

(2014) 09 AHC CK 0037

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 39222 of 2002

Ismaille Shah

APPELLANT

Vs

District Judge, Mathura

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 115
Constitution of India, 1950 — Article 226

Citation : (2015) 108 ALR 206 : (2015) 126 RD 642

Hon'ble Judges : Manoj Kumar Gupta, J

Bench : Single Bench

Advocate : P.K. Mishra and Vatsal Srivastava, Advocates for the Appellant; M.A. Qadeer, M.K. Nigam, Rahul Sahai and S.C, Advocates for the Respondent

Judgement

Manoj Kumar Gupta, J.—Heard Sri Vatsal Srivastava, Counsel for the petitioner, Sri M.K. Nigam appearing on behalf of respondents No. 3, 4 and 5 and Sri M.A. Qadeer, Senior Advocate for respondent No. 6. Pleadings have been exchanged and with their consent, this writ petition is being decided finally at the admission stage itself, as per the Rules of Court. The petitioner is plaintiff of original suit No. 516 of 1994 instituted against Ayub, Shakoar Ahmad and Noor Mohammad (respondents No. 3, 4 and 5 herein) and U.P. Sunni Central Waqf Board, Lucknow (respondent No. 6 herein). The plaintiff claimed to be owner in possession of Arazi Khasra No. 3399 (old No. 4379) situated at Mathura Bangar, area 3 acres, being his ancestral property. On the other hand, defendants claim that the same belongs to a waqf and there exists a public graveyard over it. It is admitted to the plaintiff-petitioner that in the year 1966, Yakub, father of defendant-respondent No. 3 and Noor Mohammad, brother of defendant-respondent No. 4 alongwith certain other persons, instituted a suit in representative capacity in respect of the same property, against Ram Gopal and certain other persons. Since it was a representative suit and, therefore, on publication of public notice, the plaintiff-petitioner made an application for his impleadment therein, which was allowed. He contested the suit claiming the suit property as his ancestral

property, while the plaintiffs of the said suit contended that it is waqf property and a public graveyard exists over it. Ultimately, the aforesaid suit was dismissed in appeal and the judgment was affirmed in second appeal. As such, the petitioner claimed that the controversy stands decided in the said suit and he has been held to be the owner of the property in question. However, defendants No. 1 to 3 and certain other persons with mala fide intention instituted another suit being Original Suit No. 142 of 1973 claiming it to be a public graveyard. The petitioner, who was defendant in the said suit, contested those proceedings and a preliminary issue was struck between the parties regarding the suit being barred by principles of res-judicata. It was decided in favour of the petitioner and against the plaintiff of the said suit. It is admitted between the parties that first appeal filed against decision dated 8.12.1973 holding the suit to be barred by doctrine of res-judicata already stands dismissed and now, appeal at the instance of respondents No. 3 to 5 herein is pending before this Court, which, according to Sri Vatsal Srivastava, learned Counsel for the petitioner is Second Appeal No. 1010 of 2007.

2. Yet another suit being original suit No. 100 of 1984 came to be instituted by U.P. Sunni Central Waqf Board-respondent No. 6 (hereinafter referred to as the "Board") arraying the plaintiff-petitioner as a defendant thereto, apart from 10 other persons. In the said suit, the Board has prayed for permanent injunction restraining the defendants from interfering in its possession over the suit property and for recovery of possession over property shown by red colour in the plaint map; damages for illegal use and occupation thereof and declaration of decree passed in Original Suit No. 392 of 1966 as null and void. This suit was contested by the plaintiff-petitioner on same plea viz. that the property belonged to his ancestors and was inherited by him. He also placed reliance on the judgment passed in original Suit No. 392 of 1966. It is admitted between the parties that the aforesaid suit was dismissed by the Trial Court on 2.3.2004. First appeal was dismissed on 17.3.2010 and second Appeal No. 677 of 2010 is stated to be pending before this Court.

3. In the aforesaid background, the plaintiff-petitioner filed the instant suit with the allegation that because of wrong propaganda by the defendants that the suit property is public graveyard and waqf property, they are creating hindrance in letting out the same by the plaintiff-petitioner, causing recurring monthly loss to him and thus, he is entitled for damages to the tune of Rs. 26,000/- and mesne profits at the rate of Rs. 30,000/- per month, till the defendants stop claiming Khasra No. 3399 as public graveyard.

4. The suit was contested by defendants-respondents No. 3, 4 and 5 by filing a written statement, in which it was stated that the property in question is a public graveyard and defendants No. 1 is the Secretary of its Managing Committee. It was further contended that the decree passed in Original Suit No. 142 of 1973 has not attained finality, as the dispute is pending in appeal before this Court. It was averred that the decree passed in earlier suit being Original Suit No. 392 of

1966 was a nullity, inasmuch as U.P. Sunni Central Waqf board was not made a party thereto. Apart from these pleas, it was specifically contended that in view of the pendency of the proceedings arising out of Original Suit No. 100 of 1984, wherein the matter, in issue, is directly and substantially the same, therefore, the instant suit is liable to be stayed under section 10, C.P.C.

5. On the basis of the pleadings of the parties, one of the issues struck between them was whether the instant suit is liable to be stayed under section 10, C.P.C.

6. The Trial Court by impugned order dated 9.4.2001 decided the issue in affirmative and held that the suit is liable to be stayed in view of pendency of earlier Suit No. 100 of 1984. Aggrieved thereby, the petitioner filed Revision No. 84 of 2001, which has been dismissed by judgment and order dated 26.8.2002 holding that under the amended proviso to section 115, the revision would not be maintainable, as the order impugned, was well within the jurisdiction of Trial Court. Aggrieved thereby, the present writ petition has been filed.

7. Sri Vatsal Srivastava, learned Counsel for the petitioner contended that the order of the Revisional Court dismissing the revision as incompetent is manifestly illegal, inasmuch as the revision deciding the issue was perfectly maintainable in view of the language of section 115, C.P.C. as amended by the State of Uttar Pradesh. He submits that even an order, which, if allowed to stand, would occasion failure of justice or cause irreparable loss to the party against whom it is made, can be subject-matter of challenge in revision under section 115, C.P.C. The Revisional Court had totally ignored the aforesaid clause under the U.P. Amendment to section 115, C.P.C. and consequently, the judgment of Revisional Court holding the revision to be incompetent is manifestly illegal. He further contends that even otherwise, the decision on merits is manifestly illegal, inasmuch as the subject-matter of the instant suit is not identical nor the parties thereto.

8. On the other hand, Sri M.K. Nigam, learned Counsel appearing on behalf of the respondents No. 3 to 5 contended that there was no material irregularity or error apparent on the face of the order of the Trial Court to warrant interference by the Revisional Court and thus, even though the revision may have been dismissed as incompetent, this Court in exercise of its jurisdiction under Article 226 should decline to interfere. He submits that the matter in issue in the instant suit is substantially the same, as was in the suit instituted by the Board. He further submits that it is not necessary that the parties to the suit should be identical. All that is relevant is that they should be litigating under the same title, as in the previous suit.

9. I have considered the submissions made by learned Counsel for the parties and perused the record. Though, the present suit is for damages but the right of plaintiff to a decree in the instant suit is dependent on his right and title over Arazi No. 3399 which he claims to be his ancestral property. Sri Vatsal Srivastava had admitted that one of the issues framed in the suit being issue No. 1 is

whether the plaintiff is owner in possession of Arazi No. 3399 (old No. 4379). In Original Suit No. 100 of 1984 instituted by the Board (defendant No. 4 in the present suit), it had taken a specific plea that the suit property is a public graveyard and is a waqf registered at Serial No. 70 in the records of the Board. Ayub (defendant No. 1 to the instant suit) is the Secretary of the Managing Committee of the said waqf. In the said suit, by setting up such right, a further relief for cancellation of the decree passed in the earlier representative Suit No. 392 of 1966 has also been claimed. Thus, the basic issue between the parties in the said suit was whether Arazi No. 3399 (old No. 4379) is the property belonging to the plaintiff-petitioner herein or is a public graveyard and waqf property under the supervision of the Board.

10. The essential ingredient for applicability of section 10, C.P.C. is that the matter in issue in the subsequently instituted suit should also be directly and substantially in issue in a previously instituted suit. In the instant case, it is amply clear that the basic dispute between the parties regarding title to the suit property was subject-matter of issue in the previously instituted suit by the Board being Original suit No. 100 of 1984, which continues to be pending in second appeal. It is not disputed by the parties that pendency of appeal is continuation of the proceeding of the previously instituted suit. Thus, the first ingredient for applicability of section 10 stands fulfilled.

11. Sri Vatsal Srivastava has placed reliance on judgment of the Apex Court in the case of *Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor*, . There, the Apex Court held that mere identity of grounds of eviction in a suit by Jesser against lessee will not attract section 10. In that case two suits were pending for eviction on ground of non-user for last six months. A third suit was filed on same ground of non-user, but for a different period. The Court held that though the grounds are the same, the cause of action are different. "The plaintiffs may or may not be able to establish the ground of non-user in the earlier suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of section 10 of the Code is not attracted in the facts and circumstances of the case." However, the law laid down therein is not attracted to the facts of the instant case.

12. The second essential is that the Court in which first suit is pending, should be competent to grant relief claimed in that suit and also the relief claimed in the second suit. It is not disputed that the Court in which first suit was instituted, was also competent to grant the relief claimed in the instant suit.

13. The third ingredient is that the suit should be between the same parties or between parties under whom they or any of them claim litigating under the same title. It has been held that section 10, C.P.C. does not contemplate that the parties in both the suits should be identical but even if they are substantially the same, section 10, C.P.C. would be attracted. Further, in case, the parties, though different, are claiming or are litigating under the same title, then also section 10,

C.P.C. would come into play.

14. In this regard, reliance has been placed on the judgment of this Court in Dwarika Das Agrawal Vs. Har Prasad Agrawal and Another, , wherein this Court relying on earlier Division Bench judgment in Wahid-un-Nissa Bibi Vs. Zamin Ali Shah and Others, , held as under:

"....One of the reasons given by the Court below for rejecting the application under section 10, C.P.C. was that the parties in both the suits are not identical. Opposite party No. 2, who is a plaintiff in Suit No. 117 of 1971, is not a party to Suit No. 273 of 1970 at all. But there can be cases in which section 10, C.P.C. can be applied although the parties not exactly identical and I am supported in my view by the ruling reported in Wahid-un-Nissa Bibi Vs. Zamin Ali Shah and Others,"

15. It is noticeable that the plaintiff-petitioner herein was defendant No. 1 in Original Suit No. 100 of 1984. Ayub, who is defendant No. 1 in the present suit, was stated to be Secretary of the Managing Committee of the Waqf in paragraph 2 of the plaint of Original Suit No. 100 of 1984. The Board (Defendant No. 4 herein) was the plaintiff of Original Suit No. 100 of 1984. It is apparent that Original Suit No. 100 of 1984 was instituted by the Board in exercise of its right of super independence over the waqf property and the right claimed was a public right of the entire Mohammadan community in a public graveyard. No private or individual right was claimed. In the written statement filed in the instant suit, Ayub, who is defendant No. 1, has claimed the same right of being Secretary of the Managing Committee of the waqf and the property in question to be a public graveyard. A perusal of the assertions made in the plaint of the instant suit reveals that other defendants namely 2 and 3 were also not claiming any personal right in the suit property but the same right, as was being claimed by defendant No. 1 and they were impleaded in the suit being the members of the same homogeneous group. Thus, there is identity of interest of all the defendants and it is amply clear that they are litigating in the instant suit under the same title, which was set up by the Board in Original Suit No. 100 of 1984 i.e., the right of the public at large in a public graveyard, which is claimed to be a waqf property. Thus, the third ingredient for applicability of section 10 also stands fulfilled.

16. In view of the discussion made above, I find no illegality in the order of the Trial Court dated 9.4.2001 deciding issued No. 3 in affirmative. Further, as a result of the above discussion, though revision has been dismissed as incompetent, I do not find that interest of justice would be served in setting aside the order of the Revisional Court or in remitting the matter back to it. Writ petition lacks merit and is dismissed.