

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 9074 of 2023

Petitioner :- Yogendra Prasad Gupta

Respondent :- Rambabu

Counsel for Petitioner :- Dinesh Kumar Singh

Hon'ble Jayant Banerji,J.

1. Heard learned counsel for the petitioner.
2. This petition has been filed by the defendant-petitioner for setting aside an order dated 27.7.2023, passed by the District Judge, Mirzapur in Misc. (Delay) Case No. 156 of 2021 (Rambabu Vs. Yogendra Prasad).
3. By the order aforesaid, the District Judge has allowed an application filed by the plaintiff-appellant under Section 5 of the Limitation Act for filing the appeal against the order dated 21.9.2021, passed by the Civil Judge (Junior Division) in Original Suit No. 1310 of 2018 while deciding issue No.7., by means of which, the application (5C) was allowed with cost of Rs. 500/-.
4. The contention of the learned counsel for the petitioner is that the dispute between the parties was settled in view of a decree passed in Original Suit No. 286 of 2004 (Yogendra Vs. Rambabu), which had attained finality and on the basis of pleadings in Original Suit No.1310 of 2018, issues were framed, one of them being that whether suit would be barred by the principle of *res judicata* and the plaint is liable to be rejected under Order 7 Rule 11(D) CPC. This issue was decided as a preliminary issue by the trial court by its order dated 21.9.2021 holding the suit to be barred. Challenging the order dated 21.9.2021, the plaintiff filed Misc. Appeal alongwith an application under Section 5 of the Limitation Act. The application under Section 5 was registered as Misc. (Delay) Case No. 156 of 2021 which was allowed by the impugned order dated 27.7.2023.
5. The contention of the learned counsel for the petitioner is that the plaintiff had full knowledge of the date of the order dated 21.9.2021 as he was present in court on that day. It is stated that without taking into account the fact of presence of the plaintiff on 21.9.2021 in court, the District Judge has proceeded to allow the application under Section 5 of the Limitation Act without discussing the facts involved and without considering the objection

filed by the petitioner.

6. A perusal of the order dated 21.9.2021 reflects that the trial court has referred to the previous case filed by the defendant-petitioner and has observed that the suit would be barred by the principle of *res judicata* and the suit was dismissed. In the application under Section 5 of the Limitation Act, it was stated by the plaintiff that on 21.9.2021 when he went to contact his Advocate, he came to know that his advocate had taken his nephew for treatment to Allahabad and as such was not available. It is stated that again when the plaintiff went on 5.10.2021 to Civil court at Mirzapur, he came to know that nephew of the advocate had passed away and his advocate was engaged in the last rites and other religious formalities with regard to his nephew and that his advocate would be available after 20.10.2021. It was stated that on 22.10.2021 when the applicant reached the District Court then he came to know that his case had been dismissed on 21.9.2021. Thereafter, certified copies of the decree and other document was applied for on 22.10.2021 which were received on 30.10.2021. When he went on 31.10.2021, he was informed that his advocate had gone to Delhi and will return on 3.11.2021. The plaintiff then met his advocate on 3.11.2021, whereafter, the application and appeal were prepared and filed. Objection was filed by the defendant-petitioner, who alleged carelessness and negligence on the part of the plaintiff in filing the appeal with delay.

7. After considering the facts made in the application and the objection, the District Judge found ground for condonation of delay to be sufficient and, accordingly allowed the application under Section 5 of the Limitation Act with cost of Rs. 500/ by the impugned order dated 27.7.2023.

8. In my opinion, the delay in filing the appeal has been sufficiently explained.

9. For the reasons aforesaid, there is no ground for interference and this petition is, accordingly, **dismissed**.

Order Date :- 29.11.2023

sfa/

(Jayant Banerji, J)