

(1973) 07 DEL CK 0004

In the Delhi High Court

Case No : Civil Writ Appeal No. 1118 of 1970

Ram Kishore and Others

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-07-1973

Acts Referred:

Citation : (1973) ILR Delhi 513

Hon'ble Judges : S.N. Shankar, J; Narain Andley, J

Bench : Division Bench

Advocate : T.C.P. Lal, J.P. Gupta, B. Dutt and U.S. Chaudhary, for the Appellant;

Judgement

S.N. Andley, J.

(1) This judgment will dispose of Civil Writ No. 1118 of 1970 and F.A.O. No. 94 of 1970. The writ petition and the appeal came to be filed in the circumstances stated hereinafter.

(2) Certain lands belonging to deceased Raghbar Dayal, predecessor-in-interest of the petitioners and the appellants, situate in village See lum Pur, were notified for acquisition u/s 4 of the Land Acquisition Act, 1894. The lessee of these lands was one Raj Kishan Jain. This notification was followed by section 6 and section 9 notifications and in or about 1962, a certain amount of market value was offered by the Collector to Raghbar Dayal as also to Raj Kishan Jain, Raghbar Dayal applied u/s 18 of the said Act on April 18, 1963 for a reference and somewhere near about that time Raj Kishan Jain also applied independently for a similar reference for enhancement of compensation offered by the Collector. The Collector made the references to the District Judge and both were transferred to an Additional District Judge for decision. The reference filed by Raghbar Dayal was numbered 226 of 1964 and the one filed by Raj Kishan Jain was numbered 225 of 64.

(3) It appears that on April 17, 1964, the Additional District Judge, Delhi, made the following order:-

"THIS case is consolidated with case No. 225 of 1964. To come up with the connected case on 18-7-64."

(4) Both the references were adjourned on several dates. It then appeared that Raghbar Dayal had died on February 6, 1965 and since no application was made for bringing on record his legal representatives within time, the Additional District Judge, by his order dated May 14, 1965 dismissed his reference as having abated. Thereafter, the legal representatives of Raghbar Dayal made an application for bringing them on record and on January 17, 1967 the Additional District Judge restored the case to the file. On January 19, 1967, the parties counsel made statements to the Additional District Judge and an order was recorded as follows:-

"IT is agreed by the parties" counsel that the evidence so far recorded and to be hereafter recorded in case No. 225 of 1964 with which this case was consolidated before its dismissal be read as evidence in this case. To come up with case No. 225 on 17-3-67."

(5) It, Therefore, follows that the two references were consolidated for the purpose of trial and thereafter both the references were taken up together. The two references were, on January 3, 1968, transferred for disposal to another Additional District Judge before whom they came up on January 5, 1968. On this date, the petitioners did not appear in their reference No. 226 of 1964 and it was dismissed for default under Order IX, rule 8 of the CPC with costs by order of the Additional District Judge which was follows:-

"THE case had been called earlier also. Now it is 4 p.m. None has come on behalf of the claimant. Previously the case was in the court of Shri J. N. Verma, Addl. District Judge, Delhi who on 3-1-1968 directed that the parties should appear in this court today because the case had been transferred to this court. The case is, Therefore, dismissed in default under O.9 rule 8 CPC with costs."

(6) Then an application was made by the petitioners on June 11, 1969 under Order IX, rule 9 of the CPC for restoration of the case and this application was dismissed by the Additional District Judge by order dated April 17, 1970 holding that there was no sufficient cause for restoration. Against this order, F.A.O. No. 94 of 1970 was filed in this Court and inasmuch as it was filed beyond time, it was accompanied by an application (C.M. No. 1069 of 1970) for condensation of delay u/s 5 of the Limitation Act and section 151 of the Code of Civil Procedure. We are not impressed by the averments made in this application for condensation of delay and we, Therefore, dismiss it. In consequence F.A.O. No. 94 of 1970 is also dismissed as time barred.

(7) Realizing the hurdle of limitation in their F.A.O., the petitioners also filed the aforesaid writ petition challenging the order of dismissal of the reference on the ground that while exercising powers under the Land Acquisition Act, the District Judge has to answer the reference irrespective of whether the claimant appears and, Therefore, he had no jurisdiction to apply Order IX of the Code of Civil

Procedure. In the ultimate analysis, the contention is that the CPC does not apply to reference proceedings before the Additional District Judge.

(8) The writ petition and the appeal came up before Khanna J. His Lordship noticed the conflict in certain decisions of other High Courts and, Therefore, made a reference to a larger Bench. That is how these two matters have been placed before this Bench.

(9) The main contention of the petitioners about the applicability of the CPC and particularly the provisions of Order Xxii and Order IX of the Code has no substance. In our opinion, the weight of authority is for the view that Order Xxii as well as Order IX and other provisions of the CPC apply to proceedings u/s 18 of the said Act. Cases under the Income Tax Act holding, as was held in *Maharajadhiraja of Darbhanga Vs. Commissioner of Income Tax*, that proceedings before the High Court on reference u/s 66(2) is not a suit, have no bearing on the question to be determined by us as the CPC has not been made applicable to the Income Tax Act which has a procedure of its own. The argument by analogy which has been addressed to us is that a reference is made by the Collector, may be on the application of the party claiming enhancement in the compensation offered and, Therefore, the District Judge to whom the reference is made is bound to decide it irrespective of whether the applicant for enhancement or any other party appears before it. Assistance is sought from Order XLvi of the CPC and it is urged that if a Subordinate Court makes a reference with respect to any question such as is contemplated by rule I of Order XLvi of the Code to the High Court, the High Court is bound to decide it irrespective of whether any party appears before it. In our opinion, no analogy can be drawn from these provisions. Rule 3 of Order XLvi of the Code specifically provides that the High Court shall decide the point referred to it after hearing the parties if they appear and desire to be heard. Therefore, in terms, it is provided that the presence of the parties is not essential and they have the option to appear or not to appear and that even if they do not appear, the High Court has to decide the question referred to it. The argument on behalf of the petitioners loses sight of the fact that reference under Order XLvi is not a reference of the whole case which is still before the Subordinate Judge for decision but only of a point in the case such as is contemplated by rule 1. Therefore, even if the parties do not appear before the High Court, at the time of hearing of the point referred, the suit is not affected and there is no question of dismissing the suit for default of appearance of the parties before the High Court.

(10) Section 53 of the Land Acquisition Act, 1894, in terms provides that save in so far as they may be inconsistent with anything contained in this Act, the provisions of the CPC shall apply to all proceedings before the Court under this Act. Therefore, all the provisions of the Code will apply to proceedings consequent upon a reference unless any provisions are inconsistent with the Act. For instance, a reference need not be filed in the form of a plaint as provided in the Code nor are the parties to be described as plaintiff or defendant. For these

purposes provision is made in the said Act. Barring such and similar provisions in the said Act, all the other provisions of the Code will apply to proceedings upon a reference u/s 18 of the said Act even mutates mutants.

(11) In Abdul Karim and Another Vs. State of Madhya Pradesh, a Division Bench of that Court held that for the purpose of Order Xxii of the Code of Civil Procedure, a suit must be taken as one meaning a suit instituted by the presentation of a plaint and, Therefore, the provisions of Order Xxii of the Code cannot be applied to proceedings u/s 18 of the Land Acquisition Act taking those proceedings as suit proceedings in reality or fictionally under the Code. To the same effect is the decision in Bhadar Munda and Another Vs. Dhuchua Oraon, . On the other hand, there is a decision of Bhagwati, J. (as his Lordship then was) of the Gujarat High Court in Alihusain Abbahbai and Others Vs. Collector, Panch Mahats, , where a contrary view was taken and the Madhya Pradesh view was not accepted. It was observed:-

"BY virtue of S. 53 of the Act, the provisions of Civil P. C. are applicable to all proceedings before the Court under the Act unless such provision in the code is inconsistent with anything contained in the Act. There is nothing in the Act which is directly inconsistent with O.22, R.3 of the Civil P.C. and hence a reference under S. 18 of the Act can be attracted by O.22, R.3 of Civil P.C."

(12) The nature of proceeding under S. 18 need not necessarily terminate with an award or determination of compensation.

"THE reference is not different from an ordinary civil proceeding whence the private party in the position of a plaintiff claims extra compensation and the Collector defends it. If the private party fails to appear at the hearing of the proceeding the reference must by force of O.9 R.8 be dismissed for want of appearance and evidence in support of the claim. Since the right to claim additional compensation devolve on the heirs of the private party on his death the provisions of O.22, R.3 are applicable. A reference to the earlier Land Acquisition Act of 1870, S. 36 which provides for application of the CPC on topics like death of parties" also indicate that the provisions of O.22, R.3 are applicable to a reference proceeding under S. 18 of the Act. "

(13) With respect, we agree with the above observations and dissent from the view taken in the Madhya Pradesh case (supra). The Gujarat and the Madhya Pradesh cases (supra) were dealt with by us in The Union of India Vs. Rameshwar Nath and Another, where the question was about the applicability of Order Xxii to an appeal against a decree made by the District Judge upon a reference u/s 18 of the Land Acquisition Act, 1894. In this case also we expressed our agreement with the observations of Bhagwati J. in the Gujarat case (supra) in so far as the application of Order Xxii of the CPC was concerned and dissented from the view taken in the Madhya Pradesh case (supra). The appeal was, however, decided on a different point, namely, that once the appeal comes before the High Court then the procedure applicable to the High Court will

apply to such an appeal.

(14) On the question of the applicability of Order IX of the Code of Civil Procedure, some assistance can be derived from the Division Bench judgment of this Court in Subhash Chander Vs. Rehmat Ullah, which was a case relating to proceedings before a Controller appointed under the Delhi Rent Control Act. u/s 37(2) of this Act and rule 23 framed under this Act, the Controller has to follow the practice and procedure of a Court of Small Causes as far as they extend and on other matters he is to be guided by the Code of Civil Procedure. The view was expressed that inasmuch as section 17(1) of the provincial small Cause Courts Act, 1887 shows that rule 13 of Order IX of the CPC is one of the rules applicable to proceedings in a court of Small Causes, the Controller can follow it although it may not be accurate to say that Order IX, rule 13 applies to proceedings before the Controller. It was held that the Controller is to follow Order IX. rule 13 of the CPC although it does not in terms apply to it. The case of the District Judge while deciding a reference u/s 18 of the Land Acquisition Act, 1894 is a fortiori because by reason of section 53 of this Act, all provisions of the CPC are made applicable to proceedings before the District Judge upon such a reference unless any provision of this Act is inconsistent with the provision of the Code. We, Therefore, have no difficulty in holding that Order IX as also Order XXII of the CPC apply to proceedings before the District Judge u/s 18 of the Land Acquisition Act, 1894. We are reinforced in this view by the judgment of the Punjab High Court in Phuman and others v. The State of Punjab and others ILR 1963 P&H 442 where it was held that the provisions of Order XXII of the CPC are applicable to all proceedings before the District Judge u/s 18 of the Land Acquisition Act, 1894. To the same effect is the decision of Pathak, C.J. of the Himachal Pradesh High Court in Natha Singh Vs. Collector, .

(15) In the result, we do not find any substance in the contention of the petitioners that the Additional District Judge did not have any jurisdiction to dismiss the reference under Order IX, rule 8 of the CPC and if the matter had rested there, the writ petition also would have to be dismissed.

(16) However, during the course of hearing, it appeared that the aforesaid order of consolidation of the aforesaid two references had been made by the Additional District Judge and the question arises whether the reference of the petitioners which was consolidated with the reference of Raj Krishan Jain could be dismissed for default of appearance in view of the order that all the evidence is to be recorded in the latter's reference. This raises the question as to the effect of an order of consolidation.

(17) There is no provision in the CPC with regard to consolidation of suits but consolidation of suits has been ordered in this country in exercise of inherent power *ex debito justitiae*. In a case before the Lahore High Court in Mussammat Lachhmi v. Mussammat Bhullis ILR (1927) Lah 384 it was held that though there was no specific provision for consolidation of suits in India, it had always been held that the Code being silent on the point, the inherent jurisdiction of Courts to

pass such orders has not been taken away. In this case, two suits were tried together and were disposed of by a single judgment. Only one appeal was filed and an objection was raised that inasmuch as no appeal had been filed in the other suit, the appeal filed was barred by res judicata. This question was decided from two points of view but we are concerned with the view concerning the effect of consolidation, Tek Chand, J. speaking for the Full Bench observed:-

"I am however, not aware of any case in this province where a formal order consolidating suits or appeals was ever passed, but, here, the same object is attained by the two suits being tried together by consent of parties and with the approval of the Court, thus bringing about, what may be described, a de facto consolidation. There is in substance, if not in form, one trial and one judgment, though the letter of the law is sometimes saved by passing a formal order in the second suit, referring to the detailed proceedings and judgment in the first. In my opinion, under such circumstances the same consequences should flow as in the case of formal consolidation, and looking at the matter from the standpoint of fundamental legal principles of person, who, by his own acts or conduct, has brought about a virtual, if not an actual, consolidation of the two suits, ought not to be allowed to turn round and invoke the rule of res judicata with a view to prevent the hearing of the appeal, against the real judgment delivered in the "consolidated" suits."

(18) We are in respectful agreement with this view which is also supported by the observations in AIR 1947 248 (Nagpur) where the Division Bench observed:-

"THERE is no specific provision of law in the CPC for consolidation of two suits as is contained in Order 49 of the Rules of Supreme Court requiring one trial and one judgment in consolidated actions. It is under the inherent powers of the Court under S. 151, Civil P.C. that the suits are consolidated. The legal effect of a de facto consolidation is usually achieved by two suits being tried together by consent of parties and with the approval of the Court. After consolidation there is only one case, and the suit consolidated has no independent existence for trial. Both the suits should be tried in one trial and should be disposed of by one judgment and decree. The fact that two judgments and decrees are passed at best shows an irregularity in following a correct and an ideal procedure, but not an absence of an intention to consolidate the two suits. In any case, the question of consolidation should not be looked at too technically and the party should not be deprived of the right to have an adjudication in appeal on a narrow and technical ground."

(19) This was, Therefore, the position which obtained in the two references Nos. 226 and 225 of 1964 and the result was that there remained only one reference with two applicants, namely, Raghbar Dayal, the predecessor-in-interest of the petitioners and after his death, the petitioners and Raj Kishan Jain. In this situation, rule 10 of Order 9 of the CPC would apply, at least by analogy. This rule provides that where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of

plaintiff or plaintiffs appearing permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit. It is not denied by the respondents that reference No. 225 of 1964 of Raj Kishan Jain did proceed to trial and was ultimately decided by the District Court. That being so and in view of the fact that reference No. 226 of 1964 with which the petitioners are concerned was consolidated with the other reference resulting in emergence of one reference, the absence of the petitioners on any particular date would not entitle the Court to dismiss their reference for default of appearance under Order IX, rule 8 of the Code of Civil Procedure. For these reasons we are of the view that the impugned order dated January 5, 1968 dismissing the petitioners' reference for default of appearance was without jurisdiction.

(20) We, Therefore, set that order aside and direct the Additional District Judge to decide reference No. 226 of 1964 of the petitioners on the basis of the evidence recorded in reference No. 225 of 1964 filed by Raj Kishan Jain. We make it clear that in view of the terms of consolidation, the petitioners will not be entitled to lead any fresh evidence before the Additional District Judge and their reference Petition (Reference No. 226 of 1964) will be decided on the evidence recorded in Reference No. 225 of 1964 filed by Raj Kishan Jain.

(21) In the result, the impugned order is quashed and the writ is allowed. In view of the fact that the point on which we have decided in favor of the petitioners was not specifically taken in their petition, we make no order as to costs.