

6.9.2023
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Ct. no. 652
sb

CO 3495 of 2019

Mst. Asia Khatun & Ors.
Vs.
Sk. Abu Tamin @ Bablu Sarkar & Ors.

Mr. Lutful Haque
Ms. Taharima Khatun ...for the Petitioners

Affidavit of service filed by the petitioners is taken on record. Opposite parties are not represented.

This is an application under Article 227 of the Constitution of India against the impugned order no. 108 dated 21.02.2019 passed by the learned Civil Judge (Junior Division), 2nd Court, Arambagh in Misc. case no. 16 of 2006 arising out of Misc. case no. 19 of 2005 arising out of Title Suit no. 73 of 2000.

Petitioner's case is that the petitioner filed aforesaid suit for declaration and injunction in respect of the schedule mentioned suit property against defendants/opposite parties. It is submitted that after filing of the suit, the summons were served through bailiff as well as registered post and the opposite parties initially appeared and subsequently chosen not to contest the suit. Accordingly, the suit was decreed ex parte on 8.7.2003. However, the opposite parties filed an application under Order IX rule 13 of the Code of Civil

Procedure for setting aside the ex parte decree being Misc. case no. 19 of 2005 along with another application under Section 5 of the Limitation Act being Misc. case no. 16 of 2006.

Learned court below by the impugned order, has been pleased to allow the defendant's application seeking condonation of delay being Misc case 16 of 2006 and also another application under Order IX rule 13 of the Code of Civil Procedure being Misc. Case No. 19 of 2005 and was thereby pleased to set aside the decree passed in Title Suit no. 73 of 2000 in favour of the petitioner.

Mr. Haque, learned counsel for the petitioners submits that defendants/opposite parties admitted in their application that they appeared in the aforesaid title suit and prayed for time for filing written statement. The petitioner's specific case is that the defendants, due to their negligence did not appear in the said proceeding. In fact, it has not been correctly stated in the application that the plaintiffs had assured that they would withdraw the suit. It is also not correct to state that their relationship was sweet in order to exercise undue influence or misrepresentation and accordingly, the court below was not justified in condoning the delay in filing the application under Order IX rule 13 of the Code of Civil Procedure and also had exceeded his jurisdiction in allowing the petitioner's application under Order IX rule 13 of the Code of Civil Procedure for setting aside the ex

parte decree. In such view of the matter the petitioner has prayed for setting aside the order impugned.

I have considered the submissions made by the petitioners and also perused the order impugned. On perusal of the order impugned, it appears that the court below has made specific observation after evaluating evidence adduced by the parties that there was sufficient reason which prevented the petitioner from appearing before the court to contest with the said suit. Court below further held that admittedly the petitioner was minor at the time of original suit and the Plaintiff/opposite party being his uncle has misled him and obtained the ex parte decree and accordingly, court below was of the view that the petitioner/defendant should be given an opportunity to contest the main suit.

If the Trial Court had the jurisdiction to condone delay and to set aside ex parte decree on sufficient grounds, I find no material for holding that there was any impropriety in exercising this jurisdiction to interfere on the only ground that a different view on facts elicited was possible. It is well-settled principle of law, that the High Court, while exercising its power under Article 227, cannot proceed to act as a court of appeal by interfering in mere errors of finding fact, if any, which requires reappreciation and reweighing of evidence adduced by the parties, unless it results in manifest miscarriage of justice. The order impugned is reasoned and has not

resulted in any gross or manifest failure of justice, nor has there been any illegality or perversity committed by the court below while passing the impugned order.

In such view of the matter, it appears that the order impugned if not interfered by exercising supervisory jurisdiction of this court, then the highest prejudice that may be caused to the petitioner/plaintiff would be that the suit will be disposed of after contested hearing on merit and perhaps nothing more. In such view of the matter, I do not find any reason to interfere with the order impugned.

Accordingly, C.O. 3495 of 2019 is dismissed. However, since the suit is pending since 2000, the court below is directed to make every endeavour for expeditious disposal of the suit and to conclude the entire proceeding of the suit within a period of eight months from the date of communication of the order.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)