

Javed Khan Vs. Avtar Singh

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Court : Madhya Pradesh

Decided On : Jul-30-2005

Reported in : 2006(1)MPHT181; 2006(1)MPLJ175

Judge : Abhay M. Naik, J.

Acts : Madhya Pradesh Accommodation Control Act; Indian Limitation Act - Sections 5; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 9, Rule 13

Appeal No. : Civil Revision No. 1309/2002

Appellant : Javed Khan

Respondent : Avtar Singh

Advocate for Def. : V.P. Verma, Adv.

Advocate for Pet/Ap. : A.D. Mishra, Adv,

Disposition : Petition dismissed

Judgement :

Abhay M. Naik, J.

1. Plaintiff/respondent sued the petitioner and his father for eviction from the suit shop under the provisions of M.P. Accommodation Control Act. Initially, the suit

was instituted against the petitioner alone. Subsequently, vide order dated 7-12-1990 Aziz Mistry was also joined as defendant No. 2. The petitioner submitted his written statement, although, his father was proceeded against ex parte. Subsequently, the petitioner also absented from the proceedings of the Civil Suit and an ex parte decree for the eviction was passed on 28-4-1995. It was contended that Aziz Khan was not duly served with summons whereas the petitioner was seriously ill from 16-4-95 to 16-5-95 and was unable to move on account of illness.

2. It was further submitted that the petitioner on regaining health contacted his lawyer on 27-6-1995 when he came to know about the ex parte decree. He applied for certified copy on 27-6-1995 which was partly supplied to him on 7-7-1995 in the sense that the certified copy of the decree was not delivered. He again submitted an application for certified copy of the decree which was received by him on 1-8-95.

3. The defendant/applicant submitted in their application under Order 9 Rule 13 of Civil Procedure Code that they came to know about the ex parte decree on 27-6-95 and, accordingly, the application for setting aside the ex parte was duly submitted (it is important to note that no application under Section 5 of the Indian Limitation Act for condonation of delay along with the application for setting aside decree was submitted). The plaintiff/decreed holder submitted his reply and opposed this application. He refuted the averments contained in the application for setting aside the ex parte decree. He also raised an objection about limitation.

4. The learned Trial Judge after recording the evidence found that service on Aziz Mistry was valid. It was further found that the defendants were father and son and the son used to participate in the proceedings. It was found by the learned Trial Judge as a fact that the petitioner was capable of making movements even during his alleged illness.

Considering the various discrepancies, the learned Trial Judge found that there was no sufficient cause for the absence of the defendant. Accordingly, the application under Order 9 Rule 13 of Civil Procedure Code was dismissed on 12-7-2000 and the appeal preferred against the same has been dismissed by the

impugned order dated 31st July, 2000. It may be noticed that Aziz Mistry died during the pendency of the appeal and his name was deleted. Aggrieved by the same, the defendant/petitioner has preferred the present revision application.

6. After hearing both the Counsels, I am of the considered opinion that the revision application is devoid of merits and is liable to be rejected.

7. Learned Lower Appellate Court has considered the evidence recorded during the enquiry under Order 9 Rule 13 of Civil Procedure Code. The detailed discussion and appreciation is contained in Paragraphs 8 to 10 of the impugned order. Learned Lower Appellate Court after a correct appreciation has rightly disbelieved the evidence of the petitioner.

8. I am conscious of the fact that the revisory powers can not be exercised to interfere into the findings of fact, unless there is a perversity or there is non application of mind. The Hon'ble Supreme Court in Masjid Kacha Tank, Nahan v. Tuff ail Mohammed, reported as : AIR 1991 SC455 has held :-

It is well settled position in law that under Section 115 of the Code of Civil Procedure the High Court can not reappreciate the evidence and can not set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the Courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction.

9. Learned Counsel for the petitioner relied on the case reported as : [2000]2SCR97 . It is true that the provisions of Order 9 Rule 13 of Civil Procedure Code are to be construed liberally. The Apex Court itself has laid down that sufficient cause for the purpose of Order 9 Rule 13 of Civil Procedure Code has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have wide jurisdiction in deciding the sufficient cause keeping the facts and circumstances of each case. The Apex Court has further held that in any case where defendant approaches the Courts immediately and

within the statutory time specified, the discretion is normally exercised in his favour provided the absence is not malafide or intentional. In the instant case the son and father were defendants. The son, i.e., the petitioner gave appearance in the civil suit and submitted his written statement whereas the father did not give appearance. Further the application under Order 9 Rule 13 of Civil Procedure Code was not submitted within the statutory time prescribed under the law. Since the petitioner was duly served with the summons, as is apparent from his written statement, the limitation for submitting an application under Order 9 Rule 13 of Civil Procedure Code commenced from the date of the decree. Since the application for setting aside ex parte decree was not submitted within the prescribed period of 30 days from the date of ex parte decree, the case relied on by the learned Counsel for the petitioner does not get attracted. The reliance by the learned Counsel for the petitioner on 1997(2) MPWN Note No. 77 and Note No. 89 is out of place as these rulings do not deal with the situation of the present case.

10. Learned Counsel for the petitioner also relied upon unreported decision of this Court in M.A. No. 1389/2002 which again is inapplicable in present situation because the applicants therein were found to be prevented from appearing in the Courts due to heavy rains and flood.

11. The learned Lower Appellate Court is found to have correctly appreciated the evidence on record which does not call for interference, moreso, within the limited powers of Section 115 of the Civil Procedure Code. Thus, I do not find any merit in the revision application. The revision application is therefore dismissed summarily.