

(2018) 07 DEL CK 0022

In the Delhi High Court

Case No : CM(M) No.243 OF 2017, CM No.8111 OF 2017

RAMVATI THR. HER S.P.A. PRADEEP KUMAR

APPELLANT

Vs

SUKHBIR SINGH CHAUHAN (THR LRS) & ORS

RESPONDENT

Date of Decision : 04-07-2018

Acts Referred:

Constitution Of India, 1950 — Article 136, 227

Code Of Civil Procedure, 1908 — Rule Order 43 Rule 1, Order 23 Rule 1, Order 3 Rule 2, Order 3 Rule 4(2), Order 47 Rule 2, Order 47 Rule 1, Order 47 Rule 7, Order 21 Rule 89, 90

Citation : (2018) 07 DEL CK 0022

Hon'ble Judges : RAJIV SAHAI ENDLAW, J

Bench : Single Bench

Final Decision : Diposed Of

Judgement

RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order [dated 12th December, 2016 in CS No.380/2015 of the Court of the

Civil Judge (North), Rohini Courts, Delhi] of dismissal of the application filed by the petitioner / plaintiff under Order XLVII Rule 1 of the Code of

Civil Procedure, 1908 (CPC) for review of the order dated 23rd January, 2016 in the suit.Â

2. The petition came up first before this Court on 28th February, 2017 when notice thereof was ordered to be issued.Â

3. The counsels were heard on 8th September, 2017 and order reserved.Â

4. The petitioner / plaintiff, acting through her Special Power of Attorney Holder Sh. Rajpal Singh, on 7th December, 2015 instituted the suit from

which this petition arises (i) for declaration that the Will dated 6th May, 1986 and other documents (if any) executed by the respondents / defendants

no.1 and 2 viz. Sukhbir Singh Chauhan and Balkishan in favour of respondents / defendants no.3 and 4 viz. Naresh Kumar and L.G. Real Estate

L.L.P. on the basis of the said Will qua agricultural land in Revenue Estate of village Bakoli, Delhi are null and void as the same are forged and

fabricated, obtained by playing a fraud upon the petitioner / plaintiff, and, (ii) for permanent injunction restraining the respondents / defendants from

disturbing the possession of the petitioner / plaintiff of the said agricultural land.Â Â

5. On 23rd January, 2016, the counsel for the petitioner / plaintiff along with Sh. Rajpal Singh, Special Power of Attorney (SPA) holder of the

petitioner / plaintiff appeared before the Court of the Civil Judge before whom the suit was pending and stated that the petitioner / plaintiff had already

settled the matter with the respondents / defendants out of Court and did not wish to pursue the suit any further; an application under Order XXIII

Rule 1 of the CPC for withdrawal of the suit had also been filed on 21st December, 2015.Â

6. The learned Civil Judge, before whom the suit was pending, recorded the statement on oath of Sh. Rajpal Singh, SPA holder of the petitioner /

plaintiff and dismissed the suit as withdrawn.Â Â

7. Thereafter on 24th February, 2016, the application aforesaid under Order XLVII Rule 1 of the CPC for review of the order dated 23rd January,

2016 was filed, pleading (i) that the order dated 23rd January, 2016 was obtained, by playing fraud upon the Court as well as upon the petitioner /

plaintiff, by the defendants / respondents in collusion and connivance with the previous SPA holder of the petitioner / plaintiff; (ii) that the Court while

dismissing the suit as withdrawn on 23rd January, 2016 failed to look into the SPA dated 14th January, 2016 issued by the petitioner / plaintiff in favour

of Sh. Pradeep Kumar and which was placed on record of the suit on 18th January, 2016 along with fresh Vakalatnama; and, (iii) that thus the action

of the Court on 23rd January, 2016 of, on the basis of the statement and application of the earlier advocate of the petitioner / plaintiff and the earlier

SPA holder of the petitioner / plaintiff, dismissing the suit as withdrawn was an error apparent on the face of the record.Â Â

8. Needless to state, the respondents / defendants contested the application aforesaid for review.Â It was inter alia contended that the suit could not

be restored through an application for review.Â It was yet further contended that it was the so called new attorney Pradeep Kumar of the petitioner /

plaintiff who was playing a fraud on the Court and that without anything to show that the earlier SPA in favour of Sh. Rajpal Singh had been revoked,

the placing on record of a new SPA was inconsequential. It was yet further contended that the petitioner / plaintiff was aware of the withdrawal of

the suit on 23rd January, 2016 but later on turned turtle.

9. The learned Civil Judge, vide the impugned order, dismissed the application for review, reasoning (i) that the application for withdrawal of the suit,

on which the suit was dismissed as withdrawn, was filed on 21st December, 2015 and the new SPA in favour of Sh. Pradeep Kumar was filed on

14th January, 2016; (ii) however inspite of filing new SPA on 14th January, 2016, the application earlier filed for withdrawal of the suit was not

withdrawn and the SPA in favour of Sh. Rajpal Singh was also not revoked; (iii) that the relief of revival of the suit cannot be sought through an

application for review; (iv) that the petitioner / plaintiff had not challenged the filing on 21st December, 2015 of the application for withdrawal of the

suit; (v)Â that the petitioner / plaintiff had not produced any material to show any revocation of the SPA in favour of Sh. Rajpal Singh; it was not

even the case of the petitioner / plaintiff that the SPA in favour of Sh. Rajpal Singh had been revoked before the application for withdrawal of the suit

with affidavit of Sh. Rajpal Singh was filed; (vi) that a review is by no means an appeal in disguise; and, (vii) that the suit in fact stood withdrawn

immediately on filing of the application for withdrawal of the suit on 21st December, 2015.Â

10. The counsel for the petitioner / plaintiff argued, (a) that on 22nd December, 2015, when the suit was listed, the Judge was on leave and the suit

was adjourned to 15th February, 2016; (b) that however the suit was withdrawn prior thereto on 23rd January, 2016; and, (c) that though Sh. Rajpal

Singh as SPA of the plaintiff had instituted the suit but Sh. Rajpal Singh filed the application for withdrawal of the suit through another advocate and

the said advocate other than the advocate through whom the suit was instituted withdrew the suit on 23rd January, 2016.Â Â

11. Per contra, the counsel for the respondent / defendant no.4 contended that the first application for withdrawal of the suit was filed on 21st

December, 2015 and there is no contradiction thereof by the petitioner / plaintiff. The counsel for the respondent / defendant no.4 cited (i) Shiv Prasad

Vs. Durga Prasad AIR 1975 SC 957 holding in the context of an application under Order XXI Rules 89 and 90 of the CPC, that mere conveyance to

the Court that the party is withdrawing his application is enough; (ii) Curewell (India) Ltd. Vs. Sahib Singh 21 (1982) DLT 397, holding that

withdrawal is complete on intimation of withdrawal given to the Court and application for withdrawal cannot be withdrawn; and, (iii) K.S. Bhoopathy

Vs. Kokila (2000) 5 SCC 458, holding that a plaintiff can abandon a suit or abandon a part of his claim as a matter of right, without the permission of

the Court. It was argued by him that thus, the suit upon filing of the application for withdrawal of the suit on 21st December, 2015 by Sh. Rajpal

Singh who was admittedly the SPA of the petitioner / plaintiff, stood withdrawn on 21st December, 2015 itself and the subsequent filing on 14th

January, 2006 by Pradeep Kumar of a SPA in his favour from the petitioner / plaintiff was of no avail. It was argued that though the suit stood

withdrawn on 21st December, 2015 upon filing of application, but remained on the board of the Court because the Judge was on leave on 22nd

December, 2015 and the suit was adjourned to 15th February, 2016 and before which date another application for withdrawal of the suit was filed by

Sh. Rajpal Singh and the suit withdrawn on 23rd January, 2016.

12. The counsel for the respondent / defendant no.3 also reiterated the said contention.

13. The counsel for the respondents / defendants no.1 and 2 argued that the requisite procedure for revocation of the SPA admittedly granted by the

petitioner / plaintiff in favour of Sh. Rajpal Singh was not followed.

Attention was invited to Order III Rule 2 of the CPC, including the persons holding powers of attorney, in the definition of "recognised agents of

parties" and to Order III Rule 4(2) of the CPC providing that appointment of an advocate shall be deemed to be in force until determined with the

leave of the Court by a writing signed by the client or the pleader or until the client or the pleader dies or until all proceedings in the suit are ended so

far as regards the client. It was contended that in the absence of any revocation of the power of attorney in favour of Sh. Rajpal Singh, he was fully

authorized on 23rd January, 2016 to withdraw the suit.

14. I had at the commencement of the hearing enquired from the counsel for the petitioner / plaintiff about the maintainability of this petition against an

order of dismissal of an application for review of an earlier order.Â It was enquired from the counsel, whether a challenge in law is maintainable to

an order of dismissal of an application for review.Â Attention of the counsel for the petitioner / plaintiff was invited to Rule 7 of Order XLVII,

providing that an order of the Court rejecting the application for review shall not be appealable.

15. The counsel for the petitioner / plaintiff contended that the bar therein is only to maintainability of an appeal and not to maintainability of a petition

under Article 227 of the Constitution of India.Â

16. I have considered the aspect of maintainability of this petition.Â

17. Considering the philosophy behind Order XLVII Rule 7 of the CPC prohibiting an appeal against an order rejecting an application for review, I am

of the view that no petition under Article 227 of the Constitution of India also should lie against such an order.Â After all a remedy is always available

to a party against the order of which review is sought and the error, even if any in the order of which review is sought, can always be corrected in

such appeal.

18. Though the counsels did not show any case law on the aspect of maintainability but I may mention that Supreme Court in Municipal Corporation of

Delhi Vs. Yashwant Singh Negi 2013 SCC OnLine SC 308 held that once the Court has refused to entertain the review petition and the same is

dismissed, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition

because to the dismissal of the review petition the principle of merger does not apply.Â Reference was made to DSR Steel (Private) Limited Vs.

State of Rajasthan (2012) 6 SCC 782 laying down that when the review petition is dismissed, the order of which review was sought, suffers neither

any reversal nor an alteration or modification and anyone aggrieved by the order of which review was sought shall have to challenge the same and not

the order dismissing the review petition.Â Applying the said principles, the SLP preferred against the order of dismissal of review petition, without

challenging the order of which review was sought, was held to be not maintainable and was dismissed.

19. Referring to the aforesaid judgments, I have in Garibani Devi Vs. State 2017 SCC OnLine Del 9367 held that what has been held with respect to

Special Leave Petition under Article 136 applies equally to a petition under Article 227 of the Constitution of India.Â Â Â Â Â Â

20. Though I have held so but otherwise also, even if a petition under Article 227 of the Constitution of India was held to be maintainable, it would be

maintainable on the well recognized grounds, of the Court having exercised jurisdiction which did not vest in it or having exercised jurisdiction with

material irregularity and which is not found to be the case.Â It is not as if the learned Civil Judge has refused to exercise the jurisdiction vested in her

of review or has exercised the same with material irregularity.Â The view taken by the learned ADJ, of there being no error within the meaning of

Order XLVII Rule 1 of the CPC in the order of which review was sought, is a well reasoned view in accordance with law.Â

There is thus no merit in the petition which is dismissed.