

Smt. Basanti Devi and ors. Vs. Ixth A.D.J. and ors.

Smt. Basanti Devi and ors. Vs. Ixth A.D.J. and ors.

SooperKanoon Citation : sooperkanoon.com/480694

Court : Allahabad

Decided On : Aug-11-2003

Reported in : 2003(4)AWC3365

Judge : Rakesh Tiwari, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : C.M.W.P. No. 30196 of 1999

Appellant : Smt. Basanti Devi and ors.

Respondent : ixth A.D.J. and ors.

Advocate for Def. : K.K. Arora, Adv. and ;S.C.

Advocate for Pet/Ap. : V.K. Agarwal, Adv.

Disposition : Writ petition allowed

Judgement :

Rakesh Tiwari, J.

1. Heard counsel for the parties.

2. When the case was taken up on 11.3.2003, Sri K. K. Arora appearing on behalf of respondent No. 3 stated that he has sent message to his client but he has

received no instructions in the matter and his client is not responding. The case was thereafter taken up on 11.7.2003, for hearing. By means of present writ petition, a writ in the nature of certiorari quashing impugned order dated 18.8.1998 and 20.4.1999, passed by respondent Nos. 2 and 1 respectively has been sought for.

3. Respondent No. 3 Sri Raja Amar Pratap Singh entered into an agreement for sale with the petitioners in respect of plot No. 695 area 5 bigha 6 biswas situated in Masudabad Qasba Kol, Pargana and Tehsil Kol, district Aligarh for a sum of Rs 80,000. He was paid a sum of Rs. 10,000 in cash as advance towards sale consideration of the aforesaid plot. It was agreed that the petitioners may get a registered agreement of sale executed in their favour after paying sum of Rs. 20,000 within two years and registered sale deed would be executed on payment of Rs. 50,000 after permission is granted by the ceiling authority.

4. The petitioner filed Suit No. 365 of 1995 for specific performance on 30.5.1995 of registered agreement in the Court of Civil Judge (Senior Division). The Court decreed the suit ex parte on 22.1.1996. Respondent No. 3 despite sufficient service did not put in appearance in the Court as such.

5. From the records, i.e., second supplementary-affidavit, it appears that respondent No. 3 was duly served with the notice of Execution case No. 37 of 1996 regarding decree dated 22.1.1996 passed in O.S. No. 365 of 1995. On 11.12.1996, a mukhtar nama khas is alleged to have been given by Raja Amar Pratap in favour of Atiqur-Rehman at Dehra Dun at the address given in the plaint. On 20.1.1997, when the respondent did not put in appearance in Court even after personal service, the Civil Judge (Sr. Division) permitted execution of sale deed in favour of the petitioners after deposit of remaining sale consideration of Rs. 50,000 by him.

6. On 20.9.1997, Atiqur Rehman moved an application of restoration of the case along with an application under Section 5 of Limitation Act with his affidavit. The petitioner filed his objection on 15.10.1997 to the aforesaid application and affidavit stating that the inter alia grounds for restoration were false. The Civil Judge (Senior Division) by order dated 18.8.1998, allowed the restoration

application and condoned the delay solely on the ground that client should not suffer on account of lawyer's mistake. Aggrieved the petitioner filed Revision No. 123 of 1998, Smt. Basanti Devi v. Amor Pratap. which was dismissed by the Additional District Judge, respondent No. 1. Aggrieved the petitioner has filed this writ petition.

7. Thereafter Sri B. N. Swami, advocate, who is said to have been conducting the case of respondent No. 3, filed an affidavit before Bar Council that he was never engaged by respondent No. 3 in any proceeding in connection with Original Suit No. 365 of 1995 of Basanti Devi and had never any connection with the case. The petitioners filed amendment application taking additional grounds and bringing the copy of affidavit filed by Sri B. N. Swami, advocate, on record. The amendment application was allowed on 8.3.2002 and notices in the writ petition as well as in the amendment application were again issued to respondent No. 3 on 17.1.2002.

8. None of the allegations made by respondent No. 3 in his restoration application about Sri B. N. Swami, advocate, are corroborated from any record and appear to be patently false. As stated above, Sri K. K. Arora, appearing for respondent No. 3 made a statement before the Court that since he has no instructions, hence in view of the aforesaid facts, there is no contest by the respondents. The land in dispute situated at Aligarh was under land ceiling and could not be sold.

9. In support of his case, the counsel for the petitioner has relied upon 1993 (2) SCC 185, wherein it has been held that it is not an absolute rule that fault of the counsel will excuse the delay. Similarly in JT 1998 (7) SC 2111, it has been held that condonation of delay cannot be granted on equitable grounds.

10. Chapter IV Rule 12 of Allahabad High Court Rules provided that affidavit is to be sworn. The counsel for the petitioner states that affidavit filed along with the restoration application was not sworn properly, therefore, it is not an affidavit in the eye of law.

11. Be that as it may, in view of fact that respondent is not responding to the instructions to his advocate, there is virtually no contest to the prayer made in the writ petition.

12. In these peculiar facts and circumstances of the case, the writ petition is allowed. The impugned order dated 18.8.1998 and 20.4.1999, passed by respondent No. 2 and 1 respectively are quashed and the respondent No. 2 is directed to decide restoration application in the light of objection made above in the body of judgment aforesaid within three months from today. No order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com