
(1999) 05 AHC CK 0126

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2276 of 1980

Salig Ram (Deceased) and Another

APPELLANT

Vs

Additional Civil Judge Aligarh and Others

RESPONDENT

Date of Decision : 11-05-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226

Citation : (1999) 05 AHC CK 0126

Hon'ble Judges : A.K.Yog, J

Final Decision : Allowed

Judgement

A.K. .Yog, J.—Heard Sri P. C. Jain, Advocate, Counsel for the petitioners and Sri T.B. Pandey, holding brief of Sri B.N. Misra, learned Counsel for Respondent Nos.3, 4 and 5.

2. Basant Lal Bhargavason of Fateh Chand and Smt. Parmeshwari Devi widow of late Fateh Chand filed Original Suit No. 684 of 1967 in the Court of Munsif, Koil (Aligarh). against present petitioners Salig Ram and Yogendra. Salig Ram, since died during pendency of the present petition, his legal representatives have been substituted under orders of this Court, suit was filed for decree to dispossess the defendants and taking over possession over the property in dispute after getting the disputed structures standing thereon demolished and removed. Suit was decided vide exparte judgment and decree dated 27101978 inasmuch as the defendants failed to appear before the court. An application under Order IX, Rule 13, Civil Procedure Code (CPC) was filed by the defendants, which was rejected by the trial court vide judgment and order dated 3171979 (AnnexureII). Feeling aggrieved, defendants filed Miscellaneous Appeal in the Court of District Judge (Aligarh) under Order LXIII, Rule 1, C.P.C. Said miscellaneous appeal was also rejected vide judgment and order dated 18121979.

3. The present Writ Petition was filed against order dated 2710 1978 (AnnexureD), order dated 3171979 (AnnexureII) and order dated 18121979

(AnnexureJ). An ad interim order dated 1231980 was passed as a consequence whereof execution of decree was stayed.

4. The present petition has been filed primarily on the ground that ex pane decree was passed against the defendants (now petitioners) without there being any prior notice or information of the date fixed. Petitioners, on the basis of the order dated 1131978,1141978,2641978and 1551978, contained in AnnexureE to the petition, want to show that when the trial court directed commissioner to submit its report, no date was fixed. The defendantpetitioners and their, Counsel remained under impression that after receipt of the commissioner's report. Court will fix some date under intimation to the parties. According to the petitioners, report was never submitted and, trial court committed an error apparent on the face of the record, as it proceeded with the hearing of the case without giving notice to the parties. Hence, petitioners pleaded that they were prevented by sufficient cause from joining proceedings. Petitioner further contended that as soon as he came to know of the ex pane decree as mentioned in his application under Order IX, Rule 13, C.P.C., he immediately filed an application without loss of time.

5. Unfortunately, none of the parties in the present proceedings have filed a certified copy or photostat copy of the entire order sheet of the trial court for the perusal of this Court so as to ascertain whether any date was fixed in presence of the parties or not. As the record stands, the impugned order dated 31 71989 passed by the trial court and the appellate court order dated 18121979 (AnnexureJ) show that these orders cannot be sustained as they suffer from error apparent on the face of the record. Trial court order dated 3171979 shows that it decided application under Order IX, Rule 13, C.P.C. against the defendants on the ground that it was not for the Court to give intimation of the date of hearing of the case⁴ to the concerned parties. This approach cannot be approved and is wholly preposterous in a given case no date was fixed to the knowledge of the defendants and Commissioner's report was not coming forth, trial court ought to have given notice to the defendants or to the defendant's Counsel. Trial Court also declined to believe the case of the defendants regarding acquiring knowledge of the ex pane decree by finding discrepancy to the extent that in the application it was mentioned that opposite party had disclosed factum of actual knowledge of the ex pane decree to himself whereas in his statement defendant disclosed that this information was given to the son of the defendant. This cannot be said to be a discrepancy of such a nature so as to disbelieve and reject the case of the defendant. Trial Court also observed, that period between 741979 to 941979 was not explained and, therefore, the defendants were not entitled to condonation of delay under Section 5, Limitation Act. If the defendant acquired knowledge of the ex pane decree on 641979 as asserted by them, it cannot be said that application under Order IX, Rule 13, C.P.C. was not within time. Even otherwise Section 5, Limitation Act does not require explanation of each day by mathematical calculation. The appellate Court also adopted the same reasoning and on account of discrepancy in the version given by the defendants in their

application under Order IX, Rule 13, C.P.C. and in its statement, decided against defendantAppellant.

6. After having perused the material on record, this Court finds that in the instant case there is nothing on record of this petition to show that the defendants petitioners were ever made aware or given notice, in any form, of the date fixed by the trial court after it took up the case on 1131978. Trial Court directed to send reminder to commissioner to send its report under order as per ordersheet, copy of which has been filed as AnnexureE to the petition. Even in the counteraffidavit paragraph 19, correctness of ordersheet (AnnexureE) has not been disputed. The contesting respondents only claim that it was the duty of the defendants and or their Counsel to find out further date fixed in the suit and that, according to the practice prevailing in Aligarh Civil Courts, cases were listed after expiry of time granted by the court and as such they ought have known that case shall be listed immediately on expiry of one month time was granted to the commissioner to submit report On such a stand taken by the contesting respondents, there remains no doubt that trial court fixed no date within the knowledge of defendants. No date was fixed on 1121978, 1131978, 1141978 and 2641978 in view of the fact that defendants were given no notice or information of the next date fixed and trial court decided to proceed without commissioner's report, ex pane, impugned order dated 3171979 (AnnexureII) passed by the trial court and order 18121979 (AnnexureJ) passed by the appellate court cannot be sustained and are liable to be set aside.

7. The Writ Petition is allowed and the impugned orders dated 3171979 (AnnexureII) passed by the trial court and order dated 18121979(AnnexureJ) passed by the appellate Court are quashed. Trial court is directed to decide the application under Order IX, Rule 13, Civil Procedure Code in accordance with law preferably within six months from the date of filing a certified copy of this judgment and order before it. There will be no order as to costs. Since suit in question was filed in the year 1967 and by now 32 years have already elapsed, it is desirable that the trial court should decide the suit expeditiously and with utmost promptness preferably not beyond six months. Petition allowed.