
(2011) 07 AHC CK 0015
In the Allahabad High Court
Case No : C.M.W.P. No. 51051 of 2003

State of U.P. and another

APPELLANT

Vs

Smt. Gauri Banerji

RESPONDENT

Date of Decision : 19-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Succession Act, 1925 — Section 372

Citation : (2012) 5 AWC 4506

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : Kirty Kumar Nirkhi, for the Respondent

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—Heard learned standing counsel for the petitioners and perused the record. By means of this writ petition, the petitioners have prayed for a writ of certiorari calling for the record and quashing of the order dated 4.9.1999 passed by Additional Judge, Small Causes Court, Allahabad (Annexure-5 to the writ petition) as well as the order dated 19.2.2002, passed by Additional District Judge, Court No. 11, Allahabad (Annexure-7 to the writ petition) and order dated 30.8.2003 (Annexure-9 to the writ petition) passed by the executing court.

2. Annexure-5 order dated 4.9.1999 is one of the orders, by which the application filed by the petitioners for recalling of the ex parte decree under Order IX, Rule 13 of the C.P.C. supported by an affidavit by the plaintiff was rejected. Aggrieved by the said order, Misc. Appeal No. 180 of 1999 was preferred by the plaintiff, which too was dismissed, confirming the findings that petitioners had knowledge about the pendency of the suit.

3. According to the petitioner, the case is to be decided on its own merits under the proviso of Order IX, Rule 13 of the C.P.C. and sufficiency of cause, should be

liberally interpreted by the Court. It is stated that subsequently in the Execution Case No. 17 of 1998, the executing court had attached the amount under decree from the accounts of the petitioner No. 2 vide order dated 19.11.2002 and subsequently vide order dated 30.8.2003, the petitioner No. 2 was directed to pay the whole of the amount under decree to the plaintiff. It is these orders which are impugned in the writ petition.

4. The brief facts of the case are that Original Suit No. 736 of 1995 was preferred by the respondents with the allegation that husband of the plaintiff Sri Ratindra Nath Banerji was a Government servant in the office of the Secretary, Madhyamik Shiksha Parishad, Allahabad who died and leaving the heirs a sum of Rs. 35.000 by way of security consisting of Gratuity, Provident Fund and other dues payable to a Government servant on retirement or death. The plaintiff-respondents had obtained a succession certificate for realization of the aforesaid amount u/s 372 of the Indian Succession Act and in spite of the fact that respondent had presented the succession certificate being entitled in law to receive the said amount it was not paid to him hence a decree for a sum of Rs. 35,000 alongwith interest at the rate of 12% was prayed.

5. It is claimed that summons were not served on petitioner No. 2, therefore, recourse for substitutive service was taken, which was acted upon the petitioner through a publication in news paper. Thereafter, the suit proceeded ex-parte. As the petitioner did not appear, the suit was decided ex-parte vide judgment dated 31.5.1990 (Annexure-2 to the writ petition), but on coming to know about the ex-parte order an application dated 5.2.1998 for recalling of the said order and decree, was moved supported by an affidavit under Order IX. Rule 13, C.P.C.

6. An objection was filed to the said application by the plaintiff, inter alia, that petitioner No. 2 had knowledge of the pendency of the suit. It was stated that once the Court summoned the original records and the original records were produced before the trial court. After production of the original records before the trial court, If the petitioners are now coming with the case that they had no knowledge of the pendency of the suit, the story set up by the petitioners is untrue.

7. It is urged that correct facts are that the petitioners had through out knowledge of the suit and they deliberately did not appear before the Court; that Court vide its order dated 4.9.1999 dismissed the application filed by the petitioners; that aggrieved by the order dated 4.9.1999, Misc. Appeal No. 180 of 1999 was preferred in which specific grounds were taken that the order of the court below was incorrect and hence liable to be set aside. Vide order dated 19.2.2002, the Misc. Appeal No. 180 of 1999 was dismissed following the finding that the petitioners through out had knowledge about the pendency of the suit. Aggrieved by the aforesaid two orders, the petitioners have filed this writ petition challenging the orders impugned on the ground that every case should be decided on its merits and under the provisions of Order IX, Rule 13, C.P.C. and the sufficiency of cause should be liberally considered.

8. Counsel for the petitioners submit that the version set up by the petitioner No. 2 that they had no knowledge of the pendency of the suit cannot be disbelieved as it is highly probable that the records may be produced in the Court and all these facts may not have been brought to the knowledge of the Secretary and the Deputy Secretary Incharge of Litigation of the Board, as such the effective pairvi could not have been done from the office of the petitioner No. 2 for want of communication. The petitioners submit that in each and every Government offices there has been a tendency of delaying the matter and moving the file slowly due to procedural requirements. In view of the aforesaid facts it could not be said that the reasons advanced by the petitioner No. 2 for condonation of delay and for setting aside the ex-parte decree were not sufficient.

9. It is then submitted by learned counsel for the petitioner "sufficiency of cause" has been liberally interpreted by the Apex Court in a number of decisions and it has been held that no party should be made to suffer by ex-parte decree as it would be always in the fitness of thing that every matter is decided on merits; that as both the courts below have erred in law on the subject hence in any view of the matter since the money was to be paid from the State exchequer which is a public money, the Court ought to have taken a lenient view and decided the matter on merits.

10. It is stated that an Execution Case No. 17 of 1998 has been registered. In the execution proceeding, the execution court vide order dated 19.11.2002 has attached the amount under decree from the account of the petitioner No. 2. Subsequently vide order dated 30.8.2003, petitioner No. 2 had been directed to pay the whole of the amount under decree to the plaintiff as such there is eminent apprehension that amount under decree may be recovered from petitioner No. 2 and as such it is expedient in the interest of justice that the proceeding and operation of order dated 30.8.2003, passed in Execution Case No. 17 of 1998 be stayed on equitable consideration.

11. On question of delay, it is argued that immediately after the order was delivered by the Additional District Judge Court No. 11, Allahabad on 19.2.2002, the pairokar of petitioner No. 2 contacted Sri Surendra Kumar Srivastava, Government advocate, who was the panel lawyer, to apply for a certified copy of the order. He directed the pairokar to bring the requisite amount/fees for applying the same, therefore, the pairokar immediately returned to the office and put the note about the requisite fee which was paid to him on 11.3.2002. On the same day, i.e., 11.3.2002 the pairokar paid the requisite fee and requested Sri S.K. Srivastava to apply for certified copy of the judgment and order. On 6.4.2002, the pairokar contacted the panel lawyer in some other case in the District Court. Allahabad and asked about the judgment, the counsel said that it has not been applied but it will be applied very soon. In the circumstances, the executing court has recorded a finding for delay was not deliberate; on the ground that on 23.4.2002, 3.7.2002, 4.7.200, 17.7.2002, 9.8.2002 and 16.8.2002 the pairokar had to contact the panel lawyer Sri S.K. Srivastava but

the certified copy was not applied by him. Ultimately after several reminders the lawyer applied for certified copy. It was made ready on 10.1.2003 and copy of the same was taken on 27.1.2003 by the lawyer of the petitioner who informed pairakar on the same day about the copy being ready. Thereafter, the pairakar contacted the office of the D.G.C. (Civil), Allahabad about the future course of action. The pairakar was advised that he should challenge the order in writ jurisdiction before this Court and ultimately a request was made to the office of Joint Legal Remembrancer through Joint Secretary for obtaining the permission. After several reminders U.P. Government sent permission to file civil revision on 13.5.2003. When the file was shown to the concerned standing counsel he advised that instead of civil revision a writ petition should have been filed against the orders impugned. Again a letter was sent to the Legal Remembrance for obtaining permission for filing writ petition which took sometime. Ultimately it was decided in the office of the chief standing counsel that pending permission for filing the writ petition, writ petition may be prepared and as and when the permission is received, the same may be filed at once. There has been no wilful or deliberate negligence on the part of the petitioners in filing the writ petition, but the same is procedural. However, if any laches are found, the same are liable to be condoned on the facts and circumstance. After hearing learned counsel for the petitioner I am of the view that delay in moving the Court is not procedural. It reeks of inefficiency and lethargy of the department, its panel lawyers. The office of legal remembrancer which admittedly acted and took decision for filing revision in the matter after several reminders and the Government counsels. The delay appears to be wilful as Court matters may not be given due priority even though all of them are aware of law of limitation. In my view the courts below have rightly come to the conclusion that the petitioners had knowledge about the facts of the case and succeeded. There is no illegality or infirmity in the orders impugned dated 4.9.1999 and 19.2.2002, passed by Additional Judge, Small Causes Court. Allahabad and Additional District Judge, Court No. 11, Allahabad respectively.

For all the reasons stated above, the writ petition is accordingly dismissed.

No order as to costs.