

MOHD. SAHID AND OTHERS

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v.

RAZIYA KHANAM (D) THR. LRS. AND ANOTHER

(Civil Appeal No.10379 of 2018)

OCTOBER 10, 2018

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[R. BANUMATHI AND INDIRA BANERJEE, JJ.]

Suit – Respondent No.1(since dead) filed suit against the appellants inter alia for permanent injunction against them over the suit land – Appellants did not appear in the suit and it was decreed vide ex-parte order dated 10.05.2012 – In appeal, the appellants filed application for condonation of delay on the ground that the appellants came to know of the judgment in the suit for the first time on 06.05.2013 through a police constable when they went to attend the hearing in another case before the Sub-Divisional Magistrate – Dismissed – High Court dismissed second appeal – On appeal, held: Statement of the appellants that they got knowledge about the judgment of the trial court in the suit for the first time on 06.05.2013 is incorrect – Certified copy of the order sheets dated 11.10.2011 and 14.10.2011 in the suit show that on 11.10.2011, parties were present in the trial court – Order sheet and other materials clearly show that the appellants had full knowledge about the proceedings of the suit – Both the First Appellate Court and the High Court recorded concurrent findings that the appellants filed the application for condonation of delay with incorrect facts and were negligent in pursuing the matter and rightly refused to condone the delay – No perversity or infirmity in the impugned order warranting interference.

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Dismissing the appeal, the Court

HELD: 1.1 The statement of the appellants that they got knowledge about the judgment of the trial court dated 10.05.2012 in the Suit for the first time on 06.05.2013 is incorrect. Certified copy of the order sheet dated 11.10.2011 and 14.10.2011 in the suit shows that on 11.10.2011, parties were present in the trial court. On 11.10.2011, the trial court heard the parties for deciding the issues No.2 and 3 and the order sheet indicates the presence

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A of the parties. Thereafter, the case was put up for recording of evidence by the respondent-plaintiff on 14.10.2011. As per the order sheet dated 14.10.2011, the case was called out and the parties were present and the case was again adjourned to 18.10.2011. On 18.10.2011, the affidavit of the respondent-plaintiff was filed and thereafter, in spite of several opportunities, the appellants-defendants did not appear and the suit was decreed *ex-parte* on 10.05.2012. In the said judgment dated 10.05.2012, the trial court has recorded that in spite of opportunities, the appellants-defendants did not appear. The First Appellate Court as well as the High Court rightly recorded concurrent findings that the appellants had full knowledge about the proceedings of the suit. The High Court has rightly observed that the appellants have not come out with the correct facts. [Paras 15, 16] [968-G-H; 969-A-B, F-G]

D 1.2 On behalf of the respondents, it is stated that in the proceedings before the Sub-Divisional Magistrate, the appellants filed the application on 23.11.2012 (Objection Paper No.23C2) wherein the judgment dated 10.05.2012 of the civil court was mentioned and it was even averred that the said judgment was passed wrongly. It is thus clear that the appellants had knowledge about the judgment and decree in the suit even on 23.11.2012. While so, the appellants filed application with incorrect averments that they got knowledge about the judgment and decree only on 06.05.2013 when constable of the Police Station gave them the information. [Para 17] [970-E-G]

F 1.3 The order sheet and other materials placed on record clearly show that the appellants had full knowledge about the proceedings of the suit and the appellants have filed application for condonation of delay with incorrect facts. Both the First Appellate Court and the High Court recorded concurrent findings that the appellants have filed the application for condonation of delay with incorrect facts and were negligent in pursuing the matter and rightly refused to condone the delay. There is no perversity or infirmity in the impugned order warranting interference. [Para 19] [971-C-E]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10379 A
of 2018.

From the Judgment and Order dated 15.10.2015 of the High Court
of Judicature at Allahabad in Second Appeal No. 819 of 2015

Yatindra Singh, Sr. Adv., D. V. Singh, M/s. Anuradha & Associates, B
Advs.for the Appellants.

U.K. Unniyal, Sr. Adv., Mr. Dinesh Kumar Garg, Abhishek Garg,
Dhananjay Garg, Deepak Mishra, P.V. Yogeswaran, Advs. for the
Respondents.

The Judgment of the Court was delivered by C

R. BANUMATHI, J. 1. Leave granted.

2. This appeal arises out of the order dated 15.10.2015 passed by
the High Court of Judicature at Allahabad in Second Appeal No.819 of
2015 in and by which the High Court affirmed the order of the First
Appellate Court dismissing the application filed under Section 5 of the D
Limitation Act and declining to condone the delay of 349 days in filing
the appeal.

3. Respondent No.1-Raziya (since dead) filed a Civil Suit No.591
of 1979 against the appellants No.1 to 3 for cancellation of sale deeds E
dated 17.02.1979 and 17.05.1979 in favour of the appellants and for
relief of permanent injunction against them over the suit land. Respondent
No.1-Raziya (since dead) contended that appellants No. 1 to 3 forged
documents and executed a *bainama* of the suit property in their favour
on 17.02.1979. Some part of the suit property was also sold to appellant
No.4-Mahesh by sale deed dated 17.05.1979. The respondents resisted F
the suit contending that respondent No.2-Hadisunnissa executed a
Hibanama in favour of respondent No.1-Raziya Khanam (since dead)
on 27.02.1979 of her properties and building situated in the village Nadva
Khas and Revri Dihi and other villages on 27.02.1979 in the consolidation
office.

4. The said Suit No.591 of 1979 was decreed on 16.04.1981 against G
appellants No.1 to 3 with the observation that they had been properly
served and had appeared and sought time for filing written statement;
but despite ample time being given, they had not filed written statement.

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- A 5. In appeal by appellants, the First Appellate Court noted that appellant No.3-Mohd. Asid was a minor at the time when the original suit was filed and the proceeding for appointment of his legal guardian has not been completed in accordance with law and in such circumstances, it could not have been possible to have proper service upon appellant No.3-Mohd. Asid. After considering the submissions of
- B appellants No.1 to 3, the First Appellate Court *vide* order dated 29.11.1985 allowed the appeal and remitted the matter back to the trial court with a direction to rehear both the parties and decide the case on merits with costs of Rs.50/- payable by the appellants and filing written statement on or before 03.01.1986.
- C 6. Respondent No.1-Raziya Khanam (since dead) filed a Writ Petition(C) No.19550 of 1985 before the High Court against the order of the First Appellate Court in which interim order dated 20.02.1985 was passed by the High Court. The said writ petition remained pending for nearly fifteen years. In the said writ petition, the appellants herein
- D were neither served nor they entered their appearance. The High Court noted that the First Appellate Court recorded a finding that the appellants were not served with notice and rightly set aside the decree dated 16.04.1981 and remanded the matter back to the trial court. The said writ petition was dismissed on 20.02.2001 and order of interim stay dated 20.02.1985 was vacated.
- E 7. The order sheet of the trial court dated 30.05.2011 indicates the order dated 20.02.2001 passed in Writ Petition (C) No.19550 of 1985 was produced before the trial court. The fact that the order in the said writ petition was placed before the High Court on 30.05.2011 is clear from the order sheet of the trial court dated 04.03.2011 which
- F reads that “*Proceeding of suit is stayed by Hon’ble Allahabad High Court Record may be produced on 30.05.2011 for further orders.*” Before the trial in Suit No.591 of 1979 was taken up, substitution applications No.113K2, 114G2, 115G2, 116G2 and 117G1 were taken up and orders were passed on various dates.
- G 8. Though the appellants claimed that they were not present before the trial court in Suit No.591 of 1979, the order sheet dated 14.10.2011 passed by the trial court in Suit No.591 of 1979 notes the presence of both the parties in the trial court on 14.10.2011 when the submissions of the parties regarding preliminary issues were considered and subsequent
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date i.e. 18.10.2011 was fixed for cross-examination of PW-1 which according to the respondents, the appellants had knowledge about the same. A

9. Subsequently, the appellants-defendants did not appear in the suit and the suit was decreed *ex-parte* on 10.05.2012. The first appellant-Mohd. Sahid preferred Civil Appeal No.131 of 2013 with application for condonation of delay of 349 days under Section 5 of the Limitation Act. In the said application for condonation of delay, the appellants averred that they came to know about the judgment of the trial court dated 10.05.2012 for the first time on 06.05.2013 when they went to attend the hearing in another case before the Sub-Divisional Magistrate and at that time, a constable from Police Station Ghosi informed him about the said judgment dated 10.05.2012. According to the appellants, after receipt of such information, they contacted their counsel over telephone for inspection of case file and after inspection on 10.05.2013, they applied for copy of the same which was received on 18.05.2013 and the appeal was filed on 22.05.2013 which caused delay of 349 days in filing the appeal. B
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10. The application for condonation of delay was dismissed by the First Appellate Court *vide* order dated 05.08.2015 on the ground that the appellants had knowledge about the judgment dated 10.05.2012 passed by the trial court in Suit No.591 of 1979 and that the appellants were not vigilant, rather they had been negligent. Pointing out that the appellants made incorrect averments in the application and that no sufficient and reasonable cause has been shown by the appellants for the delay, the First Appellate Court dismissed the application. In appeal before the High Court, the High Court noted that the reasons stated in the application for condonation of delay are self-contradictory. The High Court referred to the order sheet of the trial court dated 14.10.2011 which notes the presence of both the parties in the trial court on 14.10.2011 and the respondents-plaintiffs evidence in the form of affidavit and that the matter was fixed on 18.10.2011 for cross-examination of PW-1 which clearly shows that the appellants had full knowledge about the proceedings in the Suit No.591 of 1979 and also about the dismissal of the Writ Petition (C) No.19550 of 1985. The High Court dismissed the Second Appeal No.819 of 2015 observing that the order of the First Appellate Court does not suffer from any factual error or illegality and that no substantial question of law arises in the Second Appeal. E
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A 11. We have heard Mr. Yatindra Singh, learned senior counsel appearing on behalf of the appellants and Mr. U.K. Unniyal, learned senior counsel appearing on behalf of the respondents at length and perused the impugned order and materials placed on record.

B 12. In the application No.4-C for condonation of delay, the appellant No.1-Sahid has stated that he got knowledge about the decree and order dated 10.05.2012 passed in Suit No.591 of 1979 when the applicant had gone in pairvi on 06.05.2013 before the Sub-Divisional Magistrate and a constable of the Police Station, Tehsil Ghosi gave information about the order. The appellant further averred that on 06.05.2013, he had left to Lucknow from Ghosi and on 09.05.2013 he contacted his counsel and thereafter applied for certified copy which was received on 18.05.2013 and the appeal was filed on 22.05.2013 which caused the delay of 349 days in filing the appeal.

C 13. After referring to the averments in the application 4-C, the High Court noted that the appellant-defendant was in Lucknow from 03.05.2013 to 09.05.2013 and therefore, it was quite improbable that the constable of the Police Station, Ghosi, District Mau could have informed the appellant about the judgment of the trial court in Tehsil Ghosi on 06.05.2013 and the said contradictory averment was not explained by the appellants during arguments.

D 14. In his application 4-C filed under Section 5 of the Limitation Act, the appellant has not stated that he was in Lucknow from 03.05.2013 to 09.05.2013. Hence, the observation of the High Court in para (6) does not reflect the averments in the affidavit of appellant Sahid. It was in this context, notice was issued by this Court *vide* order dated 11.04.2016 on the ground that “the factual position depicted in paragraphs (6) and (7) of the impugned order is false and incorrect.” The observation of the High Court that the appellant-defendant was in Lucknow from 03.05.2013 to 09.05.2013 though may not reflect the averments in the application for condonation of delay, in our view, does not affect the correctness of the impugned order.

E 15. The statement of the appellants that they got knowledge about the judgment of the trial court in Suit No.591 of 1979 dated 10.05.2012 for the first time on 06.05.2013 is incorrect. As pointed out by the First Appellate court as well as by the High Court, certified copy of the order

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sheet dated 11.10.2011 and 14.10.2011 in Suit No.591 of 1979 shows that on 11.10.2011, parties were present in the trial court and the attention of the court was drawn by the respondents-plaintiffs regarding the order passed in Writ Petition(C) No.19550 of 1985 (20.02.2001). On 11.10.2011, the trial court heard the parties for deciding the issues No.2 and 3 and the order sheet indicates the presence of the parties as seen from the following:-

“Order dated 11.10.2011

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Disposal of Issue Nos.2 and 3

Today the parties made the prayer for deciding the issues No.2 and 3 after hearing the same. On the prayer of the parties, both parties are heard on the issues No.2 and 3 with respect to valuation and court fee paid and the record is perused.

In this case the issue No.2 was framed – “Whether valuation of this suit is shown lesser?” and the issue No.3 was framed – “Whether the court fee paid by plaintiff is deficient?”

No such fact was put up by the parties so that it could appear that valuation of the suit was not fixed correctly and the court fee paid was deficient. So in view of the aforesaid facts and circumstances the issues No.2 and 3 are decided in negative. The record be put up for recording of the evidence by the plaintiff on 14.10.2011.”

Thereafter, the case was put up for recording of evidence by the respondent-plaintiff on 14.10.2011. As per the order sheet dated 14.10.2011, the case was called out and the parties were present and the case was again adjourned to 18.10.2011. On 18.10.2011, the affidavit of the respondent-plaintiff was filed and thereafter, in spite of several opportunities, the appellants-defendants did not appear and the suit was decreed *ex-parte* on 10.05.2012. In the said judgment dated 10.05.2012, the trial court has recorded that in spite of opportunities, the appellants-defendants did not appear as seen from the following:-

“In the present case, the defendants have filed their objection at 17 A1 but they had remained absent at the time of adducing evidence. Therefore, on 09.11.2011, their opportunity of adducing

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A evidence was closed and they were declared ex-parte and ex-parte proceeding continued.

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B In support of their pleadings, the plaintiffs had examined PW-1 Seraj Ahmmed, PW-2 Firoz Alam and PW-3 Salauddin as witnesses. The evidences on affidavit of these witnesses have been placed on records as the Document No.120A2, 128A2 and 129A2. The defendants did not remain present for the cross-examination of the aforementioned witnesses.....”

C 16. After referring to the order sheets dated 11.10.2011 and 18.10.2011 and the subsequent hearings in the Suit No.591 of 1979, the First Appellate Court as well as the High Court rightly recorded concurrent findings that the appellants had full knowledge about the proceedings of the original Suit No.591 of 1979 and also about the vacation of stay order passed in Writ Petition(C) No.19550 of 1985.

D The High Court has rightly observed that the appellants-defendants have not come out with the correct facts.

E 17. The averments in the application that the appellants got knowledge about the judgment in Suit No.591 of 1979 dated 10.05.2012 only on 06.05.2013 through a constable is incorrect. On behalf of the respondents, it is stated that in the proceedings before the Sub-Divisional Magistrate, the appellants filed the application on 23.11.2012 (Objection Paper No.23C2) wherein the judgment dated 10.05.2012 of the civil court was mentioned and it was even averred that the said judgment was passed wrongly. It is thus clear that the appellants had knowledge about the judgment and decree in Suit No.591 of 1979 even on 23.11.2012. While so, the appellants-defendants have filed application with incorrect averments that they got knowledge about the judgment and decree only on 06.05.2013 at Tehsil Ghosi when constable of the Police Station gave them the information. The High Court rightly rejected the contention of the appellants that they came to know about the judgment dated 10.05.2012 in Suit No.591 of 1979 only on 06.05.2013 through a constable of the Police Station in Tehsil Ghosi, District Mau when he had gone there to *Pairvi* in another case.

G 18. It is also pertinent to note that in Suit No.591 of the year 1979, the appellants have not filed the written statement in spite of ample

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opportunities given and earlier the suit was decreed *ex-parte* against them on 16.04.1981. The appellants filed appeal in CA No.395 of 1981 and it was dismissed for default and the same was restored on 14.11.1983. By order dated 29.11.1985, CA No.395 of 1981 was allowed and the *ex-parte* decree dated 16.04.1981 was set aside and the matter was remanded back for decision on merits afresh with condition of depositing cost of Rs.50/-. Of course, Writ Petition(C) No.19550 of 1985 was filed challenging the same; the suit being of the year 1979 and earlier being set *ex-parte* and the matter having been remitted at the instance of the appellants, the appellants ought to have been vigilant in pursuing the matter.

19. The order sheet and other materials placed on record clearly show that the appellants had full knowledge about the proceedings of the Original Suit No.591 of 1979 and also about the disposal of the Writ Petition(C) No.19550 of 1985 and the appellants have filed application for condonation of delay with incorrect facts. Both the First Appellate Court and the High Court recorded concurrent findings that the appellants have filed the application for condonation of delay with incorrect facts and were negligent in pursuing the matter and rightly refused to condone the delay. We do not find any perversity or infirmity in the impugned order warranting interference and the appeal is liable to be dismissed.

20. In the result, the appeal is dismissed. No costs.