

CIVIL REVISION

Present:

The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on 30.08.2010

C.O. No.1316 of 2007

Smt. Sandhya Das & Ors.

Versus

Paltu Saha & Anr.

Points:

Judgment without reason- Appellate court set aside the reasoned order of the learned Trial Judge in a cryptic manner without any discussion why the findings of the learned Trial Judge should be set aside-Whether proper - Code of Civil Procedure, 1908 S 104

Facts:

Opposite party no.1 filed an application under order 9 rule 13 of the Code of Civil Procedure for setting aside an exparte decree along with an application for condonation of delay under section 5 of the Limitation Act alleging that his brother, who was entrusted to look after the suit has colluded with the plaintiff in passing the exparte decree.

Held:

Initially the opposite party no.1 appeared in the suit by filing a vakalatnama, filing appropriate applications under the provisions of the West Bengal Premises Tenancy Act, 1956 and lastly he by filing the written statement. So, he was very much aware of the institution of the suit when the opposite party no.2 left the premises in suit and settled at Behala. The opposite party no.1 should have given proper attention of the suit because he was then separated from the opposite party no.2. Therefore, the opposite party no.1

did not exercise due care and attention to know the position or the result of the suit. His contention is that he came to know about the ex parte decree when the process server went to deliver possession of the suit property. The learned Trial Judge has considered the evidence on record and concluded that the opposite party no.1 failed to show sufficient cause for condonation of delay under Section 5 of the Limitation Act and so the said application was liable to be rejected. Such order does not suffer from perversity or without any evidence. On the other hand, though the learned appellate court was not empowered to deal with the matter, he dealt with the matter and set aside the reasoned order of the learned Trial Judge in a cryptic manner without any discussion why the findings of the learned Trial Judge should be set aside. The reasons shown by the learned Appellate Court are contrary to the provisions of Section 5 of the Limitation Act. Para 9

For the Petitioners : Mr. Manas Kumar Kundu.

Prasenjit Mandal, J.: This application is at the instance of the plaintiff and is directed against the order dated October 27, 2006 passed by the learned Additional District Judge, Second Court, Alipore in Misc. Appeal No.93 of 2005 arising out of the order no.130 dated February 5, 2005 passed by the learned Civil Judge (Senior Division), Third Court, Alipore in Misc. Case No.27 of 1997.

2. The short fact of the case is that the plaintiff is the owner of the premises in suit as described in schedule of the plaint and the father of the opposite parties was inducted as a tenant in respect of the premises in suit at a rental of Rs.200/- per month payable according to English calendar month. The tenant was defaulter in payment of rent. The plaintiff also required the suit

premises for his own use and occupation and for that reason he filed the suit for ejectment and other reliefs being the Title Suit No.120 of 1988. In that suit, the opposite parties, heirs of the original tenant, appeared by filing the vakalatnama. They submitted other necessary applications, such as, petition under Sections 17(1) & (2) of the West Bengal Premises Tenancy Act, 1956, written statements, etc. Ultimately, the defendants/opposite parties did not contest the suit and as a result the suit was decreed ex parte on September 12, 1996.

3. Thereafter, the opposite party no.1 alone filed an application under Order 9 Rule 13 of the Code of Civil Procedure along with an application under Section 5 of the Limitation Act for condonation of delay. In that application, the opposite party no.1 has stated that he is a physically handicapped person. He is also suffering from epilepsy and so he executed a power of attorney in favour of his brother, opposite party no.2 who was looking after the said suit. But he colluded with the plaintiff and allowed the suit to be decreed ex parte. So, he filed the Misc. Case No.27 of 1997 along with an application under Section 5 of the Limitation Act for condonation of delay praying for setting aside the ex parte decree.

4. That application for condonation of delay as well as the misc. case were dismissed by the learned Civil Judge (Senior Division) by the order no.130 dated February 5, 2005. Being aggrieved by the said order, the opposite party no.1 filed a Misc. Appeal No.93 of 2005 which was allowed by the learned Additional District Judge, Second Court, Alipore on October 27, 2006 holding that the appellant should be given an opportunity to contest the suit. Being aggrieved by the said order, this revisional application has been preferred by the plaintiff/landlord.

5. The question is whether the impugned order can be sustained.

6. On hearing the submission of the learned Advocate for the petitioner and upon due consideration of the application supported by affidavit and annexures, I find that the opposite party no.1 appeared in the suit by filing a vakalatnama. He filed the application under Sections 17 (1) & (2) of the West Bengal Premises Tenancy Act, 1956. In the said suit, he also filed the written statement by signing thereon. So, from the very beginning of the filing of the suit in 1988, the opposite party no.1 had been contesting with the suit. But, ultimately the defendants did not contest the suit and as a result the suit was decreed ex parte on September 12, 1996. Thereafter, the misc. case was filed on August 18, 1997, that is, beyond the time limit and for that reason, an application under Section 5 of the Limitation Act was also filed. Both the parties adduced evidence in support of their respective contentions and upon consideration of the evidence on record, the learned Trial Judge has held that the opposite party no.1 has failed to show sufficient cause for non-appearance at the time of hearing and that he could not set forth sufficient cause for not filing to file the application for setting aside the ex parte decree, within the period of limitation. Therefore, the learned Trial Judge has rejected the application under Section 5 of the Limitation Act as well as the misc. case under Order 9 Rule 13 of the C.P.C.

7. It is surprising to note that the learned appellate court allowed the misc. appeal holding that the order impugned did not impress upon him at all and as such, the impugned order was liable to be set aside to subserve the ends of justice. He also held that the appellant should be given a chance to contest the suit before the learned Court below and for that reason, the misc. appeal should be allowed. Thereafter, he allowed the misc. case. Such reasons, in my view, are contrary to the provisions of Section 5 of the Limitation Act and so not sufficient to condone the delay in filing the misc. case as well as a

proof of sufficient cause for non-appearance at the time of passing the ex parte decree. What is more surprising is that the learned Trial Judge has dismissed the application under Section 5 of the Limitation Act because the opposite party no.1 failed to show sufficient cause for condonation of delay in preferring the misc. case under Order 9 Rule 13 of the C.P.C. Against such order, revision lies; but the learned Trial Judge has entertained the misc. appeal along with the application for condonation of the delay as a whole. Now, the dismissal of the misc. case occurs because the opposite party no.1 failed to show sufficient cause for condoning the delay. For that reason, a revision lies and not an appeal. The learned appellate court was not, therefore, justified at all in entertaining the appeal against the order of dismissal of the application under Section 5 of the Limitation Act. The dismissal of the misc. case is a consequential order in view of the dismissal of the application under Section 5 of the Limitation Act. So, in effect a revision lies against the order of dismissal of the application under Section 5 of the Limitation Act. Therefore, the order impugned cannot be sustained at all.

8. As regards the merit of the application under Section 5 of the Limitation Act, from the materials on record, I find that the opposite party no.1 contended that he is a handicapped person and he relied fully on the opposite party no.2 and thereafter, the opposite party no.2 connived with the plaintiff to allow the suit decreed ex parte. He has contended that the opposite party no.2 left the suit premises and began to reside at Behala in a rented house.

9. What I find that initially the opposite party no.1 appeared in the suit by filing a vakalatnama, filing appropriate applications under the provisions of the West Bengal Premises Tenancy Act, 1956 and lastly he by filing the written statement. So, he was very much aware of the institution of the suit

when the opposite party no.2 left the premises in suit and settled at Behala. The opposite party no.1 should have given proper attention of the suit because he was then separated from the opposite party no.2. Therefore, I find that the opposite party no.1 did not exercise due care and attention to know the position or the result of the suit. His contention is that he came to know about the ex parte decree when the process server went to deliver possession of the suit property. The learned Trial Judge has considered the evidence on record and concluded that the opposite party no.1 failed to show sufficient cause for condonation of delay under Section 5 of the Limitation Act and so the said application was liable to be rejected. Such order does not suffer from perversity or without any evidence. On the other hand, though the learned appellate court was not empowered to deal with the matter, he dealt with the matter and set aside the reasoned order of the learned Trial Judge in a cryptic manner without any discussion why the findings of the learned Trial Judge should be set aside. The reasons shown by the learned Appellate Court are contrary to the provisions of Section 5 of the Limitation Act. There is no evidence of connivance at all.

10. Therefore, I am of the view that the impugned order of the learned appellate court cannot be sustained at all. The findings of the learned Trial Judge on the application under Section 5 of the Limitation Act should be supported. So, the application under Section 5 of the Limitation Act was rightly rejected by the learned Trial Judge. Since the application under Section 5 of the Limitation Act fails to succeed, the misc. case under Order 9 Rule 13 of the C.P.C. automatically falls through.

11. Accordingly, the impugned order dated October 27, 2006 passed by the learned Additional District Judge, Second Court, Alipore in Misc. Appeal No.93 of 2005 is set aside. The order of the learned Trial Judge on the

application under Section 5 of the Limitation Act is hereby affirmed. Consequently, the order of dismissal of the Misc. Case No.27 of 1997 passed by the learned Trial Judge is also hereby affirmed. This application is, therefore, allowed with the observations indicated above.

12. There will be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Prasenjit Mandal, J.)