

**(2009) 12 AHC CK 0324**

**Allahabad High Court**

**Case No:** None

Vinod Kumar

APPELLANT

Vs

Jai Prakash and Others

RESPONDENT

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**Date of Decision:** Dec. 2, 2009

**Acts Referred:**

- Limitation Act, 1963 - Section 5
- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(a)

**Citation:** (2010) 1 AWC 387

**Hon'ble Judges:** Shishir Kumar, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

Shishir Kumar, J.

This writ petition has been filed for quashing the order dated 12.4.1999 (Annexure-15 to writ petition) passed by respondent No. 4.

2. Petitioner who is tenant of the shop in dispute since long and is carrying on his business and respondent Nos. 1 and 2 are the owners and landlords of the premises in dispute.

3. It appears that an application u/s 21(1)(a) of the Act No. 13 of 1972 was filed against petitioner on 8.1.1993. It was registered as P.A. Case No. 1 of 1993. It has been stated that no notices were ever served upon petitioner. However, tenant came to know regarding the aforesaid proceedings and put his appearance on 13.5.1993. Then an application was filed on behalf of respondent-landlord to withdraw the case. The aforesaid application was allowed on 20.5.1993. Another application was filed on 29.5.1993 and co-landlord Ram Prakash was made respondent No. 1 while petitioner was made respondent No. 2. Notices by registered post were issued on 29.5.1993 and it was actually sent on 31.5.1993,

5.7.1993 was the date fixed. An application was moved by landlord-respondent that service may be deemed to be sufficient on petitioner. Thereafter several dates were fixed and on 13.9.1993, the prescribed authority found that service was not done as neither registered envelope is returned nor acknowledgment due and it was not on record. Then certificate was filed by respondent-landlord issued by post master regarding delivery of registered notice on 30.9.1993. Then prescribed authority proceeded and release the accommodation in dispute on 25.11.1993. While deciding the case prescribed authority found that notice given by landlord was dated 23.11.1992 for which a certificate has been filed.

4. It has been stated that aforesaid facts have never been denied by respondent-landlord at any stage of the proceedings but the appellate court relying upon the aforesaid certificate, it has been held that registered notice was served upon petitioner. Further averment has been made that after ex parte decree dated 25.11.1993, rent was being continued to be accepted by landlord and this fact was specifically pleaded and it has never been controverted. In view of Section 21(6) of the Act, the tenancy terminates after expiry of one month from the date of order u/s 21 of the Act and since the landlord continued to accept rent after ex parte decree till November 2, 1997, therefore, decree passed u/s 21 stood waived.

5. Petitioner was having no knowledge regarding the proceedings and as the landlord was also accepting rent, it was actually in the month of June, 1998, petitioner came to know regarding the ex parte decree when police came to evict petitioner. A restoration application was filed as well as appeal u/s 22 of the Act with an application u/s 5 for condonation of delay was filed. An objection was raised on behalf of respondent-landlord that petitioner was having knowledge regarding the proceedings, therefore, an application u/s 5 of Limitation Act and appeal is not maintainable. The lower appellate court rejected the application u/s 5 and in consonance thereof, appeal too was dismissed by order dated 23.11.1998. While rejecting the application, the court below has recorded a finding that landlord has accepted rent even after ex parte decree and has deliberately not executed the order. Against the aforesaid order, petitioner filed a Writ Petition No. 42240 of 1998 which was ultimately allowed on 14.12.1998 and the matter was remanded back. While remanding the case this Court has also noted that landlord continue to accept the rent even after ex parte decree. After remand the appellate court relied upon the documents which were subsequently placed on record after the order passed by this Court such as report of process server and in view of that fact, Section 5 application was rejected. In consonance thereof appeal is also treated to be rejected.

6. It has been submitted by Sri Atul Dayal, learned Counsel appearing for petitioner that court below has relied upon Paper No. 18 Ga-2 which was a certificate issued by the post office in respect of registered envelope dated 23.11.1992. The aforesaid fact has also been noted by the appellate authority and this fact has not been

denied in the counter-affidavit by landlord, as such, finding recorded regarding service of notice by registered post upon petitioner is absolutely perverse and cannot be sustained. The lower appellate court has also held that petitioner had knowledge of the execution proceeding filed in the year 1994. The aforesaid finding has also been recorded on the basis of report of post office. Respondent No. 1 was in collusion with his brother. Respondent No. 1 being an advocate, the Court has recorded a specific finding regarding service of notice of execution case upon petitioner who was respondent No. 2. In absence of that no inference can be drawn regarding knowledge of execution proceeding to petitioner. As regards, service by process server, the appellate court has relied upon Paper No. 21 G-2, the notice issued to Ram Prakash who was admittedly a landlord. There is no such finding regarding service of notice issued to petitioner. It is just impossible to think or highly improbable that a tenant even after having knowledge of ex parte decree and continued to discuss the same that petitioner did not act immediately to file an application to set aside the ex parte decree and waited for five years till the police authority came for eviction.

7. It is also relevant to be stated here that after obtaining ex parte decree on 25.11.1993 and filing the execution in the year 1994 itself landlord did not press for execution till June, 1998. This clearly goes to show the intention of landlord as after payment of rent and after ex parte decree is concerned, specific question was raised and it was never controverted or disputed by respondent. Therefore, finding recorded by the appellate authority that no rent was paid after ex parte decree is absolutely illegal and without any basis. In the supplementary affidavit filed on behalf of petitioner it has been stated that prior to remand neither report of process server nor any report of post office regarding the execution of proceeding were on record. These were placed subsequently on record after remand by the High Court. In view of aforesaid fact, learned Counsel for petitioner submits that in the facts and circumstances of the case, appellate court ought to have allowed the application and opportunity should have been given to petitioner to pursue his case.

8. On the other hand, learned Counsel for respondents submits that application was moved for release of the said accommodation on the ground of bona fide need. Notices were issued to petitioner and proforma respondent fixing 5.7.1993 and same was served through process server to petitioner who receipt the copy of application but refuse to put his signature. It was done in the presence of two witnesses, namely Ved Prakash and Pramod Kumar. Notices were also ordered to be served through registered post as registered cover contents notice did not receive back, therefore, under the law presumption will be that service is sufficient. The court below has recorded a finding that notice is held to be sufficient on 15.7.1993 and case was directed to be proceeded ex parte for final disposal on 21.7.1993. On 21.7.1993, it was adjourned fixing 5.8.1993. On that date too petitioner-tenant remained absent. It was again adjourned and fixed for 13.8.1993 for final hearing and on that date petitioner was absent and the case was adjourned for 27.8.1993.

Then again it was adjourned on 3.9.1993. On 3.9.1993 statement of landlord was recorded and 10.9.1993 was fixed for argument and arguments were heard and 13.9.1993 was fixed for delivery of judgment but due to non-delivery of judgment it was re-fixed on 20.9.1993 for rehearing. Then again it was fixed on 22.9.1993 and as argument was not heard it was fixed 30.9.1993. Then again it was adjourned on 15.10.1993 and 11.11.1993. On 11.11.1993, the argument were heard and 25.11.1993 was fixed for judgment and judgment was delivered on that day and release application filed by petitioner was allowed. Immediately an application for execution was moved on 1.4.1994 which was numbered as Execution No. 9 of 1994 and a registered notice was issued on the address of petitioner. Notices were issued in the execution case by registered post with due acknowledgment which was not received back nor registered "cover was received back and thereafter answering respondent made an enquiry from concerned post office and post master reported that registered letter No. 649 dated 13.4.1994 was distributed to petitioner-tenant on 14.4.1994 and a certificate of post master was placed before the Court and this fact has not been denied by petitioner. In spite of notice petitioner has not turned up and he waited till the possession order was issued by the prescribed authority for dispossession of petitioner in the month of June, 1998.

9. Immediately then an appeal was filed u/s 22 of the Act, as it was a time-barred appeal, record of prescribed authority was requisitioned fixing 3.7.1998 for hearing. Petitioner has also moved an application for setting aside the decree before the prescribed authority for restoring the case. An objection was filed to the application u/s 5 of the Limitation Act, supported by an affidavit stating all the facts that petitioner was having knowledge and deliberately not appeared before the Court. Appeal was dismissed on 23.11.1998. Writ petition filed before this Court was remanded and after remand, the appellate authority has recorded a finding that petitioner was having knowledge and he deliberately not appeared before the Court hence the delay in filing the appeal cannot be condoned.

10. Learned Counsel for respondents submits that only question for consideration before this Court that whether petitioner was served with the notice or not. In case, registered notice was sent and it was not returned after service then presumption under the law is that service is sufficient. As regards the contention of petitioner that this Court in the writ petition filed by petitioner has held that rent was being accepted and as regards the service, a finding has been recorded. This Court has directed that each and every aspect has to be considered by the appellate authority. As regards the submission by petitioner that after ex parte decree, respondent-landlord kept waiting for a period of four years is not correct. Immediately after the ex parte decree an application for execution was moved on 1.4.1994. The certificate of post master clearly states that there is a certificate of post master regarding service upon petitioner. A finding has also been recorded by court below that as regards acceptance of rent, no receipt has been filed that it was ever paid after the ex parte decree and it is not the case of petitioner that landlord

was not issuing rent receipt. The court below relying upon judgment of the Apex Court has recorded a finding that from the record it is clear that petitioner is not entitled for condonation of delay and he has deliberately avoided the Court. In view of aforesaid fact, learned Counsel for answering respondent submits that writ petition is liable to be dismissed in view of finding recorded by appellate authority.

11. I have heard learned Counsel for parties and have perused the record. From the record, it clearly appears that notice were sent by registered post and as it was not returned back, therefore, a finding has been recorded that service upon petitioner is sufficient. A finding has also been recorded that from perusal of notice Paper No. 21 Gha-2 shows that process server Dhanpal Singh on oath reported the service of notice on petitioner personally but he refused to put his signature. The prescribed authority has also recorded a finding that notice were sent by ordinary post as well as registered post. It is not shown by petitioner from the record or by any means that witnesses before whom the notice was refused was having any animus with petitioner. Further finding has been recorded that an application was filed in 1993 and ex parte decree was passed on 25.11.1993 and execution proceeding from 1994 to 1998 and when police went on 26.8.1998 then petitioner came to know the proceeding went on from 1993 to 1998 and petitioner was not having any knowledge, it cannot be believed by no stage of imagination. As regards the payment of rent, no document has been filed by petitioner to show that after the ex parte decree in favour of respondent-landlord, the rent was accepted and any receipt was issued. In the supplementary affidavit filed before this Court, various receipts have been filed and same has been denied by landlord that all the receipts are forged and it has never been issued by landlord-respondent. The concerned post master has also given a certificate regarding service by registered post. As regards the substantial justice, as stated by petitioner the Apex Court in Collector, Land Acquisition Anantnag and Ors. v. Katiji AIR 1987 SC 1358 : 1987 (1) AWC 675 (SC) and in other judgments it has been held that every day, delay must be explained. It does not mean that pedantic approach should be made. The Apex Court has laid down that person seeking condonation of delay need not to explain day-to-day delay and Courts while considering this matter should be at liberty and approach should be justice-oriented. In P.K. Ramachandran Vs. State of Kerala and Another, the Apex Court in para 6 has observed as follows:

Law of limitation may hardly affect a particular party but it has to be applied with all its rigour when the statute so prescribed and the Courts have no power to extend the period of limitation on equitable ground. The discretion exercised by the High Court was, thus neither proper nor judicious. The order condoning the delay cannot be sustained.

12. In Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, has summarised the legal position as follows:

State and the private individual both stand on the same footing and should be treated alike. In the case of the State, however, while construing the cause of show in the Court should be alive to the impersonal nature of State machinery loaded as it is with inherited bureaucratic methodology inspired with not making file pushing and passing on the buck ethos. Thus, some delay may be inevitable and this should receive a more liberal consideration and is not to be viewed in a pedantic manner.

(ii) Approach in considering the cause shown should be such which would advance the cause of substantial justice rather than throttle it.

(iii) The party which seeks consideration must also bear the burden or showing that despite all necessary steps being taken to file the appeal within time it failed due to cause beyond its control. There must be absence of negligence of inaction and also no lack of bona fide, should be attributable to it.

(iv) Only on crossing these hurdles can an application for condonation succeed. However, each case deserves to be decided on its own facts and circumstances and no straitjacket formula can be prescribed.

13. The appellate court after considering all these aspects of the matter has recorded a finding that service upon petitioner was sufficient. He deliberately avoided to participate in the proceeding in spite of service it is not shown by petitioner that witnesses who have endorsed regarding service is not impartial and having any enmity with petitioner. Petitioner in spite of fact that service by registered notice was sufficient has not put appearance to contest the case deliberately.

14. In view of aforesaid fact, in my opinion, finding recorded by the court below does not suffer from any illegality. It is based on cogent reasons on the basis of relevant record, needs no interference by this Court. It is hereby dismissed, however, without imposing any cost.

15. At the last, learned Counsel appearing for petitioner submit that some reasonable time may be granted to vacate the said premises. It is provided that in case, petitioner moves an application within three weeks supported by an affidavit in the share of undertaking before the appellate authority specifically mentioned therein that immediately after expiry of period of six months from today, he will vacate the said premises and will handover peaceful possession to respondent-landlord without inducting any third person, then in that case, appellate authority after due satisfaction will grant six months time from today. It is also made clear that petitioner tenant will pay the rent of six months from today to respondent-landlord before vacation of the said premises.