

Badri Ram and ors. Vs. Narayan Ram

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Court : Rajasthan

Decided On : Nov-10-2008

Reported in : AIR2009Raj48

Judge : Prakash Tatia, J.

Appellant : Badri Ram and ors.

Respondent : Narayan Ram

Disposition : Petition allowed

Judgement :

ORDER

Prakash Tatia, J.

1. Heard learned Counsel for the parties.
2. The appellants are aggrieved against the order dated 23-7-2008 passed by the Court of Additional District Judge No. 3, Jodhpur by which the learned trial Court dismissed the appellants' application filed under Order 9. Rule 13, C.P.C. as well as application under Section 5 of the Limitation Act seeking setting aside of the ex parte decree dated 21-8-2007.
3. Brief facts of the case are that a suit for possession was filed by the plaintiff-respondent against the defendant-appellants with title allegation that in the suit

shop situated in commercial area i.e. Stadium Shopping Centre, Kalpatru Cinema Road, Jodhpur, the defendants-appellants were running their shop M/s. Mahadev Travels as licensee of the plaintiff-respondent because of the reason that they had well acquaintance with the plaintiff. It is submitted in the plaint that the defendants who are running commercial enterprises in the shop in dispute would hand over the vacant possession of the suit property as and when the possession will be demanded by the plaintiff. In the month of December 2004, the plaintiff came to know that defendants started material alteration in the suit premises which was objected by the plaintiff by sending telegram and thereafter the plaintiff demanded possession of the suit property from the defendants. In view of the above, according to the plaintiff, the defendants' licence was terminated. The plaintiff also claimed mesne profit @ Rs. 25,000/- per month from the Month January, 2005 and in the suit, decree for Rs. 2 lacs as arrears of mesne profit was claimed. The said suit was registered in the trial Court only on 13-9-2006 and summons were issued to the defendants by order dated 18-9-2006. The summons issued to the defendants was not found served, then on 3-11-2006, fresh summons were issued to the defendants for the date 14-12-2006. On 14-12-2006, an application was filed for substitute service and that too, by publication of notice in the newspaper which was allowed by the trial Court and by this mode of substitute service, the summons were served upon the defendants. On 25-1-2007, in response to the summons, the defendants' advocate put in appearance and case was adjourned to 7-3-2007. On 7-3-2007, since the Presiding Officer was not available due to transfer, case was adjourned to 10-4-2007. On 10-4-2007, the case was adjourned to 24-4-2007. On 24-4-2007, right of the defendants to file written statement was closed as the written statement was not filed and case was adjourned to date 16-5-2007. After writing this order posting the case to 16-5-2007, learned Counsel for the plaintiff requested for hearing of the application submitted by the defendants for extension of time for filing the written statement under Section 148, C.P.C. That application was dismissed on the same day i.e. 24-4-2007. On 16-5-2007 i.e. on the next date, affidavit of plaintiff was filed and case was adjourned for cross-examination of plaintiff to 25-5-2007. On 25-5-2007, nobody appeared on behalf of the defendants, therefore, the trial Court proceeded to pass ex parte against the defendants and closed the evidence of the plaintiff

and fixed the date 3-7-2007 for arguments. On 3-7-2007, due to transfer of Presiding Officer, case was adjourned to 25-7-2007. On 25-7-2007, the case was adjourned to 21-8-2007 and on the said date, the decree was passed for eviction against the defendants-appellants with a decree of Rs. 2 lacs as arrears of mesne profit and further decree for mesne profit @ Rs. 10,000/- per month till possession is delivered to the plaintiff.

4. Facing this decree dated 21-8-2007, the defendants submitted application under Order 9, Rule 13, C.P.C. before the trial Court stating therein that the plaintiff has filed absolutely frivolous suit by showing the defendants as licensee as the defendants are running their business since last 15 years in the suit shop under oral agreement to purchase the properties. The defendants submitted that they engaged the advocate and gave Vakalatnama which was filed in the trial Court on 25-1-2007. They stated that because of nature of business of transportation, they used to remain outside from Jodhpur and only on 13-1-2008, they came to know from the employees that 4-5 persons came to take possession of the suit property upon which the defendants-appellants tried to contact their counsel and found that decree was passed by the trial Court on 21-8-2007. They obtained the copies of the judgment and decree and found that their case was not conducted and they were not informed about the progress in their case by their counsel nor about passing of the decree.

5. The said application was contested by the plaintiff by filing detailed reply and by raising objection that the application barred by time and the allegation against the advocate are false one and there is no cause shown by the defendants for their non-appearance before the trial Court. The other allegations levelled by the defendants about the agreement for sale under which they are claiming that they took possession of the property in dispute, the defendants file the suit for specific performance of contract, in which they sought stay of execution of impugned decree. The stay petition in that suit was dismissed and appeal against said order was dismissed by this Court. The plaintiff requested for dismissal of the appeal.

6. Learned Counsel for the appellants submitted that the proceeding recorded in the order-sheets in the trial Court itself clearly show that summons on the

defendants were served by publication of notice in the newspaper. However, defendants engaged their advocate and learned advocates put in appearance on behalf of the defendants. It is submitted that the post was vacant due to transfer of the Presiding Officer and thereafter on 24-4-2007, right to file written statement was closed but learned Counsel submitted application for extension of time and that was dismissed on the same day without giving any opportunity to the defendants to file the written statement. It is submitted that normally, the applications are not decided on the same day but it has been done in this case. The plaintiffs evidence was closed on 16-5-2007 and on the next date only, ex parte order was passed against the defendants because defendants' counsel did not appear. Thereafter, arguments were heard in die Month of July, 2007 and decree was passed. It is submitted that from the record itself, it is clear that the defendants were not negligent and even if, there was lapse on part of the defendants, that was of very short period of maximum less than three months. It is submitted that assuming for the sake of arguments that there was lapse on part of the defendants, even then it was not a case where they could be penalised by decree of eviction from commercial premises with decree of Rs. 2 lacs and also with decree of Rs. 10,000/- per month till possession is delivered. It is submitted that it is not a case where the allegations are against the advocates that they deliberately did not inform the defendants about the progress in the suit. It is also submitted that even if it was mistake of the advocate, then the defendants cannot be punished to the extent of denying opportunity of hearing in suit. The cost can be the adequate compensation for the plaintiff. It is also submitted that there was no reason for defendants to not to contest the suit for eviction when the property is situated in commercial area and according to plaintiff, it has rental value Rs. 10.000/- per month.

7. Learned Counsel for the respondent vehemently submitted that the limitation started from the date of passing of the decree and the defendants failed to explain the delay in filing the application. The defendants adopted dilatory tactics and they cannot raise any objection about the manner of service of summons upon the defendants after putting appearance in response to the publication of summons by the order of the Court. It is also submitted that no affidavit of any of the employee or neighbour has been filed by the defendants in support of the contention that

some persons came on site to take possession of the property and from them only, the defendants got knowledge of the decree. Learned Counsel also submitted that levelling allegations against the advocates for setting aside the ex parte decree passed by the Court in the cases of the gross negligence of defendants, is common and has not been appreciated by this Court in number of cases. Learned Counsel for the respondent relied few judgments of this Court and submitted that this Court in several cases did not accept such vague pleas for setting aside of the decree passed by the Courts. It is also submitted that it is the duty of the litigant to contact advocate and it is not the duty of the advocate to search and contact the litigant-client. It is also submitted that the defendants filed the suit for specific performance of contract for this very property wherein injunction application was submitted which was dismissed and appeal against that was also dismissed by this Court. In view of the above reasons, no illegality has been committed by the trial Court in dismissing the application under Section 5 of the Limitation Act as well as application under Order 9, Rule 13, C.P.C. filed by the defendants-appellants.

8. I have considered the submissions of the learned Counsel for the parties and perused the facts of the case.

9. This Court is of the view that mere change of advocate and levelling allegations against the advocate by changing the advocate may be tendency of the litigants but because of that reason, the litigant cannot get the relief when it is found that the allegation has been levelled upon the advocate only to hide his own lapses by the litigant, then no relief can be granted to such litigants, This Court is also of the view that the party should remain in touch with the advocate and it is not the duty of the advocate to again and again approach the client for taking step in the trial Courts.

10. The similar view was taken by this Court (by me) in *Onkarmal and Ors. v. Mohar Singh* reported in 2004 (3) DNJ (Raj) 1506 : 2005 AIHC 841. But facts of the case of *Onkarmal* were different from the facts of this case. In the said case, not only defendants took part in the trial of the suit but sought time to produce evidence but did not appear to have given their own statement nor produce

witnesses by specifically saying that the defendants-appellants did not want to produce evidence, which is clear from the order dated 8-2-1999. After taking note of the conduct of the defendants, the trial Court by detailed order rejected the application of the defendants-appellants for setting aside ex parte decree and that order was under challenge before this Court wherein the revision petition was dismissed.

11. Learned Counsel for the respondent also relied upon judgment of Tawa Nine and Anr. v. The Bank of Rajasthan Ltd. and Anr. reported in 2006 WLC (Raj) UC 666. In the said case, this Court (by me) observed that defendants failed to file written statement and levelled allegation against the advocate and from the facts of the case, it was found that learned advocate sought time for filing written statement before the trial Court and also informed the trial Court that he could not contact the appellant upon which the trial Court adjourned the case and fixed the next date. Then local counsel informed the Court that appellant went out of station. The case was adjourned on payment of cost of Rs. 50/- even then no steps were taken by the defendants. The trial Court also found the statement of defendants not worth reliance. In that situation, when advocate made efforts and the facts came on record, the plea of the defendants were not accepted and, therefore, this Court dismissed the Misc. Appeal.

12. Learned Counsel for the respondent also relied on the judgment of Mohan Singh and Ors. v. Navab Ali and Ors. reported in 2006 (2) DNJ (Raj) 978. In the said case, the appellant took two grounds and one of which was that counsel did not inform him and he did not conduct the case properly. This Court found that facts show otherwise. The appellants were found negligent throughout the trial, and therefore, this Court by detailed judgment, dismissed the application under Section 5 of the Limitation Act as well as the appeal.

13. Yet another judgment relied on by the learned Counsel for the respondent, delivered in the case of Geeta Devi and Ors. v. Nirmala Kumari reported in 2005 (1) DNJ (Raj) 228 wherein ex parte decree was passed on 18-5-1996 and application for setting aside the judgment and decree was filed on 31-3-1998. In, the said case, number of adjournments were granted to the petitioner for filing the

written statement before passing ex parte decree. On facts, this Court held that defendant-petitioner failed to explain inordinate delay in filing application under Order 9, Rule 13, C.P.C. and the delay was almost three years.

14. The facts of yet another case of Ladu Ram v. Smt. Gyatri Devi and Ors. reported in 2004 (2) DNJ (Raj) 1028: 2004 AIHC 3436) are that the application for setting aside the ex parte decree was filed after seven months and this Court held that defendants failed to explain the delay and defendant admitted that his son was in touch with the counsel. In that situation, the revision petition was dismissed by the High Court.

15. The each case has its own facts and totality of the facts are required to be seen when it is to be found out whether it was a deliberate dilatory tactics of the defendants and it was a gross negligence on the part of the defendants. In the cases of gross negligence on part of the defendants, there is tendency of changing advocate and putting allegation against the counsel but the Courts can certainly find out such type of efforts. Insisting for filing any complaint against the advocate in the Bar Council cannot give any fruitful result because of the reason that the civil Courts are required to decide the cases on the basis of the facts and evidence available on record In the Court and cannot depend upon the fact whether any other action has been taken against the counsel by the litigant or not. Even if, action is taken by litigant against the counsel by lodging complaint in Bar Council, the Civil Courts are not supposed to wait for the outcome of the complaint, then that will be nothing but raising of grievance by litigant against the advocate and that is already before the civil Court. The exoneration of the advocate by the Bar Council may also not be just reason for denying relief to the aggrieved party by the Civil Court, if Court is satisfied from the material placed before it, that defaulter party is entitled to relief. If it is insisted that for levelling allegation of any sort against the advocate, there must be complaint before Bar Council, then the other insistence may be whether he has filed the suit for damages against the advocate or not. Both insistence will be of no. In a matter where there is involvement of personal skill of person and advocates are discharging their duties of personal skill then there may be error of judgment of advocate in handling the case, such acts cannot be said to be negligent act of advocate. It is better to separate the two

things, one deciding application wherein conduct of advocate is involved is of trivial nature and case of misconduct for which action against the advocate in the Bar Council may be taken.

16. In this case, though it is not much relevant that how the service was affected on the defendants because of the reason that defendants in response to the publication of the notice in the newspaper put in appearance but at the same time, the fact cannot be ignored that in this case, without making any much efforts for personal service on the defendants, straightway the notice was published in the newspaper. Even if on first occasion, the Court directs the service of summons by publication in newspaper, the party defendant is required to appear and once he puts in appearance he cannot raise objection in service of summon. But that type of procedure of substitute service can be condemned.

17. The defendants did not file the written statement upon which trial Court closed the right of the defendants to file written statement on 24-4-2007 and on the same day, the learned Advocate submitted an application for extension of time. This application was not supported by affidavit of the defendants obviously because of the reason that they were not available at that time in Court. In the said application, the learned Counsel stated that because of the nature of business of defendants, they used to go out of the Jodhpur and on the next date, written statement will be filed. The defendants are running business of transportation, is not in dispute. That shows that defendants were not present in the Court when the order dated 24-4-2007 was passed for closing their right to file written statement. The advocates vigilantly tried to get the time extended but failed in that effort. There is no material on record on the basis of which, it can be said that the defendants were given information by the learned Counsel about progress in the suit or order passed against them and under what circumstances, learned Counsel did not appear before the trial Court on 25-5-2007, is not available on record, neither explanation sought from the learned Counsel about non-appearance nor the defendants could have explained that situation because they came to know subsequently about the decree which was passed on 21-8-2007. The evidence of the plaintiff was closed on 25-5-2007 and the decree was passed after hearing the plaintiff on 21-8-2007, i.e. within the period of less than three months and during

this period, there was summer breaks of four weeks.

18. In view of the facts and circumstances of the case, I do not find any reason to disbelieve the statement of the defendants that they came to know about the decree on the date mentioned by them because of the simple reason that in totality of the facts available on record itself, it is clear that the defendants were engaged in the business of transportation. The plaintiffs own case is that he served the notice which was not delivered to the defendants which was sent by him before filing of the suit and according to plaintiff himself that publication of notice in newspaper was necessary because personal service of defendants was not possible and in that situation, the total period of absence of defendants during trial can be condoned by compensating the plaintiff but denied the opportunity to contest the suit will be too harsh in the facts of the case. In this case, it cannot be said that the defendants were negligent and they are not entitled to the relief of condonation of delay. It is true that limitation starts from the date of decree when parties put in appearance in the suit. In that situation only, the defendants are required to explain the sufficient cause for not filing the application in time and that has been done by the appellants. It is true that affidavit of any other person has not been filed by the defendants in support of the fact that they came to know that someone came to take possession of the property but at the same time, their presence on the premises all the time, is not the case of even plaintiff.

19. In view of the above reasons, the trial Court committed error of law as well as error of facts in rejecting the application under Section 5 of the Limitation Act as well as application under Order 9, Rule 13, C.P.C. The order of the trial Court dated 23-7-2008 is set aside. However, the appellants shall have to compensate the plaintiff and looking to the fact that property in question is commercial premises and there is decree of Rs. 2 lacs against the defendants, therefore the application is allowed on payment of cost of Rs. 10,000/-. The cost shall be paid by the appellant to the respondent within a period of 15 days from today either directly or through their counsel or by depositing in the Court.

20. Both the parties are directed to appear before the trial Court on 19-11-2008. In view of the facts mentioned above, time for filing of the written statement of the

appellants-defendants is extended upto 19-11-2008. The trial Court is expected to decide the suit expeditiously within one year from 19-11-2008.

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