

Court No. - 6

Case :- MATTERS UNDER ARTICLE 227 No. - 1268 of 2021

Petitioner :- Narendra Bahadur

Respondent :- District Judge -Lakhimpur Khiri And Ors.

Counsel for Petitioner :- Raghaw Ram Upadhyay,Surendra Kumar Verma

Counsel for Respondent :- Prabhakar Vardhan Chaudha,Surya Prakash

Hon'ble Rajnish Kumar,J.

1. Heard Shri R.R. Upadhyay, learned counsel for the petitioner and Shri P.V. Chaudhary, learned counsel for the respondent nos.3 to 5. The respondent nos.1 and 2 are the court concerned.

2. This Court had passed the following order on 06.12.2023, recording the arguments of learned counsel for the parties:-

"1. Sri R.R. Upadhaya, learned counsel for the petitioner submits that the petitioner had filed a suit bearing No.365 of 2002 for recovery of money because the agreement to sale executed by the father of the respondent nos. 3 to 5 was not performed and the sale deed was not executed, whereas the money was taken from the petitioner. The father of the respondent nos. 3 to 5 appeared in the proceedings and filed his written statement. Thereafter he did not appear, therefore the suit was allowed exparte by means of the judgement and decree dated 12.01.2004. The petitioner filed application for execution of decree in the year 2004 itself bearing No.32 of 2004, in which the notices were served on the respondents but none appeared. The execution case was dismissed for non-prosecution on 30.08.2014. The petitioner had filed an application for recall of the said order. On which, the notices were issued and the respondent nos. 3 to 5 had put in appearance and made oral objections. After hearing learned counsel for the parties, the order dated 30.08.2014 passed in Execution Case No.32 of 2004 was recalled in Misc. Case No.106/2014 by means of the order dated 29.09.2016 on cost of Rs.500/- and the case was restored. In pursuance thereof, cost was also received by learned counsel for the respondent nos. 3 to 5. Thereafter, the land in dispute was auctioned on 15.02.2018 for compliance of the aforesaid judgment and decree dated 12.01.2004 and the auction sale was concluded in favour of the petitioner. In pursuance thereof, the petitioner had deposited the required money but the same has not been confirmed and time and again the date was adjourned.

2. He further submits that the respondent nos.3 to 5 filed a highly time barred application on 17.10.2018 under Order 9 Rule 13 CPC before the trial court for setting aside the exparte judgment and decree dated 12.01.2004 admitting in paragraph 3 that they came to know when they had received summons in regard to the restoration application of the execution case. Thereafter, after arranging money they are moving the

application. Therefore, admittedly, the respondents no.3 to 5 had got knowledge of the judgment and decree dated 12.01.2004 in the year 2016 and they had also filed their vakalatnama on 20.09.2016 of Sri Vijay Kumar Tripathi, Advocate and only thereafter the execution case was restored by means of the order dated 29.09.2016 after hearing their counsel also. The petitioner had filed objection to the application moved by the respondent nos. 3 to 5. But without considering the same, the delay of more than 14 years has been condoned without assigning any reason and the application under Order 9 Rule 13 of C.P.C. has also been allowed by means of the order dated 21.10.2019.

3. He further submits that against the said order, the petitioner had filed revision, which has also been dismissed by means of the order dated 24.11.2020 without considering the grounds raised by the petitioner, though the judgments relied by learned counsel for the petitioner have been reproduced but not considered and the revision has been dismissed without assigning any reason.

4. In view of the aforesaid arguments of learned counsel for the petitioner, learned counsel for the respondents submits that though they have taken a plea in the counter affidavit that neither the father of the respondents had appeared and a forged vakalatnama was got filed nor respondent nos. 3 to 5 had any information about the execution case and the vakalatnama on their behalf was got filed by the petitioner with forged signatures but submits that in view of the admission made in the application, he may be granted some time to further prepare and argue.

5. As prayed, put up day after tomorrow i.e. on 08.12.2023 immediately after fresh cases."

3. Learned counsel for the respondent nos.3 to 5 could not dispute the admission made in the application for recall filed by the respondents under Order-9, Rule-13 C.P.C. However, he submits that the delay has rightly been condoned because ex-parte judgment and decree was passed against the respondents and the revision has also rightly been dismissed in accordance with law. There is no illegality or error in the impugned orders.

4. Having considered the submissions of learned counsel for the parties, I have perused the records.

5. The predecessor-in-interest of respondent nos.3 to 5 had entered into an agreement for sale with the petitioner on 01.02.2002 for sale of Gata No.364, having area-0.551 hec., situated at Gram- Nizampur, Pargana- Hyderabad, Tehsil- Gola, District- Kheri and received Rs.95,000/- as sale consideration. As per the terms and conditions of the agreement, the sale deed was to be executed after taking permission from District Magistrate being Scheduled Caste and payment of Rs.5,000/- by the petitioner. Since the sale deed was not executed because permission was not granted and the money was also not returned, the petitioner filed Regular Suit No.265 of 2002; Narendra Bahadur Vs. Fakire for return of money. The

defendant in the suit, though put in appearance but thereafter had not appeared, therefore the case proceeded ex-parte and by means of the ex-parte judgment and decree dated 12.01.2004, the suit was decreed in favour of the petitioner. The petitioner filed Execution Case No.32 of 2004 for execution of judgment and decree dated 12.01.2004, which was dismissed for non prosecution on 30.08.2014. As submitted by the petitioner, the notice of execution case was served on the respondents but they had not put in appearance. An application for recall of the order dated 30.08.2014 was moved by the petitioner. Fresh notices were issued and served on the respondent nos.3 to 6. They had put in appearance in the said execution case through counsel and raised oral objection. After considering the objection, the recall application was allowed by means of the order dated 29.09.2016 on a cost of Rs.500/-. The cost was received by the counsel for the respondent nos.3 to 5. Thereafter the land in dispute appears to have been auctioned on 15.02.2018, however the sale has not been confirmed as yet as submitted by the learned counsel for the petitioner.

6. The respondent nos.3 to 5 moved a highly time barred application on 17.10.2018, under Order-9, Rule-13 C.P.C. before the trial court for setting aside the ex-parte judgment and decree dated 12.01.2004 passed in Suit No.365 of 2002, admitting in paragraph-3 that they came to know when they received summons in regard to the restoration application of the execution case. Thereafter after arranging the money, they are moving the application, therefore admittedly the respondent nos.3 to 5 had got knowledge of the judgment and decree dated 12.01.2004, if not earlier, in the year 2016 when they had received the notice of the restoration application of the execution case and had also put in appearance in the execution case by filing Vakalatnama of Shri Vijay Kumar Tripathi, Advocate on 20.09.2016. Thereafter the execution case was restored by means of the order dated 29.09.2016 after hearing learned counsel for the parties. The respondent nos.3 to 5 had not given any explanation for the delay after coming to know about the judgment and decree, as per their own admission even in the year 2016 but the Civil Judge, Sr. Division, Kheri, without considering it merely on the ground that ex-parte judgment and decree dated 12.01.2004 has been passed by his predecessor and since they want to put their case, therefore instead of taking technical view, opportunity should be afforded for effective disposal of case, avoid multiplicity of suit and finality of judgment, condoned the delay of more than 18 years from the date of judgment and decree and more than 2 years from the date of knowledge as claimed by the respondents themselves, whereas such a long delay could not have been

condoned without sufficient explanation for the delay. The Civil Judge, Sr. Division, Kheri not only condoned the delay, but also set-aside the order dated 12.01.2004 by the same order. Since the delay could not have been condoned without considering the sufficiency of ground, therefore the application also could have not been allowed and the judgment and decree dated 12.01.2004 could not have been set-aside.

7. The petitioner challenged the order dated 21.10.2019 condoning the delay and setting-aside the judgment and decree dated 12.01.2004 in Civil Revision No.33 of 2019 before the District Judge, Lakhimpur Kheri. The revisional court also without considering the grounds raised by the petitioner that such a long delay has not been sufficiently explained by the respondents, dismissed the revision. The revisional court, though reproduced the judgments relied by the learned counsel for the petitioner, according to which such a long delay could not have been condoned on vague assertion, but without considering them dismissed the revision.

8. The Hon'ble Supreme Court in the case of **Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai, (2012) 5 SCC 157**, has held that if the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause than it would be a legitimate exercise of discretion not to condone the delay. The relevant paragraph-24 is extracted below:-

"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

9. Adverting to the facts of the present case the respondent nos.3 to 5 had contested the execution case through counsel, therefore the plea that they have filed application after arranging the money is nothing but a concocted explanation. Even otherwise, the respondent nos.3 to 5 are thorough negligent in prosecuting their cause because they have filed the application after more than two years from the date of knowledge as per their own claim of the judgment and decree but it has not been considered by the trial court as well as the revisional court, therefore the grounds taken by the trial court for setting aside the judgment and decree dated 12.01.2004 are not sustainable in the eyes of law because the right accrued in favour of the petitioner on the basis of the judgment and decree

dated 12.01.2004 could not have been taken away after such a long period in such a casual manner without considering the explanation for such a long delay and if found sufficient.

10. Normally in such circumstances the matter should have been remitted back to the trial court to decide a fresh after considering the grounds raised by the applicant, but in the present case there is admission by the respondents in regard to the date of knowledge and there is no explanation of more than two years from the date of knowledge. Learned counsel for the respondent nos.3 to 5 also failed to give any explanation even before this Court, therefore this Court is of the view that no purpose would be served by remitting the matter back to the trial court to decide a fresh.

11. In view of above and considering the over all facts and circumstances of the case, this petition deserves to be allowed.

12. The petition is **allowed**. The impugned judgment and orders dated 24.11.2020 and order dated 21.10.2019 contained in annexure nos.1 and 2 to the petition are hereby set-aside. The application for condonation of delay in filing the application under Order-9, Rule-13 C.P.C. for setting aside the judgment and decree dated 12.01.2004 is dismissed. Consequently, the application under Order-9, Rule-13 C.P.C. for setting aside the judgment and decree dated 12.01.2004 passed in Regular Suit No.265 of 2002 i.e. Misc. Civil Case No.89 of 2018 stands dismissed. No order as to costs.

(Rajnish Kumar, J.)

Order Date :- 8.12.2023
Haseen U.