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

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Date of decision: 25.01.2017

+ C.R.P. 164/2016

UCO BANK

..... Petitioner

Through Mr.Rajesh Rattan, Advocate

versus

RAM CHANDER AND ORS.

..... Respondents

Through Mr.U.M.Tripathi, Advocate for R-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The present revision petition is filed seeking to impugn the order dated 06.10.2015 whereby the Appellate Court allowed the application under Order 9 Rule 9 CPC read with Section 5 of the Limitation Act for restoration of the suit dismissed in default of the respondents.
2. Respondent No.2 is served but none is present on his behalf.
3. The controversy centers around the property being No.RZP- 255A, Raj Nagar II, Palam Colony, New Delhi, measuring 244 sq.yds. out of a total area of 444 sq.yds. The property was sold by respondent No.3 – Smt.Bimla Devi in favour of respondent No.2/Sh.Atul Kumar Garg, vide registered sale deed dated 11.06.2002. Respondent No.2 took a loan of Rs.14,75,000/- from the petitioner bank and executed various documents and also created equitable mortgage of the suit property. Smt.Bimla Devi who is the wife of respondent No.1 signed and executed agreement of guarantee dated

08.07.2002 for the said loan taken by respondent No.2. The remaining portion of the suit property, i.e. 200 sq.yds. out of total 444 sq.yds., was also sold by its owner, i.e. respondent No.3- Smt.Bimla Devi in favour of respondent No.2 vide sale deed dated 28.08.2002. The said respondent No.2 took a separate loan of Rs.10,00,000/- from respondent No.4 bank - Oriental Bank of Commerce(*hereinafter referred to as the 'OBC'*) and signed and executed various documents. Respondent No.3 also stood as guarantor to the said loan.

4. In the meantime, respondent No.4 bank and the petitioner bank filed appropriate proceeding on account of default of respondent No.2. The petitioner sated that they put the mortgaged property for sale under SARFAESI Act, 2002. In 2007 respondent No.1 and his two brothers namely, Sh.Paras Ram and Ishwar Singh filed a suit against respondent Nos.2 and 3 seeking declaration and permanent injunction that they are the owner of the suit property and the sale deeds deposited with two banks, i.e. the petitioner bank and respondent No.4 bank be cancelled.

5. As noted above, respondent No.3 is the wife of respondent No.1/plaintiff in the suit that was filed. The petitioner was not a party. However, on an application under Order 1 Rule 10 CPC the petitioner bank and respondent No.4 bank were impleaded.

6. On 04.06.2007, Sh.Paras Ram/plaintiff No.1, brother of respondent No.1 died. However, no steps were taken to implead the legal representatives. In 2008, a preliminary issue was framed as to whether the suit was barred under Section 34 of the SARFAESI Act, 2002. On 06.06.2009 Sh.Ishwar Singh/plaintiff No.2, second brother of respondent No.1 died. The sole surviving plaintiff/respondent No.1 never informed the

civil court about the death of plaintiff No.2. Several adjournments were taken to argue about the maintainability of the suit. As on 13.01.2011 none appeared for respondent No.1 and the suit was dismissed in default. In the interregnum on 08.11.2012 OA filed by the petitioner bank was allowed by DRT against respondent Nos.2 and 3 for a sum of Rs.23,98,255/- and the petitioner bank was allowed to sell the mortgaged property. On 05.03.2013 recovery officer passed an order to sell the mortgaged property.

7. After a lapse of 2 years and 3 months in 2013, respondent No.1 has filed the present application under Order 9 Rule 9 CPC read with Section 5 of the Limitation Act. In the application, it is urged that the suit was being prosecuted by plaintiff No.1 Sh.Paras Ram who expired on 04.06.2007. Thereafter, Sh.Ishwar Singh become the incharge of the joint family and started looking after day to day activities of the family including the court cases. He also expired on 06.06.2009. Since the two deceased brothers used to look after day to day affairs of the family, it is claimed that respondent No.1 and the family of respondent No.1 were unaware that the present case was pending. It is only when a hearing took place before the recovery officer in DRT on 05.03.2013, it came to the knowledge of the counsel for respondent No.1 that the present suit had been dismissed in default and hence, the present application has been filed.

8. The trial court noted that the factum of death of plaintiff Nos.1 and 2 was never informed to the court. Further, plaintiff No.2 died on 06.06.2009. Counsel for the plaintiff appeared on several dates upto 26.05.2010, i.e. up to one year after the death of the two plaintiffs meaning thereby that he had instructions from respondent No.1 to appear. Hence, respondent No.1 had knowledge about the pendency of the present suit. The trial court also noted

that respondent No.1 was careless for a long period of 21 months and is now trying to blame his counsel saying that he did not deliberately pursue the case. It also noted that on the other hand, respondent No.1 has been pursuing the matter before the DRT and Supreme Court. Hence, the trial court dismissed the application under Order 9 Rule 9 CPC.

9. The appellate court noted that it has been brought to the notice of the court that the claim of the bank have already been settled and nothing remains to be recovered from respondent No.2 or respondent No.3. In the interest of justice, the appellate court held that it would be appropriate to grant an opportunity to respondent No.1 to try and prove their case and restored the appeal subject to payment of cost of Rs.5,000/-.

10. I have heard the learned counsel for the parties.

11. The learned counsel appearing for the petitioner bank has argued that the property in question has already been sold by respondent No.1 pursuant to proceeding before DRT. Hence, he submits that for this long period of 21 months taken by respondent No.1 to move an application for restoration vested rights have come into place and he submits that there is no reason to condone the delay in filing of the application under Order 9 Rule 9 CPC. Reliance is placed on the judgments of the Supreme Court in the case of *Brijesh Kumar v. State of Haryana, AIR 2014 (SC) 1612* and *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors., (2013) 12 SCC 649*.

12. The admitted fact is that respondent No.1 namely plaintiff No.3 has also signed and verified the plaint. He was fully aware about the pendency of the suit. Hence, the argument that the matter was being followed by two brothers who have died on 04.06.2007 and 06.06.2009 is a misplaced

argument. The suit was dismissed in default on 13.01.2011. It is inconceivable that since death of the last of the two brothers on 06.06.2009, till 23.04.2013 when the application was filed respondent No.1 was oblivious of the pendency of the suit or its proceedings. He has also not taken any efforts to bring on record other legal heirs.

13. The other facts also cannot be ignored. The admitted position is that the proceedings have been going on in other courts since the dismissal of the suit in default. On 08.11.2012, O.A. in favour of the petitioner was allowed and the petitioner bank was allowed to sell the mortgaged property. On 05.03.2013 the recovery officer passed an order for sale of mortgaged property. The DRT has dismissed the appeal against the said order. This court had also dismissed the writ petition against the order. An SLP filed by respondent No.1 has also been dismissed on 21.04.2014 by the Supreme Court. It is manifest that various litigations have been indulged in by respondent No.1.

14. It is noteworthy that the party who has sold the property is the wife of respondent No.1, namely respondent No.3. It cannot but raise a suspicion that the suit appears to be conclusive in nature.

15. However, a perusal of the grounds of appeal filed by the petitioner shows that the property which was mortgaged in favour of respondent No.4 bank has been sold in an auction. The said property measuring 200 sq.yds. was sold for a sum of Rs.76,51,000/- in auction. Respondent No.4 bank after adjusting their entire outstanding dues, deposited a sum of Rs.53, 68, 954/- by way of pay order with the recovery officer and the same was handed over to the petitioner bank for recovery of its dues. The petitioner bank also recovered its entire dues in the loan account of Sh.Atul Kumar Garg,

Smt.Bimla Devi and the said accounts stand closed being satisfied in terms of order. It is clear that the claims of the petitioner stand satisfied.

16. It is manifest that respondent No.1 seeks to reopen the sale of the property and seeks other consequential relief to nullify the steps taken by the petitioner bank and respondent No.4 bank in a sale action of the property. In view of the above events that have taken place after the suit was dismissed in default, there are no grounds to permit respondent No.1 to condone the delay in filing of the present application. The Appellate Court wrongly reversed the order of the trial court. The impugned order suffers from material irregularity.

17. Reference in the above facts may be had to the judgment of the Supreme Court in the case of ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy &Ors., (2013) 12 SCC 649*** where the Supreme Court reiterated the legal position as follows:-

“17. A reference to the principle stated in *Balwant Singh (dead) v. Jagdish Singh and Ors.* would be quite fruitful. In the said case the Court referred to the pronouncements in *Union of India v. Ram Charan, P.K. Ramachandran v. State of Kerala* and *Katari Suryanarayana v. Koppiseti Subba Rao* and stated thus: (*Balwant Singh case, SCC p. 696, paras 25-26*)

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise (sic a lis). These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.”

18. Accordingly, it is clear that in the present case on account of the delay on the part of the respondent to approach the court, third party rights have arisen. Hence, there are no grounds to condone the delay in filing of the application by the respondent. The Appellate Court has wrongly with material irregularity condoned the delay and allowed the application under Order 9 Rule 9 CPC filed by the respondent.

19. Accordingly, the present petition is allowed and the impugned order passed by the trial court is set aside. All the pending applications are also allowed.

(JAYANT NATH)
JUDGE

JANUARY 25, 2017/v