
(2014) 07 AHC CK 0199
In the Allahabad High Court
Case No : Misc. Single No. 3396 of 2014

Manzoor Khan

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 02-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : (2014) 106 ALR 856

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : Mohammad Haneef, Advocate for the Appellant

Judgement

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Ram Surat Ram (Maurya), J.—Heard Sri Mohammad Haneef for the petitioners. The writ petition has been filed against the order dated 27.2.2014 passed by Civil Judge (Senior Division) Court No. 15, Sultanpur, by which application of the petitioners under Order XXIII, Rule 1, C.P.C. for withdrawing the suit with liberty to file a fresh suit, has been rejected.

2. The petitioners filed a suit for permanent injunction restraining the defendant respondent from interfering in his possession over the land situated in village Hariharpur Ishapur. After trial, the Trial Court found that although the title of the petitioners was in respect of the land of village Bahadurpur where their house situated but the disputed land situated in village Hariharpur Ishapur which is also proved from the survey report. Therefore the title of the petitioners of the land in dispute has not been established. On this finding the suit has been dismissed. The petitioners filed an appeal from the aforesaid order and in the appeal the petitioners moved an application under Order XXIII, Rule 1, C.P.C. for withdrawal of the suit with liberty to file a fresh suit. The lower Appellate Court found that the application of the petitioners does not fall within the purview of Order XXIII, Rule 1, C.P.C., inasmuch as the suit of the petitioners has not been dismissed on

the basis of any formal defect, it was dismissed on merit accordingly, the application of the petitioners under Order XXIII, Rule 1, C.P.C. was not maintainable. Hence this writ petition has been filed.

3. The relevant part of Order XXIII, Rule 1, C.P.C. is quoted below:

"(3) Where the Court is satisfied-

(a) that a suit must fail by reason of some format 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 or 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."

4. The Counsel for the petitioners is relying upon the judgment of Supreme Court in *Rekha Mukherjee Vs. Ashis Kumar Das and Others*, . In paragraph 24 of the judgment of Supreme Court held that grant of leave in such a case would result in unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. This case law relied upon the Counsel for the petitioners does not support the case of the petitioners.

5. The lower Appellate Court found that the suit of the petitioners has been dismissed on merit and not on any technical grounds. The Counsel for the petitioners submits that since the petitioners have mentioned the land in dispute was lying in village Hariharpur Ishapur instead of mentioning it in village Bahadurpur therefore this was a technical error. The argument of the Counsel for the petitioners is not accepted. The location of the land has been determined on the basis of survey report not on the basis of allegation in the plaint and in the evidence on record it was held that the petitioners could not prove his title over the land in dispute. After such finding of the Trial Court the plaintiff cannot be permitted to withdraw the suit and the impugned order does not suffer from any illegality. There is no merit in the case. The writ petition is dismissed.