

(1994) 07 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1056 of 1993

Jaishri Lohar and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Citation : (1994) 07 PAT CK 0002

Final Decision : Allowed

Judgement

B.L. Yadav, J.—What must be the precise contours of the judicial discretion exercised by the Director of Consolidation in a restoration application filed in a revision dismissed in default, is the short but significant question involved in the present writ petition filed under Articles 226 and 227 of the Constitution of India. The Petitioners have prayed that the impugned order dated 25.11.1992 (Annexure 3) passed by the Director of Consolidation, Bihar, Patna (Respondent No. 4) in Revision Case No. 1417 of 1962 (Jaishri Lohar and Ors. v. Moulvi Lohar and Ors.) filed u/s 35 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (for short, "the Act") as well as the order dated 25.8.82 passed by the Assistant Director of Consolidation (Annexure 2) in appeal and the order dated 25.8.1978 (Annexure 1) passed by, Consolidation Officer be quashed by issuing a writ of certiorari.

2. The main controversy is about the revisional order dated; 25.11.1992 (Annexure 3) rejecting the restoration application preferred by the Petitioners. The Petitioner has got a chequered history. The relationship between the Petitioners and contesting Respondent Nos. 5 to 7 would appear from the genealogical table given under paragraph 4 of the writ petition. Both the parties are descendants of Rameshwar Lohar, common ancestor of the parties. The Petitioners are descendants of Raghunandan, whereas the contesting Respondents are descendants of Raghupat. The plots in dispute were situated in village Pandeypur, Parai, Maghigawan and Dhobahan, P.O., P.S. Chand, District Bhabhua. The parties have been litigating before the Civil Courts also. Inter alia

the dispute was about the validity of sale deed and mortgage deed and the effect of the Civil Court decree and whether it would operate as res judicata. The Petitioners preferred a Revision u/s 35 of the Act, which was dismissed in default on 17.10.1987. At that time (on 17.10.1987) Mr. Gupteshwar Prasad was the counsel for the Petitioners, but he died in 1987 and the Petitioners could not know about the date fixed as their counsel was dead and the matter remained unattended for some time. Thereafter a restoration petition was filed and it was allowed. The Petitioners again engaged Mr. Rewati Raman Saran as their counsel. Per chance he also died on 9.1.1989. The Petitioners again could not know about the death of Mr. Rewati Raman Saran. Thereafter no other counsel appeared and when the Revision was listed on 11.3.1992 it was dismissed in default. A restoration petition was again filed but the same was dismissed on 25.11.1992 (Annexure 3) by the impugned order, on the ground that the earlier restoration petition was allowed in 1985, hence subsequent restoration could not be allowed.

3. The learned Counsel for the parties suggested that as counter affidavit and rejoinder thereto have been filed, the petition be decided on merits.

4. Learned Counsel for the Petitioners urged that per chance the learned Counsel engaged by the Petitioners on both the occasions died. Mr. Gupteshwar Prasad, the learned Counsel engaged at the time of filing of Revision, died in 1985 and when the case was listed the Petitioners could not know about the date fixed as their counsel was dead, hence the revision was dismissed in default. Then restoration petition was filed and the same was allowed. Later on Mr. Rewati Raman Saran was engaged as counsel for the Petitioners, but he also died before the date fixed on 11.3.1992, when the case was called out and the Petitioners had no knowledge about the date fixed, hence it was dismissed in default. Then restoration petition was filed, but it was dismissed by the impugned order on the ground that as earlier restoration was allowed, hence it cannot be allowed again and again. On both the occasions the revision was dismissed on account of the circumstances beyond the control of the Petitioners, and there was no laches on the part of the Petitioners, hence sufficient cause was made out for restoration. The Director ought to have considered as to whether sufficient ground was made out for restoration. The second restoration having nothing to do with the first restoration the Director of Consolidation erred in holding otherwise.

5. Learned Counsel for the contesting Respondents strongly urged that the Petitioners appear to be in the habit of getting the case dismissed for default and thereafter filing restoration petition. It was emphasised that on earlier occasion the Revision was dismissed in default and restored. This time also it has been dismissed in default and correctly it has not been restored.

6. Having heard the learned Counsel for the parties, the question for our determination is whether the Director was justified in dismissing the second restoration petition on the ground that on earlier occasion also the Revision was dismissed in default on 17.10.1987 and restoration petition was filed and the same was allowed, hence subsequent restoration could not be allowed.

7. In 1985 the Revision application was dismissed in default, but that was on account of the fact that Shri Gupteshwar Prasad was the learned Counsel engaged by the Petitioners but he died before the date fixed and he did not inform the Petitioners about the date fixed and restoration application filed by the Petitioners was allowed, treating the ground to be sufficient. Thereafter the Petitioners engaged Shri Rewati Raman Saran as their counsel but he also died prior to the date fixed on 11.3.1992 and he did not inform the Petitioners about the date fixed. Consequently the revision was dismissed for default. Thereafter restoration application was filed which was dismissed by the impugned order rendered by the Director of Consolidation, indicating that as the earlier revision was dismissed for default and it was restored, for the second time the revision was also dismissed for default, even though prior to 11.3.1992 the Petitioners were directed to take proper Pairvi of the revision. In his order the Director of Consolidation on 25.11.92 rejecting the second restoration observed as follows:

Even if we consider the argument given by the Petitioner that his lawyer had died on 19.11.91 he had ample time to engage another senior Counsel. It appears to me that this case is being allowed to linger. Further, since the matter had already been restored once, I do not find how this Court can continue to restore this case again and again.

In these circumstances, therefore, the restoration petition is not allowed.

Sd/- N. Verma, 25.11.92. Director, Consolidation, Bihar, Patna.

But unfortunately Shri Rewati Raman Saran, learned Counsel died prior to the date fixed. Under the circumstances the point to be determined is whether second restoration petition can be dismissed on the ground that earlier restoration petition was allowed and the Petitioners were in the habit of getting the revision dismissed for default and thereafter making an application for restoration, particularly when the cause for absence of the applicants was death of their counsel. It has also to be considered as to whether death of the counsel or when the counsel is not available on the date fixed on account of the fact that he was engaged in some other Court, or he was busy for some personal affairs, like marriage of daughter etc., can these circumstances constitute good or sufficient cause so as to condone the delay either in preparation of application or to restore the revision or appeal.

8. There are string of decisions laying down that the absence of the counsel where the counsel was engaged by the applicant and he did not appear on account of his personal difficulty or for some other reason in that event the litigation or the applicant should not be penalised inasmuch as the applicant has done all efforts for engaging a counsel and was satisfied that he will appear on the date fixed but he did not appear. In that event sufficient cause was made out to restore the revision or appeal.

9. in *Goswami Krishna Murari Lal v. Dhan Prakash and Ors.* : (1981)4 S.C.C. 574 the counsel Shri Banerji was engaged by the Appellant, but when the appeal was

called out he sought leave to withdraw at the last moment and, thereafter the appeal was dismissed (or default. Their Lordships of the Apex Court held that for Pairvi of the appeal the litigant did every thing for engaging the counsel and if he did not appear on the date fixed and withdrew from appeal without any reason, it constituted sufficient cause and the appeal was restored. Reliance was placed on Rafique v. Munshi Lal (1981) 2 S.C.C. 768 and Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, .

10. In Smt. Lachi Tewari case (supra) the Petitioner had taken extra care to engage three lawyers. Nothing more could be expected of him, but when the case was taken up, none of them appeared and the Division Bench of Gauhati High Court dismissed the application in default and vacated the interim order of stay. The restoration petition was also dismissed. The matter was taken to the Apex Court and it was observed that as the senior Counsel has gone to Calcutta and two other counsels were busy in other Courts and the matter was taken up for hearing, the litigant has engaged three counsels, it was not the duty of the client to act as watchdog of the Advocate that the latter appears in the matter when it is listed. The appeal was dismissed in default on account of the circumstances beyond control of the Appellant and treating the ground to be sufficient, the appeal was restored.

11. In Syed Haisanulla and Ors. v. Ahmed Beg and Anr. AIR 1988 Karn 93 it was held that where the Plaintiff would not appear as summons were sent in English, language not known to the client, hence the case was dismissed but in Civil Revision it was held by the High Court of Karnataka that it could not be said that the applicant was negligent.

12. In our view it was within the discretion of the Director of Consolidation to treat the cause for absence sufficient or not. The word "discretion" has been derived from the word "discretio" and it simply means the science of understanding the discern between the falsity and truth; between right and wrong; between justice and substance; and between equity and colourable blossoms and not to do according to the wills and private opinion. The discretion has to be exercised in accordance with law. It must be governed by a rule and not humour. It must not be arbitrary, vague and fanciful. See Breen v. Amalgamated Engineering Union (1971) Q.B. 175 and Panama Refinery Co. v. Ryan Hot Oil Case 1935 (239) U.S.S.C. 388.

13. In the present case the discretion by the Director of Consolidation has been arbitrarily exercised. Instead of deciding as to whether sufficient cause for absence of the Petitioner/applicant or their counsel on the date when the revision was listed for hearing, was made out or not, he has taken into consideration the absence of the Petitioners on earlier date when their counsel was dead and they had no information, but made an application and the same was restored. In fact the Director of Consolidation was called upon to decide the sufficiency of cause on 11.3.1992 when for the second time the revision was dismissed in default, but curiously enough he has taken into consideration the result of the first

restoration application, which was besides the point. The ambit of the judicial discretion has been widened provided the nature of the litigation was taken into account. Consolidation proceedings are State imposed compulsory litigation. Litigation may ultimately prove for the betterment of the people. Unlike Civil Court or Revenue Court litigation, here once a notification is issued u/s 3 of the Act, the litigants even though unwilling are bound to contest the case.

14. In other words, simply because the notification in the official gazette has been issued u/s 3 of the Act, the consequences provided u/s 4(c) of the Act would ensue inasmuch as every proceeding for correction of records and every suit and proceeding in respect of the rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which the proceedings can or ought to be taken under this Act even if pending before some other Court or authority, shall abate and the parties are to file objections u/s 10(2) of the Act. In such unusual situation the tribunal or the authority called upon to decide the rights and title of the parties or to exercise a discretion must take a liberal and justice oriented view and not a hyper-technical view in dismissing the second restoration application by making a reference to the first application. The judicial discretion must be exercised *pro re nata*.

15. It could also be angulated from another perspective. The Director of Consolidation has decided the second restoration application by referring to the first restoration application, its cause of action and result. There is a Maxim *IN JURE NON PRIOR CAUSA SED PROXIMA SPECTATUR*, which connotes that in law the immediate and not the remote cause of action or cause of any event is taken into account. The ground for second restoration application was that the learned Advocate engaged by the Petitioners died some time prior to the date fixed without informing the Petitioners. On this, even the Petitioners have no control. There is another Maxim *"LEX NON COGIT AD IMPOSSIBILIA"*, which means that the law does not compel a man to do that which he cannot possibly perform. Enunciating the same principle there is another Maxim *"ACTUS DEI NEMINI, FACIT INJURIAM"*, i.e. the law holds no man responsible for the act of God.

16. We are, however, reminded what Lord Diplock and Lord Pimslie observed in connection with exercise of discretion as follows:

Discretion vested in judges by statute or at common law must be exercised judicially or in Scott's phrases used by Lord Pimslie in *Smith v. Middleton* (1972) A.C. 30, not arbitrarily or idiosyncratically and for otherwise rights of parties to litigation would become dependant on judicial whim. See Lord Diplock in *Cookson v. Knowles* (1979) A.C. 556 and *Kar Power Corporation Ltd. v. Geetha* (1989) Kar. 104.

17. We have considered the facts and circumstances of the case and the restoration application that the cause for non-appearance was absence of the counsel engaged as he has died earlier. It was, therefore, humanly not possible for the Petitioners to have appeared on the date fixed as they were not informed

by the counsel. In our opinion, a sufficient cause for non-appearance of the Petitioners was made out, the restoration application ought to have been allowed and, we accordingly, allow the same.

18. In view of the premises aforesaid this writ petition succeeds and the same is allowed and the impugned order dt. 25.11.92 contained in Annexure 3 is quashed. The Director of Consolidation, Patna (Respondent No. 4) is directed to restore the Revision to its original number. As the matter has dragged on for too long, what, is required is expedition. We, therefore, direct the Revision to be decided within three months on its merit, after affording opportunity to the parties of being heard. In the circumstances of the case, however, there will be no order as to costs.

Aftab Alam, J.

19. I agree.