

(2013) 09 RAJ CK 0199

In the Rajasthan High Court

Case No : Civil Writ Petition No"s. 5053 and 7705 of 2012

Kanti Lal Patel and Others

APPELLANT

Vs

Naresh Taldar and Another
 Naresh Taldar and Another
Vs Mahendra Kumar Jain and Others

RESPONDENT

Date of Decision : 09-09-2013

Acts Referred:

Citation : (2013) 4 CDR 2134 : (2014) 4 RCR(Civil) 115 : (2014) 1 RLW 706 :
(2014) 2 WLN 26

Hon'ble Judges : Govind Mathur, J

Bench : Single Bench

Advocate : M.C. Bhoot, assisted by Mr. Arpit Bhoot, Mr. Surendra Singh in S.B. Civil Writ Petition No. 5053 of 2012 and Mr. R.K. Thanvi, Assisted by Mr. Anil Joshi in S.B. Civil Writ Petition No. 7705 of 2012, for the Appellant; R.K. Thanvi assisted by Mr. Anil Joshi, Mahendra Trivedi in S.B. Civil Writ Petition No. 5053 of 2012, Mr. P.R. Mehta in S.B. Civil Writ Petition No. 7705 of 2012, Arpil Bhoot, Surendra Singh and P.R. Mehtam, for the Respondent

Judgement

Govind Mathur, J.—These two petitions for writ are heard together being arising out of the same controversy and being having facts substantially interlinked. The writ petition No. 5053/2012 is directed against the order dated 3.5.2012 read with the order dated 29.4.2010 passed by learned District Judge, Banswara in Original Civil Suit No. 34/2010. By the order dated 29.4.2010 learned District Judge while exercising powers under Sec. 91(1) of the Civil Procedure Code, 1908 granted leave to the respondents No. 1 and 2 to prefer and institute a suit for removal of public nuisance or wrongful act. To recall the order aforesaid the petitioners preferred an application and that came to be rejected vide the order dated 3.5.2012.

2. While questioning correctness of the orders aforesaid it is submitted by Shri M.C. Bhoot, learned Senior Advocate assisted by Shri Arpit Bhoot and Mr. Surendra Singh that the Court below granted leave to institute suit in public interest with mechanical exercise of powers as much as no reason has been

prescribed for granting such leave.

3. While opposing the petition it is submitted by Shri R.K. Thanvi, learned Senior Advocate assisted by Shri Anil Joshi that the leave was granted by learned District Judge after examining the averments contained in the plaint and as such the orders suffers from no jurisdictional error warranting interference of this Court while exercising powers under Article 227 of the Constitution of India.

4. The writ petition No. 7705/2012 is directed to challenge the order dated 5.7.2012 whereby learned Additional District Judge, Banswara accepted an application preferred by the defendants under Order 39 Rule 7 read with Sec. 151 Civil Procedure Code. Under the order aforesaid learned Additional District Judge denied the request of the plaintiff for appointment of the Commissioner and also refused to extend the order to maintain status quo which as a matter of fact was granted with consent of the defendants.

5. It is submitted by Shri R.K. Thanvi, Senior Advocate, counsel for the petitioners that the Court should have granted the interim relief to maintain status quo otherwise the very purpose of filing the civil suit shall be frustrated.

6. Heard learned counsel for the parties.

7. Learned District Judge by order dated 29.4.2010 granted leave to institute suit in public interest by mentioning "plaintiffs alongwith the suit have preferred an application under Sec. 91(1) of the CPC seeking leave to institute suit in the public interest, on which counsel for the plaintiff is heard and the plaint is perused. Looking to the facts and circumstances of the case and the averments made in plaint, while reserving rights of the defendants, leave is granted to the plaintiffs to institute suit under Sec. 91(1) Civil Procedure Code". (Translation of original vernacular is made by the Court). While rejecting the application preferred by the petitioners in S.B. Civil Writ Petition No. 5053/2012 learned District Judge observed that "keeping in view the averments contained in plaint filed by the plaintiffs the presentation of suit in public interest is appropriate and valid. In light of the legal illustrations cited by both the parties, we find that the leave granted by the Court on 29.4.2010 to the plaintiffs to institute suit as per Sec. 91(1) CPC was proper and valid. The objections raised by the defendants are rejected being having no merit." (Translation of original vernacular is made by the Court).

8. From perusal of the finding given by the Court it is apparent that no reasons are given by the Court either to grant leave or to reject the objection raised by the petitioners. As per Sec. 91(1)(b) of the CPC a suit for declaration and injunction or for such other relief as may be appropriate in the circumstances may be instituted by two or more unaffected persons by such public nuisance or wrongful act, but only after having leave by the Court. The condition precedent to have leave before institution of such suit clearly indicates that the remedy available under this provision is something extra than the institution of a suit between the parties adversely having lis affecting each others right. The

deviation from a normal course always demands special circumstances and reasons thereof. The legislature knowing it well that the institution of suit as per Sec. 91(1)(b) CPC is a deviation from normal course, considered it necessary to have leave by the Court. Meaning thereby, the Court is required to satisfy itself prima facie that the cause sought to be agitated by the public spirited persons is genuine. The genuineness of the cause at this stage is required to be assessed by preliminary examination of facts averred in the plaint and the leave application. The consideration of leave application being a judicial exercise of powers, should be made objectively and not mechanically. Objective consideration of any issue presupposes existence of valid reasons to arrive at a conclusion. If such conclusion is not supported by the reasons then that fails on the scale of objectivity. As such, while granting leave for institution of a suit as per provisions of Sec. 91(1)(b) Civil Procedure Code, the Court is required to record its reasons for granting such leave.

9. In the instant matter in the orders impugned absence of reasons is conspicuous, as such, the leave granted is not supported by the reasons. The orders impugned hence are bad.

10. The writ petition bearing No. 7705/2012 is against the order not extending the interim order, which as a matter of fact was granted with consent of the defendants. This order also pertains to disposal of the application under Sec. 39(7) Civil Procedure Code. The order impugned to the extent of non-extension of interim order to maintain status quo is apparently just in view of the fact that at the first instance such order was made as a concession made by the defendants. On withdrawal of such concession the Court rightly refused to extend the same. So far as issuing of commission is concerned, it is well settled that inspection of any property which is subject matter of suit can be permitted only with a view to arrive at a just decision for considering an application preferred under Order 39 Rule 1 and 2 Civil Procedure Code. If adequate material is already available to arrive at a just decision, then the Court can always deny for issuing such commission. In the instant matter the Court below arrived at a conclusion that no such commission is desirable in view of the material already available. The order dated 5.7.2012 does not suffer from any such error that may warrant interference of this Court under Article 227 of the Constitution of India. In result, S.B. Civil Writ Petition No. 5053/2012 is allowed. The orders impugned dated 3.5.2012 and 29.4.2010 are hereby quashed. The trial Court is directed to reexamine the issue with regard to grant of leave to the plaintiffs for instituting civil suit as per provisions of Sec. 91(1)(b) Civil Procedure Code. The consideration in the terms above is required to be made by the trial Court on or before 30.09.2013. The writ petition No. 7705/2012 is dismissed being having no merit.