
(2009) 02 AHC CK 0055

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11317 of 1983

Sohan Lal and another

APPELLANT

Vs

A.D.J., Gyanpur, Varanasi and others

RESPONDENT

Date of Decision : 03-02-2009

Acts Referred:

Citation : (2009) 02 AHC CK 0055

Hon'ble Judges : S.U.Khan, J

Final Decision : Allowed

Judgement

S.U. Khan, J.—This writ petition was allowed by me on 23.9.2008 without hearing any one on behalf of contesting respondents as no one had appeared on their behalf. Thereafter, rehearing application was filed. Thereafter, the matter was heard on different dates and affidavits, counter affidavits and supplementary affidavits were filed by both the parties. On 7.1.2009, arguments of learned Counsel for both the parties were heard on the rehearing application as well as on the merit of the writ petition and judgment was reserved.

2. Paragraphs No. 2 and 3 of my judgment dated 23.9.2008, which contained necessary facts, are quoted below:

"Petitioners or their predecessors in interest filed O.S. No. 196 of 1975 against respondents No. 3 & 4, Mithai lal and Jawahar lal. The suit was decreed ex parte on 5.11.1977. Copy of the exparte judgment is Annexure CA3 to the counter affidavit. The suit was decreed for permanent prohibitory injunction restraining the defendants from interfering in the possession of the plaintiff. It was further directed through the said ex parte decree that the defendants should remove their possession over the land in dispute within a month and shall deliver possession of the land in dispute to the plaintiff.

Thereafter, execution application was filed numbered as Execution Case No. 66 of 1980. In the execution proceedings, Commission was issued to the Amin. Amin reported that pucca constructions were there in the form of a pucca house and

unless decree for demolition was passed, simple decree for possession could not be executed. Trial Court/Executing Court/Munsif, Bhadohi, Varanasi rejected the execution application through order dated 4.8.1981 holding that in execution of a decree for possession alone, a pucca house could not be demolished as no order of demolition was there in the decree. Against the said order, Civil Revision No. 551 of 1981 was filed, which was dismissed by A.D.J., Gyanpur, Varanasi through order dated 31.5.1983, hence this writ petition."

3. I am satisfied that sufficient ground for nonappearance on 23.9.2008 when writ petition was allowed ex parte has been made out. Accordingly, the said order is set aside subject to cost. The aspect of cost will be dealt with afterwards in this judgment.

4. The main argument of learned Counsel for the respondent is that against ex parte decree, restoration application had been filed and in the restoration application, execution of the decree had been stayed and the restoration application has not yet been decided. Copy of ordersheet of restoration case (Misc. Case No. 140 of 1978) has been annexed along with supplementary affidavit filed by the respondents on 5.11.2008 and copy of order sheet of revision has been annexed along with supplementary affidavit filed on behalf of petitioner on 16.12.2008. In the restoration case on 30.8.1978, following order was passed:

"Issue notice to O.P. fixing 30.9.1978 for objection and disposal. Meanwhile, the execution of decree in Civil Suit No. 196 of 1975 is stayed till further order."

5. The said order sheet runs till 26.3.1983. Thereafter, there is no entry in the said order sheet. In the order sheet of the civil revision on several dates orders were passed that file of the original case should be summoned. On several dates in the order sheet, it is mentioned that file of Misc. Case No. 140 of 1978 had not been received. Such orders on the order sheet are of 21.12.1982, 20.1.1983, 7.2.1983 and 25.2.1983. Thereafter, matter was heard on 13.4.1983 and judgment was delivered on 31.5.1983. On 16.4.1983, an order was passed directing the case to be put up for further hearing on 7.5.1983. Matter was again heard on 7.5.1983.

6. From the perusal of the order sheet of the revision, it is clear that order for summoning the file of restoration case was passed and revision was adjourned on several dates on the ground that the said file had not been received. Thereafter, there is no entry as to whether file was received or not? In the impugned judgment of the revisional Court also there is absolutely no mention in that regard. Learned Counsel for the respondents categorically stated that the file of the restoration case was summoned and till date it is lying in the record room tagged with the file of the civil revision.

7. It is rather strange that learned A.D.J., who decided the revision, did not say a single word regarding stay order granted in the restoration case. There is no mention either in the order sheet or in the judgment that file was not received.

In any case if file was not received, then either fresh direction for getting the file should have been issued or it should have been mentioned that it is not traceable or it was not essential to peruse the said file for deciding the revision.

8. From the perusal of the order of the executing Court dated 4.8.1981, it is clear that respondents defendants were not heard. They were heard only in revision. Revisional Court should have considered the point raised by the respondent that execution application was not maintainable as execution had been stayed in restoration case. Probably, Revisional Court was of the opinion that as revision was to be otherwise dismissed, hence it was not necessary to consider that aspect.

9. In my judgment dated 23.9.2008, I decided the legal question regarding maintainability of execution application and power of executing Court regarding demolition of the house. However, this question requires consideration as to whether execution application could proceed in view of stay order granted by the Court in restoration case (Misc. Case No. 140 of 1978).

10. Learned Counsel for the respondent has not argued anything against the legal view taken by me on 23.9.2008.

11. In case restoration application has not yet been decided, then it is very strange.

12. Accordingly, writ petition is allowed. Both the impugned orders are set aside and it is held that in view of the authorities of this Court reported in Mohd. Ismail v. Asif Hussain, AIR 1970 All. 648 and Dakhilal Khushwaha v. A.D.J., 1986 ALJ 582 = 1986 AWC 10 = 1986 (12) ALR 1 (Sum.) in execution of decree for possession, demolition can be ordered. The contrary view of the Courts below is erroneous in law and is set aside.

13. Learned Counsel for the petitioners has argued that matter should not be remanded on the ground that restoration application is pending and in case restoration application is allowed, defendant/J.D. under section 144, C.P.C. may seek reversal of the order of execution. The argument is not tenable. If order of stay had not been passed in the restoration case prior to passing of order by the Executing Court then the application of the said principle could be considered.

14. Matter is remanded to the Executing Court. The Executing Court shall decide restoration application (Misc. Case No. 140 of 1978), if not already decided and the execution case (Misc. Case No. 66 of 1980) simultaneously. Both the a as are consolidated (provided that restoration application is still pending).

15. Under interim order passed on the rehearing application, respondents have deposited Rs. 20,000/ before Court below Let this amount of Rs. 20,000/ be paid to the petitioners as cost of restoration of this writ petition and cost for the negligence of the respondents in not pursuing with their restoration application before the Trial Court for such a long time.

16. Both the parties are directed to appear before Trial Court/executing Court on 5.3.2009. Executing Court/Trial Court at the relevant time was Munsif Bhadohi at Gyanpur, District Varanasi. Now the area in question is included in District Bhadohi/ Sant Ravidas Nagar. Accordingly, parties shall appear before Munsif City (or by whatever name that Court is called in the District in question). Trial Court/ Executing Court shall positively decide the matter within three months from the date on which parties appear before him along with certified copy of this judgment. If the files are in District Varanasi, then District Judge, Varanasi shall immediately send the file to District Sant Ravidas Nagar/ Bhadohi.

17. Office is directed to send a copy of this order to District Judge, Varanasi and District Judge, Bhadohi/Sant Ravidas Nagar within a week.