

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CM.(M) 1735/2005

% Judgment delivered on: 21.1.2011

Smt. Vidya Devi petitioner.

Through: Mr. Dinesh Kumar Gupta, Adv.

versus

Smt. Ramwati Devi Respondent.

Through: Mr. O.P. Aggarwal, Adv.

**CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR**

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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 |

KAILASH GAMBHIR, J. Oral

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1. By this petition filed under Article 227 of the Constitution of India, the petitioner seeks quashing of the

order dated 4.9.2002, passed by the learned Additional District Judge whereby the application of the petitioner filed by her under Section 5 of the Limitation Act was dismissed.

2. Before I proceed to deal with the contentions raised by the counsel for the parties, it would be appropriate to state the brief background of facts of the case.

3. A suit for specific performance was filed by the respondent against the petitioner seeking specific performance of the agreement to sell dated 24.9.1987. The said suit was decreed ex-parte by the learned trial court on 13.5.1988, but subsequently on the application moved by the petitioner the said ex-parte decree was set aside by the learned trial court vide order dated 1.11.1988. After the said ex-parte decree was set aside, the petitioner had filed written statement and thereafter the issues were framed by the learned trial court. But when the case was fixed for evidence of the respondent, the same was dismissed in default by the learned trial court due to the non appearance of the respondent vide order dated 20.8.92. A restoration

application was moved by the respondent to seek restoration of the said suit and in the said application the petitioner had appeared on 4.9.1995. Since nobody appeared from the side of the respondent, the same resulted in dismissal of her application. The respondent then moved application under Order 9 Rule 9 CPC. The said application moved by the respondent was restored by the learned trial court without directing notice of the same upon the petitioner. On 24.7.1996 the petitioner was proceeded ex-parte in the said application and the suit was restored by the learned trial court on the same day. Once again on 14.8.1996, the suit was dismissed in default and yet another application was moved by the respondent on 22.8.96 seeking restoration of the suit. The said suit was again restored by the learned trial court on 4.12.96 and the matter was adjourned by the learned trial court for ex-parte evidence. On 20.12.96, the evidence was adduced by the respondent and the learned trial court heard final arguments on the same day and thereafter reserved the matter for orders. Vide

order dated 8.1.97, an ex-parte decree for specific performance was passed by the learned trial court against the petitioner and in favour of the respondent. After passing of the said judgment and decree an execution application was moved by the respondent and without directing any notice upon the petitioner, the learned trial court directed appointment of Local Commissioner through whom the sale deed was executed and registered in favour of the respondent. When the petitioner learnt about the said ex-parte judgment and decree dated 8.1.97 on 24.12.1999, she filed an application under Order 9 Rule 13 CPC along with an application under Section 5 of the Limitation Act. The said application filed by the petitioner under Section 5 of the Limitation Act was dismissed by the learned trial court vide impugned order dated 4.9.2002 and as a result of the dismissal of the said application, the application moved by the petitioner under Order 9 Rule 13 CPC was also dismissed.

4. Assailing the said order dated 4.9.2002, Mr. D.K. Gupta, counsel for the petitioner contends that the

respondent has played fraud not only upon the petitioner but upon the learned trial court as well, as the respondent failed to take steps to serve the petitioner after the dismissal of her case in default on various occasions. Counsel for the petitioner also submits that the learned trial court has adopted a hyper technical approach while dismissing the application filed by her under Section 5 of the Limitation Act instead of doing substantial justice between the parties. Counsel for the petitioner also submits that the petitioner explained sufficient reasons for not filing the condonation application within the prescribed period of limitation, but yet the learned trial court ignored the sufficient reasons given by the petitioner in her said application. Counsel further submits that reasonable opportunity was not granted by the learned trial court to the petitioner to substantiate the averments made by her in the said application by leading evidence and therefore abrupt dismissal of the said application is in gross violation of the principles of natural

justice and ultimately the same has resulted into causing serious miscarriage of justice.

5. Opposing the present petition, Mr. Aggarwal counsel for the respondent submits that the petitioner has been most negligent in her conduct throughout the proceedings i.e. before the learned trial court as well as in filing the present petition. The contention of the counsel for the respondent is that the petitioner failed to disclose any sufficient reason for not filing the application under Section 5 of the Limitation Act within the prescribed period of limitation from the date of her coming to know about the dismissal of the suit. Counsel further submits that not only there was a delay before the learned trial court but before this court as well the petitioner has preferred the present petition after a lapse of about three years period from the date of passing of the said order dated 4.9.2002.

6. Elaborating his arguments further, counsel for the respondent submits that the present petition was preferred by the petitioner after another suit was filed by

the respondent claiming decree of possession and mesne profits against the petitioner was decreed by the learned trial court vide judgment and decree dated 15.4.2004, and even after the appeal against the said judgment and decree was preferred by the petitioner vide RFA No.617/2004. Counsel thus submits that even the present petition would not be maintainable on account of inordinate and unexplained delay and laches on the part of the petitioner.

7. I have heard learned counsel for the parties at considerable length and gone through the records.

8. In the application filed by the petitioner under Section 5 of the Limitation Act and also in the application under Order 9 Rule 13 CPC, the petitioner disclosed that she had received the notice dated 15.12.99 on 24.12.99, which was handed over by her to one Mr. R.S. Gulia, Advocate who did not take any steps in the matter and had expired on 21.1.2000. The petitioner thereafter managed to get back the notice and engaged a new counsel on 29.1.2000. In the application it was further stated that the petitioner had got

the case file inspected in the first week of May 2000, and thereafter she got filed the said applications on 8.5.2000. Since the petitioner in her both the said applications failed to give any reasons for not filing the application between 29.1.2000 till 8.5.2000, therefore the learned trial court did not find any ground to condone the delay in filing the application by the petitioner under Order 9 Rule 13 CPC. The learned trial court also did not find any merit in the explanation given by the petitioner that since due to the dismissal of the said case on four occasions different goshwara numbers were given, therefore, the same resulted in not locating the file for a long period of four months. The learned trial court further found that the petitioner did not disclose the fact that for how long the lawyers remained on strike during the said period of delay.

9. Under Article 123 of the Limitation Act, the limitation for filing an application to set aside an ex-parte decree is 30 days and the time begins to run from the date of the judgment and decree or where the summons or notice

were not duly served from the date when the applicant has derived knowledge of the decree. In the facts of the present case, the learned trial court passed the ex-parte judgment and decree dated 8.1.1997 while the said application under Order 9 Rule 13 and application under Section 5 of the Limitation Act were filed by the petitioner on 8.5.2000. The petitioner has claimed knowledge of the said ex-parte judgment and decree dated 8.1.1997 on 24.12.99 when she had received the notice from the court in the other case. Prior to this date the petitioner has claimed total ignorance about passing of the said ex-parte judgment and decree against her. From the said date of notice dated 15.12.99, 30 days period came to expire on 14.01.2000. In both the applications the petitioner has failed to advance any explanation as to why the said applications could not be filed by the petitioner within the said period of 30 days from the date of the receipt of the notice. The only explanation given by the petitioner is that she had handed over the notice to Mr. R.S. Gulia, Advocate who had expired on 21.1.2000. Even if the said

period is condoned, then also the petitioner should have explained the delay from 29.1.2000 when she had engaged a new advocate. Even from that date again no explanation has come forth from the petitioner to explain the delay. The petitioner has also not disclosed as to when the counsel for the petitioner had taken steps to inspect the file and how the counsel did not succeed in carrying out the inspection of the said four files and how come the counsel for the petitioner could only inspect the files in the first week of May, 2000.

10. To seek condonation of delay under Section 5 of the Limitation Act, the applicant should have explained each day's delay or at least sufficient reasons for not filing the application within the period of 30 days from the date of the knowledge as prescribed under Article 123 of the Limitation Act. Once having not given any sufficient or plausible explanation to explain the delay, can it be still said that the learned Trial Court should have exercised discretion in favour of the petitioner to condone the delay. The Hon'ble

Apex Court in a catena of judgments has taken a view that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. The Apex Court in ***Special Tehsildar, Land Acquisition, Kerala Vs. K.V. Ayisumma, (1996) SCC 634***, also held that the approach of the Court should be pragmatic and not pedantic. There cannot be any dispute with the above said legal position as it stands that the technicalities cannot be given precedence over the substantial justice and substantive rights of the parties. In every case the endeavour of the court should be to decide the lis between the parties on its merits. The courts are also required to see whether any party to the suit has been adopting dilatory tactics to cause unnecessary and inordinate delay in final disposal of the case due to mala fide and oblique reasons. The ex-parte judgment and decree in the present case was passed by the trial court on 08.01.1997 and the petitioner claimed knowledge of the said judgment and decree only on 24.12.99. It can be hardly believed that the petitioner

would not have known the said judgment and decree dated 8.1.97, when the other case filed by the respondent i.e. suit for possession was being hotly contested by the petitioner. Nevertheless, even if the explanation given by the petitioner is accepted as correct, then she should have at least taken prompt steps in filing the said applications to seek setting aside of the ex-parte decree. It is one thing that one is not able to give plausible and sufficient reasons for delay while it is another thing if one does not offer any explanation as to how and for what reasons delay has taken place in filing the application. Here is a case where there is no explanation on the part of the petitioner in not taking timely steps to file the said applications. In the absence of any such explanation given by the petitioner, the court was not expected to assume on its own as what reasons could have prevented the petitioner to file the said applications. Although the petitioner was not seen crossing the bridge so far her feeble case before the learned trial court was concerned, yet another hurdle that came in the way of the

petitioner was the failure of the petitioner to explain the reasons for not filing the present petition for a period of about three years. Nowhere in the present petition the petitioner has given any explanation for not challenging the said order dated 4.9.2002, of which certainly the petitioner cannot feign ignorance. The petitioner was fiercely contesting the other case filed by the respondent i.e. suit for possession and it is only when the decree in the suit for possession was challenged by the petitioner in RFA No.617/2004, the petitioner woke up from her deep slumber to challenge the said order dated 4.9.2002 in the present petition. There is thus evidently gross unexplained delay and laches on the part of the petitioner in filing the present petition.

11. Taking in view the totality of the facts and circumstances of the case, this court is not inclined to exercise jurisdiction in favour of the petitioner who not only failed to act reasonably or to give any explanation for delay in filing the application under Order 9 Rule 13 and Section 5 of

the Limitation Act before the learned trial court, but has further failed to challenge the said order expeditiously or at least within a reasonable period of time. The legal maxim *Vigilanibus, non dormientibus, jura subvenient* which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him. The present case is an ideal example where the delay has proved to be catastrophic to the cause of equity and it is expected of people approaching the portals of law to be alert in espousing their cause.

12. In the light of the above, there is no merit in the present petition, hence the same is hereby dismissed.

January 21, 2011
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KAILASH GAMBHIR, J