

(1991) 02 AHC CK 0060

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 93 of 1985

Rama Shankar

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 04-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 19
Limitation Act, 1963 — Section 5

Citation : (1991) 1 AWC 455 : (1991) RD 151

Hon'ble Judges : R.R.K. Trivedi, J

Bench : Single Bench

Advocate : R.S. Maurya and V.K.S. Chaudhary, for the Appellant;

Final Decision : Allowed

Judgement

R.R.K. Trivedi, J.—In this writ petition, counter and rejoinder affidavits have been filed and the learned Counsel for the parties are agreed that the writ petition may be heard and finally disposed of at this stage.

2. I have heard Sri V.K.S. Chaudhary learned Counsel appearing for the Petitioner and learned Standing Counsel. By means of this writ petition the Petitioner has sought quashing of order dated 23-7-84 passed in Misc. case No. 43 of 1983 by which application of the Petitioner for recalling the order dated 26th May 1978 and for restoring the appeal has been dismissed. It appears from the perusal of the documents filed that the Prescribed Authority by order dated 28th July 1976 determined 25.40 acria of irrigated land as surplus. Aggrieved by this order, Petitioner filed an appeal which was registered as appeal No. 546 of 1976 and which was pending before the 1st Civil Judge, Gorakhpur. In this appeal 26th May, 1978 was fixed for hearing. However, as neither the Petitioner nor his counsel appeared. The appeal was dismissed in default on 26th May 1978.

3. On 3rd February, 1983, Petitioner moved an application under Order 41 Rule 19 CPC and prayed that the order dated 26th May 1978 may be set aside and the

appeal may be restored to its original number. Petitioner also filed his affidavit which is on record and has been filed as Annexure 3 to the writ petition. On behalf of the State, a composite objection was filed opposing Section 5 application as well as application under Order 41 Rule 19 CPC. A copy of this objection has been filed as Annexure 4 to the writ petition. Learned civil Judge, after hearing the parties, dismissed this application by the impugned order dated 23rd July 1984 aggrieved by which this writ petition has been filed.

4. The case of the Petitioner mentioned in his application and affidavit was that he had fallen down from the roof and had suffered a serious head injury and he had lost his memory and he continued in this position for a long time. He was not in a physical position to have memory of the appeal pending before the learned Civil Judge and consequently could not attend and it was dismissed in default. If the order is not recalled he shall suffer irreparable loss and injury there was no other person in the family to look after the case. The learned Civil Judge has stated in his order that there is no evidence to support the allegations made by the Petitioner that his mental condition was such that he could not look after the case. The main reason for not accepting the case of the Petitioner appears to be that the medical certificate and other oral evidence or affidavits of the witnesses have not been filed. The reasoning given by the learned Civil Judge, Gorakhpur cannot be termed to be unreasonable but there is yet another aspect of the case which escaped the consideration by learned Civil Judge. The Petitioner filed an affidavit in support of his application. In this affidavit Petitioner has stated on oath all the facts. However this affidavit remained uncontroverted as no counter affidavit was filed on behalf of the State. This Court in number of cases has already expressed the view that the uncontroverted affidavits should not be ordinarily rejected unless there is something on the record itself to falsify the allegations made therein. The judgments reported in *Juggi Lal Kamla Pat Vs. Ram Janki Gupta and Another*, are cases where this position of law has been upheld. The Petitioner in para 8 (j) has specifically stated that no counter affidavit was filed by Respondents. This averment has not been denied in para 15 of the counter affidavit. Thus the affidavit filed by the Petitioner was on record which was, in my opinion, was sufficient evidence as there was nothing to rebut the facts stated therein. The learned Civil Judge, in these facts and circumstances, could not legally reject the application on the ground that no evidence has been filed by Petitioner in support of his application.

5. Hon"ble Supreme Court in a case *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, said that the courts should have a liberal approach towards expression "sufficient cause" employed by the legislature. The observations of the Supreme Court in para 3 of the aforesaid judgment can be gainfully quoted here:

The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matter on merits. The expression

"sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that :--

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. Every day's delay must be explained does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational commonsense pragmatic manner.
4. When substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.
5. There is no presumption that delay is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.
6. Now in view of the guidelines laid down by Supreme Court considering the facts that by the order of the prescribed authority Petitioner's 25.40 acres land was determined surplus and he would be deprived of this valuable land without having an opportunity of his case being examined by the appellate authority. In my opinion, he could ill afford to commit deliberate default in appearing before the court to prosecute his appeal. There is nothing on record to show that he was adopting dilatory tactics in this matter. In case the order dismissing appeal dated 26th May 1978 is not set aside, he may suffer injustice as the case may go unexamined by the appellate authority which is last court for consideration of the facts in the proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, whereas in case impugned order dismissing the appeal is set aside, no harm will be caused to anybody and the matter shall be examined by appellate authority on merits and the rights of the parties shall be determined after full hearing, which shall subserve the ends of justice.
7. For the reasons recorded above, the impugned order dated 23-7-1984 Annexure 5 to the writ petition is hereby quashed. The restoration application filed by Petitioner is allowed and the appeal No. 546 of 1976 filed by Petitioner shall stand restored to its original number. As the provisions of the Act have been amended and now the appellate powers have been conferred on the

Commissioner of the Division, the record of Appeal No. 546 of 1976 Rama Shanker v. State of U.P. shall be transmitted to the concerned authority for hearing and decision, who shall hear and decide the appeal as early as possible according to his convenience. There will be no order as to costs.