
(2011) 08 AHC CK 0200
In the Allahabad High Court
Case No : Writ C No. 21167 of 1989

Jahuran

APPELLANT

Vs

Adj

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115
General (Civil) Rules, 1957 — Rule 89A

Citation : (2011) 08 AHC CK 0200

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sibghat Ullah Khan, J.—Heard Shri Siddharth Verma, learned Counsel for the Petitioner and Shri M.C. Gupta, learned Counsel for the contesting Respondents.

2. Original suit No. 602 of 1985 instituted by Plaintiffs-Respondents Nos. 2 to 7 against the Petitioners (which term includes Petitioners predecessor in interest) was decreed ex-parte on 28.1.1987. Defendants filed restoration application under Order 9 Rule 13 CPC alongwith delay condonation application on 2.7.1987 (probably opening day after summer vacation of June, 1987). The restoration application was registered as Misc. Case No. 22 of 1987. Trial court/Additional Munsif (XV), Azamgarh allowed the delay condonation application as well as restoration application through judgment and order dated 20.12.1988 and set aside the ex-parte judgment and decree dated 28.1.1987. Against the said order Plaintiffs-Respondents filed Civil Revision No. 6 of 1989 which was allowed by With Additional District Judge, Azamgarh on 18.8.1989. Restoration order passed by the Trial Court was set aside and restoration application was rejected as barred by time hence this writ petition.

3. Normally an order restoring a suit is not interfered with in exercise of revisional jurisdiction u/s 115 CPC In this regard, learned Counsel for the Petitioners has cited an authority of the Supreme Court reported in Ramji Dass

and Ors. v. Mohan Singh 1978 ARC 496. The Defendants-Petitioners had taken up the plea that their Advocate had told them that until substitution application filed by the Plaintiffs, numbered as 19-A-2 was disposed of and notice to the heirs brought on record was issued, suit would not proceed on merit. Kharpattu one of the Defendants had died. However, his sons were already on record hence through application 19-A-2 their formal substitution was sought.

4. It is mentioned in the judgment of the revisional court that Plaintiffs had been granted temporary injunction and Defendants appeal and writ petition against the same had been dismissed. It cannot therefore be said that Defendants were interested in delaying the proceedings. The contrary view expressed by the revisional court is incorrect.

5. It was specifically argued before the revisional court that after transfer of the suit Additional Munsif (XV), Azamgarh, no notice was given to the Defendants as required by Rule 89A of General Rule Civil. This argument has been noticed in last but two paragraphs of the judgment of the revisional court. However, absolutely nothing has been said regarding the veracity of the said argument either factually or legally.

6. In my opinion there was no jurisdictional error in the order of the trial court. Hence even if it is assumed that there was some slight error in the order of the Trial court restoring the suit, revisional court hearing revision u/s 115 CPC had absolutely no jurisdiction to reverse the restoration order.

7. However, the Trial court should have allowed the restoration application on payment of appropriate cost.

8. Accordingly, judgment and order passed by the revisional court is set aside. Judgment and order passed by the trial court is restored. The suit is restored with the modification that the ex-parte decree dated 28.1.1987 shall stand set aside on payment of Rs. 1,000/-as cost which shall be paid on the next date which is fixed to be 10.10.2011. Parties are directed to appear before the trial court on 10.10.2011. If the costs are paid/deposited on the said date, proceedings of the suit shall commence and as the suit is quite old hence it shall be decided very expeditiously.

9. Writ petition is accordingly disposed of.

10. Abatement of petition due to death of Petitioner No. 5 is set aside after condoning the delay in applying for the same.

Substitution application is allowed.

11. In spite of sufficient service no one has appeared on behalf of proposed heirs. Accordingly this application to substitute the legal representatives of Respondent No. 4 who had already died when the writ petition was filed is allowed.

12. In spite of sufficient service no one has appeared. Accordingly substitution application to bring on record legal representatives of Respondent No. 5 is

allowed.