Bhagmal & Ors vs Kunwar Lal & Ors on 27 July, 2010

Equivalent citations: AIR 2010 SUPREME COURT 2991, 2010 (12) SCC 159, 2010 AIR SCW 4799, (2010) 5 MAD LW 41, (2010) 4 PUN LR 267, (2010) 2 WLC(SC)CVL 443, (2010) 111 REVDEC 666.2, (2010) 2 CLR 519 (SC), (2010) 4 CAL HN 205, (2010) 3 CURCC 323, (2010) 3 GUJ LH 246, (2010) 4 JCR 63 (SC), (2010) 3 ICC 710, (2011) 1 CIVLJ 75, (2011) 1 ORISSA LR 187, (2011) 1 RAJ LW 459, (2011) 1 MAD LJ 369, (2010) 5 ALL WC 5405, (2010) 83 ALL LR 108, (2010) 3 RECCIVR 941, (2010) 4 RAJ LW 2926, (2010) 2 ALL RENTCAS 857, (2010) 4 CIVILCOURTC 120, 2010 (7) SCALE 490, (2010) 7 SCALE 490

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Bench: V.S. Sirpurkar, Mukundakam Sharma

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"Reportable "

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5875 OF 2005

Bhagmal & Ors. .... Appellants

Versus

Kunwar Lal & Ors. .... Respondents

J U D G M E N T

V.S. SIRPURKAR, J.

1. The order passed by the High Court allowing a Civil Revision and thereby restoring the order of the Trial Court is challenged herein. A Civil Suit bearing No. 321-A of 1984 came to be filed by the respondents against the father of the petitioner No. 1 namely Kallu. Kallu died during the pendency of the suit and his legal heirs were brought on record. The suit was for declaration of title, possession and permanent injunction against the appellants/defendants in respect of the house in dispute. The Court proceeded ex-parte and the decree came to be passed. It is only when the execution proceeding started that the appellants/defendants allegedly came to know about the decree and moved an application under Order IX Rule 13 read with Section 151 of the Civil Procedure Code (hereinafter called `CPC' for short) for setting aside the ex-parte decree.

2. According to the appellants/defendants, this application was moved within 30 days from the date of their knowledge of ex-parte decree. The appellants/defendants had pointed out that there was a compromise effected on 10.12.1983, which was an out-of- Court settlement, wherein it was agreed between the parties that the respondent No. 1/plaintiff would withdraw the suit on account of the understanding having been arrived at between the parties. The appellants/defendants further pleaded that since it was the understanding between the parties that the respondent No. 1/plaintiff would withdraw the suit or get it dismissed, they did not attend the further proceedings, which the respondent No. 1/plaintiff continued surreptitiously and hence they did not even know about the ex-parte order and the decree passed against them. It was the stand of the appellants/defendants that since the application had been moved within 30 days from the knowledge, a separate application for condonation of delay was not required. The application under Order IX Rule 13 was dismissed by the Trial Court, which held the said application to be barred by time. A Misc. Civil Appeal came to be filed in the Court of District Judge, Bhopal against that order. There was some delay in filing the said appeal and, therefore, the application under Section 5 of the Limitation Act for condonation of delay was also filed. The appellate Court held that the application filed by the appellants/defendants under Order IX Rule 13 deserved to be allowed and held that the Trial Court had erred in law in not allowing the application. The appeal came to be allowed and the appellate Court directed the Trial Court to decide the case on merits after hearing the parties.

3. A Civil Revision came to be filed under Section 115 CPC before the High Court. The High Court took the view that the application filed by the appellants/defendants under Order IX Rule 13 was barred by time and the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and, therefore, the appellate Court had exceeded its jurisdiction in allowing the application without condoning the delay. On that count, the impugned order of the appellate Court was set aside and that of the Trial Court was restored. Ms. June Chaudhary, learned Senior Counsel appearing on behalf of the appellants invited out attention to the order of the appellate Court, by which the Order IX Rule 13 application of the appellants/defendants was allowed. The learned Senior Counsel pointed out that the appellate Court had, on merits, discussed all the issues and had come to the finding that there indeed was a compromise effected in between the parties, in which there was an understanding arrived at that the respondent No. 1/plaintiff would withdraw his suit in pursuance of the understanding between the parties. The learned Senior Counsel also pointed out that, therefore, the appellants/defendants never attended the Court after 10.12.1983. This was tried to be countered with Shri M.P. Acharya, the learned Counsel appearing on behalf of the respondents that the order sheet of the suit showed as if the appellants/defendants were present even after 10.12.1983. Our attention was invited to the order sheets of the dates after 10.12.1983, wherein it was recorded `parties as before'. On that basis Shri Acharya contended that the appellants/defendants remained present in the Court and they had the knowledge of the proceedings. However, our attention was also invited to the finding by the appellate Court that those entries could not be relied upon because admittedly there were no signatures of the parties on any of those order sheets. Therefore, one thing was certain that the appellate Court was right in holding that due to the compromise effected, the appellants/defendants did not attend the suit and, therefore, were not knowing about the proceedings at all.

4. The appellate Court also has pointed out that the evidence was led before the Trial Court in support of the application under Order IX Rule 13 and in that, the appellants/defendants had examined the witnesses like Rambharose (AW-1), Shanta Bai (AW-2), Jabia (AW-3), Babulal (AW-4), Bhagmal (AW-5), Genda Lal (AW-6), Dashrat Singh (AW-7), Bhurra @ Aziz (AW-8) and Nand Kishore (AW-9). The appellate Court also recorded the finding that the compromise deed was also got proved by the appellants/defendants in those proceedings through the witnesses who asserted that the compromise deed bore their signatures. The witnesses went on to say that the compromise deed was also signed by the present respondents. The appellate Court, therefore, rightly came to the conclusion that the appellants/defendants were justified in not attending the Court and that they did not even know about the decree having been passed and, therefore, the delay in presenting the application was also justified. The appellate Court also referred to the evidence of respondent Kunwar Lal and came to the conclusion therefrom that indeed a compromise deed was executed between the parties. The appellate Court also went on to express that the inference by the Trial Court that the compromise deed was doubtful, was also not correct. The appellate Court has also dealt with the cross objections raised before it by the present respondents to the effect that the compromise deed (Exhibit A-1) was prepared fraudulently. The appellate Court has rejected that contention in the cross objections and in our opinion, rightly.

5. This well considered order of the appellate Court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellants/defendants before the Trial Court in support of their application under Order IX Rule 13 CPC. The High Court observed that the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction. The High Court also commented on the fact that the ex-parte decree was decided on 19.4.1985, while the application for setting aside the ex-parte decree was filed on 8.7.1988 and that no application for condonation of delay under Section 5 of the Limitation Act was filed.

6. Relying on Article 123 of the Limitation Act, the High Court took the view that the application ought to have been filed within 30 days from the date of passing of the decree and since it was not so filed, at least a condonation of delay application should have been made under Section 5 of the Limitation Act and, therefore, in the absence of prayer for condonation of delay, the appellate Court could not have allowed the application under Order IX Rule 13.

7. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the Trial Court's order that the Trial Court entertained the application on merits. The Trial Court undoubtedly has referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond the limitation. However, the view taken by the Trial Court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The Trial Court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "parties as before". Therefore, the Trial Court did not throw the application under Order IX Rule 13 merely on the basis of the fact

that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants/defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants/defendants for making the Order IX Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order IX Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

8. Shri Acharya, learned Counsel appearing on behalf of the respondents tried to argue on the basis of Article 123 of the Limitation Act. However, in our opinion, Article 123 cannot be, in the facts of this case persuade us to take the view that the limitation actually started from the date of knowledge, as the appellants/defendants had no notice of the decree or the proceedings which the respondents had promised to terminate. Shri Acharya then tried to persuade us by suggesting that unless the application was filed for condonation of delay, the court had no jurisdiction to entertain the application for setting aside the decree. He has based this contention on the basis of a reported decision of this Court in Sneh Gupta Vs. Devi Sarup & Ors. [2009 (6) SCC 194] and more particularly, the observations made in para 70 therein. In our opinion, the facts of this case were entirely different, as it was held in that case that the appellant had knowledge of passing of the compromise decree and yet she had not filed the application for condonation of delay. That is not the situation here. Even in this case, there is a clear cut observation in para 57, as follows:-

> "However, in a case where the summons have not been served, the second part shall apply."

The Court was considering Article 123 of the Limitation Act. In our opinion, in this case, the limitation must be deemed to have started from the date when the appellants/defendants came to

know about the decree on 22.6.1988. An application under Order IX Rule 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any.

9. We, therefore, allow this appeal, set aside the judgment of the High Court and restore that of the appellate Court. The suit will now proceed before the Trial Court in pursuance of these orders. Under the circumstances, the proceedings of the suit shall be expedited. There shall be no costs.

.....J. (V.S. Sirpurkar) .....J. (Dr.MukundakamSharma) New Delhi;

July 27, 2010