

(1985) 04 AHC CK 0028
In the Allahabad High Court
Case No : Civil Revision No. 512 of 1984

Mohan Steels, Mathura and Another	Vs	APPELLANT
U.P. Financial Corporation, Kanpur		RESPONDENT

Date of Decision : 30-04-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115
Limitation Act, 1963 — Section 5

Citation : AIR 1986 All 151

Hon'ble Judges : N.N. Sharma, J

Bench : Single Bench

Advocate : N.K. Rastogi, for the Appellant; R.P. Misra, for the Respondent

Final Decision : Dismissed

Judgement

N.N. Sharma, J.—This revision is directed against order dated 5-4-1984, recorded by Sri J. S. P. Singh, learned Civil Judge Mathura in Misc. Case No. 110 of 1982, U. P. Financial Corporation. Kanpur through its Managing Director v. M/s. Mohan Steels through Mohan Lal and another arising out of Original Suit No. 106 of 1981 by which the prayer of opposite party as incorporated in application 6 Ga under Order IX, Rule 13 of CPC was allowed and ex parte decree dated 4-2-1982 in favour of revisionists was set aside and the suit was restored to its original number. The delay in filing the application in between 16-3-1982 and 3-9-1982 was condoned as sought by paper No. 54-Ga application by opposite party u/s 5 of Limitation Act.

2. The aforesaid suit was filed for permanent injunction in the Court of Civil Judge, Mathura by M/s. Mohan Steels through Mohan Lal Gupta, sole proprietor, and another v. U. P. Financial Corporation, Kanpur. The injunction was allowed by an ex parte decree dated 4-5-1982 by which opposite party was restrained from recovering any amount from the plaintiff through attachment and sale of their property through Collector or Tahsildar or any other agency otherwise in due course of law. This decree was set aside by the impugned order on payment of

Rs. 100/- as costs.

3. I have heard learned Advocates for parties and perused the record.

4. On behalf of revisionists, it was pointed out that pending the proceedings, an interim injunction was granted on 29-5-1981 after ten days time was allowed by the Court to opposite party to file objection to the temporary injunction. Summons was duly served on opposite party who engaged Sri N. M. Acharya who filed his notice of engagement on 2-9-1981; no written statement was filed by opposite party by 11-12-1981 which was the date fixed for filing the written statement and 18-12-1981 was fixed for framing issues. Despite personal service, opposite party did not appear in Court and allowed the suit to proceed ex parte. The clerk of the Advocate obtained a copy of that decree on 9-8-1982. Even the letter dated 12-5-1982 sent by revisionists to defendant opposite party mentioned about the ex parte order. Under such circumstances, learned trial Judge erred in setting aside the ex parte decree believing the affidavit dated 3-9-1982 of Sri Nilkanth, Law Officer of defendant-opposite party annexed to the application for condonation of delay and application for setting aside the ex parte decree dated 4-2-1982. Learned trial Judge did not carefully consider the fact that the aforesaid affidavit as well as rejoinder-affidavit dated 21-10-1983 were not properly verified by Sri Nilkanth. Learned trial Judge was misled by letter dated 19-12-1981 which purports to have been sent on 19-12-1981 by Advocate of opposite party mentioning that 16-3-1982 was the date fixed for issues in the suit even though the suit had been decreed earlier. There was no affidavit of the Advocate concerned or his clerk to prove the said letter. Even the envelope had not been filed by opposite party to establish the genuineness of the aforesaid document.

5. Learned Advocate for revisionists further pointed out that the ex parte order could not be validly set aside in this case as under Article 123 of Limitation Act, thirty days period shall begin to run from the date of decree and not from the date of alleged knowledge of applicant as summons had been served sufficiently upon the opposite party. Learned trial Judge ignored this aspect of the matter which was brought out in *Chunilal Nathubhai Vs. Abdul Razak Shaikh and Another*, .

6. Reliance was also placed upon *Ramjee Pandey (deceased by L. R's.) Vs. Board of Revenue and Others*, in which order about setting aside the ex parte decree was drawn without examining whether the defendant could have known about the date fixed for hearing or failing to know of the hearing date due to his willful conduct and so the order was struck down and the Court below was required to examine the evidence and material before it to find from the fact and circumstances whether the defendant could be said to have knowledge of the hearing date or if it could have known of it but for any willful conduct on its part, in that case, the ex parte decree was not liable to be set aside.

7. Reliance was further placed upon *Steel Authority of India Ltd. Vs. R.N. Datta*,

where it was observed that the petitioner has to prove that he was diligent and has to explain day-to-day delay from the last day of limitation.

8. Reliance was further placed upon Kali Prasad Basu and Others Vs. Susanta Kumar Pratihari and Others, in support of the contention that in an application u/s 5 of Limitation Act, the date of legal advice on which reliance was placed in that application, was not given and so it was held that such application u/s 5 of Limitation Act could not be allowed.

9. Reliance was also placed upon Scientific Instrument and Chemical Company Vs. Vishwanath Poddar, . In that case, the applicant put forward a false plea of traffic jam on the date when the ex parte decree was set aside and so the order refusing to set aside the ex parte decree was affirmed. In support of his contention that the affidavit of Law Officer relied by the learned trial Judge was false and so this fact was seriously noticeable, reliance was placed upon State v. Shingara Singh, reported in AIR 1963 Punj 185.

10. On behalf of opposite party, it was pointed out that the scope to interfere in revision by this Court was limited one. It is not sitting as a Court of appeal and can sparingly interfere in exercise of its discretionary powers vide Sita Ram Sahu and Others Vs. Kedarnath Sahu, . Reliance was further placed upon Ramzan Ali Vs. Mt. Satul Bibi and Others, in support of the contention that the revisional jurisdiction of the High Court was entirely discretionary and must be exercised only in the interest of justice. Similar proposition was laid in K. Balasubramania Chetty Vs. N.M. Sambandamoorthy Chetty, .

11. So the contention was that the opposite party, who had already advanced a loan of Rs. 2,49,000/- to plaintiffs, should not be hampered in the recovery of that loan by the ex parte decree. It was not in the interest of justice that the opposite party should be denied even an opportunity to contest the suit on merits.

12. It appears that in his detailed order, the learned trial Judge has found that the defendant opposite party was not blameworthy if the ex parte decree was drawn against it on account of the wrong information supplied to it by Sri N. M. Acharya Advocate. Opposite party was not bound by any application of the Clerk of Sri N. M. Acharya in procuring the copy of the ex parte decree earlier before moving of application for setting aside the ex parte decree. Letter dated 12-5-1982, sent by revisionists to opposite party did not mention a word about ex parte decree. Learned trial Judge also found that the defendant-opposite party was kept in dark by the misconduct of his Counsel Sri N. M. Acharya, in between 16-3-1982 and 3-9-1982. It was only on inspection by Sri Om Prakash Parikh, another Advocate, on 3-9-1982 that the knowledge about the ex parte decree was gained by opposite party for the first time. He has believed the affidavit of Law Officer Sri Nilkanth. He also found the letter of Sri N. M. Acharya as genuine.

13. On the facts and circumstances mentioned above, it is not proper for me in exercise of revisional jurisdiction to disturb all these findings when there has

been no misreading of evidence nor any affidavit relied upon by learned trial Judge has been shown as demonstrably false. Learned trial Judge found that there were sufficient grounds for condonation of delay in the interest of justice. In the The State of West Bengal Vs. The Administrator, Howrah Municipality and Others, it was laid that the expression "sufficient cause" as used in Section 5 of Limitation Act, has to be liberally construed so as to advance substantial justice.

14. A similar view occurs in Smt. Sonadevi v. Deputy Director of Consolidation, Varanasi, reported in 1982 AWC 548: (1982 ALJ 980(1)). In Ramji Das v. Mohan Singh 1978 (1) ARC 496 the Supreme Court observed that where an ex parte decree is set aside by the Court which granted it then High Court should not exercise its discretion to set aside the order and restore the ex parte order.

15. In Rafiq and Another Vs. Munshilal and Another, , it was held that in a case where the appeal had been dismissed for default of appellant's counsel, the party should not suffer for misdemeanour or inaction of his counsel. It was observed at page 1401 : --

The disturbing feature of the case is that under our present advisory legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job."

16. I do not find anything apparent on record to show that the letter, which purports to have been drawn by Sri N. M. Acharya, was bogus and fabricated by U.P. Financial Corporation simply to corroborate the affidavit of their Law Officer. It is in the interest of justice that the claim must be contested by opposite party and the ex parte decree should not come in the way of opposite party.

17. In this view of the matter, I do not find it a fit case to interfere in revision when the Court below has not exercised a jurisdiction not vested in it by law nor failed to exercise jurisdiction so vested nor acted in the exercise of its jurisdiction illegally or with material irregularity.

18. In the result, the revision fails and is dismissed. Costs easy. Ad interim stay order dated 14-11-1984 is vacated herewith.

19. Let the record be sent to the Court below at the earliest for a quick disposal.