

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Jurisdiction Case No.3048 of 2016

in

First Appeal No. 991 of 1970

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Indu Devi

.... Petitioner

Versus

Gauri Shanker Mandal & Ors

.... Opposite parties

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Appearance :

For the Petitioner : Mr. Vishal Saurabh, Advocate.
Mr. Parmeshwar Vishwakarma, Advocate.
For the Opp.Party nos.1 to 3 : Mr. Bidhanesh Mishra, Advocate,
Mr. Rajendra Kr. Jha, Advocate.
Ms. Tanuja Kumari, Advocate.
For the Opp.Party nos.16 to 23 : Mr. Ashok Kr. Singh, Advocate.
Mr. Brajesh Tiwary, Advocate.
Mr. Ambrish Rahul, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. ORDER

22 19-07-2017

I have heard the learned counsel Mr. Vishal Saurabh on behalf of the petitioner and the learned counsel Mr. Bidhanesh Mishra on behalf of opposite party nos.1 to 3 as well as learned counsel Mr. Ashok Kumar Singh on behalf of opposite party nos.16 to 23.

2. This M.J.C. application has been filed by the plaintiff-respondent-petitioner under Order 41 Rule 21 of the Code of Civil Procedure praying therein to rehear the First Appeal No.991 of 1970 after setting aside the judgment and decree dated 16.12.1997 passed by this Court. Since there is delay of about 15 years, separate limitation application has been filed being I.A.



No.4100 of 2013. It may be mentioned here that earlier civil review was filed being Civil Review No.499 of 2012. However, subsequently the same was converted to M.J.C. application.

3. By terms of order dated 06.04.2017 it was directed that this limitation application shall be considered at the time of hearing in admission matter, as prayed for by the petitioner. Therefore, I heard the parties in admission matter and also in limitation matter.

4. It will not be out of place to mention here that one Anti Mandal filed partition suit being Title Suit No.50 of 1964 claiming 1/3rd share. The defendants contested the suit. The trial court decreed the suit by judgment and decree dated 31.07.1970.

5. Thereafter against the aforesaid judgment and decree the defendants-opposite parties herein filed First Appeal No.991 of 1970 on 23.09.1970.

6. During the pendency of the appeal Anti Mandal, the plaintiff-respondent, died on 11.01.1994. The legal representatives of Anti Mandal i.e. sons and grandsons and two daughters were substituted. Ultimately the appeal was heard and judgment and decree was passed as aforesaid allowing the first appeal and setting the judgment and decree of the trial court.

7. The learned counsel Mr. Vishal Saurabh for the



petitioner submitted that the appeal notice was never served on any of the heirs substituted in place of Anti Mandal. One of the sons of Anti Mandal, namely, Bindeshwari Mandal also died leaving behind sons and widow but no substitution application was filed and the learned counsel, who was appearing on behalf of deceased Anti Mandal, submitted before the Court that he has got no instruction after the death of Anti Mandal, therefore, three weeks time was granted to take instruction. However, the appeal was heard and judgment and decree was passed setting aside the trial court's judgment and decree. The petitioner had no knowledge about the said first appeal. For the first time in last week of August, 2012 when some people were taking measurement of the land in question which is in possession of the petitioner, on a query they informed that the vendors of the said people have succeeded in first appeal before the Hon'ble Court. Thereafter, the petitioner contacted the advocate and then came to know about this case and the application has been filed. On these grounds the learned counsel for the petitioner submitted that the petitioner had no knowledge about the first appeal, as such the judgment and decree passed in first appeal is to be set aside and opportunity of hearing be granted to the petitioner. According to the learned counsel, the limitation will start running from the date



of knowledge of the case and judgment and decree in view of Article 123 of the Limitation Act.

8. On the other hand, the learned counsel for the defendants-opposite parties submitted that seven legal representatives were substituted in place of deceased plaintiff-respondent Anti Mandal. Notices were issued to all the legal representatives and the notice was validly served on all the legal representatives which would be evident from the office note dated 27.06.1994 and while passing judgment and decree the High Court also accepted that notices have already been validly served on them. The learned counsel, who was appearing for respondent no.1, was also granted three weeks time for taking instruction on 26.06.1995 but then no vakalatnama was filed, therefore, the appeal was heard. The learned counsel Mr. T.S. Tatarvei and Mr. Rajindra Kishore Prasad were heard on behalf of respondent no.1, therefore, the judgment and decree passed by the High Court is not ex-parte.

9. The learned counsel further submitted that only one of the sons of Anti Mandal has filed this M.J.C. application and the others are not challenging the service of notice. The statement made by the petitioner only that for the first time he got the knowledge after 15 years is not reliable at all and moreover the



other legal representatives are not saying that no notice was served on them or that they had no knowledge about the first appeal. The record shows otherwise and this M.J.C. application has been filed with ulterior motive after such a long period without any basis, therefore, the M.J.C. application be dismissed.

10. From perusal of the first appeal record, it appears that the office noted in the office note dated 27.06.1994 that notice has already been validly served on all the heirs of Anti Mandal. The argument that Court did not record order accepting the notice as valid service is nothing but a technical objection. It cannot be said that if notice was validly served then it will be invalid service as order sheet is not there. Office has clearly pointed out that notice was validly served. Moreover in the judgment it has been held that notice was served validly. It appears that the petitioner is trying to obtain undue advantage of the non-recording of separate order sheet. In my opinion since it is recorded in the judgment, mere denial that notice was not served that too after more than 15 years will not be accepted. The submission made by the petitioner is contrary to the record. There is presumption that the record maintained by court is correct. The delay is inordinate and the explanation is only that no summons were served which is also contrary to record and also the fact. The suit was partition suit,



dismissed by the High Court in appeal in 1997. The question is whether the plaintiff had not taken any steps for final decree after decree of the suit. What happened to the final decree proceeding? No explanation. It cannot be presumed that no steps for final decree was taken. Then whether the petitioner had no knowledge about final decree proceeding. There is no explanation at all. Only one heir has filed this restoration application and rest have not joined to say that they had no knowledge about appeal or the judgment in 1997.

11. In view of my above discussion the delay of 15 years has not been properly explained. Mere denial of knowledge is not acceptable in view of the circumstances stated above. Thus, the limitation petition is rejected and as such this restoration application for rehearing of appeal is dismissed.

(Mungeshwar Sahoo, J)

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