

Civil Revision No.4363 of 2018

Date of Decision:19.09.2018

Jitender Kumar

.....Petitioner

Vs.

Kalpana Kumar and others

....Respondents

CORAM : HON'BLE MR.JUSTICE AMOL RATTAN SINGHPresent: Mr.Rajesh Lamba, Advocate,
for the petitioner.**AMOL RATTAN SINGH, J. (Oral)**

By this petition, the petitioner challenges the orders passed by the learned trial Court, i.e. Civil Judge (Junior Division), Faridabad, dated 24.01.2013 (Annexure P-1), and of the Civil Judge(Senior Division), Faridabad, dated 23.05.2016 (Annexure P-4), as also the order of the learned Appellate Court (learned Additional District Judge, Faridabad) dated 29.05.2018 (Annexure P-6).

Vide the first order dated 24.01.2013, the petition filed by the petitioner under Section 383 of the Indian Succession Act, 1925, seeking revocation of the succession certificate issued on 14.08.2010, was dismissed in default. The said order reads as follows:

“In compliance of office order Endst.No.23457-479 dated 22.12.2012, case file put up before me. Case called several times since morning but none is responding to the calls on behalf of the petitioner. Waited sufficiently. It is 2.30 PM. It appears that the petitioner does not want to proceed further with the petition. As such the same is dismissed in default. File be consigned to the record room after due compliance.”

2. Thereafter, the petitioner filed an application seeking restoration of the petition on 09.12.2015, to which a reply was filed by the respondents

in January, 2016, but with the application dismissed on 23.05.2016.

In the application it was stated that he “was in touch with his previous counsel and when on 06-12-2015 the applicant-petitioner received a letter dated 01-12-2015 sent by NTPC regarding release of final dues of Late Sh.Suresh Kumar on the basis of succession certificate obtained by Kalpana Kumar.”

Thereafter it is further stated that the petitioner came to the seat of his counsel, and found that the previous counsel had died, after which he approached another counsel who informed him that the petition had been dismissed in default on 24.01.2013.

Hence, it was contended that the non-appearance of counsel on 24.01.2013 was not the fault of the petitioner and with him not being aware of his petition having been dismissed in default, even the delay in filing the application seeking restoration thereof was not his fault and therefore could not be attributed to him.

3. In the reply filed by the respondents herein, to the application seeking restoration, firstly it was stated that they had already received some benefits in respect of the property of the deceased who (as per the respondents) had nominated respondent no.1 (his wife/widow), in his life time, to be the beneficiary thereof. Thus the contention was that in any case the petitioner was not entitled to get any benefit as regards the property of the deceased on the basis of the will set up by him, the deceased being his brother and the respondents being his wife and children.

It was further stated that as per the Indian Succession Act, 1925, the wife and the children alone, alongwith the mother of the deceased, would

be entitled to the Death-cum-Retirement Gratuity (DCRG) and other benefits due from the employer of the deceased.

As regards the dismissal of the petition, which was actually what was in question in the application seeking restoration thereof, it was stated that the son of the counsel who had died, was also a practising lawyer, sitting at the same seat that his father had occupied and the petitioner could therefore have contacted the son, that fact being very well in the knowledge of the petitioner (as per the respondents).

On the aforesaid contentions dismissal of the application was prayed for by them.

4. The learned Civil Judge, after noticing the aforesaid facts, went on to hold that even prior to the dismissal of the petition, issues had been framed on 18.01.2011, after which the petition had been listed for the petitioner to lead evidence, with 5 opportunities having been availed of by him for producing such evidence, with not even a single witness examined.

Thereafter, two years after the issues were framed, the petition had been dismissed in default in the year 2013 and as regards the application filed on 09.12.2015, seeking restoration, it was obvious that the petitioner had not “even care to look towards the Court” and was therefore least bothered to even contact his lawyer. Thus, he having reacted only when he received a letter from the employer of the deceased (i.e. the National Thermal Power Corporation), as regards payments to be made, that he thought of reviving the petition. Consequently, the application was dismissed.

5. In the appeal filed by the petitioner against that order (dated

23.05.2016), the learned Additional District Judge, again after noticing the contentions of both sides, essentially for the same reasons, including the fact that no evidence was led by the petitioner despite 5 effective opportunities given to him from 18.01.2011 till 24.01.2013, also dismissed the appeal, further noticing that in the *zimni* order dated 17.01.2012, the presence of Sh.C.P.Malik, Advocate, had been marked, with the presence of the other counsel in whose favour the power of attorney has been issued by the petitioner, i.e. Sh.Ashok Malik, Advocate, also marked in the orders dated 10.05.2012 and 20.09.2012. On the latter date the case had been adjourned to 24.01.2013 and as such, with none having appeared on that date (despite several calls as per the order of the trial Court), the petition had been dismissed. Hence, the appeal filed by the petitioner was also dismissed.

6. In this revision petition, learned counsel for the petitioner first submits that the order dated 24.01.2013 by which the petition was dismissed in default by the trial Court, does not speak of no evidence having been led by the petitioner due to which the petition had been dismissed, and therefore the Courts below having relied on that fact while dismissing even the application seeking restoration, the orders are not sustainable, making the orders in fact erroneous and illegal.

He submits that, thus, the dismissal of the restoration application is for a different reason to the one on account of which the petition had been dismissed, which was only due to the fact that counsel for the petitioner had not appeared on that single date, i.e. 24.01.2013.

He also relies upon a judgment of the Supreme Court in **“Manoharan vs. Sivarajan and others,”** 2014 (1) RCR (Civil) 247, in

which it was held by their Lordships that with the plaintiff not being aware of his plaint having been rejected 2 years and 9 months earlier to the date of his knowledge thereof, it was the fault of his counsel for not having so informed him and therefore, the Courts below had erred in rejecting the petition on account of non-payment of fee *ad valorem* (that being the reason for which the suit had been rejected), with the High Court in that case also having erred in dismissing the regular first appeal filed against such dismissal.

Thus, Mr.Lamba submits that the case of the petitioner is identically covered in his favour in terms of the ratio of the aforesaid judgment.

7. Having considered the aforesaid argument, I cannot agree with the learned counsel, for the reason that though the delay in filing the application seeking restoration of the petition under Section 383 of the Act, may possibly be accepted on the ground that the petitioner did not come to know about the dismissal of his petition, (though even that contention is difficult to accept in the face of the fact that the petitioner never bothered to contact his counsel for the period of 2 years and about 11 months between 23.01.2013 and December, 2015), however, also for the reason that the past conduct of the petitioner cannot be ignored by this Court, when, as per the impugned orders dated 23.05.2016 and 29.05.2018, it has been specifically found that the petitioner had not even examined even a single witness in his favour over a period of 2 years, between January 2011 to January 2013, despite five effective opportunities having been given to him to do the needful.

No factual position to the contrary, with regard to five opportunities having been given, has been brought to the notice of this Court in this petition.

8. That being so, in my opinion dragging the respondents, who are the widow and the children (one of them shown to be a minor), back to Court after four years in the aforesaid circumstances, would be highly unjust.

Therefore, even though the order dated 24.01.2013, by which the petition of the petitioner was dismissed in default, does not speak of the petitioner not having led any evidence for two years and vide the said order the petition was simply dismissed for non-appearance of the counsel for the petitioner (or the petitioner personally), despite several calls made on a single date, the past conduct of the petitioner in not producing any witness at all for two years has to be taken into account by this Court, before dragging the respondents back to court.

Consequently, finding no merit in this petition, it is dismissed in *limine*.

No order as to costs.

(AMOL RATTAN SINGH)
JUDGE

September 19, 2018.

dharamvir/dinesh

Whether speaking/reasoned : YES/NO
Whether Reportable : YES/NO