
(2006) 05 JH CK 0144
In the Jharkhand High Court
Case No : C.R. No. 77 of 2005

Radha Krishna Agrawal

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 03-05-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 3, Order 9 Rule 3(2), Order 9 Rule 4, 151
Limitation Act, 1963 — Section 5

Citation : (2007) 2 BLJR 1116 : (2007) 2 JCR 254

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Advocate : P.K. Prasad and Ananda Sen, for the Appellant; M.S. Akhtar, S.C. II and Manoj Kumar Jha, for the Respondent

Final Decision : Allowed

Judgement

Narendra Nath Tiwari, J.—Heard the parties.

2. In this revision application the petitioners have assailed the legality and correctness of the order dated 30th of April, 2005 passed by Sub Judge I, Ranchi in Miscellaneous Case No. 1 of 1996 whereby the application for restoration of the suit under the provisions of Order IX Rule 4 read with Section 151 of the CPC has been dismissed. From perusal of the record it appears that the application for restoration was time barred, but in that application a composite prayer was made for condonation of delay as prayer No. 1 and for restoration. The said application was registered as Miscellaneous Case No. 1 of 1996. Notice was issued to the opposite parties who contested the said miscellaneous case. Since the petition for restoration was filed after a delay of about 6 months, the petitioners in the said composite application had explained the reason for delay stating, inter alia, that due to illness of his son, whose condition has become critical, he had to go to different places including a far off place in Madras for his treatment. The opposite parties in their reply, while contesting the said petition, had not

controverted the said statement relating to the explanation of delay on account of the treatment of his son at different places. The petitioner, thereafter, examined himself and has proved the statement made in the petition. No evidence in rebuttal was led by the defendants-opposite parties.

3. Learned court below has noticed the said fact that no oral or documentary evidence was led on behalf of the opposite parties. However, the Court below observed that though the petition for restoration was time barred, no separate petition u/s 5 of the Limitation Act was filed praying condonation of delay. Learned Court below has further observed that in his view there was no sufficient cause explained by the petition for restoration. He further observed that the petitioners had failed to file any medical proof in support of the ground of illness of his son taken by him and on the said" counts the Court below dismissed the said miscellaneous case.

4. Mr. P.K. Prasad, learned counsel appearing on behalf of the petitioners submitted that learned Court below has committed serious errors in making the said observation and dismissing the miscellaneous case of the petitioners on technical ground and without applying judicial mind. Learned counsel submitted that the petitioners had categorically made a prayer for condonation of delay in the prayer No.1 of the petition itself and there is no bar in filing a composite petition praying two reliefs. Learned counsel submitted that he had shown sufficient reason for condonation of delay, but the same has been rejected on the ground that the plaintiffs had not produced the medical documents in support of the illness of his son, whereas the statement made by the petitioners was not disputed by the defendants-opposite parties in their reply and the same was not even required to be proved. The petitioner who examined himself as A.W.I has supported the said fact stated by him in the petition. there was no evidence in opposition to rebut the said statement/evidence of the petitioners. He further submitted that the petitioners were informed by the counsel, but the Court below has questioned as to how the plaintiffs came to know when there was no inspection slip on record. Summing up, learned counsel submitted that the order of the learned Court below is wholly unfounded and based on conjectures and assumptions and is wholly erroneous and liable to be set aside.

5. Mr. M.S. Akhtar, learned counsel appearing on behalf of the opposite parties, on the other hand contended that though the statement regarding the illness and treatment was not controverted as it was not within the knowledge of the defendants-opposite parties, it was the duty of the petitioners to produce the supporting documents to prove the fact before the Court below. Learned counsel submitted that the petitioners should have filed a separate petition u/s 5 of the Limitation Act praying condonation of delay, but instead a prayer was made in the application for restoration itself and it has rightly been rejected by learned Court below. Learned counsel further submitted that there was no sufficient explanation for the delay in filing the miscellaneous case by the petitioners and learned Court below, having considered the materials on record, has rightly

dismissed the miscellaneous case.

6. After hearing learned counsel for the parties and on perusal of record, I find that in the application which was registered as miscellaneous case, the petitioners had made a specific prayer in paragraph 9(a) of their petition seeking condonation of delay under the provisions of Section 5 of the Limitation Act and in para 9(b) there is prayer for restoration under Order IX Rule 4 of the CPC was made. I further find that in reply the defendants-opposite parties did not controvert the petitioners' statement regarding the illness and treatment of their son at different places. The said statement remained uncontroverted. Even though the petitioner examined himself as A.W.1 and supported his statement, the evidence of said A.W.1 also remained uncontroverted and unrebutted as no evidence was produced by the opposite party in opposition. The explanation made in the application and proved by the petitioner as A.W.1, thus, explained both the default and the delay, but learned Court below disbelieved the same, only on the ground that the medical documents were not filed in support of the said explanation which was not at all required as the said fact was not denied or controverted by the opposite parties in their reply. The petitioners were, thus, able to show sufficient cause for their non-appearance on the date the suit was dismissed. Order IX Rule 4 of the CPC runs as follows:

Order IX Rule 4 - Plaintiff may bring fresh suit or Court may restore suit to file:- Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

7. On perusal of the provision, it is clear that while considering an application for restoration under this provision if the petitioner furnishes sufficient cause for his non-appearance it is imperative on the Court to make an order setting aside the dismissal and fix a date for proceeding with the suit. In view of the said mandate of the law, learned Court below should not have dismissed the miscellaneous case of the petitioners and should have restored the suit. The reasons assigned by learned Court below are wholly unsound and unsustainable in law. There is no legal impediment in praying for condonation of delay and for setting aside abatement in a composite petition nor there was any insufficiency of reasons for exercising the jurisdiction under Order IX Rule 4 of the Code of Civil Procedure. The impugned order is unsustainable in law and is, hereby, set aside. This civil revision application is allowed. The Title Suit No.11 of 1977 in the Court below is restored to its original file and stage. Let the Lower Courts' records be sent back to the Court below without any delay.