

(2017) 05 AHC CK 0031
In the Allahabad High Court
Case No : 12118 of 2002

Naresh Kumar

APPELLANT

Vs

State Of U.P. & Others

RESPONDENT

Date of Decision : 04-05-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, Section 80, Order 23Rule 1 - Notice
Specific Relief Act, 1963, Section 41 - Injunction when refused
Uttar Pradesh Panchayat Raj Act, 1947, Section 106, Section 115 - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951, Section 9, Section 122-B

Citation : (2017) 05 AHC CK 0031

Hon'ble Judges : Sangeeta Chandra

Bench : Single Bench

Advocate : Ajay Rajendra, A.B. Singhal, Mahesh Narain Singh, V.K. Singh

Judgement

1. This writ petition has been filed by the petitioner challenging the order dated 31.3.2001 passed by IInd Additional District Judge, Meerut on his application filed under Order XXIII Rule 1 (3) of Civil Procedure Code (herein after referred to as the CPC). The writ petition as it was originally filed was under Articles 226 and 227 of the Constitution of India.

2. At the time of hearing counsel for the petitioner, Sri Ajay Rajendra submitted that in view of law laid down by the Hon'ble Supreme Court in the case of Radhey Shyam Vs. Chhabinath 2015 (5) SCC 423, this writ petition may be treated to have been filed as an application under Article 227 of the Constitution of India, praying for exercise of supervisory jurisdiction of this Court and the relief clause praying for a writ in the nature of certiorari for quashing the

impugned order dated 31.3.2001 passed by IInd Additional District Judge, Meerut may be suitably modified and the impugned judgment and order dated 31.3.2001 be set aside in exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution. On oral prayer being made, this Court has deemed it appropriate to treat this writ petition No. 12118 of 2002 as an application under Article 227.

3. The petitioner while challenging the order dated 31.3.2001 has submitted that he had filed a suit for permanent injunction in the Court of Civil Judge, namely Original Suit No. 910 of 1993 (Naresh Kumar Vs. State of U.P. through Collector, Meerut) arraying the Land Management Committee of Gaon Sabha Bahadurpur, Tehsil Sardahana, District Meerut and four private opposite parties in this suit for permanent injunction. The petitioner had claimed that he was the owner in possession of land (Gher) situated at village Bahadurpur which land had devolved upon him as ancestral property from his father Aatma Ram who in turn came into possession from his fore fathers and since their possession over the land in dispute was from before Zamindari Abolition, they became owner in possession under Section 9 of the U.P. Z.A. & L.R. Act. It was further stated that on the said land, there was a Pucca room, Ahata and a shed for the animals and an oil press but the Gaon Sabha in question initiated proceedings under Section 122-B for eviction of the petitioner and therefore, the petitioner sent a registered notice under Section 80 CPC and 115 of the U.P. Panchayat Raj Act to the State respondents and the Gaon Sabha in question on 15.9.1995 and later filed the suit for permanent injunction.

4. The said suit was dismissed by the IInd Additional Civil Judge, Meerut. In the judgment dated 15.9.1995 seven issues were framed out of which issue no. 1 related to the merits of the claim of the plaintiff as to whether he was entitled to claim title and possession over the land in question. Issue no. 2 was whether the plaintiff's suit was barred by the provisions of Section 80 CPC. Issue no.3 was as to whether the suit was barred by Section 106 of the U.P. Panchayat Raj Act. Issue no.4 was whether the suit was barred by Section 41 of the Specific Relief Act. Issue no.5 was whether the Civil Court had jurisdiction to hear the matter. Issue nos. 6 & 7 were whether any relief at all can be given to the plaintiff or the suit was liable to be dismissed with costs in favour of the Gaon Sabha.

5. Aggrieved by the judgment and order dated 15.9.1995, the petitioner filed Civil Appeal No. 164 of 1995 (Naresh Kumar Vs. State of U.P.). During the pendency of the said Civil Appeal, the petitioner filed an application on 12.2.2001 under Order XXIII, Rule 1(3) of CPC with a prayer to withdraw the suit with liberty to file another suit, after curing the formal defects mentioned therein. The respondents filed their objections and the IInd Additional District Judge, Meerut by the impugned order dated 31.3.2001 partly allowed the said application by allowing withdrawal of the suit, but rejected the prayer of granting liberty to file a fresh suit. Since the prayer for withdrawal of the suit was allowed, the appeal was dismissed as having become infructuous.

6. The main ground of challenge raised in this writ petition is that the IInd Additional District Judge, Meerut could not have divided the said application under Order XXIII, Rule 1(3) of CPC into two parts and the said application could either have been allowed or rejected in its totality. The case of the petitioner was severely prejudiced by this action of the Appellate Court and if the IInd Additional District Judge, Meerut was not convinced with the case of the petitioner, he should have dismissed the application dated 12.2.2001 and should have proceeded to hear the appeal on merits.

7. In the appeal, the main ground of challenge was that since the suit was held to be not maintainable by the lower Court as barred in the absence of valid notice under Section 80 CPC and 106 of the U.P. Panchayat Raj Act, and that the Civil Court had no jurisdiction to entertain the suit at all and that the petitioner should have approached the Revenue Courts in the first instance, then, in that case, when it was held that the suit was not maintainable, no finding could have been recorded on any other issue on the merits of the suit by the Court below.

8. It was argued before this Court by the learned counsel for the petitioner that the finding recorded by the lower Court on other issues on the merits of the claim of ownership of the plaintiff were non-est being without jurisdiction. In a suit that was already held to be not maintainable these findings could not have been allowed to influence the decision of the IInd Additional District Judge, Meerut leading to rejection of his prayer for liberty to file a fresh suit.

9. The Appellate Court wrongly assumed that the findings given by the Trial Court on the issue relating to ownership of land as well as lack of jurisdiction of the Civil Court to try the suit will be nullified, if permission to file a fresh suit is allowed.

10. Learned counsel for the petitioner has also argued that in terms of the law settled by Hon'ble Supreme Court as followed by the various High Courts of the country, including this Court, the application under Order XXIII Rule 1(3) should be dealt with as a whole. When the court divided the reliefs into two parts and allowed the suit to be withdrawn but refused liberty to file a fresh suit, the order of the Court below prima-facie becomes erroneous. It had been settled position in law that if the Court has no reason for allowing the withdrawal application in terms of the under Order XXIII Rule 1(3), the Court should have rejected the application seeking liberty to withdraw and should have proceeded with the hearing of appeal on merits.

11. Learned counsel for the petitioner has relied upon the following cases to buttress his argument: 1. Kandapazha Nadar & others Vs. Chitraganiammal & others reported in 2007 (7) SCC 65 (Para 18 & 19)

2. Balbir Singh Vs. Baldev Singh 2012 AIR UC 268 (Para 7, 8, 9 & 10) Uttranchal High Court

3. Rajasundari Vs. Gowri @ Avaduai Ammal & others 2006 AIR 156 (Para 7, 9,

12, 13, 14 & 15) Madras High Court

4. Ravula Gopal Reddy Vs. Ravula Narasi Reddy & others 2014 (4) ALT 234 (Para 4, 7, 10, 11, 13 & 14) Andhra Pradesh High Court

5. K Ravindra Kumar & another Vs. Suraj Bhan through L.Rs. & others 2015 (1) Andh LD 349 (Para 5) Telangana and Andhra Pradesh High Court

6. Mario Shaw Vs. Martin Fernandez & another 1996 (Bomba) 116 (Para 6) Bombay High Court.

12. Learned counsel for the petitioner has taken the Court through each of the judgments cited herein above, wherein, in the respective cases, it has been held that dismissal of a suit as withdrawn cannot constitute a decree as there is no observation on the merits of the case, and when an application under Order XXIII Rule 1(3) is considered, it should be treated as a whole and if the Court finds that there is no good reason for withdrawal, or if the case of the respondents would in any way be prejudiced by allowing the withdrawal, it should refuse the application in its totality and should proceed with the suit/appeal on merits. Paragraph 8 and 10 of the judgment rendered in the case of Balbir Singh Vs. Baldev Singh (supra) may be quoted herein below: "8. Learned counsel for the petitioner has also placed reliance in a Division Bench judgment rendered by the Karnataka High Court in the case of D.P. Sharma Vs. Bangalore Mahanagar Palika and others [AIR 2001 Karnataka 401], wherein referring the judgment rendered by the High Court Himachal Pradesh in the case of Hans Raj Akrot Vs. State of Himachal Pradesh [AIR 1989 HP, page 43] has observed in paragraph no.11 as under:-

"11. In the second decision, the acting Chief Justice of Himachal Pradesh High Court in Paras 5 and 6 thereof, had held as hereunder (at page 44):

"5. It is settled that where a plaintiff makes a prayer for withdrawal of the suit with liberty to file a fresh suit in respect of the subject matter of the suit, the Court can permit the withdrawal of the suit coupled with the liberty to file a fresh suit. It cannot refuse that liberty to the plaintiff on its own. If the Court feels that, in the circumstances, brought before it, permission to withdraw the suit should not be granted, it can refuse the prayer by rejecting the application. It is not open to the Court to split up the prayer made by the plaintiff by allowing the withdrawal of the suit and refusing the liberty to institute a fresh suit in respect of the same subject matter. (See Wazir Singh Chhela Blaka Baba Mulangah Shah Vs. Hidayat Shah Shrida, AIR 1967 Punj 405, Devidas Tulsiram Brijwani Vs. Commr., Poona Municipal Corpn., AIR 1974 Bombay 39 and Radha Krishhna Vs. State of Rajasthan, AIR 1977 Rajasthan 131 (DB).

6. The impugned order of the learned sub-Judge is unsustainable for he has exercised jurisdiction which he did not possess in law. It deserves to be and is set aside."

"10. The plaintiff-petitioner has specifically made a prayer in the application

(paper no. 227-Ka) that permission may be granted with liberty to file a fresh suit. By the order dated 18.10.2010, the learned trial court has partly allowed the application of the plaintiff so far as permission to withdraw the suit was concerned, but liberty to file fresh suit was not accorded. I am of the considered view that the trial court should not have split up the prayer made by the plaintiff-petitioner. It was open to the trial court either to have allowed the application in toto or should have rejected the application as a whole."

13. Similar observations have been made by the Madras High Court in the Case of *Rajasundari Vs. Gowri @ Avaduai Ammal* (supra) in paragraph 12 which is quoted herein below: "12. An Application to withdraw the Suit with liberty to file a fresh suit must either be allowed or refused in toto. It is not open to the Court to grant a prayer for withdrawal and refuse the leave. If liberty is refused, the Suit should not be dismissed, but must be retained in the file for Trial / continuation of Trial. If an application is made for withdrawal of the Suit with liberty to file a fresh suit, it is not open to the Court to grant only permission for withdrawal, without liberty to file a fresh suit. If the Court simply allows withdrawal but refuses liberty, the Court would be acting without jurisdiction in dividing the Petition into two parts. It is to be noted that the Application under Order 23 Rule 1(3) of C.P.C is indivisible whole. The Trial Court was not right in separating the prayer for withdrawal and the leave to file a fresh suit. When the Court has declined to grant leave to file a fresh suit, the Trial Court ought to have dismissed the Application in toto."

14. The Madras High Court after quoting several judgments of the same High Court and other Courts has observed in paragraph 15 thereafter as under: "15. Thus, it has been consistently held that an Application under Order 23 Rule 1(3) C.P.C is an indivisible whole and if the Plaintiff is not allowed liberty to institute a fresh suit, the pending suit should not be dismissed; but the Application should be refused altogether and that the Suit should be retained for Trial. The Trial Court was not right in partly allowing the Petition to the extent of permitting the Plaintiff withdrawing the Suit and refusing to grant liberty to file a fresh suit. Having declined to grant leave to file a fresh suit on the same cause of action, the Trial Court ought to have dismissed the Application in entirety. The order of the learned Judge declining to grant the leave is justified since the Application has been filed when the Suit was in Part-heard stage. However, learned Judge ought not to have dismissed the Suit. Hence, the Application in I.A.No. 10477 of 2004 is to be dismissed in toto."

15. From the perusal of the order under challenge dated 31.3.2001, it is evident that the learned II Additional District Judge, Meerut was convinced with the objections raised by the Gaon Sabha against the application made by the petitioner under Order XXIII Rule 1(3) CPC that since the findings regarding the jurisdiction of the Civil Court to decide the right title and ownership of the plaintiff/petitioner and on the merits of the case were also under appeal the said order would act as *resjudicata* and only to nullify such findings, application for

withdrawal had been moved praying for liberty to file a fresh suit. Learned Appellate Court, therefore, while allowing the application in part for withdrawal of the suit, did not grant any liberty to file a fresh suit.

16. This approach of the Learned Appellate court is erroneous. It is a well settled law that when a suit is withdrawn on an application being allowed under Order 23 Rule 1(3) CPC, then it does not amount to an order passed on merits, as permission to withdraw a suit decides no matter in controversy, and does not confer any right on a party on the basis thereof, and would not in any way prejudice the defence to be set up by the respondents in another proceedings.

17. Moreover, in this case, the learned court below while dismissing the suit for permanent injunction had held that suit was not only barred in view of the failure to give proper notice under Section 80 of CPC and 106 of Panchayat Raj Act, but also because the Civil Court had no jurisdiction in the matter as the the Revenue Courts were seized of the matter under Section 122B of the U.P. Z.A. & L.R. Act. The findings on merits given by the learned Court below were therefore without jurisdiction and they would be treated as non-est and would not act as res-judicata on the particular issue raised in between the parties before the competent court.

18. This Court is of the considered opinion, in view of law laid down by the Hon"ble Supreme Court and also reiterated by various High Courts and this Court, that the judgment and order dated 31.3.2001 in Civil Appeal No. 164 of 1995 (Naresh Kumar Vs. State of U.P. and others) is liable to be set aside and is thus set aside.

19. The application filed by the petitioner on 12.2.2001 paper no. 108 C-2, may be considered afresh by the Appellate Court and should either be allowed as a whole or rejected as a whole in which case the appeal be decided on merits. The writ petition is allowed to this extent.