
(2010) 03 AHC CK 0302
In the Allahabad High Court
Case No : Writ-B. No. 68291 of 2005

Chikhur and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 31-03-2010

Acts Referred:

Citation : (2010) 03 AHC CK 0302

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : Ramesh Singh and Smt. Sharda Chauhan, for the Appellant; Anuj Kumar, for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—This is defendants' writ petition. The defendants are descendants of Mahangi. One Sukkhu father of respondent Nos.5 & 6 instituted Suit No. 147 of 1993 u/s 229-B and 209 of U.P.Z.A & L.R Act in respect of old Plot No.94 situate in Village Misraulia, District Ghazipur.

2. The suit was instituted on the pleas inter alia that name of Mahangi was wrongly recorded in the revenue record during the consolidation operation.

3. The suit was contested by Mahangi by denying the plaint allegations on the pleas that his name was rightly recorded in the revenue record. The plea that filing of suit was nothing but an abuse of process of the Court as it was instituted after about 10 years of the de-notification u/s 52 of the LLP Consolidation of holdings Act, was also raised.

4. During the pendency of the suit, Mahangi who was defendant obtained injunction order against the plaintiff Sukkhu, after contest. The suit was dismissed in default of the plaintiff by the judgment and decree dated 30.08.1999. An application under order 9 Rule 9 CPC to restore the suit to its original number along with an application for condonation of delay in its filing was filed. The Trial Court after hearing the counsel for the parties dismissed both

the applications by the order dated 13.05.2005. While doing so it also took into consideration that name of Mahangi is continuing since before the commencement of the Chakbandi in the Village and as such the application is barred u/s 49 of the said Act. The order was challenged by way of appeal being Appeal No. 12 of 2005 (Shanker Prasad & Ors. v. Chikltur & Ors.). The said appeal was allowed by the judgment dated 26.07.2007 and the delay in filing the restoration application was condoned. The order of the first appellate authority has been confirmed in revision being Revision No. 101 of 2004-2005.

5. Challenging the aforesaid two orders, the present writ petition has been filed on the ground that the plaintiff-respondents were not prevented by sufficient cause for not filing the restoration application within the time. The two Courts below wrongly condoned the delay in filing the restoration application. They proceeded on the wrong assumption that the allegations made in the restoration application were not controverted by filing any counter affidavit, which is not so. The affidavit controverting the allegations was already on the record before the Trial Court and as such it was wrongly assumed by the appellate Court that no such affidavit was filed. It was also contended that the appellate Court allowed the appeal on the date of preliminary hearing of the appeal itself without calling for the record of the Trial Court. On that day only limited issue about the maintainability and admission of the appeal was involved but the first appellate Court has disposed of the entire appeal without giving proper opportunity of hearing. In reply, the learned counsel for the contesting respondents submits that no affidavit controverting the restoration application was filed before the Trial Court and it appears that by manipulation, a counter affidavit has been put on the record. In support of the said argument, the learned counsel relied upon the observation made in the judgment of the first appellate Court that the affidavit filed in support of the restoration application that the affidavit remained uncontroverted.

6. Considered the respective submissions of the counsel for the parties and perused the record. The only question which falls for determination in the present writ petition is whether the first appellate Court and the revisional Court were well within their jurisdiction to set aside the order dated 13.05.2005 whereby the restoration application filed by the contesting respondent was rejected and the delay in its filing was condoned.

7. It may be noticed that it is admitted case of the parties that during the pendency of the suit, the petitioners who were defendant in the suit prayed for and was granted interim injunction order restraining the plaintiff-respondent not to forcibly evict them from the property in question. In paragraph 6 of the writ petition, it has been stated that after the death of Mahangi (the father of the petitioners) an injunction application in the suit on 23.11.1992 was filed by the defendants and the Court passed an interim order restraining the plaintiff-respondent from interfering in the peaceful possession over the plot in question. On 18.06.1993, an application by the respondent herein for vacating the interim

stay order was filed wherein 06.07.1993 was the date fixed for further hearing on the injunction application. As none appeared on behalf of the plaintiff-respondent on 06.07.1993, the interim order granted in favour of the petitioner was made absolute. Since 06.07.1993, the plaintiff-respondent never appeared to prosecute the suit, as averred in paragraph 8 of the writ petition. The reply of the said paragraph has been given in paragraph 32 of the counter affidavit. In paragraph 32 of the counter affidavit only this much has been stated that the contents of paragraph 6, 7 & 8 are not admitted. However, the filing of the injunction application, passing of the interim injunction order dated 23.11.1992, filing of the application for its vacation before the Trial Court etc. have not been denied. Only this much has been stated that the said stay vacation application was pending and several dates were fixed. In paragraph 33, it has been stated that the Trial Court wrongly and illegally dismissed the suit on 30.08.1999 and the contesting respondents came to know about the afore stated order only on 07.11.2004.

8. Now the question arises as to whether in this fact situation, the appellate Court was justified in condoning the delay and restoring the suit to its original number. A bare perusal of the order of the first appellate Court would show that it decided the appeal on the date fixed for its admission, a fact which is mentioned in the order itself, just above the heading Adesh (order). It proceeded to dispose of the appeal on the ground that in such matters, the approach of the Court should be justice oriented and the Court should liberally condone the delay in filing the restoration application. So far as legal proposition is concerned, there cannot be any quarrel to it. The appellate court proceeded to condone the delay on the assumption that there was no counter affidavit disputing the allegations made in support of the application for condonation of delay. The learned counsel for the petitioner submits that a detailed counter affidavit which is on the record of the Trial Court was filed and the said mistake has occurred as the record of the Trial Court was not summoned. In paragraph 10 of the present writ petition, it has been stated that on 27.12.2004, petitioner No.2 Babu Lal filed a counter affidavit disputing and controverting the false and frivolous allegations of the respondent made in their application dated 09.11.2004 to recall the order dated 30.08.1999. A copy of the counter affidavit filed by Babu Lal, petitioner No.2 has been attached as annexure-4 to the writ petition. The respondents herein did not file any reply or rejoinder affidavit controverting the allegations made by the petitioners in their counter affidavit.

9. The contents of paragraph-10 of the writ petition have been dealt with in paragraph 34 of the counter affidavit of Shri Shanker Lal filed on behalf of respondent Nos.5, 6 & 7. In paragraph 34, it has been stated that it is totally wrong to say that the counter affidavit was filed by Shri Babu Lal. In fact neither the copy of any such counter affidavit was served on the plaintiffs/the present respondents nor it was argued before the Sub-Divisional Officer.

10. Thus, there appears to be a dispute between the parties as to whether the

copy of the counter affidavit was served on the plaintiffs-respondents or not. The fact whether counter affidavit was filed or not could be ascertained only after looking into the record of the Trial Court. In this fact situation, the first appellate Court was not justified in deciding the appeal on the assumption that no counter affidavit was filed on behalf of the present petitioners. After perusal of record it should have recorded a finding with regard to the filing or non filing of a counter affidavit. The appellate Court has failed to do it. This vitiates the very decision making process of the first appellate Court and as such the order of the first appellate Court is legally defective and cannot be allowed to stand.

11. Apart from above, the contesting respondents herein were the plaintiffs in the suit. It was their duty to have kept the track of the suit proceedings. They are required to explain for their non appearance on the date fixed and also to explain the delay.

12. The suit was dismissed on 30.08.1999 and the restoration application appears to have been filed after the expiry of more than five years which itself is a long period and has to be explained sufficiently. Such a long delay cannot be condoned on one's ipse dixit. There has to be some cogent and valid reason. It is true that in such matters, the approach of the Court should be justice oriented and liberal view should be taken but it does not follow that a party may approach the Court at its convenience and sweet will. The appellate Court has not found that cause of non appearance of the plaintiff on 30.08.1999 was sufficient while condoning the delay. The appellate Court has also not considered that the delay of more than four years in filing the restoration application to recall the order dated 30.08.1999 is sufficiently explained. Unless it is found that a party was prevented by sufficient cause for non appearance on the date fixed or the delay has been sufficiently explained, an order cannot be recalled and the delay cannot be condoned.

13. The revisional Court has dismissed the revision at the admission stage itself without applying its mind to the controversy involved in the case. The revisional Court was of the view that the order under revision was an ex parte order and for expeditious disposal of dispute, no interference is called for. The said approach of the revisional Court also shows its non application of mind to the facts of the case. Therefore, the order of the revisional Court also cannot be allowed to stand.

14. There is one more argument on behalf of the petitioner that Munshi one of the Sons of Mahangi died on 12.01.1995 during the pendency of the proceedings before the Court below leaving behind him five heirs but no substitution application was filed to substitute the heirs of Munshi. Necessary averments have been made in this regard in paragraph 8 of the writ petition. The reply of paragraph 8 has been given in paragraph 32 of the counter affidavit. In reply, there is no specific denial either about the death of Shri Munshi or non filing of the substitution application with regard to Munshi. This fact also needs consideration.

15. Viewed as above, the impugned orders suffers with manifest error of law and cannot be allowed to stand.

16. In the result, the writ petition succeeds and is allowed. The impugned orders dated 14.09.2005 and 26.07.2005 are hereby quashed. The first appellate Court is directed to re-hear and re-decide the Appeal No. 12 of 2005 afresh in the light of the observations made above in accordance with law preferably within a period of six months from the date of production of certified copy of this order.

17. No order as to costs.