that the vakalatnama did not disclose the address of the counsel nor were the particulars of the respondents stated therein. The petitioners asserted that Sh. O.P Sharma, Advocate was never engaged by them as their counsel to defend them at any point of time. On these grounds, the

setting aside of the *ex-parte* judgment dated 18.10.2007 was prayed for by the petitioners, vide their application dated 23.11.2013.

6. Along with the above application, the petitioners had moved an application under Section 5 of the Limitation Act for seeking condonation of delay in filing the application under Order 9 Rule 13 of CPC. In the said application, the petitioners had averred that they had come to know of the passing of the *ex-parte* decree only when they received a notice from the Recovery Officer, in the execution proceedings.

7. The DRT-II dismissed the applications filed by the petitioners (M.A. 179/2013) vide order dated 06.06.2014, by holding that the signatures of the defendant nos. 2 and 3 appearing on the vakalatnama executed in favour of Sh. O.P. Sharma, Advocate, were similar and identical to the signatures available on the documents filed by them before the DRT. Relying on the new proviso added to Order 9 Rule 13 CPC which states that the Court should not set aside a decree passed *ex-parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendants had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim, the DRT held that the fact that the petitioners were represented through a counsel who had attended the court on several dates, clearly shows that they had knowledge of the pendency of the OA. It was thus concluded that the petitioners had failed to establish sufficient cause for their non-appearance when the case was called for

hearing. The application for condonation of delay in filing the above application (I.A 766/13) was also dismissed by the DRT on the ground that the petitioners have not even disclosed the date on which they received the notice in the recovery proceeding and they had failed to explain the delay. Learned DRT-II also observed that as per the averments made in para 3 of the application, the applicants had the knowledge of the *ex parte decree* on 09.09.2013 and the period of limitation of 30 days even if reckoned from that date, had expired on 09.10.2013 whereas the application was filed much later, on 26.11.2013. This fact had also weighed against the petitioners and the respondent No.2.

8. The above said order was impugned by the petitioners before the DRAT by way of an appeal, which was dismissed vide order dated 28.10.2015, that has been impugned before us in this petition. A perusal of the impugned order shows that the appeal filed by the petitioners was also dismissed for non-prosecution on 16.07.2015, since no one had appeared on their behalf before the DRAT. The said appeal was restored subsequently on their moving an application.

9. The petitioners took similar pleas before the DRAT as were taken by them before the DRT, that they had never engaged Mr. O.P. Sharma as their counsel and since his address on the vakalatnama was “Central Hall, Tis Hazari” which was vague, it was not possible for them to identify as to who was the Advocate who had appeared for them before the DRT. The respondent No. 1/Bank filed an affidavit of Sh. Dinesh Kumar, Assistant General Manager, who placed on record

the relevant pages of the Delhi Bar Association Directory issued in the years 2004, 2006 and 2013 containing a list of Advocates members. The said list includes the names of several Advocates by the name of O.P Sharma. The Tribunal noticed that in the relevant pages of the Directories annexed by the Bank alongwith the affidavit, the name of one Sh. O.P. Sharma, Advocate appears with the address mentioned as “Central Hall, Tis Hazari Courts, Delhi” which is the same address that appears in the vakalatnama filed by Mr. O.P. Sharma, Advocate in the present case and held that the name of Mr. O.P. Sharma, Advocate who had filed a vakalatnama on behalf of petitioners is duly listed in the Directories published by the Bar from time to time.

11. On their part, the petitioners filed an affidavit of Mr. Rakesh Sharma, son of late Mr. O.P. Sharma, Advocate. In the said affidavit, Mr. Rakesh Sharma deposed that his father was not engaged in the case entitled **“IDBI Bank vs. M/s Rohini Strips Ltd. & Ors”**. He also denied that the signatures on the vakalatnama were that of his father and stated that the said vakalatnama had not been signed by him. The Tribunal observed that Mr. Rakesh Sharma claimed to be in practice for 6-7 years and noting that he had filed the affidavit on 30.05.2015, it had to be assumed that he was practicing as an advocate from the year 2008 onwards. It was thus held that as per his own showing, Mr. Rakesh Sharma was not competent to state as to whether his father, Shri O.P. Sharma had appeared in this case in the year 2002-2003 or not.

12. The Tribunal also noted the fact that the vakalatnama bears the signatures of Mr. Babu Lal Aggarwal/petitioner No. 2 and Mr. Alok Kumar Aggarwal/petitioner No. 3 and in that scenario, the signatures of the counsel on the vakalatnama would not be of much significance. The Tribunal observed that no plea was taken on behalf of the petitioner No. 2/Mr. Babu Lal, denying his signatures on the said vakalatnama and Mr. Alok Kumar Aggarwal/petitioner No. 3 was also evasive in denying his signatures on the vakalatnama. Noting that the petitioner nos. 2 and 3 are father and son and are residing at the same address at Punjabi Bagh, their plea that they were not served, was held to be misleading and rejected.

13. The petitioners also took a plea before the Tribunal that they should not be made to suffer for the fault of their counsel but the said plea was rejected on the ground that it was not open to the petitioners to take such a plea since it was their stand that they had never authorized Mr. O.P. Sharma, Advocate to appear on their behalf. The Tribunal was of the opinion that they could have taken the said plea had they admitted to the fact that they had engaged the said counsel and he had defaulted in pursuing the case on their behalf. In the absence of any such admission on their part, the petitioners could not claim that they should not be made to suffer for their counsel's default. The Tribunal noted that the signatures appearing on the vakalatnama were disputed by the petitioners as being forged and if that was the case, then the burden was on them to have proved it, which they

had failed to discharge. The appeal was thus dismissed holding that it was the responsibility of the litigants to attend to the proceedings and simply because they had engaged a counsel, will not be a ground to exonerate them.

14. The impugned order has been assailed in the present petition on the ground that there is nothing on record to show service of the summons on the petitioners and the respondent No.2 for 26.07.2002, as per the order of the DRT-II dated 20.05.2002; that the service was accepted by the DRT-II only on the basis of handing over of the vakalatnama by Sh. O.P. Sharma, Advocate; that the acknowledgment of service on the petitioners in this manner was improper and it has caused them gross injustice. Even the vakalatnama was not filed in the Registry but was handed over by the counsel to the Tribunal. It was also urged by Mr. Khosla, learned counsel for the petitioners that the Tribunal has failed to appreciate that the vakalatnama did not bear seal of the petitioner No.1/Company; that the Tribunal has erred in assuming that there is no denial of the signatures on the said vakalatnama by the petitioners especially when they had taken a plea in the application under Order 9 Rule 13 of CPC, that they had never signed any vakalatnama; that Sh. O.P. Sharma, Advocate had expired in August 2013, and the petitioners came to know of the recovery proceedings only in September 2014 and therefore they could not have taken any action against him during his life time. The impugned order is assailed on the ground that the facts and circumstances of

the case have not been appreciated by the Tribunal in its correct perspective and the impugned order is based on surmises and conjectures.

15. We have heard the arguments advanced by learned counsels for the parties and perused the relevant records. The factual position is that an *ex-parte* decree was passed in OA No. 293/2001 on 18.10.2007, against petitioners and the respondent No. 2. Admittedly, the petitioner No. 1/Company had taken a loan of Rs. 350 lakhs in the years 1996 and 1997, which had remained unpaid. Petitioners No.2 and 3 and respondent No. 2 are the Directors of the petitioner No.1/Company. The petitioners were proceeded against *ex parte* on 08.03.2004 and the *ex parte* decree was passed on 18.10.2007. The application for setting aside the *ex-parte* decree along with an application for condonation of delay (Section 5 of Limitation Act) was filed by the petitioners only on 23.11.2013.

16. The grounds on which recalling of the *ex-parte* order is sought is lack of knowledge of the pendency of the OA filed by the respondent No.1 against the petitioners on the ground that the summons were not served on them and that they had acquired knowledge of the *ex-parte* decree only on receipt of the notice in the recovery proceedings. At no stage, either in their application or the appeal or for that matter, in this petition, have the petitioners disclosed the date on which they had actually received the said notice of the recovery proceedings. It is a settled proposition of law that when there is a delay in filing the application for setting

aside an *ex-parte* decree and an application under Section 5 of the Limitation Act for condonation of delay is moved, it is for the applicant to explain, as best as is possible, sufficient cause for the delay of each and every day. Section 5 of the Limitation Act is reproduced as under for ready reference:-

5 Extension of prescribed period in certain cases. —Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application **within such period**.

17. In the case titled as **Ramlal, Motilal and Chhotelal vs. Rewa Coalfields Ltd, AIR 1962 SC 361**, the Supreme Court while discussing the provision of Section 5 of the Limitation Act had held as under:-

8. Now, what do the words "within such period" denote ? It is possible that the expression "within such period" may sometimes mean during such period. But the question is: Does the context in which the expression occurs in s. 5 justify the said interpretation? If the limitation Act or any other appropriate statute prescribes different periods of limitation either for appeals or applications to which s. 5 applies that normally means that liberty is given to the party intending to make the appeal or to file an application to act within the period prescribed in that behalf. It would not be reasonable to require a party to take the necessary action on the very first day after the cause of action accrues. In view of the period of limitation prescribed the party would be entitled to take its time and to file the appeal on any day during the said period and so *prima facie* it appears unreasonable that when delay has been

made by the party in filing the appeal it should be called upon to explain its conduct during the whole of the period of limitation prescribed. In our opinion, it would be immaterial and even irrelevant to invoke general considerations of diligence of parties in construing the words of s. 5. The context seems to suggest that "within such period" means within the period which ends with the last day of limitation prescribed. In other words, in all cases falling under s. 5 what the party has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that the party will have to show sufficient cause not only for not filing the appeal on the last day but to explain the delay made thereafter day by day. In other words, in showing sufficient cause for condoning the delay the party may be called upon to explain for the whole of the delay covered by the period between the last day prescribed for filing the appeal and the day on which the appeal is filed. To hold that the expression "within such period" means during such period would in our opinion, be repugnant in the context. We would accordingly hold that the learned Judicial Commissioner was in error taking the view that the failure of the appellant to account for its non-diligence during the whole of the period of limitation prescribed for the appeal necessarily disqualified it from praying for the condonation of delay, even though the delay in question was only for one day; and that too was caused by the party's illness.

18. In the instant case, the petitioners have not revealed the date of service of the notice on them. The date of their gaining knowledge of the *ex-parte* decree is also not on record. The said date is significant for any court to examine if there exist reasonable/ sufficient ground for condonation of delay which period shall have to be reckoned from the date of gaining knowledge. The petitioners have failed to offer sufficient cause to explain the delay in filing the application. They have not

even furnished a tentative date or the week of the month in which they were served with the notice of the recovery proceedings. The records reveal that the petitioners had filed an application before the Recovery Officer on 09.09.2013. Even if it is presumed that the date of gaining knowledge was 09.09.2013, an application for setting aside the *ex parte* decree was required to be filed by the petitioners within 30 days reckoned therefrom but they moved the said application only on 23.11.2013. No satisfactory or reasonable explanation has been offered by them for this delay.

19. Primarily, two pleas have been taken by the petitioners to assail the impugned order, one is absence of service of summons of the OA on them and the second is that they had not authorized Sh. O.P. Sharma, Advocate who was appearing on their behalf, to attend the proceedings before the DRT-II. However, on comparing the signatures of the applicants with the admitted documents, the DRT had found that the said vakalatnama bears the signatures of the same persons who had signed the admitted documents. Sections 72 & 73 of the Indian Evidence Act empower the courts to compare disputed signatures with the admitted signatures. In the impugned order, the DRAT has also noted that denial of signatures by the petitioners was half hearted; that there is no clear denial of the signatures by Mr. Babulal Aggarwal and Mr. Alok Kumar Aggarwal and only a bald plea taken was that they were forged.

20. Even before us, it has not been pleaded that the signatures on the vakalatnama are not that of the petitioners No. 2 and 3. Rather, the plea taken is that the vakalatnama was not filed in the Registry and was handed over by Mr. O.P. Sharma, Advocate, in the course of the proceedings held before the DRT on 26.07.2002 and that the DRT had not made any observation about the status of service, though the case was fixed on the said date for the service of the petitioners. The said pleas are of no consequence in view of the fact that Sh. O.P. Sharma, Advocate had entered appearance on behalf of the petitioners on 26.07.2002 and the DRT had no reason to doubt the authority of the learned Advocate to do so. To prove that no Advocate by the name of O.P. Sharma had appeared before the DRT, the petitioners had first denied the very existence of any such Advocate and when the respondent no. 1 had produced the Directories for the relevant years and successfully proved the existence of Sh. O.P. Sharma, Advocate at the address, 'Central Hall, Tis Hazari', the petitioners had proceeded to file an affidavit of the son of Late O.P.Sharma who had in his affidavit, denied the signatures of his father on the vakalatnama filed before DRT in the year 2002-2003 and deposed that his father never appeared in the said case. The said affidavit was rightly rejected by the learned DRAT because Mr. O.P. Sharma's son did not claim that he was enrolled as an Advocate and was working with his father during that period for him to be aware of every brief that his father had accepted and every case in which he had appeared. The aforesaid acts of the

petitioners only shows the extent of their desperation as in any which way they wanted to show that no Advocate by the name of O.P. Sharma had attended the court proceedings on their behalf and thereby raise a question mark on the *bona fides* of the court proceedings.

21. The question that assumes significance is not as to whether the vakalatnama in question bears the signatures of Sh. O.P. Sharma, Advocate or not. The point is whether the petitioners had authorized him to appear on their behalf. Since the signatures of the petitioners appear on said vakalatnama printed in the name of Sh. O.P. Sharma, the court proceedings show that he had actually attended the proceedings before the DRT-II on behalf of the petitioners, the version of the petitioners must be discarded in favour of the respondent No. 1. The affidavit of the son of Sh. O.P. Sharma to the effect that the said vakalatnama does not bear the signatures of his father is also of no consequence. He can certainly not vouch for the fact that his father had never appeared before the DRT-II on behalf of the petitioners, when he was not ever enrolled as an Advocate at the relevant point of time.

22. The petitioners' plea that they cannot be made to suffer due to the fault of their counsel who had allegedly defaulted in attending the court proceedings is of no consequence. The said plea amounts to blowing hot and cold in the same breath as on one hand, the petitioners have denied having even engaged Sh. O.P. Sharma

as their Advocate and even got his son to file an affidavit to the said effect, and on the other hand, they have taken a plea that they should not be made to suffer because of their counsel's default.

23. The DRAT has rightly observed that if the petitioners wanted to take advantage of the fact that they should not be made to suffer for the fault of their Advocate in the first instance, they ought to have accepted that they had actually authorized Sh. O.P. Sharma, Advocate to appear on their behalf but they had all along taken the plea that they had not authorized him to appear on their behalf.

24. The facts on record clearly demonstrate that the petitioners had the knowledge of the pendency of OA No. 293/2001 and they had duly authorized Sh. O.P. Sharma, Advocate to appear on their behalf. That being so, it was their duty to remain vigilant and watchful of the proceedings before the DRT. They cannot be permitted to pass on the buck to their counsel only to wriggle out of a tight situation. The learned DRAT has rightly held that the application filed by the petitioners under Order 9 Rule 13 CPC was highly belated and their application for condonation of delay does not even disclose the date on which they had gained knowledge of the passing of the *ex-parte* decree.

25. In view of the above facts and circumstances, we are of the opinion that the impugned order does not deserve any interference as the conclusion arrived at is

backed with sound reasoning. The petition is accordingly dismissed along with the pending application with no order as to costs.

**DEEPA SHARMA
(JUDGE)**

**HIMA KOHLI
(JUDGE)**

OCTOBER 30, 2017/ss