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Court : Allahabad

Decided On : Feb-01-2007

Reported in : 2007(3)AWC2680

Judge : S.U. Khan, J.

Appellant : Deep Chand and ors.

Respondent : Viith Addl. District Judge and ors.

Disposition : Petition allowed

Judgement :

S.U. Khan, J.

1. This writ petition was earlier allowed by me on 5.10.2006 without hearing learned Counsel for the contesting respondent as he had not appeared on the said date. Afterwards rehearing application was filed which was allowed on 22.12.2006 and on the same date arguments on merits were also heard.

2. O.S. No. 2 of 1974 instituted by Udaiveer Singh respondent No. 3 for specific performance of agreement for sale against the petitioners was decreed ex parte on 14.3.1978 by IIIrd Additional Civil Judge, Agra. Restoration application filed on 26.5.1978 was dismissed on 21.4.1979 and the said order was maintained in Civil Revision No. 11 of 1980 which was dismissed by VIIth Additional District Judge,

Agra on 20.7.1984 hence this writ petition.

3. Against the rejection of restoration application appeal is maintainable under Order XLIII, Rule 1(d), C.P.C. However revisional jurisdiction is also part of appellate jurisdiction. In any case appeal would also have been maintainable before the same Judge before whom revision was filed, i.e. District Judge or any Additional District Judge to whom matter might have been transferred by District Judge.

4. For rejecting the restoration application the courts below took a very technical view. It was stated that one of the defendants, i.e., Sobran Singh was doing pairvi and as he fell ill hence he could not attend the Court on 14.3.1978. Even though medical certificate was filed however, trial court held that no medical certificate was filed. Revisional court noted this error in its judgment. In any case it is not necessary to file medical certificate in such matters. Supreme Court in Collector v. Katiji : (1987)ILLJ500SC , has held that in restoration matter too technical view shall not be taken.

5. If there are several plaintiffs or defendants, usually one of them does pairvi in the case. The view of the courts below that other defendants could look after the case if Sobran Singh was-ill was also erroneous in law vide G.P. Srivastava v. R.K. Raizada and Ors. 2000(2) AWC 1294 (SC).

6. In the supplementary counter-affidavit dated 8.11.2006 it was stated that as default was committed in compliance of interim order dated 17.3.2001 hence stay order stood automatically discharged and trial court/Additional Civil Judge (S.D.), court No. 23, Agra executed the sale-deed in favour of the plaintiff-respondent on 13.4.2006 and plaintiff was in possession of the land in dispute since the date of the sale. As the ex parte decree in execution of which sale-deed was executed is being set aside through this judgment hence possession shall at once be restored to the petitioners in case it has been delivered to the plaintiff-respondent. However, the sale-deed shall not be actually cancelled in the records of the Sub-Registrar concerned until first decision of the suit and appeal it any. Until final decision, the sale-deed shall remain in suspended animation. In case suit is ultimately decreed then the sale-deed shall stand revived otherwise it shall be

cancelled. Until final decision of the suit and appeal if any petitioners are restrained from transferring the property in dispute.

7. Through second supplementary counter-affidavit filed on 22.12.2006 orders passed on substitution applications in this writ petition have been questioned. Firstly no formal prayer for setting aside those orders has been made and secondly I do not find any error in the said orders.

8. While allowing the writ petition on 5.10.2006 I had directed that restoration application of the petitioner filed before the trial court should stand allowed on payment of Rs. 40,000 as cost to the plaintiff-respondent which had already been deposited in pursuance of interim order dated 17.3.2001 passed in this writ petition. The same direction is again 'being issued. Last three paragraphs (relevant portion) of my judgment dated 5.10.2006 shall form part of this judgment which are quoted below:

Through the interim order dated 17.3.2001 passed on stay Application No. 88773 of 2000 it was directed that petitioners should deposit Rs. 10,000 per year as a condition of stay. Learned Counsel for the petitioners states that in pursuance of the said order Rs. 10,000 were deposited each year for four years and total amount of Rs. 40,000 have been deposited by the petitioners.

As by virtue of the stay order ex parte decree obtained by the plaintiff-respondent has remained stayed for 22 years hence it is essential to award good cost for restoration.

Accordingly, restoration application filed by the petitioners is allowed on payment of Rs. 40,000 as cost. The amount of Rs. 40,000 deposited under interim order dated 17.3.2001 passed by this Court shall be paid to the plaintiff-respondent as cost of restoration.

9. Accordingly, writ petition is allowed both the impugned orders are quashed. Both the parties are directed to appear before the trial court on 12.3.2007.

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