

June 5, 2023
Sl. No.16
Court No.19
s.biswas

CO 1185 of 2023

Smt. Keya De
vs.
Sri Jyotirmoy Mitra and others

Ms. Riya Banerjee

... for the petitioner

The petitioner is aggrieved by the judgment and order passed in Misc. Appeal No.32 of 2019, by the learned Additional District Judge, Re-designated Court, Paschim Medinipur.

The Misc appeal was filed by the opposite parties against the order dated February 28, 2019, passed by the learned Civil Judge (Senior Division), 1st Court, Paschim Medinipur in Judicial Misc. Case No.09 of 2016 arising out of Title Suit No.456 of 2006 rejecting an application under Order 9 Rule 13 of the Code of Civil Procedure.

The said title suit was filed for a declaration that the deed of gift was null and void, for demarcation of boundary and delivery of possession. The said suit was decreed *ex parte* in view of the failure of the learned advocate for the defendants to enter appearance at the time of hearing.

The defendants filed an application under Order IX Rule 13 of the Code of Civil Procedure along with the application under Section 5 of the Limitation Act and prayed for setting aside of the *ex parte* decree, upon condonation of delay. By an order dated

February 28, 2019, the application for setting aside the *ex parte* decree along with the application for condonation of delay, were rejected.

Aggrieved, the defendants filed Misc. Appeal No.32 of 2019. The Misc. Appeal was allowed and the delay in filing the application was condoned. The *ex parte* decree dated March 5, 2014 passed in Title Suit No.456 of 2006, was set aside. Title Suit No.456 of 2006 was restored to its original file and number and the learned trial court was directed to dispose of the suit as early as possible.

Aggrieved by the order passed in Misc. Appeal, this revisional application has been filed.

Learned advocate for the petitioner/plaintiff submits that the defendants had intentionally failed to appear in the suit in order to delay the proceedings and frustrate the legitimate claim of the petitioner as the daughter of the erstwhile owner of the property in question.

According to the learned advocate, the defendants had stayed away from appearing in the suit, intentionally. Even the application for injunction was disposed of *ex parte*. It is further submitted that the learned advocate who appeared on behalf of the defendants was also not cooperating and refused to accept notices with regard to the proceedings.

Having gone through the records and the judgment which is impugned before the Court, it appears that the learned lower appellate court considered the day to day development in the suit and the orders passed therein. The timeline has been elaborately narrated in the judgment impugned.

The defendants contested the suit by filing a written statement on December 3, 2007. Thereafter, issues were framed on February 25, 2008 and the suit was fixed for peremptory hearing on July 10, 2008. The plaintiff filed an application for amendment of the plaint and the amendment petition was allowed on contest, on August 27, 2009. The plaintiff filed the amended plaint. The additional written statement was filed by the defendants on April 26, 2010. On June 4, 2010, the suit was fixed for framing additional issues. Thereafter, the plaintiff filed an application for injunction. No additional issues were framed and the suit was fixed for *ex parte* hearing.

The learned trial court recorded in the order dated February 28, 2019 that the learned advocate for the defendants refused to accept a copy of the application for injunction. The order also records that as many as 11 or 12 days were fixed for hearing of the suit and thereafter, the suit was decreed on

March 5, 2014. As per the order-sheets and the facts which are apparent to the Court, it appears that the defendants contested the suit for five years until the time when they had stopped appearing before the Court through their learned advocate. From the evidence of the defendants, it appears that the defendants had entrusted the learned advocate to do the needful and the learned advocate was contacted by the defendants regularly. However, learned trial judge rejected the application on the ground that the defendants were negligent and not the learned advocate. The learned court assumed that a learned advocate, who was entrusted with a case, would not normally to be negligent.

Learned lower appellate court, however, considered the issues on the basis of the facts and the laws applicable. Several decisions were relied upon and the learned lower appellate court found that the duty of a party who had engaged a learned advocate to conduct the case was to pay the fees, and give necessary factual instructions. A litigant could not be blamed for failure of the learned Advocate to conduct the case properly. The litigant could afford to have full faith and trust on the learned advocate. Learned lower appellate court found that although the learned advocate who was

conducting the case had filed hazira, none appeared when the suit was called on. No steps were taken.

It was the solemn duty of the learned advocate to present the case of his client and there was nothing on record for the trial court to presume that the learned advocate was not at fault and assume that the defendants were responsible for the suit having proceeded *ex parte*, in their absence.

Once the learned lower appellate court had come to the conclusion on the basis of the records, that the defendants had discharged their obligation as dutiful litigants and as there is nothing on record to show that the defendants were at fault, this Court is of the view that the application under Article 227 of the Constitution of India should not be entertained, in order to upset the factual findings by a sub-ordinate court. The view taken by the lower appellate court is a plausible view. The court held that due to the laches of the learned advocate, the litigant cannot suffer an *ex parte* decree.

In ***Babhutmal v. Laxmibai***, a Bench consisting of three Judges have explained the scope and power of the High Court under Article 227 in the following manner:-

"The power of superintendence of High Court under Art. 227 being extraordinary is to be exercised most sparingly and only in appropriate cases. This power, as in the case of certiorari jurisdiction, cannot be invoked to correct an error of fact which only a superior

Court can do in exercise of its statutory power as a Court of appeal. The High Court cannot in guise of exercising its jurisdiction under Art. 227 convert itself into a Court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate Court or tribunal final on facts. The High Court cannot, while exercising jurisdiction under Art. 227, interfere with findings of fact recorded by the subordinate Court or tribunal. Its function is limited to seeing that the subordinate Court or tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and re-appreciating it."

In ***Maneck Custodji v. Sarafazali***, their Lordships have explained the interference of the High Court under Article 227 in the following manner:-

"Held that the respondent had clearly a legal remedy available to him by way of an appeal against the decree of the City Civil Court and that remedy was not only adequate but was more comprehensive than the one under Art. 227 of the Constitution. It is true that, despite the existence of an alternative, legal remedy, the High Court may interfere in favour of an applicant under Article 227 of the Constitution, but this was certainly not one of such extraordinary cases. It was not proper for the High Court to entertain an application under Art. 227 against a decree passed by a subordinate Court when the procedural law allows an appeal against it and that appeal lay to the High Court itself."

"The jurisdiction under Art. 227 of the Constitution is an extraordinary jurisdiction which is to be exercised sparingly and in appropriate cases and it is not to be exercised as if it were an appellate jurisdiction or as if it gave unfettered and unrestricted power to the High Court to do whatever it liked."

In ***Mohd. Yunus v. Mohd. Mustaqim***, the Apex Court has explained the power and scope of Article 227 in the following manner:--

"A mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Art. 227. The supervisory jurisdiction conferred on the High Courts under Art. 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record much less an error of law. In exercising the supervisory power under Art. 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be based or to correct errors of law in the decision."

In the decision of ***M/s Puri Investments vs. M/s Young Friends and Co. & ors.*** decided in ***Civil Appeal No.1609 of 2022***, the Hon'ble Apex Court held that in exercise of jurisdiction of Article 227 of the Constitution of India, the High Court could not act as an appellate court by going deep into the factual arena and by disagreeing with the final fact finding forum. According to the Hon'ble Apex Court, unless there was perversity in the order passed by the Tribunal the High Court should not interfere. The order of the Tribunal or inferior court should not be tested through the lens of the appellate court, unless the order is (a) erroneous on account of non-consideration of material evidence, or (b) contrary to the evidence, or (c) based on inferences that were impermissible in law.

It appears from the records that the defendants had failed on several occasions to appear before the

learned trial court through their learned advocate. However, the defendants had contested the suit in the first five years. There is no reason for this court to upset the finding of the learned lower appellate court. The court found that the defendants had discharged their duty by engaging a learned Advocate and could not be faulted for trusting him. It is mandatorily made clear that the said defendants shall ensure that they are represented and the suit can be proceeded expeditiously within the time line to be fixed by the learned Trial Judge as already directed by the learned Additional District Judge, Re-designated Court, Paschim Medinipur and disposed of within a period of one year from the date of communication of the order. The suit shall proceed strictly in accordance with law.

This Court is in agreement that the principle laid down by the lower appellate court that the defendants cannot be blamed in this case. Once, the litigant entrusts the learned Advocate to conduct the case, it is the bounden duty of the learned Advocate to ensure that his client is properly represented before the court.

Thus, the judgment and order impugned, is upheld. The order of the learned Additional District Judge, Re-designated Court must be complied with.

Accordingly, this revisional application is disposed of.

All the parties are directed to act on the basis of server copy of this order.

(Shampa Sarkar, J.)