
(2013) 09 AHC CK 0057
In the Allahabad High Court
Case No : C.M.W.P. No. 50551 of 2013

Shankar

APPELLANT

Vs

D.D.C.

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : (2014) 124 RD 364

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri O.P. Pandey, for the petitioners and Sri R.C. Singh, for the respondents. The writ petition has been filed against the orders of Assistant Settlement Officer Consolidation (respondents) dated 15.6.2012, condoning the delay in filing the appeal, from the order of Consolidation Officer dated 4.5.1976, by respondents-3 to 9 (hereinafter referred to as the respondents) and Deputy Director of Consolidation (respondent-1) dated 10.7.2013, dismissing the revision of the petitioners, against the aforesaid order, in the title proceedings under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. The respondents filed a time barred appeal (registered as Appeal No. 507/542) u/s 11 of the Act, from the order of Consolidation Officer dated 4.5.1976, passed in Case No. 434, u/s 9-A of the Act, alongwith delay condonation application. In the memorandum of the appeal, delay condonation application and the affidavit filed in support of it, it has been stated by the respondents that notices had not been served upon them. The service of the notice had been allegedly affected by pasting it, on the doors of the respondents but they had no knowledge of it and the order of Consolidation Officer dated 4.5.1976 was an ex parte order. On 1.12.1995, the petitioners, tried to take possession over the land in dispute, then they got inspected the records on 2.12.1995 and came to know about the order dated 4.5.1976; 3.12.1995 was

Sunday as such the appeal was filed on 4.12.1995.

The petitioners filed objection and counter-affidavit in the delay condonation application, in which they denied the allegations made in the affidavit. They have stated that notices were, received to the parties; Brahm Deo, who was karta of the joint family was doing pairavee, on behalf of the all the parties; Brahm Deo appeared before the Consolidation Officer on the date fixed in the notice and got his statement recorded before the Consolidation Officer and consented for partition of the shares of the parties in khata in dispute, as mentioned in CH Form-5. His statement was recorded by the Presiding Officer and signed by him on which Brahma Deo had put his thumb-impression. Accordingly, the respondents had knowledge of the order from very beginning. The appeal was mala fide filed with the delay of 19 years 7 months. The delay in filing the appeal was not liable to be condoned.

3. The delay condonation application was heard by Assistant Settlement Officer Consolidation (respondent-2), who by order dated 15.6.2012 found that although it has been stated that statement of Brahm Deo was recorded by the Consolidation Officer but in the order dated 4.5.1976, the statement was not mentioned and the order has been passed without framing issues; Such an order, comes in the category of "marginal order" and not liable to be accepted under the law. The notices attached in the record shows that notices had been served through pasting it on the doors and were not served personally. On these findings delay in filing of the appeal has been condoned and a date was fixed for arguments in the appeal, The petitioners filed a revision (registered as Revision No. 699) from the aforesaid order. The revision was heard by Deputy Director of Consolidation (respondent-1) who by his order dated 10.7.2013 held that as by the impugned order, delay in filing of the appeal has been condoned and a date has been fixed for arguments in the appeal. In deciding the delay condonation application, liberal view is required to be taken as such the Assistant Settlement Officer Consolidation has not committed any illegality in condoning the delay. There is a dispute between the parties, in respect of their share which is required to be decided according to the law. On these findings the revision was dismissed by the order dated 10.7.2013. Hence this writ petition has been filed.

4. The Counsel for the petitioner submitted that the dispute with regard to share of the recorded tenure-holders in khata-132, was raised during partial and the respective shares of the co-sharers, as claimed during partial, was noted in CH Form-4 at serial No. 158, under Rule 19 of the U.P. Consolidation of Holdings Rules, 1954 (hereinafter referred to as the Rules). Thereafter, the notice in CH Form-5 has been issued to the tenure-holders, according to the provisions of Rule 25(c), in which dispute regarding share of the co-sharers was mentioned. The parties did not appear before Assistant Consolidation Officer, on the date fixed, as such conciliation was not done by him. Assistant Consolidation Officer, therefore, referred the dispute to the Consolidation Officer for decision on merit and notices were issued to the parties fixing 4.5.1976, under Rule 25-A (2) of

the Rules. The notices could not be served personally as such the process server affected the service of the notices by pasting it on the doors of the parties, in presence of two witnesses, Kailash and Hari Singh who had signed the duplicate of the notice. Brahm Deo, who was karta of the joint family was doing pairavee, on behalf of all the co-sharers as such he appeared before the Consolidation Officer on the date fixed in the notice and his statement was recorded by Consolidation Officer, which contained his thumb-impression and was signed by the Presiding Officer. On the basis of consent given by Brahm Deo, the order dated 4.5.1976 was passed. He submitted that Rule 58(2) provides one of the mode for service by pasting the notices on the doors in presence of two witnesses as such notices were served according to the provisions of law. In any case, the parties came to know about the proceedings and appeared before Consolidation Officer and statement of Brahm Deo was recorded. On the basis of order of Consolidation Officer dated 4.5.1976, the share of the parties was given effect to in the Revised Annual Register, CH Form-11. Thereafter on its basis CH Form-23 was prepared and chaks of all the co-sharers were prepared separately. Thus all the respondents had knowledge of the order from very beginning. At least, Brahm Deo had knowledge of the order from very beginning. Inordinate delay of about 21 years was not liable to be condoned. There was no cause, what to say "sufficient cause" for condonation of delay. The delay has been illegally condoned without examining the record and considering the objections of the petitioners in the counter-affidavit. Respondent-1 has illegally dismissed the revision as not maintainable, although the question of limitation is a question of jurisdiction and the order condoning the delay cannot be termed as an interlocutory order. He placed reliance on the judgment of this Court in State of U.P. and Another Vs. Dhampur Sugar Mills Ltd., in which it has been held that law of limitation harshly affects a party and it has to be applied with all its rigour, delay can only be condoned on the sufficient cause" being shown and not on a mercy ground.

5. I have considered the arguments of Counsel for the parties and examined the record. By virtue of section 53-B of the Act, section-5 of the Limitation Act, 1963 has been applied to the proceedings under the Act. u/s 11 of the Act, 21 days limitation has been provided for filing the appeal from the date of the order. The arguments of the petitioners are that (i) the parties came to know about the notice issued by Assistant Consolidation Officer, as it was pasted on their doors, (ii) Brahm Deo, who was karta of the family and was doing pairavee on behalf of the all the co-sharers, appeared before the Consolidation Officer and got his statement recorded and the order was passed thereafter as such Brahm Deo had knowledge of the order from very beginning and (iii) the order has been given effect to in Revised Annual Register, CH Form-11 and CH Form-23 and the chaks of all the co-sharers were prepared separately as such the order was enforced much before and all the parties had knowledge of it at least from the date of its enforcement. On the other hand, the respondents took the case that they had no knowledge of the proceedings as well as the order dated 4.5.1976 before,

2.12.1995. On 1.12.1995, the petitioners tried to enforce the order, then they got inspected the records on 2.12.1995 and came to know about it for the first time. Thereafter the appeal was filed on 4.12.1995 as 03.12.1995 was Sunday.

6. The first question arises as to whether the respondents had knowledge of the order earlier. The provision of the Limitation Act, 1963 are *pari materia* with the provisions of the Act as such the principles of law as provided therein can be taken as a guiding factor. Article 123 of the Limitation Act, 1963, provides 30 days for filing an application for setting aside *ex parte* decree from the date of the decree, when the summons were personally served and in case of substituted service, from the date of the knowledge of the decree. By virtue of Explanation added in it, it has been clarified that substituted service cannot be treated as the personal service. Admittedly, there was no personal service and the service of the notice was effected by pasting the notice on the doors, which is a substituted service. Thus limitation for filing the appeal will be started from the date of the knowledge of the order.

7. In paragraph-5 of the writ petition, it has been stated that 28.4.1976 was the date fixed for conciliation before the Assistant Consolidation Officer on that day parties did not appear before him as such he referred the dispute to Consolidation Officer fixing 4.5.1976 for decision on the merit and issued notice for appearance of the parties before him, fixing 4.5.1976, which has been served by pasting it on the doors. The petitioners have stated in the counter-affidavit, filed in delay condonation application that Brahm Deo was "karta" of the family and he used to do *pairavee* in the litigation. Therefore he alone appeared before the Consolidation Officer, in compliance of the notice on 4.5.1976 and got his statement recorded, which was signed by the Presiding Officer and bears thumb-impressions of Brahm Deo and the order was passed on the same day on its basis as such Brahm Deo had knowledge of the order from very beginning. Thus none of the petitioners appeared either before the Assistant Consolidation Officer or before the Consolidation Officer as such their statement that Brahm Deo got his statement recorded before the Consolidation Officer on 4.5.1976, which was signed by the Presiding Officer and bears thumb-impressions of Brahm Deo, cannot be believed as they had no personal knowledge of these facts and specifically denied by the respondents. It is very strange that the petitioners raised a dispute claiming their shares to be 1/2 jointly in the khata in dispute, although according to the pedigree, their share was 1/5 jointly, even then the petitioners did not care to appear before the Assistant Consolidation Officer or the Consolidation Officer. It may be mentioned that at the time of service of CH Form-5, a notice in proforma CH Form-5-B is also issued by Assistant Consolidation Officer, giving twenty-one days time for filing objection. The petitioners although raised the dispute claiming their more share during partial but did not file any objection, nor they appeared before Assistant Consolidation Officer where the conciliation was possible as Brahm Deo was not contesting their claim, nor they appeared before the Consolidation Officer, which could not be a normal conduct of the petitioners. In case, CH Form-5 or notice dated

28.4.1976 would have been served then the petitioners must have necessarily attended the proceedings.

8. The petitioners further took the plea that Brahm Deo was "karta" of the family and he used to do pairavee in the litigation on behalf of the family members. Brahm Deo therefore alone appeared before the Consolidation Officer on 4.5.1976 and got his statement recorded. The identity of Brahm Deo before Consolidation Officer was not verified either by any advocate or by the members of Consolidation Committee. In the absence of verification of the identity, it was not possible for the Consolidation Officer to record statement of Brahm Deo. As mentioned by Settlement Officer Consolidation that Consolidation Officer neither framed any issue nor fixed any date for evidence of the parties and straight way recorded statement which was not a normal procedure. In these circumstances, recording of statement of Brahm Deo by the Consolidation Officer is highly suspicious and rightly disbelieved by respondent, as the respondents had denied it.

The petitioners have not stated that when the partition took place in the joint family. Further they could not give any reason for issuing a separate notice to them although khata was jointly recorded and in such circumstances either the notices ought to have been issued to all the co-sharers separately or only one notice as the khata in dispute was jointly recorded. Thus the statement of the petitioners in this respect also does not inspire any confidence. Even if, the chaks were carved out separately in the names of the members of the family, but as the family was joint, then there could have no occasion to the members to know about the order of Consolidation Officer as all of them were co-sharing cultivation in every chak and not strangers to whom a separate chak had been allotted, particularly when the parties were illiterate. In these circumstances, no inference can be drawn that the respondents had knowledge of the order before 2.12.1995 and the statement of the respondents that they had no knowledge of the order, earlier, cannot be disbelieved. If the respondents had no knowledge of the order, this was sufficient cause for condonation of delay. Quantum of delay is immaterial.

9. Supreme Court in Collector (L.A.) v. Katiji, 1987 (13) ALR 145 (SC) held that the legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters 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 sub-serves the ends of justice, that being the life-purpose for the existence of the institution of Courts and laid down a guidelines to examine the "bona fide of the reasons" "sufficiency of the cause" and condonation of the delay as follows:

"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 common sense pragmatic manner.

4. When substantial justice and technical considerations 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 occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary 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."

10. Supreme Court again in B. Madhuri Goud Vs. B. Damodar Reddy, held that the expression "sufficient cause" used in section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years Courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay. On the basis of the aforesaid discussion, respondent-2 has not committed any illegality in condoning the delay. Since the appeal will be heard on merit, no prejudice will be caused to the petitioners. At this stage, no interference is required by this Court. The writ petition has no merit and is dismissed.