
(2002) 02 AHC CK 0039
In the Allahabad High Court
Case No : C.M.W.P. No. 353 of 2001

Dinesh and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 08-02-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 80, 80(2)
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B, 333, 333(1), 333(2)

Citation : (2002) 2 AWC 1144

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : A.C. Tewari, for the Appellant; Krishna Mohan, for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Sri A.C. Tewari, counsel for the petitioner and Shri Krishna Mohan, counsel appearing for contesting respondent Nos. 2 to 7.

2. Counter and rejoinder-affidavit have been exchanged and with the consent of the parties, the writ petition is being decided finally.

3. Facts of the case as emerge from the pleadings of the parties are ; petitioners filed a suit u/s 229B of U.P. Zamindari Abolition and Land Reforms Act praying for declaration of their title. Along with the plaint, an application for granting of leave u/s 80(2) of CPC and Section 106 of U.P. Panchayat Raj Act was given by the plaintiff. It was prayed that leave be granted to file the suit without notice. The trial court on 30.5.1997 passed an order after hearing objection of the defendants. By the said order, the trial court allowed the plaintiff to file suit without notice and fixed date for written statement. A Revision No. 473 of 1996-1997 was filed by defendant-respondents u/s 333 of U.P. Zamindari Abolition and Land Reforms Act. Against the order dated 30.5.1997 passed by trial court in the aforesaid revision, an application was filed on 14.10.1998 by the petitioners who were respondents in the revision under Order XXIII. Rule 1 and

Section 151 of C.P.C. praying that suit be permitted to be withdrawn with liberty to file fresh suit. Revision was heard by the revisional court and was decided by the order dated 30.11.1998. While deciding, the revision, the revisional court allowed the application of the plaintiffs for withdrawal of the suit with liberty to file fresh suit. Before the revisional court, it was stated on behalf of the respondent that if the plaintiffs are granted permission to withdraw the suit, the said permission be granted with conditions that they will not file any suit in future. The revisional court took the view that trial court itself has accepted that due to mistake, the leave for filing the appeal could not be granted Initially by the Court which was subsequently granted by the trial court. Revisional court also held condition that no suit shall be filed in future is not acceptable and the plaintiffs are entitled for withdrawal of the suit with the liberty to file a fresh suit. Against the order of revisional court dated 30.11.1998, a revision was filed by the respondents which revision has been allowed by Board of Revenue vide its order dated 7.12.2000. The petitioners have challenged the order dated 7.12.2000 passed by Board of Revenue.

4. The counsel for the petitioners raises following submissions :

(1) The Additional Commissioner has rightly allowed the application of petitioners for withdrawal of the suit with the liberty to file fresh suit in the facts of the present case, which order has been illegally interfered with by the Board of Revenue.

(2) The question of non-giving of notice u/s 80, could have been objected by the State and the State having not objected the aforesaid want of notice, it was not open to the respondents to raise objection regarding want of notice.

Counsel for the respondent Shri Krishna Mohan refuting the submission of the counsel for the petitioners has raised following submissions in support of the impugned order :

(i) The revisional court i.e., Additional Commissioner had no jurisdiction to allow the application of the petitioners for withdrawal of the suit.

(ii) The application was in fact not maintainable before the revisional court.

(iii) The order of the Additional Commissioner giving liberty to the petitioners to file fresh suit is without jurisdiction. Reliance has been placed on the judgment of the Apex Court in K.S. Bhoopathy and Ors. v. Kokila and Ors. JT 2000 (6) SCC 212.

5. After having heard the counsel for the parties and after perusing the record, following two issues arise for determination in the present case :

(A) Whether while deciding a revision u/s 333 of U.P. Zamindari Abolition and Land Reforms Act, the revisional court can grant permission to withdraw the suit itself under Order XXIII, Rule 1, C.P.C.?

(B) Whether Additional Commissioner committed error in granting liberty to the

plaintiffs to institute fresh suit while allowing their application to withdraw the suit?

6. The first question to be considered is regarding the scope of revisional court to allow an application under Order XXIII, Rule 1, CPC when the suit is pending in the trial court. It is to be noted that the revision was filed by the defendants respondents against the order of trial court dated 30.5.1997 by which the trial court has granted leave to the plaintiffs for prosecuting the suit without notice u/s 80, C.P.C. It is well-settled unless the Court grants leave u/s 80(2), C.P.C. for filing the suit, without notice, the suit itself is not competent. The permission to withdraw the suit under Order XXIII, Rule 1 (3) contemplates that where the Court is satisfied, that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject-matter of a suit, permission to withdraw from such suit with liberty to Institute a fresh suit can be granted. Order XXIII, Rule 1 is quoted below :

"(1) Withdrawal of suit or abandonment of part of claim.-(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied :

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim....."

7. The defendants themselves have filed a revision challenging the order of trial court by which leave was granted. Thus, the defendants were contending that leave granted by the trial court is not proper. From the facts brought on the record, it is clear that leave was not granted by the trial court immediately when the suit was filed and it was granted at subsequent stage by the trial court. In these circumstances, the plaintiffs filed an application to withdraw suit with liberty to file a fresh suit to avoid any complications in prosecuting the suit. The revision was filed by the defendants u/s 333 of U.P. Zamindari Abolition and Land

Reforms Act, 1950, Section 333 of U.P. Zamindari Abolition and Land Reforms Act, 1950, is quoted below :

"333. The Board may call for the record of any suit or proceeding decided by any subordinate court in which no appeal lies, or, where an appeal lies but has not been preferred, and if such subordinate court appears :

(a) to have exercised a jurisdiction not vested in it in law. Or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of jurisdiction illegally or with material irregularity, the Board may pass such order in the case as it thinks fit."

8. Section 333 (1) contemplates exercise of revisional power by the Board or by the Commissioner. The last line in Sub-section (1), i.e., may pass such order in the case it thinks fit gives ample power to the revisional court to pass any order in the revision. The above sentences clearly confer wide power on the revisional court to pass any order as it may think fit. The wide power given to the revisional court can also be exercised for disposing of the suit itself. The revisional court may pass any order which has effect of disposing the suit itself. While considering scope of Section 115, C.P.C. which gives the revisional power, there are various authorities for the proposition that in exercise of revisional jurisdiction, the whole case can be disposed of by the revisional court itself. In *Hazi Rahmetulla Vs. Chaudhari Vidya Bhusan*, , civil revision was filed. In that case, an application was filed before the Court of Munsif along with the arbitration award with the prayer that award be made with the leave of the Court. The application was purported to be made u/s 14 of Arbitration Act. While deciding the civil revision, the High Court while allowing the revision passed decree on the basis of award and the cost of, revision as well as the suit was awarded.

9. This Court while considering the scope of revision u/s 115, CPC had laid down that object in the revision is that so far as possible. Justice may be done in the proceedings as a whole in *Rati Ram Vs. Niader Mal*, . This Court has held that :

"I do not think that there is any real force in that, because once the High Court is seized of the revision, then, in my view, it becomes its duty to cast its eye not merely on one part of the proceedings but the whole of them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole."

10. In *Dr. Dwijendra Mohan Lahiri v. Rajendra Nath* AIR 1971 Gau 143. It has been held in paragraph 8 that :

"8. Since we have exercised our Jurisdiction u/s 115, C.P.C. In this case to interfere with the order what would be the order which we should pass? Should we remand the matter again to the first appellate court and for the forth time in

the history of this litigation/should we continue the problematic uncertainty of this litigation resultant as it seems to be of the orders of as many as six Courts over six lessees of land with a tiny cowshed which may, after nearly 14 years of its challenging existence under the protection of the law, perhaps, give into nature's fury if not yet to a decree of Court? The Justice of the case requires that we take the burden ourselves in examine the entire records and make the final order on the merits, just and appropriate, in the circumstances of the case. Once we hold, which we do, that Section 115, C.P.C. is attracted, there is no bar in law to pass such order as the High Court thinks fit including final disposal of the suit."

11. From the above discussion, it is clear that while exercising the revisional jurisdiction u/s 333 of U.P. Zamindari Abolition and Land Reforms Act, Court may pass also any order which has effect of finally deciding the suit, including allowing an application under Order XXIII, Rule-1, C.P.C.

12. The second question raised by the counsel for the respondent is to the effect that the revisional court committed error in granting liberty to the plaintiffs to file fresh suit. The counsel for the respondent submitted that the revisional court ought not to have granted liberty for filing fresh suit. Order XXIII, Rule 1 (3), C.P.C. contemplates that where the Court is satisfied that a suit must fall by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiffs to institute a fresh suit, the Court may grant permission to withdraw from such suit with liberty to Institute a fresh suit. In the present case, the leave granted by the trial court permitting the filing of the suit without notice was challenged by the defendants themselves. Thus, it was defendants who were contending that there is a defect in institution of the suit. In the present case, suit itself had not proceeded nor parties entered Into evidence nor any Issue was decided between the parties. Assuming for arguments sake that leave granted by the trial court to the plaintiff to file suit without notice was erroneous, the effect would be that suit cannot held to be properly instituted suit. In case the suit is held not be properly instituted suit, the suit will be treated to be not filed at all and provision of Order II, Rule 2 and Section 11, C.P.C. can never be attracted. In that situation, there was no requirement for granting any permission to withdraw suit with liberty to file a fresh suit. In facts of the present case, the revisional court has rightly exercised its discretion in granting permission to withdraw the suit with liberty to file a fresh suit. The counsel for the respondent had relied on Apex Court judgment in K.S. Bhoopati and others (supra). Apex Court in the aforesaid judgment has held that the Court is to discharge the duty mandated under provision of Order XXIII, Rule 1 by taking into consideration relevant aspect of the matters. In the case before Apex Court, an application for withdrawal was filed in the second appeal. In the aforesaid case, the decree was made by first appellate court and in the first appellate court, there was finding that plaintiffs have no exclusive right of user of path way and all the parties are entitled to use the same and it is common pathway. In paragraph 17 the Apex Court held :

"17. From the above, it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial court and the first appellate court It is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them, by the first appellate court they took recourse of Order XXIII, Rule (3) CPC and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter, its approach appears to have been that since the interest of the defendants can be safe-guarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/ reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate- is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he losses the benefit of the decision in his favour in the lower court."

13. In the aforesaid case that the Apex Court took the view that permission granted in the second appellate stage prejudices to defendants was writ large since he loses the benefit of the decision in his favour in the lower court. Thus, the Apex Court's judgment cited by counsel for the respondent does not help the respondent in the present case. In the aforesaid case. Apex Court held that High Court while considering the application under Order XXIII, Rule 3 does not appear to have considered the relevant aspect in the matter. In the present case, admittedly, in suit even the trial did not begin. There was no judgment even by the trial court in the cases so as to cause any prejudice to the defendant. Further, it was the defendants themselves who were contending that suit should not be permitted to proceed due to want of leave u/s 80(2), C.P.C. In the facts of the present case, the revisional court has rightly exercised its discretion in permitting to withdraw the suit with a liberty to file a fresh suit.

14. It is held that no error was committed by revisional court in granting liberty to the plaintiff to file fresh suit. It is further to be noted that Board of Revenue in its order has not given any reason for interference except observation to the effect that learned Additional Commissioner did not act properly in permitting the suit to be withdrawn with option to bring a fresh suit.

15. There is one more reason due to which the order of Board of Revenue cannot be sustained. Section 333 of U.P. Zamindari Abolition and Land Reforms Act was amended by U.P. Act No- 20 of 1997 with effect from 14.10.1997, the amended provision of Section 333 has been quoted above in this judgment. By the said amendment, Section 333 (2) has been added with effect from 14.10.1997 that If any application under the Section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by either of them. This clearly meant that same person cannot file two revisions. In the present case, respondent Nos. 2 to 7 has filed Revision No. 473 of 1997 which were decided vide judgment dated 30.11.1998. When the judgment dated 30.11.1998 was given, amended provision of Section 333 had come into force including the Sub-section section (2) of Section 333. In view of Subsection (2) of Section 333, second revision by same respondent Nos. 2 to 7 was not maintainable. Thus, the Revision No. 26 of 1998 was not maintainable before Board of Revenue and the order passed by Board of Revenue dated 7.12.2000 is without jurisdiction. Although this question has not been canvassed by the petitioner in this writ petition, but since this goes to the jurisdiction of Board of Revenue to pass the impugned order, the same can be taken into consideration. The Board of Revenue had no jurisdiction to entertain the second revision filed by respondent Nos. 2 to 7 and the same is clearly barred by Section 333 (2) of U.P. Zamindari Abolition and Land Reforms Act, the said order cannot be allowed to remain. In this view of the matter, the order passed by Board of Revenue dated 7.12.2000 cannot be sustained and is liable to be quashed.

16. In view of the discussion made above, the impugned order dated 7.12.2000 passed by Board of Revenue (Annexure-5) to the writ petition is quashed.

17. The writ petition is allowed. Parties may bear their own cost.