12.04.2024
Ct. No. 19
Item No. 10
Cp

C.O. No. 3926 of 2023

Shri Bhagirath Pasari
Vs.
Kotak Mahindra Bank Limited & Ors.

Mr. Deepan Kumar Sarkar
Mr. Samriddha Sen
Mr. Tirthankar Das
Mr. Aayush Lakhotia

....for the petitioner.

Mr. Pratik Ghose
Mr. Avishek Roy Chowdhury

....for the opposite party no. 1.

1. Liberty is granted to correct the cause title by incorporating the order dated December 14, 2020.

2. The revisional application arises out of two orders, i.e., dated December 14, 2020, passed by the learned Debt Recovery Appellate Tribunal, Kolkata in I.A. No. 246 of 2020 and July 19, 2023. Both the orders were passed in Appeal No. 46 of 2020 by the said learned Debts Recovery Appellate Tribunal, Kolkata.

3. By the first order dated December 14, 2020, an application for condonation of delay of 296 days in filing the appeal before the learned DRAT from the order dated December 2, 2019, passed by the learned Debt Recovery Tribunal -1, Kolkata, (hereinafter referred to as “DRT-1”), was allowed and the Appeal

was registered as Appeal No. 46 of 2020. The said order was passed ex parte. By the second order the appeal was allowed.

4. The learned appellate tribunal found that the learned DRT-1 had committed patent illegality in dismissing the application for restoration filed in connection with O.A. No. 540 of 2018. The O.A.540 of 2018 (TA 9 of 2002) had been dismissed for default on June 17, 2013. The financial institution applied for restoration. By order dated December 2, 2019, the application for restoration was dismissed as the learned DRT-1 was of the opinion that no petition was pending before the said tribunal. Affidavits were exchanged with regard to the restoration application. The learned appellate tribunal was of the opinion that the DRT-1 ought to have considered the restoration application on its own merits instead of dismissing the same. Accordingly, the learned DRAT directed the DRT-1 to decide the restoration application in accordance with law after affording opportunity of hearing to the parties.

5. Mr. Sarkar, learned advocate for the petitioner, has assailed the order on the following grounds:

   a) The application for condonation of delay had been allowed ex parte.

   b) In the affidavit-in-opposition a specific point was raised with regard to the legality of the said application, which had not been affirmed as per law. The provision of the Notaries Act had been violated as the representative of the appellant admitted to have signed the document in Mumbai and not before the Notary Public at Kolkata. The learned appellate tribunal did not take into account such objection.

c) A proceeding which was dismissed for default in 2013 and which was sought to be restored in 2019, could not have been that urgent that the application for condonation of delay was required to be heard and disposed of in the absence of the petitioner. The conduct of the financial institution would indicate that they were disinterested in recovering the loan and was proceeding with the matter in a casual and cavalier fashion. The sympathy of the appellate tribunal in the absence of bona fide should not have been paramount.

d) When the affidavit accompanying the application for condonation of delay as also the affidavit accompanying the appeal were not in accordance with law and was affirmed in a fraudulent exercise undertaken by the representative of the financial institution without being present before the Notary Public at Kolkata, the application and the Memorandum of Appeal did not merit any consideration and ought to have been rejected on this ground alone.

6. Reference is made to the Notaries Act, 1952 and the Notaries Rules, 1956. Reference is further made to the following decisions:

   a) Muthu Karuppan, Commissioner of Police Chennai vs. Parithi Ilamvazhuthi & anr., reported in (2011) 5 SCC 496;

   b) Prataprai Trumbaklal Mehta vs. Jayant Nemchand Shah & anr., reported in 1991 SCC Online Bom 205;

   c) State of Kerala & ors. vs. G. Sredharan Nair, reported in 2012 SCC Online Ker 31640;

   d) Dhanlaxmi Chandu Devrukar vs. Town Planning/Land Acquisition Officer, through the Government Pleader & ors., reported in 2022 SCC Online Bom 337;

7. Mr. Ghose, learned advocate appearing on behalf of the financial institution denies the allegations made by Mr. Sarkar. He submits that as soon as the Kotak Mahindra Bank became the assignee of the loan, steps were taken before the learned DRT-1. First, an application for substitution was filed because the original application was filed by UCO bank. The application for substitution was allowed, but the

department failed to take steps. The learned DRT-1, by misconstruing that the financial institution had not taken steps, dismissed the original application for default on the part of the Bank. Immediately, an application for restoration was filed, but the said application was not listed for hearing for almost six years. The financial institution tried to get the matter listed by filing put up applications, but the matter ultimately could not be taken up. The restoration application came up for hearing before the Presiding Officer, DRT-1, Kolkata on December 2, 2019. The learned tribunal dismissed the application for restoration, inter alia, holding that no petition was pending. Aggrieved by such order, the appeal and the application for condonation for delay in preferring the appeal were filed.

8. The grounds for the delay in preferring the appeal, were confusion whether to file an application for recalling of the order of the DRT or to file an appeal. Consumption of some time when the finance company sought legal advice at different levels was briefly narrated. Thereafter, further delay was caused due to the onset of the COVID-19 pandemic on and from March, 2020. The asset reconstruction office was situated in Mumbai and it was difficult for the officers and representatives of the finance company to travel

during the pandemic. The representative of the financial institution signed the application and the affidavits, prepared in Mumbai. It is concluded that the learned advocate assured that the needful would be done in Kolkata. There was no intention either to mislead the court or to circumvent the law.

9. Heard the learned Advocates for the respective parties. This court finds that the order by which the original application OA 540 of 2018 (T.A. 9 of 2002) was dismissed for default records that the bank had not taken any steps to serve the amended copy of the plaint upon the defendants. There is no dispute that the application for restoration was filed immediately thereafter. However, the said application for restoration was listed sometime in 2019. The DRT-1, without recording any reasons and without hearing the said application on its own merits, dismissed the same on the ground that no application was pending before the Tribunal.

10. In my, prima facie view, such finding was incorrect. The records show that on June 17, 2013, T.A. No. 9 of 2002 (O.A. No. 540 of 2018) had been dismissed for default. Naturally, there would be no pending application and that was why a restoration application was filed. The financial institution adopted the proper legal procedure by preferring the appeal along with an

application for condonation of delay. The explanation for the delay had been pleaded in the application itself.

11. However, the contention of Mr. Sarkar that the appeal and the application were *non est* in the eye of law for not having been filed by a proper notarized affidavit, cannot be ignored. Nothing prevented the bank from getting their application notarized in Mumbai and filing the appeal and application in Kolkata. Notarizing an affidavit in the absence of the deponent before the Notary Public in Kolkata, was not the proper process. The deponent could not be identified.

12. Under such circumstances, the orders impugned before this court are set aside. The learned DRAT may have been correct in the ultimate decision, but the decision was based on applications which did not have any legal foundation.

13. Hence, liberty is granted to the financial institution to file a fresh application for condonation of delay as also an appeal from the order dated December 2, 2019, passed by the learned DRT-1 with proper explanations, pleadings and affidavits, through an authorized representative. The period spent in the litigation before the learned DRAT and till the disposal of this application, shall be explained accordingly and the learned DRAT shall take note of the same.

14. Under such circumstances, the revisional application is dismissed.

15. The application for condonation of delay, along with the memorandum of appeal shall be filed by the financial institution within three weeks from date. The petitioner shall file the affidavit-in-opposition to the said application within two weeks from receipt of a copy thereof. The learned DRT shall dispose of the said application for condonation of delay on its own merits within three weeks thereafter. Based on the result of the said application, the appeal shall be considered and disposed of expeditiously.

16. The apprehension of Mr. Sarkar that the learned DRT-1 will proceed with the hearing of the application is not correct. This court has set aside the order of the learned DRAT, remanding the matter back to the learned DRT-1, for adjudication.

17. There shall be no order as to costs. Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)