
(2002) 05 RAJ CK 0066

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 253 of 2002

Mehboob Bhai and Another

APPELLANT

Vs

Abdul Kadir and Others

RESPONDENT

Date of Decision : 10-05-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 10A, Order 7 Rule 4, 91

Citation : (2002) 3 CivCC 272 : (2002) 3 RCR(Civil) 414 : (2002) 3 RLW 1345

Hon'ble Judges : H.R. Panwar, J

Bench : Single Bench

Advocate : Rakesh Arora, for the Appellant;

Final Decision : Allowed

Judgement

Panwar, J.—Heard counsel for the appellants and perused the order impugned dated 22. 4. 2002.

2. Plaintiff-appellants filed suit in representative capacity for declaration and mandatory injunction against the defendant- respondents. An application u/s 91, C. P. C. was also filed alongwith the suit seeking permission to file the suit in representative capacity. Vide order impugned dated 22. 4. 2002 the trial Court returned the plaint under Order 7 Rule 10, C. P. C. holding that in the suit filed in representative capacity seeking decree of declaration and injunction in mandatory form the Municipality, Abu Road is a necessary party as the relief sought there in is with regard to declaration of the patta dated 7. 6. 2000 issued by Municipal Board, Abu Road to be illegal and void ab initio.

3. In the instant case, plaint has returned under Order 7 Rule 10 C. P. C. without notice to defendant respondents. In such a situation, this misc. appeal can be disposed of without issue of notice to defendant respondents.

4. I have carefully scanned the order impugned dated 22. 4. 2002. There is no manner of doubt that in the facts and circumstances of the case the plaint could

not have been returned under Order VII Rule 10, C. P. C. "Return of the plaint" necessarily connotes lack of jurisdiction to try the suit and, in the circumstance, it is mandatory for the Court to specify the Court in which the suit should have been instituted on the plaint itself while returning the same. Return of the plaint under Rule 10 would always be subject to the provisions of Rule 10-A of Order VII of the Code of Civil Procedure.

5. The matter before the trial Court was for consideration of an application filed by plaintiff appellants u/s 91 of the CPC seeking permission to bring up the suit in representative capacity. Section 91 C. P. C. reads thus:-

"91. Public nuisance and other wrongful acts affecting the public. --(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. "

6. From plain reading of the aforementioned section, it is manifestly clear that suit must relate to a public nuisance or other wrongful act affecting or likely to affect the public and is instituted either by the Advocate General, or with the leave of Court, by two or more persons even if no special damage is caused to such persons by public nuisance or wrongful act. In the instant case, the suit as instituted is based on allegation of public nuisance by the persons specified in Section 91(1)(b) C. P. C. Thus, in my considered opinion, before returning the plaint as has been done by the Court below it should have disposed of in the application moved u/s 91 C. P. C., after having satisfied the requirement of Rule 4 of Order 7 C. P. C.

7. The counsel has placed before this Court a copy of the plaint. It is evident from the material on record that the patta in question is in respect of the land sold by municipality, which is alleged to be the land of public user. It cannot be disputed that the right of public user is a higher right to weigh with preponderance over right of a private individual and where complete and effective relief could be obtained in respect of subject-matter in dispute against a party, who is alleged to have caused/created public nuisance, it is not necessary to join any other party against whom no relief is sought by the plaintiffs. In the instant case, indisputably it is the plaintiffs to shoulder the burden of proof in the suit presented by them against the defendants. However, it will be open for the trial Court to decide this point after the defendants appear and if such plea is raised. In this view of the matter, in my considered opinion, the order of the trial

Court returning the plaint at that stage cannot be sustained and is liable to be set aside.

8. In view of the above, therefore, I am inclined to allow this appeal. The order impugned dated 22. 4. 2002 is set aside. The trial Court is directed to decide the application u/s 91 C. P. C. and proceed with the suit in accordance with law. The appeal stands allowed accordingly.