

(2010) 08 AHC CK 0228

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 47245 of 2010

Shadab and another

APPELLANT

Vs

Judge, Small Causes Court, Ghaziabad and another

RESPONDENT

Date of Decision : 11-08-2010

Acts Referred:

Citation : (2010) 08 AHC CK 0228

Hon'ble Judges : Rakesh Tiwari, J

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—Heard learned Counsel for the petitioners and perused the record. The facts of the case are that the shop in dispute is claimed to have been constructed on 1.4.1932 and given on rent @ Rs. 340/ per month to Sri Ibne Hasan; that the tenant had defaulted in payment of rent which was due upon him for the period 1.4.1990 to 21.12.1990, that registered notice dated 22.5.1990 was served upon the tenant terminating the tenancy. Sri Ibne Hasan died in the meantime. The notice by the landlord, aforesaid, was replied by Sakir Husain son of Ibne Hasan claiming himself to be the tenant of the shop in dispute According to landlord, since there was some inadvertent mistake in the aforesaid notice, hence another notice dated 31.8,1990 was again served upon the tenants which was replied to by them by means of reply dated 7.9.1990 inter alia that he was joint tenant with the other members of the family of late Ibne Hasan, the tenant.

2. Shishir Kumar, respondent No. 2 thereafter filed Suit No. 22 of 1990 in the Court of Civil Judge/Judge Small Causes Court on 22.12,1990 for a decree of arrears of rent and eviction of the tenant Ibne Hasan from The shop in dispute No. 30 (old No. 43/5B) situated in mohalla Kishanpura, Bulandshahr Road, Hapur district Ghaziabad,

3. Written statement in the suit was filed by respondent No. 3 in the suit on 4.5.1993 that they are defaulters or any rent is due from the tenants. It was also claimed that their tenancy in the shop is since 1975. It was stated in the written

statement that the landlord had himself not accepted the rent and correct facts in this regard had been given by the tenant on 23.8.1990 in reply to the notice of the landlord dated 22.5.1990. However service of the record notice by the landlord dated 31.8.1990 was denied and it WFIS prayed in the facts and circumstances the suit be dismissed with costs.

4. An application under section 5 of the Limitation Act was moved by Shadab Hasan son of Late Ibne Hasan resident of house No. 481 Nai Abadi Peer Waligali Hapor District Ghaziabadpetitioner No. 1 alongwith an application under Order IX, Rule 13 and section 151, C.P.C. supported by an affidavit praying for restoration of J.S.C.C Suit No. 22 of 1990 Shishir Kumar v. Smt. Rasidan and others by setting aside the ex parte order and judgment dated 17.3.2001 and decide the suit on merits. These applications and affidavit are appended as Annexure No. 3 to the writ petition. A perusal of these shows that the application filed under section 5 of the Limitation Act, Shadab Hasan has averred that there has been delay of 9 years 5 months and 10 days which is not deliberate and is liable to be condoned in the facts and circumstances of the case. From a perusal of application filed by Shadab Hasan Order IX, Rule 13 read with section 151, C.P.C. the circumstances for consideration of restoration of the suit are that he was not born when aforesaid Suit No. 22 of 1990 was filed that re parte suit proceedings were not in his knowledge as such he could not contest the case and that now he is 19 years old and has come to know about the case on 29.7.2001 at about 4.00 p.m. through his sister Ruksana. He has also averred that no summons have been served upon him that he has never refused any summons sent by registered post by the Court but postman in collusion with the landlord has made incorrect remarks in his favour and service shown upon him in fraudulent, It is lastly stated that publication in news papers of the notices in the aforesaid suit was not in proper compliance of the orders of the Court, having been published in local newspaper rather than national daily.

5. The allegations in the aforesaid two applications are supported by similar averments in the Affidavits dated 30.7.2010 shown by Shadab Husan. It may also be mentioned here that in the second affidavit dated 30.7.2010 he has averred on oath that the applicants have been got prepared by his Counsel. The contents of para 3 of the affidavit and those of paragraph Nos. 1 to 12 of this application have been sworn on personal knowledge,

6. Petitioner No, 2 Smt. Ruksana daughter of Late ibne Hasan resident of mohalla and Kasba Haraywali Tehsil Dhampur District Bijnor also moved application under section 5 of the Limitation Act for con donation of delay of 9 years 1 months and 23 days in filing of restoration application alongwith affidavit appended as Annexure No, 4 to the writ petition; inter alia that she came to know for the first time on 7.5.2010 about ex parte decree 17.3.2010 in the suit; that delay had occurred due to the fact that she had no knowledge about the suit proceedings due to the fact that summons had not been published in newspapers having wide circulation in the area such as "Damik Jagran", "Amar Ujaia",

"Rastriya Sahara", Navbharat" and "Hindustan." but were published in local newspapers published from Ghaziabad hence her nonappearance is not deliberate and delay is liable to be condoned and the suit be heard on merits.

7. In paragraph No, 5 of her application for restoration of the ease, she averred thus :

She also made allegation of summons not having been served upon her the post office stating that remarks on the summons sent by registered have been obtained by the landlord in his favour from the postman, by collusion.

9. Both the petitioners moved stay application before the Court below with affidavit of one Kalwa for staying of decretal amount of Rs. 85,000/ and for accepting Kalwa as guarantor for the said amount.

10. The Court vide order dated 30.7.2010 rejected the applications of the petitioners. The relevant contents of the orders on the applications of the petitioners is as under:

11. The averment made by the applicant Shadab appears to be incorrect He attained the age of majority a year back from the date of filing of the application. It is noted that the restoration application filed by Shahnaz and Shakir in the aforesaid suit had been rejected by the Court below against which a revision is pending. In so far as Ruksana is concerned, she was minor and about 7 years of age at the time of execution of the decree and after death of her father had gone to live in her maternal uncle's house (Mamu/Mama). She admittedly came to know about the case when she received summons from the Court in the execution case in 2010 when she was at her inlaws house after her marriage. Admittedly she was minor and tenancy could not have been devolved upon her. According to section 3 (g) of the Act the tenancy would first devolved firstly upon the spouse and thereafter upon others in the manner given thereunder i.e., it would Firstly devolve upon the spouse, then upon the male limit descendants and thereafter upon such parents, grand parents and any unmarried or widowed, divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her. Therefore, the tenancy first devolved upon the mother in the instant casts who admittedly did not file any written statement to contest the suit.

12. However, even if it is assumed that tenancy jointly devolved upon the family the notice is admitted to have been served upon Shakir Husain who filed the reply to the notice on behalf of family as tenant, therefore, on the same principle of claiming of joint tenancy by the petitioners notice is deemed to be served upon the family and the written statement filed by Shakir would be the written statement jointly filed by the members of the family including the petitioners. Hence case decided against Shakir would be case decided against all other members of the family of the deceased tenant.

13. Even otherwise according to the provision or Order XXX11, Rule 3 (a) the

decree against a minor is not liable to be set aside unless any prejudice is, caused,

14. in the Facts and circumstance and the written statement filed by Shakir in the case claiming himself to be the tenant in place of his deceased father denying the allegations of the plaintiff/landlord and the suit having been decided thereafter, it cannot be said that any prejudice is caused to the minors for moving application after they have attained majority, it appears that the applications have been filed only to prolong the hearing of the case and to impede the course of justice as even after almost 10 years, their revision against the judgment and decide is still pending. For the reasons the minors have not suffered any prejudice by the decree as judgment and the suit was pursued by the other adult persons of their family. The application for restoration have earlier been filed by Smt. Rasidan mother of the petitioner and respondent No. 2 by Shakir respondent No. 3, by Suit. Shahnaz, respondent No. 8 and Rukhsana, respondent No, 10 in the suit. The restoration application of Shahnaz and Shakir have already been rejected. The petitioners have filed applications after rejection of the restoration application of Shahnaz and Shakir. It therefore appears that the daughters who have already got married are filing the restoration applications for prolonging the dispute. It is neither claim of the aforesaid daughters nor of the mother or the petitioner No. 1 that they were working in the shop with the original tenant Ibne Hasan. In fact petitioner claims out to have been even born at in time of filing of the suit. Hence it appears that filing of the writ petition against the order regarding the restoration application by the petitioners who claimed themselves to be minor at that time of decision in the suit is abuse of process of Court, the writ petition is dismissed with the cost of Rs. 25,000/ which shall be deposited within one month failing which the petitioners may be proceeded in accordance with law.

15. It is further directed that the Revisional Court shall hear and decide all the applications pending in the revision as well as revisions on merits within a period one month from today. The contention of the learned Counsel for the petitioners that Parwana has been issued and the petitioners shall be evicted, is wholly misconceived as Rukhsana has married and living in her inlaws house at Hapur, she never lived with her mother, brothers and sisters after death of her father. As regards Shakir is concerned, the decree is binding upon him also.