
(1994) 02 AHC CK 0041
In the Allahabad High Court
Case No : Civil Misc. Writ No. 31095 of 1993

Smt. Malti Devi

APPELLANT

Vs

Hon"ble Board of Revenue, U.P. and others

RESPONDENT

Date of Decision : 24-02-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1963 — Section 5
Uttar Pradesh Tenancy Act, 1939 — Section 190, 59

Citation : AIR 1995 All 26 : (1994) 2 AWC 1081

Hon'ble Judges : Sudhir Narain, J

Bench : Single Bench

Advocate : V.K. Shukla and S.L. Yadav, for the Appellant; Standing Counsel and S.N. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

1. This writ petition is directed against the order dated 17th Sept 1992, passed by Additional Commissioner, Varanasi Division, Varanasi, making reference to the Board of Revenue for setting aside the order dated 20th Feb. 1991, passed by Sub Divisional Magistrate, Ghazipur, whereby the application for restoration was allowed and the order of Board of Revenue dated 5th. July, 1993, accepting the said reference made by the Additional Commissioner.

2. The facts, in brief, are that respondents 3 and 4 had filed a suit against the petitioner under Sections 59/190 of U.P. Tenancy Act on 30th June, 1972 for declaration of their rights over the land in dispute in the said suit, the petitioner had filed written statement and denied the allegations of the plaintiffs. The suit was dismissed for default on 7th Sept. 1974. The Respondents filed an application for restoration. The restoration application was allowed on 19th December, 1974. The suit was again dismissed in default for non- appearance of the plaintiff-respondents on 7th August, 1975. It was again restored. The matter

again proceeded and again the plain tiff-respondents did not appear in the case and it was dismissed for default on 2nd May, 1977.

3. After a gap of about twelve years, proceedings u/s 145 Cr.P.C. were initiated on the report of the Station House Officer, Kotwali, Ghazipur. The proceedings were, however, dropped by the Sub Divisional Magistrate, Ghazipur, by his order dated 11th January, 1990. It was found that the petitioner was in possession on the date of preliminary order. After the decision of Sub Divisional Magistrate, the respondents filed suit No. 167 of 1990 on 26th February, 1990, in the Court of Munsif, Ghazipur for restraining the petitioner from interfering in their possession. They also prayed for interim injunction. The learned Munsif, on the date of filing of the plaint, granted interim injunction. The petitioner filed objection to the said application and, after hearing counsel for the parties, the trial court vacated the injunction order on 26th April, 1990. The respondents filed an appeal against the said order and the said appeal is alleged to be pending.

4. On 14th June, 1990, the respondents filed an application before the Sub Divisional Officer in Suit No. 14 of 1972 to recall the order dated 2nd May, 1977, whereby the suit filed by them was dismissed in default. In the application they stated that the suit was dismissed on 17th June, 1977 for default of the parties and as none of the parties were present, their application was maintainable under Order IX, Rule 4, C.P.C. It was further stated that there was litigation between the parties in Criminal and Civil Courts and the applicants could not file application for restoration in time. Subsequently, the counsel for the applicants advised them to file an application to recall the order dated 6th May, 1977, and, therefore, they are filing the application to that effect. This application was opposed by the petitioner stating that the respondents had full knowledge of the order dated 2nd May, 1977. They had been deliberately avoiding to appear in the Court. In the suit her possession has been found in proceedings u/s 145, Cr.P.C. and there was no litigation pending between the period 2nd May, 1977 till 10th August, 1989, when proceedings u/s 145, Cr.P.C. were initiated.

5. The Sub Divisional Officer by his order dated 20th February, 1991, rejected the application by holding that there was no sufficient ground for condoning the delay and for recalling the order dated 17th May, 1977. The respondents preferred a revision before the Commissioner, Varanasi Division, Varanasi, and the Additional Commissioner by his order dated 17th Sept. 1992, made a reference to the Board of Revenue recommending that the revision be allowed. The Board of Revenue has accepted the reference and allowed the application filed by the respondents and recalled the order dated 2nd May, 1977. The petitioner has filed the writ petition against the order.

6. I have heard learned counsel for the parties.

7. The application was filed after a gap of about thirteen years. In the restoration application, no reason had been given why the respondents did not appear on 2nd May, 1977. Secondly, in the application the reason for delay was explained

by stating that as criminal and civil proceedings were pending, the counsel advised them to proceed in the matter which is already before the Criminal Court or before the Civil Court, but subsequently they advised to file an application to recall the order dated 2nd May, 1977. The Additional Commissioner and Board of Revenue did not record any finding as to why the petitioner did not appear on 2nd May, 1977, and secondly whether, in fact, any proceeding in criminal or civil court was pending as alleged by the respondents so as to explain the delay in filing an application after a gap of thirteen years.

8. If a person files an application to recall a particular order or to set aside the ex parte order, the defendant's right is also affected and the precedent condition for allowing application is that there must be some sufficient cause to justify to allow that application. Unless the necessary findings are recorded, which could justify in allowing the application, the Court cannot arbitrarily in every case without recording any finding condone the delay and set aside the ex parte order.

9. Learned counsel for the respondents has cited various decisions in support of his contention that the court should be liberal in allowing the application u/s 5 of the Limitation Act and this Court should not interfere in an order passed by an authority condoning the delay under Art. 226 of the Constitution of India.

10. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , it was held that the High Court should not interfere under Art. 226 of the Constitution of India where no injustice is caused in the case. In A.M. Allison Vs. B.L. Sen, , the same view was taken.

11. In Rafiq and Another Vs. Munshilal and Another, , it was held that where an appeal filed, by appellant was disposed of in absence of his counsel, and his application for recall of order of dismissal was rejected by the High Court, their Lordships of the Supreme Court took the view that the parties should not suffer for misdemeanour or inaction of his counsel.

12. In Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , it was held that the Court should adopt liberal approach in condoning the delay moved u/s 5 of the Limitation Act. In Rama Shanker v. State of U.P. 1991 Rev Dec 151: (1991 AH LJ 395), it was held that while considering the sufficient cause, the court should adopt a liberal approach and it is not necessary that every day's delay must be explained. In Smt. Ram Thakura v. Deputy Director of Consolidation 1975 Rev Dec 270, it was held that where delay in filing the appeal before the Settlement Officer (Consolidation) was condoned, the High Court should not interfere in writ jurisdiction in such orders. Similar view was taken in Allaha Tala through Mutawalli Smt. Fatma v. D.D.C. 1993 Rev Dec 41 and Sukhdeo v. D.D.C. 1993 Rev Dec 1: (1993 All LJ 179).

13. It is true that the court should adopt a liberal approach while condoning the delay in allowing the application for setting aside the ex parte order on a restoration application when the case is dismissed in default because the court has to take into account complex human problems. The application has, however,

to establish his bona fide. In case the application is not bona fide and the rights of the opposite party is being defeated the court is not to allow the application merely on the supposition that by granting the hearing to the parties justice will be done to them. In *Ram Lal v. Rewa Coal Field* AIR 1962 SC 361 laid down the following tests while considering an application to condone delay (at p. 363 of AIR):--

"In construing S. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone the delay and admit the appeal."

It was further emphasised in the following words that proof of sufficient cause is a necessary condition precedent (at p 365 of AIR):-

"It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by S. 5. If sufficient cause is not proved nothing further has to be done, the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay."

In *State of U.P. and another Vs. Surendra Nath and others*, , a Division Bench of this Court held that unless sufficient cause was shown and proved, the applicant is not entitled to condonation of delay in filing appeal.

14. In the instant case, the application was filed after thirteen years. The conduct of the contesting respondents indicate that it was dismissed in default twice and twice it was restored and it was the third time the suit was dismissed in default on 2nd May, 1977. The application was filed after thirteen years. They had not given any reason in the application as to why they did not appear on 2nd May, 1977. The reason which they had given in restoration application for delay was that the matter regarding the disputed property was pending before the Criminal and Civil Courts and they were advised to contest those cases and later on they were advised to file application for restoration of suit No. 14 of 1972. The Board did not examine whether any litigation was pending as alleged by the respondents from 2nd May, 1977 till 10th August, 1989, when the proceedings, were initiated u/s 145, Cr.P.C. In proceedings u/s 145, Cr.P.C., it was found that the petitioner was in possession on the date of preliminary order and ultimately the proceedings were dropped on 11th January, 1990. It was necessary to record

finding on the correctness of version of the respondents. The application has to be allowed or rejected after considering the allegations made by the applicant and the objection which has been raised on behalf of an opposite party. These aspects have not been looked into by the Board or Revenue before allowing the application filed by respondents u/s 5 of the Limitation Act.

15. Learned counsel for the respondents urged that this Court should not interfere under Art. 226 of the Constitution of India because in granting the hearing to the parties justice will be done. The concept of justice has to be viewed so as to both the parties may get justice. In case, the rights of an opposite party is defeated illegally, it will be injustice to him. It has to be considered on the facts of each case when the application is to be allowed or rejected. Considering the facts of the present case, it is necessary that respondent No. 1 be directed to reconsider the matter afresh keeping in view the observations made above and in accordance with law within two months from the date of production of a certified copy of, this order after giving opportunity of hearing to the parties.

16. In view of the above, the writ petition allowed, the order dated 5th July, 1993, hereby quashed and respondent No. 1 is directed to decide the reference against as directed above.

17. The parties shall bear their own costs.

18. Petition allowed.