State of U.P. and anr. Vs. Iii Additional District Judge, Azamgarh and anr.

State of U.P. and anr. Vs. Iii Additional District Judge, Azamgarh and anr.

SooperKanoon Citation : sooperkanoon.com/467827

Court : Allahabad

Decided On : Sep-27-1988

Reported in : AIR1989All14

Judge : B.L. Yadav, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 115 - Order 9, Rule 13 - Order 43, Rule 1; Limitation Act, 1963 - Sections 5

Appeal No. : Civil Misc. Writ Petn. No. 938 of 1988

Appellant : State of U.P. and anr.

Respondent : iii Additional District Judge, Azamgarh and anr.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : A.P. Singh, Adv.

Disposition : Petition allowed

Judgement :
ORDER

B.L. Yadav, J.

1. Whether the findings, which were essentially findings of fact, given by the trial Court about the 'sufficient cause', having been made out by the defendants under

Order 9 Rule 13 of the Code of Civil Procedure (for short the Code) for restoring the suit, can be set aside by the revisional Court under Section 115 of the Code, or only questions pertaining to the jurisdiction could have been gone into by the revisional Court and whether the grounds for condonation of delay under Section 5 of the Limitation Act (for short the Act) could be re-examined by the Revisiona! Court are the short questions for consideration in the present petition filed by the defendants under Article 226 of the Constitution seeking the relief for writ of certiorari quashing impugned order dated 7-9-1987 passed by IIIrd Additional District Judge, in revision.

2. The portrayal of essential facts are these. The plaintiff? respondent No. 2 has filed Suit No. 337 of 1983 in the Court of Munsiff for permanent injunction restraining the defendants/present petitioners from realising the amount of pension already paid to him and the suit was decreed ex parte on 27-9-1985 as the defendants, present petitioners were not present. The defendants/present petitioners filed an application for restoration under Order 9, Rule 13 of the Code accompanied by an affidavit and application for condonation of delay under Section 5 of the Limitation Act which was allowed by an order dated 31st October, 1986. Against that order plaintiff/respondent No. 2 preferred a revision which has been allowed by the impugned order. Hence present petition.

3. Mr. K. B. Mathur, learned counsel for the petitioners, urged that sufficient cause for non-appearance of the petitioners, as required by Order 9, Rule 13 of the Code was explained in the affidavit filed in support of the restoration application and grounds for condonation of delay in filing the restoration application were made out and explained in the affidavit filed in support of the application under Section 5 of the Limitation Act. The affidavits filed by the petitioners were relied upon by the trial Court and delay was condoned and sufficient cause was made out for restoration of the suit. These findings of the trial Court about the sufficient cause being made out for restoration of the suit and for condonation of delay in filing the restoration application, were findings of fact, even if they were perverse, could not have been set aside in revision filed under Section 115 of the Code.

4. Mr. K. P. Agarwal learned counsel for the respondents on the other hand urged that the learned Additional Distt. Judge has correctly scrutinised the cause for restoration of the suit and condonation of delay in filing . the restoration application and in the instant case the Revisional Court has correctly interfered to meet the ends of justice.

5. Having heard learned counsel for the parties, as stated above, main points for determination in this case are whether the findings of the trial Court pertaining to the condonation of delay in filing the restoration application under Section 5 of Limitation Act and restoration of the suit under Order 9, Rule 13 of the Code can be set aside by the Revisional Court in exercise of powers under Section 115 of the Code.

6. Broadly speaking High Court or the District Judge or Additional Distt. Judge as the case may be according to the nature of the suit may interfere under Section 115 of the Code only if the subordinate Court appears to have exercised jurisdiction not vested in it by law or if acted with material irregularity. Even though Section 115 of the Code has been amended by the State Amendment on a number of times but substantially for our purposes it remains the same. The IIIrd clause in Section 115 pertaining to have acted in exercise of jurisdiction illegally or with material irregularity must also relate to some defect in jurisdiction pointed out under Clause A or B. In the instant case whether sufficient cause was made out or not for the restoration under Order 9, Rule 13 for which an application accompanied by an affidavit was moved which was controverted by the plaintiff/respondent No. 2 by filing a counter-affidavit, was the main question. The trial Court has jurisdiction to consider the sufficiency or otherwise of the case shown by the present petitioners and once that cause was held to be sufficient that would be a finding of fact. It was held by the trial Court that the cause shown was sufficient. There may be some variation in the vision or approach to be made to this problem. May be that on the same set of facts trial Court would have taken a different view or the lower appellate Court could have taken different view but nevertheless it is the finding of fact recorded by the trial Court which should prevail, even though those findings may appear to be erroneous,

7. It may be highlighted that under Order 43. Rule 1 (one) (c), (d) of the Code appeal has been provided for an order to set aside the decree passed ex parte but no appeal has been provided against an order restoring the suit and allowing application under Order 9, Rule 13. For this it is better to appreciate the elementary rule of interpretation leading to the intendment and wisdom of Parliament in not providing the appeal against an order by which restoration has been allowed. Different parts of the Statute including Order 9, Rule 13, Order 9, Rule 9, Order 43, Rule 1, Section 115 of the Code have to be read together and harmonious construction has to be made. Order 9, Rule 13 or Order 9, Rule 9 and similarly Order 43, Rule 1 are the provisions pertaining to the procedure and the rule of interpretation is that the procedural provision should be so construed so as to give effect to the purpose and object of the Code or the Act The object behind not providing appeal against an order allowing restoration application under Order 9, Rule 13 appears to be that once an application for restoration has been allowed that has to be deemed to be sufficient, equitable and also that by such order substantial justice would be done. Even though by not providing an appeal against such orders some hardship may be caused to a party but that alone would not justify different construction to Order 9, Rule 9 or Order 9, Rule 13 and Order 43, Rule 1 of the Code. It is presumed in such matters that the legislature was aware of those hardships but nevertheless deliberately the provision as it is under Order 43, Rule 1 (c) (d) of the Code was made. (See Bhagmal v. Prabhu Ram, AIR 1985 SC 150, S. Sundaram Pillai v. V. R. Pattabiramah, AIR 1985 SC 582).

8. In the instant case I am of the view that reappraisal of the evidence made by the learned Additional Distt Judge, either to ascertain whether sufficient cause was made out for an application under Order 9, Rule 13 of the Code or not, or whether sufficient cause was made out for condonation of delay under Section 5 of the Limitation Act or not, was beyond his jurisdiction in exercise of powers under Section 115 of the Code. He appears to have presumed as if he was exercising jurisdiction of the appellate Court. It would not be out of place to mention that in Manick Chandra Nandy v. Debdas Nandy, AIR 1986 SC 446, their Lordships of Supreme Court explaining the jurisdiction of revisional Court under Section 115 of the Code in particular reference to an application under Order 9, Rule 13 of the Code, observed that learned Additional District Judge must have been cautious

about the scope of his revisional jurisdiction and he need not have mixed it with the appellate jurisdiction. In my considered opinion it is needless to repeat that exercise of revisional jurisdiction is confined to the question of jurisdiction while exercise of appellate jurisdiction is free to decide all, questions of law and fact. In exercise of revisional jurisdiction the Court is not entitled to reappraisal of the evidence on the record and to substitute its own findings in place of the findings of the trial Court. The plea of limitation is a mixed question of law and fact. The findings of the trial Court that sufficient cause was made out for allowing application under Order 9, Rule 13 and also that sufficient cause was made out for condonation of delay under Section 5 of the Act, could not be said to be not borne out by the evidence on the record nor the same could be said to be manifestly contrary to the evidence on the record or palpably wrong and at the same time it could not be said that in case those findings are permitted to continue they would in any way result in miscarriage of justice.

9. Matter can be viewed from other angle as well The Court should see in a given case that the parties may be given an opportunity of being heard on merits and not that the opportunity of hearing may be shut out. In the instant case in case ex parte decree is maintained, the petitioners would be prevented from appearing before the Court or from proving their case on merits. The findings recorded by the trial Court about the sufficient cause having been made out by the defendants under Order 9, Rule 13 of the Code for restoring the suit and sufficient ground for condonation of delay under Section 5 of the Act was made out, were essentially findings of fact and the same cannot be re-examined by the revisional court under Section 115 of the Code. The impugned order appears to be manifestly erroneous in respect of exercise of jurisdiction under Section 115 of the Code. The revisional Court assumed as if it was exercising appellate jurisdiction conferred under Order 43, Rule 1 or under Section 96 of the Code. In this view of the matter as the question of jurisdiction was not involved and the lower appellate Court assumed the jurisdiction of 1st appellate Court, whereas in fact it has got only the limited jurisdiction of a revisional Court, a case for interference and issuance of writ of certiorari has been made out. The only inescapable conclusion is that the findings of fact recorded by the trial Court could not be set aside in exercise of revisional jurisdiction. Present petition accordingly succeeds and is allowed. Impugned order

dated 7-9-1987 passed by III Additional Distt. Judge is quashed. As the matter has dragged on for too long what is required is expedition. Accordingly I direct that the trial court shall decide the suit on merits within a period of 6 months from the date a certified copy of this order is produced before it. An undertaking to this effect has also been given by the learned Counsel for the parties. Under the circumstances, of the case there shall be no order as to costs.