

(2018) 03 MP CK 0178
In the Madhya Pradesh High Court
Case No : W.P. No.5101 OF 2018

Gulrez Qureshi

APPELLANT

Vs

State Of Madhya Pradesh & Ors

RESPONDENT

Date of Decision : 27-03-2018

Acts Referred:

Constitution of India — Article 32, 226

Code Of Civil Procedure, 1908 — Rule Order 2 Rule 2, Order 9, Rule 9

Citation : (2018) 03 MP CK 0178

Hon'ble Judges : P.K. JAISWAL, J;VIRENDER SINGH, J

Bench : Division Bench

Advocate : Meena Chaphekar, Vivek Patwa, Kushal Goyal

Final Decision : Dismissed

Judgement

Heard.

2. By this writ petition under Article 226 of the Constitution, the petitioner is praying for the following relief :-

It is therefore prayed that, this petition may kindly be allowed with costs and appropriate writ, direction or order be issued to the Respondents

directing them not to acquire the land owned by the petitioner (as described in para (ii) of Facts) on A.B. Road, Dewas without following the due

procedure of law and not to disturb the ownership and peaceful possession of the petitioner on the said land. Any other appropriate writ, direction or

order which this Hon'ble Court deems fit be also granted to the petitioner, in the interest of justice.

3. The petitioner being aggrieved by the action of the respondent No.2 illegally trying to acquire land admeasuring 700 sq. ft. (65.05 sq.m.) which is

situated at Dewas Junior, Patwari Halka No.18, in Ward No.13 on A.B. Road,

Dewas, which he has purchased by the registered sale deed dated 13.5.2008 and since then he is in peaceful possession of the said land.

4. The question involved in this writ petition is squarely covered by the decision of this court in the case of *Â Martin Ahmed V/s.Â State of M.P. &*

Ors . passed in W.P.No.05/2018 on 8.1.2018. Para 3 to 7 of order datedÂ 8.1.2018 is relevant which reads as under:-

â??3. A reply has been filed by the Municipal Corporation. As per para 6 of the reply of the Municipal Corporation, the action has been taken under

Section 305 of the Act of 1956 and, therefore,Â theÂ petitionersÂ landownersÂ areÂ entitled for compensation under Section 387 of the Act of

1956. Para 6 of the reply reads as under :-

â??6. It is submitted that the petitioner in the present petition fairly stated that the petitioner is not having any problem in giving land for the betterment

of the city and asking for the compensation. The petitioner is free to approach competent authority under section 387 of the Municipal Corporation

Act, 1956 for claiming compensation.â??

4. It is submitted by the learned Government Advocate that the issue involved in these writ petitions is squarely covered by the decision of the Apex

Court in the case of *Ravindra Ramchandra Waghmare V/s. Indore Municipal Corporation & Others*, reported asÂ 2017 (1) SCC 667 . She submitted

that in the case ofÂ *Ravindra Ramchandra Waghmare(supra)*, the Apex court has considered the issue in question and held that for issuance of

notice under Section 305(1) (a), it is relevant where the repair work is undertaken in projecting part or other parts of building, the Corporation can

require voluntary action on part of owner so that projecting portion can be set back by owner himself during such repair work.

5. Section 305 being a special provision with respect to maintaining a regular line of a public street. The Corporation can remove building or any part

of building beyond regular line of public street. Being a special provision, Section 305 would prevail over general provisions of Section 78 and 79 of the

Act of 1956.

6. On due consideration of para 6 of the reply filed by the respondent No.2 â?" Municipal Corporation, we direct the Municipal CorporationÂ to

proceed further and decide the issue of compensation to the petitioners in accordance with the provisions of the Act of 1956 and the law laid down by

the Apex court in the case of Ravindra Ramchandra Waghmare (supra) within a period of one month from the date of filing of the certified copy of the order.

7. With the aforesaid, W.P.No.5/2018 and W.P.No.6/2018 are disposed of.

5. Order dated 8.1.2018, passed in W.P.No.5/2018, shall apply 'mutatis mutandis' in the present petition also.

6. On due consideration of the fact and circumstances, the petition is disposed of in terms of order dated 8.1.2018 passed in W.P.No.5/2018.

7. Accordingly, the petition is disposed of.

In the case of Gulabchand Chhotalal Parikh v. State of Gujarat. AIR 1965 SC 1153, the Apex Court has held that :

1. If a petition under Article 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties

unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and

for obtaining the same or similar orders or writs.

3. If the petition under Article 226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or

because it is held that the party had an alternative remedy available to it the dismissal of the writ petition would not constitute a bar to a subsequent

petition under Article 32.

4. Such a dismissal may, however, constitute a bar to a subsequent application under Article 32 where and if the facts thus found by the High Court be

themselves relevant even under Article 32.

5. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on

the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32, because, in such a case, there had been no

decision on the merits by the Court.

Before we deal with the question, we may dispose of the short points urged for the appellant. It is urged that if a decision in a writ application on

merits be held to operate as *res judicata* in a regular suit, the provisions of 0.2, r. 2 C.P.C. would also be applicable to the institution of the subsequent

suit with respect to such part of the cause of action for which no relief was sought in the writ petition. The contention is not sound as the provisions of

r. 2, 0.2 apply only to suits. Sub-r. (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of

the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then

provides that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of

the portion so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do

not apply to the contents of a subsequent suit. Such a view was indicated by this Court in *Devendra Pratap Narain Rai Sharma v. State of Uttar*

Pradesh(I) when it was said at p. 324 : ' "The bar of 0.2, r. 2 of the Civil Procedure Code on which the High Court apparently relied may not apply to

a petition for a high prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior

to the date of the suit, we do not think that we would be justified in (1) [1962] Supp. 1 S.C.R. 315.

In the case of *Ramsingh vs State Of Rajasthan And Ors.* decided on 25 July, 1968, it has been held by the Hon'ble Apex Court that there is no

dispute between the parties that the present writ petition is based on the same facts on which the previous writ petition was filed by the petitioner.

Now, it remains to be considered whether the present writ petition. In *Krishnalal Sadhu v. State of West Bengal*, AIR 1967 Cal 275 it was observed

that Section 141 C. P. C. was directly attracted to an application under Art 226 of the Constitution and, therefore, such provisions of the Code of Civil

Procedure as can be suitably applied to writ proceedings were applicable to such proceedings." In this view of the matter, the learned Judges of the

Calcutta High Court held that the provisions of Order 22 C. P. C. would be applicable to writ proceedings.

In that case, while dealing with the impact of the principles of *res judicata* on writ proceedings, their Lordships also examined the applicability of Order

2 Rule 2 CPC to such proceedings and expressed themselves in the following terms:

It is urged that if a decision in a writ application on merits be held to operate as res judicata in a regular suit, the provisions of Order 2, Rule 2, CPC

would also be applicable to the institution of the subsequent suit with respect to such part of the cause of action for which no relief was sought in the

writ petition. The contention is not sound as the provisions of Order 2, Rule 2 apply only to suit. Sub-rule (1) requires that every suit shall include the

whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in

order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of or intentionally

relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. By its very language, these

provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit.

On the question, whether in a writ application filed under Art 226 of the Constitution the procedure laid down in the Code of Civil Procedure would be

applicable or not, the learned counsel for the petitioner has placed reliance on a Bench decision of this Court in Chandmal Nauratmal v. State of

Rajasthan, AIR 1968 Raj 20. So far as the observations made by their Lordships of the Supreme Court are concerned, we may state at once that in

AIR 1962 SC 1334, referred to above, the question had not arisen at all as to whether a writ is a civil proceeding and whether the procedure laid down

in the Code of Civil Procedure would be applicable to writ procedure. In that case, the writ application was dismissed by the High Court on the ground

that the petitioner's claim for salary was barred by virtue of Order 2, Rule 2 CPC. On appeal, their Lordships of the Supreme Court concurred with

the view expressed by the High Court and did not feel persuaded to interfere with the order of the High Court passed in the exercise of its writ

jurisdiction and it was observed that the bar of Order 2, Rule 2 CPC may not apply to writ proceedings. Thus, the question whether the writ

proceedings fall within the ambit of civil proceedings was not at all canvassed before their Lordships of the Supreme Court.

Again in Gulabchand Chhotalal Parikh(Supra), the question whether the writÂ proceedingsÂ beforeÂ theÂ High Court under Article 226 of the

Constitution are civil proceedings was not at all dealt with. What was contended in that case was that Order 2, Rule 2. CPC would not apply to writ proceedings and Apex Court^Â by interpreting Order 2, Rule 2. CPC on its very language held that these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit. The rationale of the decision therefore is that if in a writ petition certain portion of a claim is omitted, such an omission in the writ petition would not bar its inclusion in a suit subsequently instituted. The result of acceptance of such a proposition would mean that even though a writ petition may have remained pending for a few years and then it has been dismissed in default or may have been disposed of for any other reason except on merits, the petitioner would have a right to move such an application on the same facts again and again till it is disposed of on merits. Looked at from another point of view, such a procedure would result in disregarding and circumventing the earlier orders of this Court. In these circumstances, we are of the opinion that the principle contained in Order 9, Rule 9, CPC :an be suitably applied to writ proceedings. As has already been stated above, the earlier writ petition in this case based on the same facts was disposed of on merits. Thus, applying the principle contained in Order 9, Rule 9, CPC, the present writ petition^Â is not maintainable. Even otherwise we may state that, in the circumstances of the present case, we are not prepared to exercise our inherent and extraordinary jurisdiction in favour^Â of the petitioner on this second writ petition.

In view of the aforesaid and for the reasons of provisions under Order 2 Rule 2 of CPC, the present writ petition is not maintainable. Accordingly, it is^Â dismissed as not maintainable. In the circumstances of the case, however, the parties are left to bear their own costs.