
(1993) 09 AHC CK 0011

In the Allahabad High Court

Case No : Civil Miscellaneous Writ petition No. 27282 of 1993

Himmat Singh

APPELLANT

Vs

III Additional District Judge and Others

RESPONDENT

Date of Decision : 20-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 115

Provincial Small Cause Courts Act, 1887 — Section 15, 25

Transfer of Property Act, 1882 — Section 106, 109, 111G, 37

Citation : (1994) 1 AWC 91

Hon'ble Judges : A.P. Singh, J

Bench : Single Bench

Advocate : Shashi Nandan, for the Appellant;

Final Decision : Dismissed

Judgement

A.P. Singh, J.—Through this writ petition, Himmat Singh Petitioner, who is the tenant of a shop at Mohan Koti, Madan Road, town Deoria. district Deoria, has sought quashing of (he order dated 26-7-1993 passed by the ill Additional District Judge, Deoria and the order dated 3-4-1993 passed by the Civil Judge, Deoria Annexure 3 and 1 respectively to the writ petition). These orders were passed in proceedings under Small Cause suit no. 8 of 1984 filed by Respondents nos. 3, 4, 5 and 6 jointly for eviction of the Petitioner and recovery of rent and other arrears of water tax etc. from the Petitioner in respect of the said shop (Respondents 3 to 6 hereinafter shall to be referred to as the Respondents). The order dated 26-7-93 was passed by HI Additional District Judge, Deoria Respondent no. 1 in revision u/s 25 of the Provincial Small Cause Courts Act and the order dated 3-4-93 was passed by Additional Civil Judge, Deoria decreeing Small Cause suit no." 8 of the 1984 filed by the Respondents.

2. In brief the facts of the case are as under.

3. The shop mentioned above originally belonged of Janki Mahal Trust in district Faizabad which sold the same by two separate sale deeds dated 9-8-83 in favour

of the Plaintiff-Respondents. Both the sale deeds were executed on the same date-one being in respect of an area 170 Sq. feet in favour of Plaintiff-Respondents 1 and 2 whereas the remaining area 420 Sq. feet was transferred by separate sale deed on the same date in favour of Respondents 3 and 4. Consequent to the transfer of the shop in dispute by two separate sale deeds in favour of the Respondents, the previous owner, namely, Janki Mahal Trust through the lawyer sent notice to the Petitioner on 8-10-83 informing him of the sale of the shop in dispute in favour of Respondents and asking him to pay rent to the Respondents in respect of the said shop. The Respondents, however, brought a suit on the allegation that the Petitioner failed to pay the rent inspite of the written notice sent to him by the previous owner of the shop in dispute on 8-10-83 as well as the oral notice given by them informing the Petitioner of purchase themselves and also the oral demand of rent from the Petitioner coupled with a written notice sent to the Petitioner through lawyer u/s 111(g) and 106 of the Transfer of Property Act dated 22-5-1985. As stated above, the suit was for eviction of the Petitioner from the shop in dispute as well as for recovery of rent from 1-8 -- 83 and damages and arrears of water tax and house tax with effect from 1-4-1975.

4. The Petitioner contested the suit on several grounds-main ground being that the Respondents were not owners/landlords of the shop in dispute, hence no rent was payable to them. He also pleaded that the Respondents inspite of notice having been sent to them by the Petitioner did not identify the person to whom the rent was payable and in what proportion, as such, there was no cause of action for eviction as until the Petitioner was informed about the proportion in which the rent was to be paid, there was no question of the rent being due and the consequent default in paying rent for giving rise to the suit. Petitioner also claimed that after the Respondents failed to identify as to in what proportion the rent was to be paid to them and the person to whom the rent was to be paid, he sent the rent by money order which was refused by the Respondents. Thereafter, he filed an application u/s 30 of U.P. Act No. 13 of 1972 and deposited the rent in the Court. Hence the question of default in payment of rent did not arise. The Petitioner also challenged the sale deed dated 9-8-83 by filing suit no. 945 of 1984. The Respondents maintained that since the Petitioner has denied their title and has also failed to pay rent and other dues in respect of the shop in dispute and had also failed to vacate the shop in dispute on service of notice, as such, he was liable to be evicted therefrom by the Court.

5. The Petitioner as well as Respondents filed documents in support of their respective pleas, Out of the documents filed by Respondents, paper nos. 57-C and 66-C being notice for apportionment regarding payment of rent of the shop in dispute was also filed by Petitioner. By this document Petitioner tried to "- establish that inspite of the said notice the Respondents failed to identify their respective shares in the shop in dispute and their respective share in the rent to be paid total of which was only Rs. 50/- per month for the entire shop and on account of the failure of Respondents in this respect rent could not be paid as

such there was no default in payment of rent by him.

6. The trial Court examined Respondent no. 4 who, according to the Respondents, was the landlord of the shop in dispute and had the right of receiving rent from the Petitioner. Respondent no. " proved the documents filed by Respondents .as well as the plaint case. He was not fully cross-examined as the Petitioner refused on more than one date fixed for the purpose to cross-examine him. The case, therefore, proceeded ex parte and the trial Court decreed the suit after recording a finding that the Respondents were the owners of the shop in dispute and the Petitioner had committed default in payment of rent which inspite of being demanded by the Respondents had not been tendered nor paid, Petitioner also malafidely denied the title of the Respondents in respect of the shop in dispute and had malafidely deposited rent in the Court u/s 30 of U.P. Act no. 13 of 1972 although receipt of rent was" never refused by the Respondents as [the same was never tendered by the Petitioner. It is also held that Petitioner had not been able to prove the tender of the rent either personally or through money order. The trial Court also held that the Petitioner had also not been able to prove the sending of notice vide paper nos. 57 C and 66 C regarding demand for apportionment of the shares of the Respondent in the shop in dispute. It was also held that the Respondents demanded the rent orally as well as by notice sent to the Petitioner through lawyer u/s 106 read with Section 111(g) of Transfer of Property Act, as alleged by them in the petition. With these findings the suit was decreed both for recovery of rent, damages and for house and water tax as well as for eviction of the Petitioner from the shop in dispute. Feeling aggrieved by the decree of the trial Court Petitioner filed revision u/s 25 of the Provincial Small Cause Courts Act challenging the decree of eviction as well as of payment of arrears of rent, damages and house and water tax on the same grounds on .which he had contested the suit. Apart from the above, the Petitioner also attacked the procedure adopted by the trial Court in deciding the suit ex parte under Order 17 Rule 3 of the Code of Civil Procedure. It was contended that the circumstances did not justify the trial Court to have proceeded and decreed the suit by taking report"to Order 17 Rule 3 of the Code of Civil Procedure

7. Thus revisional Court by an elaborate and well written judgment rejected the revision and upheld the judgment and decree of the-trial Court except that the revision was allowed in respect of the portion of the claim of house and water tax, instead of decreeing the entire claim of the Respondents for the payment of house and water tax it was decreed only to the extent of 10% of the actual rent and amount of damages. In other respects, the revision was dismissed and*the costs was made easy. The revisional Court also rejected the plea of the Petitioner .to the effect that the circumstances of the case before the trial Court did not justify the trial Court to proceed under Order 17, Rule 3 of the CPC for decreeing the suit ex parte. The revisional Court while giving elaborate reasons and supporting his reasons by reported decisions of this Court, held that the procedure adopted by the trial Court for decreeing the suit ex parte under Order

17 Rule 3 CPC was justified on the facts of the case. The revisional Court held that the provisions of Order 17 Rule 3 CPC, in the circumstances of the case, was fully applicable and the trial Court was justified to have taken resort to the said provision in decreeing the *cuit ex parte*.

8. Aggrieved by the above orders of the trial Court as well as by the revisional Court, the Petitioner has filed this writ petition, as already stated, for quashing the same. Although almost all the grounds on which the suit was resisted and the revision was filed have been reiterated in support of the writ petition but at the Bar Sri Shashi Nandan, who has appeared before me on behalf of the Petitioner, has argued only three points. The first being that the trial Court as well as the revisional Court was wholly unjustified in disbelieving the service of notice vide documents 57 C and 66 C inasmuch as the same bears the name of the Petitioner as sender of the notice, therefore, it could not be said by the Courts below that the notice was not proved. The next point contended before me by the learned counsel for the Petitioner was that the trial Court had committed illegality in proceeding to decide the suit *ex parte* as the circumstances of the case did not permit the same and the suit; should have been decided under Order 17 R. 2 of the CPC on merits and not under Order 17 Rule 3 of the Code. The third argument advanced by the learned counsel for the Petitioner was that Respondents having failed to send written notice under Sections 37 and 109 of the Transfer of Property Act, which was a necessary requirement in view of existence of separate sale deeds for the same shop, as such, the Petitioner cannot be said to be defaulter and the finding recorded by the courts below to the effect that the Petitioner was a defaulter was wholly illegal. Consequently, the decree of the trial Court was liable to be quashed.

9. Before advertng to the arguments of the learned Counsel for the Petitioner, it is necessary for me to examine the scope of the writ jurisdiction as against the orders under challenge.

10. As noted above, the proceedings by way of suit No. 8 of 84 were initiated under the provisions of Provincial Small Cause Courts Act, 1887. The proceedings under the said Act are summary in nature. The decision of the suit, filed u/s 15 of the said Act, is to be unlike the suits filed and decided before ordinary civil courts. Special procedure is provided under the Act for filing and disposal of the suits. Section 17 restricts applicability of CPC in its entirety and the provisions of the Code are applicable to the extent it is contemplated by the Act only. Section 24 provides for appeals against only some of the orders, namely, those contemplated by clauses (ff) and (h) of sub-Section (1) of Section 104 of the Code and not others. Similarly Section 25 contemplates filing of revision against the decrees passed by the Court of Small Causes or against any case decided by the Court of Small causes if the same was not according to law. The revisional Court has also power to act *suo motu* and decide a revision if it finds that the case was not decided by the trial Court in accordance with law. Section 27 provides that subject to the orders of the revisional Court u/s 25, the orders of

small Cause Court shall be final. The first question, therefore, arises as to whether a writ petition will be maintainable against a decree passed by the Small Causes Court which was duly confirmed by the " revisional Court u/s 25 of the said Act and further if the writ is maintainable then what is the scope of review by this Court under Article 226 of the Constitution in respect of the orders passed by the trial Court as well as by the revisional Court under the Act.

11. However, before examining the scope of review "in writ jurisdiction by this Court against the orders of the trial Court as well as the revisional Court under the Act, it is also necessary to consider as to whether on the facts of the present case Petitioner is at all entitled for invoking the extra ordinary jurisdiction of the Court for issuing high prerogative writ jurisdiction under Article 226 of the Constitution. In this connection it is to be kept in mind that recourse to issue of writs under Article 226 of the Constitution is not to be had in a routine way. Recourse has to be taken only in cases where grave injustice has occurred on account of illegal exercise of non-exercise of power by the courts concerned. The recourse to issue of high prerogative writs should occasion very rarely in cases where the orders are made final within the scheme of the Act under which the said order has been passed. The Scheme of Provincial Small Cause courts Act will show that decree passed by the Judge Small Cause Courts is only assailable by filing revision u/s 25 before the District Court. Such order is not, thereafter, subject to further review by this Court even u/s 115 of the Code of Civil procedure. Reference in this regard may be held to a Full Bench judgment of this Court, Jupiter Chit Fund (Pvt.) Ltd. Vs. Dwarka Diesh Dayal and Others, and also to a decision of the Supreme Court in case of Vishesh Kumar Vs. Shanti Prasad, . This Court as well as the Supreme Court, as noted above, have held" that no revision u/s 115 of the CPC will be maintainable against an order passed by the revisional Court.

12 Now keeping the above decisions of this Court as well as by the Apex Court of the land in mind, it has to be examined as to whether the order which has become final and is not amenable to review by this Court in exercise of its power of superintendence u/s 115 of the CPC can the same order be amenable to review by this Court in exercise of its extra ordinary power under Article 226 of the Constitution. In my opinion, where a decree has been passed, which is made final under the scheme of tde Act and is not amenable to the power of review by this Court u/s 115 CPC the said decree cannot at all be reviewed by this Court in exercise of it's power under Article 226 of the Constitution, because a thing which cannot be done directly cannot be done indirectly, that is to say, that if this Court has no power to revise the decrees passed under the Act by taking resort to its powers u/s 115 CPC on the same analogy this Court shall have no power at all to review or revise the same order in exercise of its power under Article 226 of the Constitution inasmuch at the power under Articles 226 and 227 of the Constitution have been conferred on this Court for the purposes of enabling this Court to retain its power of superintendence over subordinate courts or the Tribunal whose order is brought under challenge before it. This does not mean

that this Court has no power of superintendence over the Court of small Causes established under the Provincial Small Cause Courts Act but once the power of superintendence has been exercised u/s 25 of the said Act by the District Court, the same cannot be reopened for re-exercise either u/s 5 of the CPC or under Articles 226 and 227 of the Constitution. In my opinion; therefore, an order passed by the Small Cause Court which has been subject to judicial review u/s 25 of the said Act cannot be put to further review by the High Court either u/s 115 of CPC or under Article 226 of the Constitution. Such an order, in my opinion, can only be questioned by filing Special Appeal under Article 136 of the Constitution.

13. In my opinion, therefore, this writ petition, which is directed against the orders passed by the Judge Small Causes as well as by the revisional Court under the provisions of the Provincial Small Cause Courts Act, is not maintainable under Article 226 of the Constitution and the writ petition is, therefore, liable to be dismissed on this ground lone.

14. This apart, the scope of review under Article 226 of the Constitution is very limited. This Court cannot substitute its own views in place of the view of the Courts below. This Court in a fit case exercise its extra ordinary power under Article 226 of the Constitution where it is satisfied that on account of non-compliance of the provisions of law, Rules or Regulations framed under the Act or on account of improper or non-exercise of jurisdiction substantial injustice has occasioned to the person who has approached the Court. In its writ jurisdiction this Court does not and should not at all permit general review of the orders passed by the courts below in exercise of their powers under the Scheme of the Act in which they are conferred with the jurisdiction to decide the cases. The area of scrutiny under Article 226 of the Constitution is very limited, that is to say, this Court will only interfere if there is any substantial failure of justice on account of illegality in the decision making process by some subordinate courts or Tribunal. This Court, however, will not interfere against order under challenge even if it is established that the order is erroneous and decided wrongly interpreting the laws. Irrespective of the existence of circumstances which may justify interference, this Court in exercise of its power under Article 226 of the Constitution will not interfere against an order at the instance of a person who is found guilty of laches or has approached the Court with unclean hands.

15. Now keeping in mind above limitations under which the power under Article 226 of the Constitution is exercised, I proceed to . examine the facts of the present case in this respect.

16. Sri T. P. Singh, learned counsel for the Respondents has drawn my attention to the order sheet of the Court of Small Causes as well as to the observations and findings recorded by the revisional Court in paras 10, 11, 12, 13 and 14 of its judgment, The order sheet has been filed as Annexure 3 to the counter affidavit. A perusal of the order sheet will show that the Petitioner has unreasonably and unjustifiably prolonged the hearing of the suit before the Court

of Judge Small Causes by taking unnecessary and uncalled for adjournments on one or the other pretext on as many as 50 occasions.

17. In the instant suit from which the writ petition has arisen was filed by the Petitioner in the year 1984. A suit of small causes should normally be decided in a year or two, but the order sheet will show that the Petitioner managed to prolong the hearing of the suit for over nine years. From a perusal of the paragraphs mentioned above, and order of revisional Court would also show that the Petitioner has been found to be guilty of unnecessarily prolonging the disposal of the suit inspite of the specific directions of the District Judge for disposing of the suit within a period of three months. The revisional Court has observed that while rejecting petitioner's application for transfer the District Judge directed the suit to be decided within three months but inspite of the said direction the suit remained pending for over six months on account of the adjournment applications filed by the Petitioner. These facts do suggest that the petitioner's conduct in the trial of the suit in the Court of Judge Small Causes was not above board and he had adopted a most reprehensible tactics of causing delay in the decision of the suit. Such a person, in my opinion, is not entitled for invoking extra ordinary jurisdiction of this Court under Article 226 of the Constitution. This writ petition is, therefore, also" liable to be dismissed due to the dilatory tactics adopted by the Petitioner in the decision of the suit as the Petitioner cannot be said to have approached this Court with clean hands. A person who has come with unclean hands to this Court has no right or face for invoking the extra ordinary jurisdiction of this Court for issue of high prerogative writs in his favour, which as a matter of Rule is issued in case of grave injustice. In view of above facts and conduct of the Petitioner, I do not find any justification for interference against the decree of the triat Court and order of the revisional Court which are under challenge before me, the writ petition is, therefore, liable to be dismissed on this ground too.

18. Now I deal the points raised by Shri Shashi Nandan, learned counsel for the Petitioner.

19. First contention advanced by the learned counsel for the Petitioner was that since the Respondents had failed to give a notice u/s 37 as well as u/s 109 of Transfer of Property Act, therefore, the question of default on the part of the Petitioner in payment of rent did not arise.

20. A perusal of the aforementioned Sections will show that the same are not attracted to the facts of the present case specially in view of the specific finding recorded by courts below to the effect that the Petitioner was duly informed of the sale by the previous landlord as well as by Respondents that the rent was payable to Respondent no. 4 in his capacity as landlord of the shop in question and inspite of the same rent was not tendered by him. There is also a finding to the effect that the Respondents served a notice u/s 106 read with Section 111(g) of the Transi ir of Property Act which was duly served on the Petitioner bit inspite of the service of the said notice the rent was not tendered to Respondent no. 4,

as such, default in payment of rent, by Petitioner occurred. It is also to be noted, that the District Judge as well as the trial Court rightly held that under the provisions of U.P. Act no. 13 of 1972, which was applicable to the shop in dispute, Respondent no. 3 was landlord as per the information orally given to the Petitioner by the Respondents. Giving of information to the Petitioner by Respondent regarding the fact that Respondent no, 4 was landlord of the shop in dispute was duly proved before the trial Court.

21. In "view of the above findings, Sections 37 and 109 of Transfer of Property Act are not attracted to the facts of the present case. Otherwise also Sections 37 and 109 of Transfer of Property Act have no application in cases where tenement is in respect of an accommodation which is governed by the provisions of U.P. Act no. 13 of 1972 because under the said Act rent is payable to landlord and not to the owner and as seen above, Respondent no. 4 was duly identified as landlord of the shop in dispute. The question, therefore, of applicability of Sections 37 and 109 of Transfer of Property Act does not arise. The contention of the learned counsel for the Petitioner in this respect is, therefore, without substance and is, accordingly, rejected.

22. The next argument of the learned counsel for the Petitioner is that the trial Court committed grave illegality in proceeding to decide the suit under Order 17 Rule 3 of the CPC and should have decided the suit under Order 17 Rule 2 of the CPC. This aspect of the case has been examined by the revisional Court in detail and has been fully dealt with in paras 10 to 14 of its judgment. I fully endorse the view taken by the revisional Court and do not consider (sic) necessary at all to restate the same in this judgment to make it cumbersome. The reasons given by the revisional Court for rejecting the above contention of the Petitioner while rejecting the revision are legally justified and the same are being upheld. This contention of the learned counsel for the Petitioner too is without any substance and is also rejected for the same reasons on which it has been rejected by the revisional Court.

23. The last argument of the learned counsel for the Petitioner was that the trial Court as well as the revisional Court was wrong in not accepting paper nos. 57 C and 66 C V by those documents, notices given by the Petitioner to the Respondents (sic) identifying the person and the proportion in which the rent was to be (sic) was proved. The trial Court as well as the revisional Court have concurrently held that the said documents have not been proved as the same had not been signed either by the Petitioner or by Sri Lallan Misra. This Court in exercise of its power under Article 226 of the Constitution does not take the job of review of findings of fact. A finding whether legally or illegally given is not to be interfered with by this Court specially when the same is not reached in an illegal exercise of power and also when the order based on the finding has become final under the Scheme of the Provincial Small Cause Courts Act. Otherwise also I do not find any justification to interfere in the said finding that paper no. 57 C bears the name of the sender, namely, the Petitioner is not

acceptable. It had to be proved by oral evidence as to whether the same was written by the Petitioner and was signed by him, in absence of proof to that effect, the trial Court as well as the revisional Court were justified in holding that the said document was not proved. I, therefore, do not find any illegality in the finding recorded by the trial Court as well as by the revisional Court. _ The argument of the learned counsel for the Petitioner on this score too is rejected.

24 Even if the contention of the learned counsel for the Petitioner in this respect is accepted, it does not make any difference and still the writ petition cannot be allowed on that ground. As seen above, the courts below have recorded concurrent finding of fact that the Respondents had given oral information to the Petitioner that "the rent in dispute was to be paid in its entirety to Respondent no. 4. In view of the above finding which has not been assailed before me even if it is assumed that notice through paper nos. 57 C and 66 C was sent to the Respondents by the Petitioner, the same makes no difference.

25. No other argument was advanced by the learned counsel for the Petitioner.

26. The result of the above discussion is that this writ petition has no merit and is, accordingly, dismissed with costs which is assessed at Rs. 500/-.

27. Learned counsel for the Petitioner, thereafter for vacating the shop in dispute. Learned counsel for the Respondents has expressed no objection to it on the condition that the Petitioner gives vacant possession of the shop in dispute to Respondents on the expiry of the time which may be allowed to the Petitioner. In view of the fact that learned counsel for the Respondents has no objection to the time being given to the Petitioner to hand over vacant possession of the shop in dispute, I allow the Petitioner six months' time from today to vacate the shop in dispute and hand over its vacant possession to the Respondents (Respondent no. 4) immediately on the expiry of the period of six months from today. For this Petitioner shall file an affidavit of undertaking to that effect before the trial Court within three weeks from today. On petitioner's filing the undertaking the execution proceedings shall remain suspended. In case, Petitioner fails to file the affidavit, as directed above, the decree under challenge shall be put to execution and shall be executed without further delay, it is further directed that in case no undertaking, as directed above, is filed the trial Court shall not entertain any objection from the Petitioner in the execution proceedings and the execution of the decree shall be expedited to the maximum possible.