

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 375/2010

Nirdesh Kumar & Another

.... Petitioners

Versus

Bageshwar & Another

.... Respondents

Mr. M.S. Tyagi, Advocate, for the petitioners.

Mr. Arvind Vashistha, Senior Advocate, for the main contesting respondent no. 1.

None for the remaining respondents.

July 31st, 2017

Hon'ble Servesh Kumar Gupta, J.

This Court has rendered hearing to Mr. M.S. Tyagi, Advocate for the petitioners, as well as Mr. Arvind Vasistha, Senior Advocate for the main contesting respondent/defendant.

Having known the backdrop pertaining to the facts beginning from execution of power of attorney by Bageshwar Singh, original land owner, dated 7.2.1984 in favour of Mahant Harihar Dev; revocation of such power of attorney on 16.2.1988; ignoring such revocation, the execution of the sale deed by Sri Harihar Devi in favour of Jeevan Krishna and Rameshwar Pandey; execution of a portion of land by Jeevan Krishna in favour of Smt. Seema Devi as well as Surendra Kumar, I feel that the service upon rest of the respondents no. 2 onwards is not at all necessary because the trial court in its judgment dated 19.3.1999, whereby the Original Suit No. 141/89 (launched by Nirdesh Kumaar and Dinesh Kumar) was dismissed, It was held that since the power of attorney dated 7.2.1984 had been revoked, hence all the sale deeds on such power of attorney are void.

Now, the fact remains that Bageshwar Singh executed another power of attorney dated 16.12.1988 in

favour of Rakam Singh, who was the defendant no. 5 in the Original Suit and invigorated by such attorney, Rakam Singh executed agreement to sell dated 19.12.1988 in favour of Nirdesh Kumar and Dinesh Kumar (plaintiffs). Pursuant to such agreement (total consideration of Rs. 1,26,000/-), Rs. 1,10,000/- are said to have been paid to Rakam Singh by the proposed purchasers, but the terms of such agreement were not complied with. So, the notice dated 2.1.1989 was issued asking Rakam Singh to execute the sale deed. However, such sale deed could not be executed because Rakam Singh did not make the compliance of his obligation entailed in such agreement. So, this was the root cause behind instituting the Original Suit No. 141/89.

It has been argued by the learned Counsel of the writ petitioners that Bageshwar Singh although filed the written statement, but he never seriously pursued such suit even though it was dismissed on merits by the learned Civil Judge (Sr. Div.) on 19.3.1999, whereagainst Civil Appeal No. 41/99 was filed. Such appeal was resisted by Bageshwar Singh engaging the Advocate Mr. Veer Abhimanyu Singh, who filed his Vakalatnama, but withdrew the same on 22.4.2003 from the Court, albeit no sanction was accorded by the Court for withdrawing such Vakalatnama.

Since Advocate Mr. Veer Abhimanyu Singh did not turn up for Bageshwar Singh, so the Court passed the order that the matter shall be heard ex parte on 29.7.2003. The matter remained pending for two more dates for submitting the arguments, but it was transferred to the Court of Ist F.T.C., Haridwar vide order of the District Judge dated 10.9.2003.

When the file was received by the transferee Court on 12.9.2013, the appeal was fixed for arguments looking to the past order sheets. Somehow, the Court felt that since the file had been received by transfer, so the parties should be informed under Rule 89A of the General Rules, Civil (Vol. I) and the Court ordered accordingly on 19.9.2003.

It appears that such information was never sent to Bageshwar Singh and the Court proceeded to decide the appeal ex parte on 11.3.2004 and thus decreed the suit. After such decree, the plaintiffs kept such decree on hold with themselves for almost four years and after such a long period, they initiated the Execution Case No. 3/2008, wherein the notices were sent to the judgment debtor Bageshwar Singh. Bageshwar Singh was astonished to receive such notice and rushed to the Court, engaged his lawyer and could know everything as to what happened in his back starting from 22.4.2003 (when Vakalatnama was withdrawn). So, he moved an application to the Court for restoration of the Civil Appeal No. 41/99 to its original number and setting aside the ex parte decree passed against him. Such decree was set aside by the learned Additional District Judge vide the impugned judgment and order dated 3.3.2010.

I think that when the Court has passed an order dated 19.9.2003 to send the information to the parties, then either it must have been complied with or the Court would have passed some other order making the order dated 19.9.2003 otio, but without doing so the Court proceeded and decided the appeal ex parte resulting in the decree of the suit.

Learned Counsel of the writ petitions has relied upon a judgment of the Allahabad High Court rendered in

Mahesh Narayan Singh v. Additional District Judge, reported in **2012 (117) RD 782**, wherein the applicability of Rule 89A of the General Rules (Civil) has been discussed.

I think the law laid down by the Allahabad High Court is not attracted in the present circumstances because the learned Judge of the Allahabad High Court was of the view that once the defendant has refused to receive the summons sent by the transferer Court, then after receiving the litigation in the next Court, the transferee Court need not to make compliance of Rule 89A.

I also do agree with this view, as has been expressed by the learned Single Judge of the Allahabad High Court, but here the circumstances are different because Bageshwar Singh did not refuse to receive the summons inasmuch as he was appearing even before the First Appellate Court through his Counsel Mr. Veer Abhimanyu Singh, but without extending any information to him either by his Advocate or by the Court, the Vakalatnama was withdrawn on 22.4.2003. So, he was in the dark all throughout regarding the decision of the appeal and it was more so because the decree holder put that decree in the execution after four years.

So, I think that the learned Additional District Judge by passing the impugned judgment and order dated 3.3.2010 has rightly restored the appeal for fresh hearing. I uphold such order.

Considering that the lis between the parties is too old, but the blame alone cannot be attached to the defendant Mr. Bageshwar Singh, hence the learned Additional District Judge will make every endeavour to decide the appeal expeditiously, preferably within six months. It is further made clear that any observation made by this Court regarding the power of attorney dated

7.2.1984 as well as the sale deeds dated 23.2.1989 and thereafter by Jeevan Krishan will not prejudice the learned First Appellate Court deeming them the observations over and above the impugned judgment dated 3.3.2010.

This writ petition has no force. It is hereby dismissed.

Let the LCR be sent back.

(Servesesh Kumar Gupta, J.)

Prabodh