

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

RFA No.41/2019
CM No.7658/2019
CM No.7659/2019

Date of Order:09.06.2020

Union Territory of J&K & Ors. Vs. Mehmooda Shaheen Medical
Trust Hospital

Coram:

Hon'ble Mr Justice Dhiraj Singh Thakur, Judge

Appearance:

For the Appellant(s): Mr. B. A. Dar, Sr. AAG.

For the Respondent(s): Mr. Jahangir Iqbal Ganai, Sr. Advocate.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |
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1) With the consent of learned counsel for the parties, the present appeal was taken up for final disposal.

2) This is an appeal preferred against the order dated 12.10.2019 passed by learned Additional District Judge, Srinagar.

3) Briefly stated, the material facts are as under:

4) **First round of litigation**

- i) The respondent i.e. Mehmooda Shaheen Medical Trust Hospital, instituted a suit against the State of J&K and others seeking a decree of injunction against the defendants for restraining them from demolition of a wall which the State claimed had been constructed on the State land. The suit was filed in the Court of 1st
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Subordinate Civil Judge, Srinagar, and was finally decided vide judgment and decree dated 27th of March, 2017 restraining the defendants therein from demolition or causing interference, *inter alia*, in regard to the wall except in due course of law.

- ii) The respondents are also stated to have filed a writ petition bearing OWP No.686/2006 before the High Court with regard to the same subject matter, in which, on 21.09.2006, the following order was passed:

“.....Till objections are filed, respondent No.3 to take steps for removal of unauthorized occupation/obstruction on the public road shown at mark ‘D’ in the site plan Annexure-L to the petition and report compliance.”

- iii) The appellants being convinced that the plaintiff/respondent had encroached upon the land belonging to the State issued a show cause notice under the provisions of Public Premises Eviction of Unauthorized Occupants Act, 1959. The same was challenged in appeal by the respondent before the Court of 2nd Additional District Judge, Srinagar. The appellate court, however, vide order dated 23rd of February, 2012, dismissed the appeal filed by the respondent against the show cause notice dated 29.05.2007.

iv) Finally, according to the case set up by the appellants, after serving the notices as were required under the Public Premises Eviction of Unauthorized Occupants Act, 1959, the encroachment allegedly made by the respondents was removed over the State land with the assistance of police. Not only this, an FIR bearing No.133/2011 under Section 447-A, 353, 506, 336 RPC, was also registered against the respondent.

5) **Second round of litigation**

i) A civil suit for recovery of Rs.80/ lacs came to be instituted by the respondent which was decided on 18.12.2012. It was alleged that the State have demolished the structure erected by the respondent/plaintiff despite pendency of the appeal against the notice of demolition and despite the decree earlier obtained by the respondent/plaintiff. The said suit came to be decreed in *ex parte* and the court below allowed the damages to the tune of Rs.20/ lacs in favour of the plaintiff (respondent herein) and against the defendants (appellants herein) along with interest @ 6% per annum from the date of decree till realization.

ii) On coming to know about the passing of *ex parte* decree, an application under Order 9 Rule 13 of the Code of Civil Procedure along with an application seeking condonation of delay was filed.

There was approximately 110 days delay in preferring the application under Order 9 Rule 13 CPC.

- iii) On 9th May, 2013, the Court below ordered filing of objections. The objections came to be filed and the court below listed the application for arguments on **6th of July, 2018**. What is important to notice here is the fact that even when the application for condonation of delay along with application under Order 9 Rule 13 CPC was filed as early as in the year 2013, no effective orders were passed by the court from 2013 till 6th of July, 2018, when the objections were filed. It thus took the court five years to even pass orders for calling objections.
- iv) It appears that for the first time, vide order dated 11th of June, 2019, 40 days time was granted to the appellants to lead evidence which was the only effective opportunity granted from 2013 onwards. It was ordered on 11th of June, 2019, that in case evidence was not lead in support of the application for condonation of delay, the right to lead evidence would stand closed. It also appears, as has been stated by counsel for the appellants, that on 4th of July, 2019, Government disengaged all government advocates and, therefore, no evidence could be led in the application for condonation of delay for which the counsel had pleaded for grant of an opportunity. The

next date was fixed on 9th of August, 2019, when the Presiding Officer is stated to have been on leave.

v) On 17th of September, 2019, the applicant was present but the non-applicant was absent and finally on 12th of October, 2019, the order impugned came to be passed.

6) It is thus quite clear that the applicant/appellant herein was not provided an adequate opportunity to lead evidence in the application for condonation of delay for setting aside the *ex parte* decree.

7) Although much can be said about the *ex parte* decree yet I refrain from making a comment at this stage lest it affects the outcome of the applications filed by the appellants herein in the court below. Needless to say that the order impugned passed by the court below in my opinion is unsustainable in law, inasmuch as it had ignored the fact that the rights of the appellants could not be prejudiced only on account of the delay in disposal of the application for condonation of delay since 2013 when the record clearly reflects that the court below itself had taken as many as five years from 2013 to 2018 in calling the objections in the application filed by the appellants. Moreover, the court below ought to have appreciated the fact that in view of disengagement of the Government counsel and till such time the panel was constituted, some delay would be warranted in leading the evidence.

8) For the reasons mentioned above, appeal succeeds. The order impugned dated 12.10.2019 is set aside. The appellants are held entitled to lead evidence in the application for condonation of delay.

Srinagar
09.06.2020
"Bhat Altaf, PS"

(Dhiraj Singh Thakur)
Judge

