
(2012) 03 AHC CK 0162

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4945 (M/S) of 2006

Mujizun Nisan (Smt.) and others

APPELLANT

Vs

Additional District and Sessions Judge and others

RESPONDENT

Date of Decision : 26-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7, 11

Citation : (2012) 03 AHC CK 0162

Hon'ble Judges : Sibghat Ullah Khan, J

Final Decision : Allowed

Judgement

Sibghat Ullah Khan, J.

Heard learned counsel for both the parties.

This writ petition is directed against orders passed by the courts below rejecting petitioners' restoration application under Order IX Rule 13 C.P.C. First order was passed on 16.10.2004 by I Additional Civil Judge (Senior Division), Court No.20, Lucknow in Misc. Case No. 29C of 2000 rejecting petitioners' restoration application through which exparte decree dated 5.7.2000 passed in Original Suit No.51 of 1982 was sought to be set aside. Against the said order petitioners filed Misc. Civil Appeal No.202 of 2004 which was dismissed by Additional District Judge, Court No.12, Lucknow on 12.7.2006 hence this writ petition.

Predecessor in interest of the petitioners and proforma respondent no.4 was contesting defendant no.1 in the suit. He died on 17.11.1985. Application seeking substitution of the three petitioners and proforma respondent no.4 Smt. Nasreen Fatma was filed on 12.2.1986. Notices were issued several times. Service was also affected through publication in newspaper Lucknow Mail dated 13.1.1997. Ultimately on 17.2.1997 substitution application was allowed. The said order and subsequent orders have been quoted in paragraph 23 onward of the counter affidavit. On 24.2.1997 the trial court passed the order for issuance of summons to newly added defendants nos. 1/1 to 1/4 fixing 2.4.1997 for filing

written statement and 9.4.1997 for framing issues. Thereafter on 29.4.1997 it was noted that one of the heirs i.e. respondent no.4 in this writ petition was reported to be residing at America and rest of the heirs had not been served personally and it was further reported that they were avoiding the service. Thereafter it was directed that plaintiff should take fresh steps for service which was accordingly done. Thereafter on 27.7.1998 it was ordered by the trial court that the suit must proceed exparte as the registered envelopes had not returned back even though one month had expired and 31.8.1998 was fixed for exparte evidence.

Thereafter on 22.12.1998 application was filed by the petitioners under Order IX Rule 7 C.P.C. for recalling the order dated 27.7.1998. The said application was rejected on 24.4.2000. Thereafter exparte decree was passed on 5.7.2000. Restoration application under Order IX Rule 13 C.P.C. was filed on 25.7.2000 which was rejected by the impugned order and appeal filed against the same was also dismissed as stated above.

Learned counsel for the plaintiff/respondent has argued that as against order dated 24.4.2000 rejecting the application of the petitioners under Order IX Rule 7 C.P.C. no revision etc was filed hence subsequent restoration application was not maintainable. This is not correct legal position. Supreme Court in Arjun Singh vs. Mahendra Kumar A.I.R. 1964 S.C. 993 has held that "an order rejecting the application under Order IX Rule 7 is not of the kind which can operate as resjudicate so as to bar the hearing on the merits of an application under Order IX Rule 13". (Para16).

The question of service through publication etc is not much relevant as thereafter substitution application was allowed on 17.2.1997 and on the same date fresh notices were directed to be issued. The position prevailing thereafter has to be seen. On 24.2.1997 and 29.4.1997 plaintiff was directed to take steps both ways which was done by the plaintiff. The most crucial date is 29.4.1997. As till that date the court was not satisfied about the service hence on that date for the last time it was ordered that steps must be taken. The only thing which is mentioned in the order dated 29.4.1997 is that petitioners were reported to be avoiding the service but it is not mentioned that from what material the court gathered the said impression. In any case it is evident from the order dated 29.4.1997 that till then the court was not satisfied about the sufficient service upon the petitioners. In the order dated 27.7.1998 service was presumed as registered envelopes did not return even after one month.

In the impugned orders it is mentioned that petitioners had stated that some tenant had informed them about the case however, affidavit of that tenant was not filed. In my opinion it was not absolutely essential. In the matter of restoration etc. too strict view is not warranted vide Collector, Land Acquisition, Anantnag v. Mst. Katiji AIR 1987 SC 1353.

Learned counsel for the respondents has cited an authority of the Supreme Court

reported in Parimal vs. Veena 2011 (3) SCC 545. However, the facts of the said case were quite different. In that case husband's suit had been decreed ex parte and two years thereafter husband had remarried and was having two sons who were 17 and 18 years of age when the matter was being decided by the Supreme Court. In the said case the Supreme Court found that defendant wife had deliberately avoided the court.

However, in the instant case due to inordinate delay the plaintiff deserves to be compensated in terms of cost.

Accordingly, both the impugned orders are set aside. Restoration application of the petitioners is allowed on payment of Rs.20,000/ as cost. Written statement shall be filed alongwith cost of Rs.20,000/ on 30.4.2012. Thereafter both the parties shall appear before the trial court for framing of issues on 7.5.2012. The suit shall be decided very expeditiously. Absolutely no unnecessary adjournment shall be granted to any of the parties in any form. If any adjournment is granted it shall be on very heavy cost which shall not be less than Rs.500/ per adjournment. The suit shall positively be decided before the end of the year.

Writ petition is allowed accordingly. If the cost is not deposited by 30.4.2012 then this order shall stand automatically recalled and the writ petition shall stand dismissed.