

*** HIGH COURT OF DELHI : NEW DELHI**

CM (M) No. 1099/2010 & CM No. 15466/2010 (stay)

% Judgment reserved on: 27th August, 2010

Judgment delivered on: 31st August, 2010

Smt. Saraswati (since deceased)
Represented through her LRs:

1. Sh. Mahipal Singh
S/o late Sh. Sohan Lal
2. Sh. Rakesh Kumar
S/o late Sh. Sohan Lal

Both residents of:
J-15/9-A, Jai Prakash Nagar,
Ghonda, Shahdara,
Delhi – 110 053

....Petitioners.

Through: Mr.V.K.Khurana, Advocate.

Versus

Smt. Sushila Rani,
W/o late Sh. Kishore Chand Gupta,
R/o 336-A, Hari Nagar, Ashram,
New Delhi – 110 014

....Respondent

Through: None

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |

3. Whether the judgment should be reported
in the Digest?

Yes

V.B.Gupta, J.

Petitioners have filed present petition under Article 227 of the Constitution of India where by they have challenged order dated 1.10.2004 passed by Civil Judge, Delhi, vide which application under Order 9 Rule 13 read with Section 151 of Code of Civil Procedure (for short as 'Code') moved on behalf of legal heirs of Judgment Debtor (petitioners herein), was dismissed and also order dated 6th July, 2010 vide which their appeal was dismissed by Additional Sr. Civil Judge, Delhi.

2. Brief facts of the case are that, in 1982 Smt. Sushila Rani, respondent (who was plaintiff in the trial court), filed a suit for possession against Smt. Saraswati (defendant in the trial court) since deceased. Present petitioners are the legal representatives of Smt. Saraswati. Smt. Saraswati was duly served in the suit, but she did not appear despite service and as such was proceeded ex parte.

3. Vide judgment dated 30.8.1983 passed by Sh. Z.S.Solanki, Sub-Judge-III, Delhi, suit of respondent was decreed.

4. In application under Order 9 Rule 13 of the Code, it is stated that petitioners have come to know for the first time after having received summons from the trial court in application under Order 22 Rule 4 of the Code that decree has been passed on 30th August, 1983. Thereafter, they engaged counsel who inspected the main file and it was revealed that during the course of fire that has taken place in the civil record room, file of main case has been burnt. It is alleged that deceased mother of petitioners during her life time did not receive any summon or notice from the trial court. It appears that Decree Holder has played fraud upon the Court as suit was filed in year 1982 and execution petition have been filed either beyond the period of limitation or at the fag end of limitation period. Thus, judgment and decree dated 30.8.1983, is liable to be set aside.

5. It is contended by learned counsel for petitioner that deceased Smt. Saraswati had never received any kind of summon or notice from any Court or at any point of time. Execution application was filed almost after a period of 12 years after passing of the ex parte judgment and there is a strong presumption that respondent might have manipulated the alleged service of summons on deceased Smt. Saraswati and ex parte decree has been obtained by fraud.

6. It is also contended that findings of First Appellate Court that, bailiff being a Government servant has to be believed, is against the principles of natural justice. Petitioners ought to have been given opportunity for producing evidence of process server and as such impugned orders are liable to be set aside.

7. In entire application under Order 9 Rule 13 of the Code, petitioners have nowhere stated as to on which date they came to know about passing of ex parte decree against deceased Smt. Saraswati. As per this application, case of petitioners is that “the legal representative of Judgment Debtor have for the first time came to know regarding passing of decree dated 30.8.1983 in Suit No.705/1982, after having received the summon from the Court in an application under Order 22 Rule 4 and Section 151 CPC.”

8. Petitioners deliberately, have not placed on record the copy of that summon so as to show as to on which date they have received notice of application under Order 22 Rule 4 and Section 151 CPC. Since Smt. Saraswati was served long back in year 1983 and ex parte judgment and decree was passed against her on 30.8.1983, present application under Order 9 Rule 13 of the Code, filed in year 2002, is hopelessly time barred.

9. Rule 13 of Order 9 of Code reads as under:

“Rule-13 Setting aside decree ex parte against defendant- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff’s claim.]

[Explanation-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree]”

10. It is well settled that “sufficient cause” as per this provision, for non appearance in each case, is a question of fact. This Court in *New Bank of India Vs.M/s. Marvels (India): 93(2001)DLT558*, held;

“No doubt the words "sufficient cause" should receive liberal construction so as to advance substantial justice. However when it is found that the applicants were most negligent in defending the case and their non-action and want of bonafide are clearly imputable, the Court would not help such a party. After all "sufficient cause" is an elastic expression for which no hard and fast guide-lines can be given and Court has to decide on the facts of each case as to whether the defendant who has suffered ex-parte decree has been able to satisfactorily show sufficient cause for non-appearance and in examining this aspect cumulative effect of all the relevant factors is to be seen.”

11. Trial court in impugned order dated 1st October, 2004 held:-

“The judgment and decree were passed long back on 30/08/1983 against deceased Smt. Saraswati of whom the applicants are the L.R.'s and as per the judgment so passed by Sh. Z.S.Solanki that deceased deft. was served and then proceeded ex-parte for non-appearance dispute service. The judicial file of the suit is no more available as having been burnt in fire accident having taken place in the record-room. So, the recording in the judgment is the only record to be relied upon. No sufficient ground has been shown as to why deceased deft./judgment debtor could not appear despite service. It is not the question of the L.R.'s of deceased deft. to show sufficient cause for their non-appearance in the court. But the question is about the deceased deft.”

It further observed;

“I have carefully perused the reports of the bailiff filed in execution petition and on perusal, it reveals that on 19/05/1998 when the bailiff went for the

execution purpose at the residence of Smt. Saraswati Devi at Khasra No. 666, Jai Prakash Nagar, Ghonda, Shahdara Delhi – 53 House No. J-15/9A, Smt. Saraswati Devi (Judgment Debtor) alongwith the wife of Mahipal were very much present and again on 21/01/1999, the bailiff again went to the place of judgment debtor for execution purpose and in his report, it is clearly stated that Smt. Saraswati (the judgment debtor) was present at the spot. And it is clearly stated by Smt. Saraswati Devi (J.D.), as per the report of the bailiff that my son is not present and I will show the documents in the court and I do not know about the case at this time. I will not vacate the house nor I will write anything on the warrant as I am an illiterate lady. Again on 5.7.2001, when bailiff went again to the place of J.D. for the execution purpose, the suit premises of the J.D., Smt. Saraswati was found locked and on the enquiry, it was found that Smt. Saraswati (J.D.) is no more.

On perusal, it is clear that the factum of execution was very much in the knowledge of the J.D. Smt. Saraswati. But the present application under Order 9 Rule 13 filed on 1.3.2002. When the factum of execution proceedings was very much in the knowledge of the Smt. Saraswati since 1998, then why the present application was filed in the year 2002.”

12. In this regard relevant findings of the First Appellate Court read as under;

“There are judicial orders available in the trial Court file which clearly shows that warrants of possession were issued against judgment debtor for taking possession of the suit premises. In pursuance thereto, the bailiff also visited the suit premises three times on different dates i.e. 19.05.1998, 21.01.1999 and 05.07.2001 but unfortunately

possession of the suit premises could not be taken for one reason or the other. It goes without saying that the bailiff is a public servant who had gone to the site in discharge of his official duty and the reports of bailiff in respect of all the aforesaid three dates, were filed in their official capacity. The said reports carry a presumption of truthfulness of the contents mentioned therein and it is for the person to rebut the same in case he/she disputes its correctness. Thus, it was for the appellants to show as to how and in what manner, all the said three reports of three different bailiffs given at three different times are false or incorrect. Merely because the said reports do not contain signature of deceased judgment debtor or that no independent witness has been joined, alone cannot be sufficient ground to overlook or disbelieve the said reports. Moreover, there is no requirement in law that the bailiff should get the signature of judgment debtor or his representative on his report made on the site or to join any independent witness in each and every case and each and every time.

For all the above reasons, this Court is of the view that the view taken by Ld. Civil Judge that the deceased defendant/judgment debtor was shown to be well within the knowledge about the decree since 1998, is appropriate and does not call for any interference from this Court.”

It also observed:-

“Once the appellants who have stepped into the shoes of deceased defendant/judgment debtor are shown to be within knowledge of decree since 1998 and the application under Order 9 Rule 13 CPC having not been filed within the prescribed period of limitation which is thirty days even from the date of knowledge as per Article 123 of The Limitation Act, the said application was bound to

be dismissed being barred by limitation. For this very reason, the submission of Ld. Counsel for the appellants that the entire conduct of the respondent has been malafide in obtaining the decree by playing fraud, cannot be appreciated. Ld. Trial Court has rightly observed that the plea of appellants that execution petition has been filed beyond the prescribed period of limitation, cannot be raised in application U/o 9 rule 13 CPC and they are well within their right to raise this plea before the Executing Court.”

13. This court cannot act as a court of appeal to re-appreciate material on basis of which courts below gave concurrent findings, as observed in *Madan Mohan vs. Prem Lata Malhotra & Ors.* 170 (2010) DLT 106;

“It is settled law that under Article 227 of Constitution of India, this Court cannot act as a Court of appeal to re-appreciate the material on the basis of which the two Courts below had given concurrent findings. This Court under Article 227 of the Constitution of India had no jurisdiction to set aside the concurrent findings of two Courts below who come to a conclusion that the petitioner had deliberately avoiding service and was duly served by publication. I find no reason to set aside this finding of two Courts below.”

14. As per record, suit was filed in year 1982 which was decreed in 1983. Application under Order 9 Rule 13 of the Code was filed in 2002 , that is, about 20 years after passing of the decree. This clearly shows that only purpose of filing this application is to deprive the

decree holder the fruits of decree, which was passed long ago, that is about 27 years ago. In this regard observations made by Apex Court in *Ravinder Kaur vs. Ashok Kumar & Another (2003) 8 SCC 289* are quite relevant which read as under:-

“Courts of law should be careful enough to see through such diabolical plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system.”

15. After scanning through the orders of Courts below, no illegality or infirmity can be found in these orders. Present petition under Article 227 of the Constitution of India is most frivolous, bogus and mischievous one and is liable to be dismissed with heavy costs. The same is dismissed with costs of Rs.50,000/- (Rupees Fifty thousand only).

16. Petitioners are directed to deposit the costs by way of cross cheque with Registrar General of this court, within four weeks from today.

17. List for compliance on 6th October, 2010.

CM No. 15466/2010 (stay)

18. Dismissed.
19. Copy of this order be sent to the trial court.

31st August. 2010
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V.B.GUPTA, J.