

**(1995) 08 AHC CK 0073**

**Allahabad High Court (Lucknow Bench)**

**Case No:** Civil Miscellaneous Writ Petition No. 15383 of 1987

Dharmendra Kumar

APPELLANT

Vs

4th Addl.Distt.Judge, Etah and  
others

RESPONDENT

**Date of Decision:** Aug. 24, 1995

**Hon'ble Judges:** N.L.Ganguly, J and Dharmendra Kumar, J

**Final Decision:** Allowed

### **Judgement**

1. The petitioner was appointed as a Head Clerk in Har Narain Intermediate College, Ganj Dundwara, Etah. He was receiving salary from the College which was illegally stopped by the Committee of Management. The petitioner filed Suit No. 202/80 against Har Narain Intermediate College through its Manager and the Society, A.S.H.P. Association running the Institution. The suit was decreed by judgment and order dated 20382. Civil Appeal No. 166 of 1982 was filed by the respondent on behalf of the College which was dismissed by the order dated 16784 by the Special Judge. Second Appeal was filed being Second Appeal No. 2582 of 1984 before this Court in which conditional interim orders were passed directing the respondents to continue to deposit the amount @ 379.10 within two months during the pendency of the appeal. The amount was not deposited by the respondents. The interim order was also modified by this Court on 191084.

2. During the pendency of the second appeal in this Court, since the College had not been able to get any favourable order in their favour, a restoration application was filed on behalf of ASHP Association for setting aside the decree granted in the Civil Suit No. 282 of 1980.

3. The restoration application was filed on 20484 and the decree was passed on 20382 which shows that the respondents had knowledge of the proceedings in the civil court.

4. The application for restoration was rejected by order dated 211082 after hearing the respondents.

5. Against the order rejecting the restoration application for setting aside the decree, which was filed before the District Judge being Misc. Appeal No. 86 of 1986 which was transferred and finally decided by the IV Addl. District Judge, Etah. The judgment in appeal is impugned in the present writ petition.

6. The learned lower appellate court had allowed the appeal and set aside the order rejecting the application under Order 9 Rule 13 CPC. The writ petition was not formally admitted. It is ready for hearing since parties have exchanged their affidavits in the present writ petition.

7. Heard Sri P.K. Jain, learned counsel for the petitioner and Sri S.K. Gupta, learned counsel for the respondents at length and perused the record. It is not disputed that the original suit was filed by Sri Dharmendra Kumar, petitioner against Har Narain Intermediate College, Ganj Dundwara, through its Manager of the committee of management of College and ASHP Association Gunj Dundwara through its Secretary, State of U.P. and DIOS. It is also not disputed that the petitioner's suit was decreed against the College as well as ASHP Association, the Society which runs the Institution. As pointed out, against the judgment and decree, appeal was filed by the College and second appeal before the High Court on behalf of the College, which was pending. An application for recalling of the ex parte decree and restoration of the suit to its original number was submitted by the ASHP Association. It is noteworthy that in the trial court when the suit was filed, a joint written statement was filed on behalf of the College as well as on behalf of the ASHP Association funning the College. A copy of the written statement has also been filed as Annexure 5 to the writ petition. It is also not disputed that Sri Jageshwar Sahai, Advocate filed the Vakalatnama for the college as well as the ASHP Association. It is also stated that the Vakalatnama filed by Sri Jageshwar Sahai was never withdrawn by ASHP Association.

8. Sri Vijetendra Kumar, Advocate is the Secretary of ASHP Association. The decree originally passed by the Munsif in the suit is against Har Narain Inter College and not against ASHP Association.

9. The learned counsel for the petitioner placed the order of the trial court Annexure 2, by which the application under Order 9 Rule 13 was rejected. He pointed out the record of the Original Suit No. 202 of 1980 was received after appeal to the trial court on 4182 in the matter of application by one Rajendra Pal Singh for impleadment as party in original suit which was rejected by trial court, appeal was filed and record of suit was sent to appellate court. The appeal was dismissed and record was sent back to trial court. The trial court decreed the petitioner's suit on 20382. The Vakalatnama of Sri Jageshwar Sahai, Advocate for the Committee of Management of College and ASHP Association was on record, who participated in

proceedings before Munsif. Information was given to the Clerk of Sri Vijetendra Kumar, Advocate on 23182. The Clerk of Sri Vijetendra Kumar had made endorsement and signature in the margin of the order sheet. The allegation that the respondent ASHP Association could not get information of the return of the record to the trial court. The clerk of Sri Vijetendra Kumar, Advocate filed an affidavit and denied his signature on note of the order sheet. It was also said that no information about the receipt of the record was given to ASHP Association. The trial court found that information about the return of the record and fixing a date was received by Sri Govind Singh, the Clerk of Sri Vijetendra Kumar, Advocate. The trial court found that the appeal filed on behalf of the ASHP Association also before the District Judge being Appeal No. 166 of 1982 was dismissed in which Sri Jageshwar Sahai was the Advocate. The judgment In Appeal No. 166 of 1982 was binding on ASHP Association. A Second Appeal has been filed by the Committee of management in High Court, which is pending. The question whether Sri Vijetendra Kumar had received information through his Clerk and Sri Jageshwar Sahai who represented the ASHP Association was found by the trial court in favour of the petitioner, i.e. which was held that Sri Vijetendra Kumar had notice and information and so Sri Jageshwar Sahai also. It was submitted by Sri P.K. Jain that when Appeal No. 166 of 1982 was itself decided, there was no occasion for ASHP Association to submit application under Order 9 Rule 13 CPC. The judgment of Munsif had merged in the appellate judgment.

10. Learned counsel for the petitioner submitted that the lower appellate court without considering the fact that Sri Jageshwar Sahai, Advocate, represented ASHP Association and also represented Har Narain Inter College, and the legal submissions already mentioned above passed the impugned order. The vakalatnama of Sri Jageshwar Shai was never withdrawn or cancelled so far ASHP Association is concerned. Thus, failure to consider this aspect of the matter that Sri Jageshwar Sahai was presumed to have information so far as Har Narain Inter College was concerned, but it was pleaded before the appellate court that Sri Jageshwar Sahai had ceased to represent the ASHP Association as well as notice to Sri Jageshwar Sahai for Har Narain Inter College was not a notice for ASHP Association. This fact has been categorically stated in para 21 of the writ petition. In the counter affidavit, the reply of para 21 of the writ petition has vaguely stated that the contents are not correct. The copies of the affidavit of Sri Vijetendra Kumar, Secretary of the Association and Sri Govind Singh, Clerk of Sri Vijetendra Kumar were referred in reply counter affidavit. The question whether ASHP Association against whom the decree was passed was represented by Sri Jageshwar Sahai who represented the College and Vakalatnama of Sri Jageshwar Sahai for the ASHP Association stands till date. A perusal of the judgment of the lower appellate court shows that the lower appellate court has attempted to make out a third case which was not permissible, according to law. A perusal of the judgment of the lower appellate court impugned shows that the lower appellate court has reversed the

judgment of the trial court without examining the judgment of the trial court and looking into the admitted facts of the case that Sri Jageshwar Sahai continued to be the counsel for the College as well as counsel for the ASHP Association. Had that fact been considered by the lower appellate court, there was no scope for arriving at any other conclusion than what has been decided by the trial court. The other aspect is that Sri Govind Singh, who is Clerk of Sri Vijetendra Kumar was not under obligation to inform Sri Vijetendra Kumar, his Advocate, about the date of his private case. The reasoning by the lower appellate court for arriving such a conclusion is patently perverse. It is the known fact that the Clerk of the Advocate concerned if is informed about the personal case of the Advocate, he would definitely informed his Advocate and the reasoning that the Clerk was not under any legal obligation to inform the counsel of his private case is absurd and perverse. A perusal of the judgment of the lower appellate court also shows that the lower appellate court was swayed under an impression that injustice would not be done to any party if the matter is remanded for trial afresh after evidence by the parties. In some circumstances, this may be a relevant considerations but this is not a rule of law for each and every case. The courts should not forget that a judgment or decree which was passed in favour of a person creates a legal right in that person, such a legal right which was created in him should not be revoked on extraneous considerations and perverse reasoning.

11. Sri S.K. Gupta, learned counsel for the respondents submitted that the impugned judgment is not open to challenge under Article 226 of the Constitution. He submitted that the learned Addl. District Judge was fully competent to appreciate evidence and arrive at a conclusion on facts. He has found as a fact that the learned counsel for the ASHP Association had no information of the date fixed after the record was received back from appellate court. Information given to the Clerk of Sri Vijetendra Kumar, Advocate was no communication of date fixed.

12. These arguments may appear to be sound and just legal submissions. The courts are not to shut its eye from the attending circumstances in the case. These facts were taken into consideration by the learned Munsif. The learned Addl. District Judge failed to exercise the jurisdiction vested in him.

13. After hearing the learned counsel for the parties, I am convinced that the arguments of the learned counsel that since the respondent Sri Vijetendra Kumar is an Advocate, who is the Secretary of the ASHP Association, running the College, was represented by same counsel Sri Jageshwar Sahai, who had the information of the return of the record to the trial court. The respondent could not be permitted to say that the Vakalatnama for Sri Jageshwar Sahai was cancelled or withdrawn and he was not representing the ASHP Association. In view of the facts of this case, I have to hold that merely because the contesting respondents are advocates of the Court, where the case was pending, does not mean that the courts would apply a different standard for appreciating the facts of the case. The judgment and order of the

learned Munsif is based on correct facts and law. The judgment in appeal impugned in the writ petition is *per se* perverse and unwarranted.

14. In view of the above observations, the writ petition is allowed. The judgment dated 28th July, 1987 Annexure 6 to the writ petition, is quashed and the judgment of the trial court refusing to restore the suit to its original number after setting aside the *ex parte* decree is maintained. The petitioner shall be entitled to receive cost from the opposite party Nos. 2 & 3.