

(1976) 09 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Special Appeal No. 135 of 1973

Radha Krishna and Another

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 16-09-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(1), Order 23 Rule 1(2), 11

Constitution of India, 1950 — Article 225, 226

Citation : AIR 1977 Raj 131 : (1976) RLW 671

Hon'ble Judges : M.L. Jain, J;A.P. Sen, J

Bench : Division Bench

Advocate : P.N. Dutt, for the Appellant; S.K. Tiwari, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Sen, J.—The short question which arises for determination in this special appeal against the order of J. P. Jain, J., dated 28-9-1973 is, whether the learned single Judge was right in holding that (1) the writ petition filed by the appellants barred by the rule of constructive res judicata and (2) it could not be entertained due to inordinate delay and laches on their part.

2. It is common ground that the appellants had previously filed writ petition No. 1384 of 1971 on identically the same facts, claiming the same reliefs viz. for quashing the notifications issued by the State Government of Rajasthan under Sections 4 and 6 of the Rajasthan Land Acquisition Act, 1953 dated 17-10-1963 and 7-1-1971 for the acquisition of village Rampura Roopa for the Jainpir Improvement Trust for public purpose i.e. for the planned development of Jaipur City under the Lal Kothi Scheme.

3. That petition of theirs was heard on merits along with Writ Petitions Nos. 538 and 546 of 1971 by Tyagi, J. on 23-2-1972. Tyagi, J. had, in the meanwhile, rejected 28 Writ Petitions challenging the aforesaid notifications on precisely similar grounds by the judgment in Writ Petition No. 112 of 1070 dated

31-3-1971. The order-sheet of 23-2-1972 reads:--

"23-2-1972 Hon"ble Tyagi J. Mr. P. N. Dutt for the petitioners.

Mr. S. K. Tiwari, Dy. Govt. Advocate.

Heard learned counsel for the parties.

Learned counsel for the petitioners wants to obtain further instructions from his clients to withdraw this petition in view of various judgments given by this Court. Let this case be listed for dictation of judgment on 14-3-72.

Sd/- V. P. Tyagi."

On 14-3-1972, the prayer for further time was renewed. Tyagi, J. accordingly fixed the case for 16-3-1972 "for dictation of judgment". On that day, learned counsel for the petitioners, however, prayed for withdrawal of the writ petition with liberty to file a fresh one on the ground that certain facts had come to his notice. That prayer of his was opposed by the learned Deputy Government Advocate. Tyagi J. accordingly passed the following order:--

"This question whether the petitioner has a right to file a fresh petition shall be examined when the fresh petition is filed in this Court. Subject to the objection raised by the learned Deputy Government Advocate, the writ petition is allowed to be withdrawn. The writ petition is therefore dismissed as withdrawn."

It would thus appear that the appellants prevented the Court from dismissing the earlier writ petition by withdrawing the same on the date of judgment.

4. On 13-9-1973. i.e. after a lapse of nearly 1 1/2 years, the appellants filed the present writ petition on identically the same facts, challenging the said notifications on precisely the same grounds except for the ground based on the decision of their Lordships of the Supreme Court in *Munshi Singh v. Union of India* AIR 1973 SC 1150. The learned single Judge has dismissed the writ petition as not maintainable for the grounds stated above.

5. The earlier writ petition having been withdrawn, there was no decision on merits and, therefore, the learned single Judge was not right in holding that the writ petition was barred by the rule of constructive res judicata: *Arati Ray Choudhury v. Union of India* AIR 1974 SC 532. The question still is whether the second writ petition lies.

6. It is urged that the order of Tyagi J. should be construed as one granting leave to withdraw the earlier writ petition with liberty to bring a fresh petition. It is true that the permission mentioned in Order 23, Rule 1, C.P.C. need not be given in express terms. It is sufficient if it can be implied from the order read with the application on which the order was made. It is conceded that there was no "formal defect" within the meaning of Clause (a) of Sub-rule (2), but it is said that there were "other sufficient grounds" within Clause (b). There is no merit in the contention. The words "other sufficient grounds" in Clause (b) of Sub-rule

(2) must be read ejusdem generis with the words "formal defects"; AIR 1944 183 (Nagpur) i. e. on grounds analogous to a "formal defect". The writ petition before Tyagi J. did not suffer from any such defects and, therefore, he rightly did not grant leave to the appellants to withdraw the petition with liberty to bring a fresh petition.

7. Learned counsel for the appellants urges that the proceedings under Article 226 of the Constitution are "civil proceedings" u/s 141, and are, therefore, governed by the Code of Civil Procedure. The Court has no power, it is said, apart from Order 23, Rule 1, C.P.C. to allow a suit to be withdrawn with liberty to file a fresh one, and the power should be exercised subject to the conditions prescribed therein. There can be no dispute with this proposition but the difficulty is as regards its application.

8. There can be no doubt as to the principles applicable to a suit. The court has undoubtedly no power apart from Order 23, Rule 1, C.P.C. to allow a suit to be withdrawn with liberty to file a fresh one, and the power has to be exercised subject to the conditions prescribed therein. When leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order must not be one dismissing the suit with liberty to bring a fresh suit, but one granting permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit. Where leave is refused, the Court should simply dismiss the application. It should not make an order disposing of the suit on the assumption that the plaintiff would withdraw the suit under Sub-rule (1) if the application was refused. The Court cannot split up application under Sub-rule (2) of Order 23, Rule 1, C.P.C. into two parts, one for withdrawal of the suit, and the other for permission to file a fresh suit and allow the former, and refuse the latter (see Mulla's CPC 13th Edn. Vol. 2 p. 1285; Mahant Biharidasji v Parshotamdas Ramdas ILR (1908) 32 Bom 345 ; Kamini Kumar Roy and Another Vs. Rajendra Nath Roy and Another, ; Baikanta Nath Ghose Vs. Bhuban Chandra Mahapatra and Others, ; Marudachala Nadar Vs. Chinna Muthu Nadar and Another, ; Naru v. Mst. Noji AIR 1959 Raj 53 , and T.W. Ranganathan Vs. T.K. Subramaniam and Others, .

9. Where the plaintiff withdraws from a suit without the permission of the Court he is precluded from instituting a fresh suit in respect of the same subject-matter under Sub-rule (3) and against the same defendant: Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., .

10. The CPC does not in terms apply to the proceedings under Article 226 of the Constitution. The practice and procedure under Article 226 of the Constitution is ordinarily governed by the rules framed by the Court under Article 225. The principles embodied by the CPC can be made applicable only in so far as they are in consonance with the rules or where the rules are silent.

11. It is amply clear that the appellants withdraw the earlier writ petition at their own risk. They made a false representation seeking leave to withdraw the

petition on the pretext that some new facts had come to their notice. The present petition is, as it is now accepted, based on identically the same facts. But it is said that it is based on a new ground, namely, on the decision of their Lordships of the Supreme Court in *Munshi Singh and Others Vs. Union of India (UOI)*, which according to the learned counsel, constitutes new facts, and therefore, a second petition was maintainable. The submission is wholly unwarranted. There were a series of petitions based on more or less similar grounds. They were also dismissed by Tyagi J. by his order in Writ Petition No. 112 of 1970 dated 31-3-1971. The decision of the Supreme Court in *Munshi Singh v. Union of India* came much later, and that could not constitute new facts which had come to the knowledge of the appellants on the date of withdrawal of their earlier petition.

12. In our judgment, the present writ petition was clearly barred by Rule 382 of the Rajasthan High Court Rules, 1952, which runs as follows:--

"382. where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

In *Ramsingh Vs. State of Rajasthan and Others*, , the earlier writ petition had been dismissed in default. The question before the Division Bench of Dave and Lodha, JJ. was whether a second petition on the same facts lies. The Division Bench held that the second petition was barred. Lodha, J. in delivering the judgment, observed:

"..... If the contention raised on behalf of the petitioner to the effect that the petitioner has a right to invoke extraordinary jurisdiction of this court under Article 226 of the Constitution successively, unless the matter has been disposed of on merits, is driven to its logical conclusion, it would result in *reducio ad absurdum*. The result of acceptance of such a proposition would mean that even though a writ application may have remained pending for a few years and then it has been dismissed in default or may have been disposed of for any other reason except on merits, the petitioner would have a right to move such an application on the same facts again and again till it is disposed of on merits.

Looked at from another point of view, such a procedure would result in disregarding and circumventing the earlier orders of this Court. In these circumstances, we are of the opinion that the principle contained in Order 9, Rule 9, C.P.C. can be suitably applied to writ proceedings. As has already been stated above, the earlier writ application in this case based on the same facts was dismissed in default in the presence of the opposite party and the application for the restoration was dismissed on merits. Thus, applying the principle contained in Order 9, Rule 9, C.P.C. the present writ application is not maintainable."

In Special Appeal No. 1 of 1971 *D. N. Bandopadhyay v. Union of India* dated 9-3-1971 (Raj) *Beri, C. J. and Joshi, J.* observed that successive petitions do not lie on the principle that a party cannot be vexed twice. This is a salutary principle and there is no reason for us to depart from that principle in the present case.

We must, accordingly, hold that the petition was barred under Rule 382 of the Rajasthan High Court Rules.

13. Even otherwise, the learned single Judge was, in our view, right in the circumstances of the present case in rejecting the writ petition. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. He was right in not exercising the inherent and extraordinary jurisdiction in favour of the appellants. They must fail on account of inordinate delay and laches on their part. Their earlier petition was dismissed as withdrawn on 16-3-1972. They sat quiet for a period of nearly 1 1/2 years. There was unreasonable delay on their part in moving the Court. The delay remains unexplained. Merely because the Supreme Court held in *Munshi Singh and Others Vs. Union of India (UOI)*, that the public purpose stated in notifications, viz. for planned development of Jaipur City was vague, that would not furnish a ground to them to file a fresh petition. The petition must, therefore, fail on the ground of laches: *Indrapuri Griha Nirman Sahakari Samiti Ltd. Vs. The State of Rajasthan and Others*, .

14. The result, therefore, is that the appeal fails and dismissed with costs.