

(2002) 05 AHC CK 0095

In the Allahabad High Court

Case No : Second Appeal No. 1271 of 2000 with C.M.W.P. No. 12510 of 1996

Surendra Nath Rai and Another

APPELLANT

Vs

Prahlad Singh and Others

RESPONDENT

Date of Decision : 14-05-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 141
Constitution of India, 1950 — Article 226, 227

Citation : AIR 2002 All 296 : (2002) 3 AWC 2301 : (2002) 93 RD 468

Hon'ble Judges : Yatindra Singh, J

Bench : Single Bench

Advocate : H.R. Misra, R.S. Misra and Arun Kumar, for the Appellant; Sankatha Rai and K.P.S. Yadav, for the Respondent

Final Decision : Allowed

Judgement

Yatindra Singh, J.—A suit or a civil appeal can be decided on the basis of compromise under Order XXIII Rule 3 of the CPC (C.P.C.) but "whether a writ petition in the nature of certiorari, which lies on the error apparent on the face of the record, can be decided (allowed) on the basis of a compromise" is a question involved in these cases.

THE FACTS

2. One Abhilash Singh was common ancestor of the parties. He had three sons. Hanuman Dayal Singh, Hari Narain Singh and Shiv Narain Singh. The successor-in-interest of Hanuman Dayal Singh and Hari Narain Singh (the plaintiffs) are on one side ; one of the grand daughters of Shiv Narain Singh namely. Smt. Ram Kumari alias Rama Devi and her husband Surendra Nalh Rai (the defendant-appellants) are on the other side.

3. The dispute in Second Appeal No. 1271 of 2000 is in respect of house No. D-44/182-A, Bagh Rani Bhawani (Ramapura). Varanasi. Smt Shyam Kunwar, the mother of Smt. Ram Kumari and daughter-in-law of Shiv Narain Singh, was

recorded in the Municipal records over the same. She executed a sale deed in respect of this house in favour of her son-in-law Surendra Nath Rai (husband of Smt. Ram Kumari) on 13.10.1977. The plaintiffs filed a suit for declaration that Smt. Shyam Kunwar was merely a benamidar and the sale of the disputed house was illegal. This suit was decreed on 26.5.1989. Defendant-appellants filed an appeal before this Court. The Court granted an interim order on 7.8.1989, staying their dispossession on deposit of money. This appeal was later transferred to the District Court : it was dismissed on 21.9.2000. The defendant-appellants have filed the second appeal.

4. The dispute in Writ Petition No. 12510 of 1996 is in respect of chak No. 296 (area 10.18 acres) and 1/3rd share of chak-out plot No. 187 (area 46 decimal) situate in village Digghi, pargana Dhoos, district Varanasi (now district Chandauli). The chak No. 296 was recorded exclusively in the name of Smt. Shyam Kunwar as tenure holder. In the chak out plot, she was recorded along with the plaintiffs ; she was shown to have 1/3rd share. The plaintiffs filed an objection in the consolidation proceedings for expunging her name. It was rejected by the Consolidation Officer on 4.11.1980. The plaintiffs appeal was allowed by the Assistant Settlement Consolidation Officer, Varanasi (A.S.O.C) on 15.4.1994. Smt. Ram Kumari filed a revision, which was allowed by the Deputy Director of Consolidation, Varanasi (D.D.C) on 6.2.1996. The writ petition is against "this order of the Deputy Director of Consolidation.

5. During pendency of these cases, parties have compromised and similar compromise applications along with affidavits were filed in the second appeal and the writ petition. It was sent to the District Judge for verification. He has verified it and sent it back. The compromise application is also signed by the counsels of the parties. The compromise application in the second appeal is numbered as Civil Misc. Compromise Application No. 52531 of 2001. It is a long application but terms of compromise are in sub-paragraphs (1) to (7) of paragraph 21 of this application. These terms along with details of three sets of applicants (described as defendant-appellants-Applicants-I set, plaintiff-respondents-Applicants-II set and Defendant-respondent-Applicants-III set) in the beginning of the compromise application explain the compromise among the parties.

6. This compromise relates to property in dispute in the second appeal and the writ petition, as well as some other property. The terms of the compromise, so far as property in dispute in the cases here, are as follows :

"(i) The property in dispute in the suit is to be given to the defendant-appellants and the amount deposited by the defendant-appellants is to be returned to them.

(ii) The property in dispute in consolidation is to be given to the plaintiffs.

The result is that in case the compromise is accepted, then the second appeal as well as the writ petition has to be allowed. "

7. There is no dispute that, under amended Order XXII Rule 3 of the C.P.C. after

1976, compromise can be in respect of property not involved in the suit. Sarkar's the Law of Civil Procedure (Second edition page 1726) states the law as follows :

"Decree has now to be passed covering the whole compromise comprising matters connected with the suit and also unconnected with the suit, if there are any, provided that the matters relate to the parties to the suit and decree so passed will be executable. In the old rule before the amendment, the wording being "so far as it relates to a suit", where a compromise comprised also matters unconnected with the suit, the Court was required to limit the operative part of the decree only to the subject-matter of the suit which might be given effect to by execution, and the terms which went beyond the subject-matter of the suit, though they were also incorporated in the decree, they attained only the force of an agreement which might be enforced by suit or whatever means the parties chose."

8. However, there is some dispute whether the writ petition can be allowed on the basis of compromise. Sri Sankatha Rai, counsel for the plaintiffs and Sri R.S. Misra, counsel for the defendant-appellants submit that writ petition can be allowed on the basis of compromise though the standing counsel disputes it. He submits :

(i) This question (whether a writ petition for certiorari can be allowed on the basis of compromise or not) was referred to larger Bench in Civil Misc. Writ Petition No. 5912 of 1974, Brij Bhushan Tiwari v. Shiv Shanker Dutt Ojha (Brij Bhushan case) and a Division Bench has answered it in the negative ; this decision is binding on a single Judge.

(ii) The result of the compromise is that order of Deputy Director of Consolidation would be set aside and order of Assistant Settlement Consolidation Officer would be restored. This Court cannot issue a writ of certiorari to quash an order unless and until there is error apparent on the face of record.

(iii) The Supreme Court has refused to recognise compromise decree in cases Smt. Nai Bahu Vs. Lala Ramnarayan and Others, under the Rent Control Acts on the ground that the statutory requirement was not made out ; similarly here unless ground for issuing certiorari is made out neither any writ can be issued, nor order of the Deputy Director of Consolidation can be set aside.

(iv) The Deputy Director of Consolidation is also party In the writ petition. He has not entered into any compromise. The writ petition cannot be decided on the basis of compromise, as all parties in the writ petition have not compromised.

BRIJ BHUSHAN CASE IS NOT APPLICABLE

9. The Division Bench in Brij Bhushan case, answered the question on 5th May, 1978. At that time, Article 226 had been amended by 42nd Constitution Amendment Act, which had restricted the power under Article 226 and Court could issue writs only if any one of three conditions namely Clauses (a) to (c) of

Sub-article (1) of the Article 226 were satisfied. At that time, the 44th Constitution Amendment Act, that has restored the original provision, had not come into existence. Today a High Court can issue a writ for enforcement of fundamental right or for any other purpose. The Court in Brij Bhushan case has interpreted Article 226 at a time when it was restricted ; it did not Interpret Article 226 as it originally stood or as it stands today. This opinion is not binding upon me as I am considering Article 226 as it stands today ; a different provision.

10. Apart from the above, it is true that there are certa observations in the Brij Bhushan cas that writ petition cannot be allowec in terms of compromise but ultimately the Court answered the question as follows :

"As a result of the discussion attempted above, our opinion, on the question referred to us for consideration clearly is that the Court in a proceeding under Article 226 of the Constitution is not bound to accept and grant the prayer for a properly made and duly verified compromise arrived at between the contesting parties which inter alia seeks to set aside and quash the impugned order."

The Court merely opined that it is not bound to accept the compromise. This does not mean that in a suitable case, the Court cannot pass an order on the basis of compromise ; or the Court is prohibited in every case in giving effect to the compromise. Indeed Judges of our Court in suitable cases, despite Brij Bhushan case, have been passing orders giving effect to compromises though the wordings have been different Hanuman v. Deputy Director of Consolidation, Sheo Prasad v. Deputy Director of Consolidation, Marchi Singh v. Deputy Director of Consolidation and Fahim v. Board of Revenue.

SCOPE OF ARTICLE 226 : WRIT-- COMPROMISE

11. Article 226 permits issuance of a writ, order or direction for enforcement of fundamental rights and for any other purpose. It also gives inclusive power for issuing a writ In the nature of habeas corpus, mandamus, prohibition, quo warranto and certtorari. These writs originated in England and could be issued by the three High Courts in the presidency town within the limits of their original jurisdiction even in the pre-independence era. The other High Courts could issue only habeas corpus u/s 491 of Criminal Procedure Code. Since enforcement of the Constitution, this difference has been removed and all High Courts are now similarly empowered.

12. Article 226 does not limit High Court's jurisdiction to issue writ, order or direction, or bind it to the technical procedural objections of Courts in England. It is also unnecessary to consider its scope in light of English decisions. This is how our Supreme Court has explained it.

(i) In view of the express provisions in our Constitution, we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by T.C. Basappa Vs. T. Nagappa and Another,

(ii) The power of the High Court under Article 226 of the Constitution is not limited to the issue of writs falling under particular groupings, such as the certiorari, mandamus, etc. as these writs have been understood in England, but the power is general to issue any direction to the authorities, viz. , for enforcement of fundamental rights as well as for other purposes. P.J. Irani Vs. The State of Madras,

(iii) (High Court) can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart. High Courts can also issue directions, order or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of the country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in.....England..... Such a construction defeats the purpose of the article itself. Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another,

13. Second appeals and civil revisions He on substantial question of law or on error of jurisdiction. It is never doubted that they cannot be compromised even if the grounds on which they lie are not there. It is true that this is possible due to specific provision (Order XXIII Rule 3) in the C.P.C. and this provision does not apply to writ petitions in view of the Explanation to Section 141 of the C.P.C. Nevertheless, the Courts have been adopting broad principles of the C.P.C., while exercising writ jurisdiction, in so far as they are not Inconsistent with the rules of the High Courts some examples are :

(i) Issuing commission for taking evidence, if necessary. Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others,

(ii) The principle under Explanation IV to Section 11, The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, , Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others,

(iii) Fresh writ petition or SLP cannot be filed unless earlier writ petition or SLP was withdrawn with permission (Order XXIII Rule 2 (3), C.P.C.). Upadhyay and Co. v. State of U.P. AIR 1999 SC 505.

There seems to be no justification for not adopting the broad principles of Order XXIII Rule 3 to writ jurisdiction.

14. The winds of change have been blowing over English soil. They have also realised futility of technical and procedural objections. They have removed many technicalities by framing statutory provisions (Order LIII in the Rules of the

Supreme Court in 1977). It provides for filing an application for judicial review instead of seeking any particular writ and the Court can grant appropriate relief even though it is not asked for. The House of Lords *I.R.C. v. Federation of Self-Employed*, (1981) 2 All ER 93 explained the changes as follows :

"An applicant for relief will no longer be defeated merely because he has chosen to apply for the wrong remedy. Not only has the Court a complete discretion to select and grant the appropriate remedy, but it now may grant remedies which were not previously available."

.....

They (Order LIII of Rule of the Supreme Court) were designed to stop the technical procedural arguments which had too often arisen and thus marred the true administration of justice, whether a particular applicant had pursued his claim for relief correctly, whether he should have sought mandamus rather than certiorari, or certiorari rather than mandamus, whether an injunction or prohibition or prohibition rather than an injunction, or whether relief by way of declaration should have been sought rather than relief by way of prerogative order. All these, and the like technical niceties, were to be things of the past. All relevant relief could be claimed under the general head of "judicial review", and the form of judicial review sought or granted (if at all) was to be entirely flexible according to the needs of the particular case. The claims for relief could be cumulative or alternative under Rule 2 as might be most appropriate. Secondly, relief by way of declaration, or injunction, was made a form of judicial review to be granted in an appropriate case having regard to the factors mentioned in Rule 1 (2). "

15. English Courts are no longer bound by technicalities in exercising discretion for judicial review. We had never incorporated these technicalities in our Constitution ; there seems no justification to incorporate them by interpretation. Of course, this does not mean that discretion under Article 226 should run amuck or it is like a bull In a china shop ; it has to be under judicious leash.

16. More than sixty years ago, Lord Atkin observed *United Australia Ltd. v. Barclays Bank*, 1941 AC 1, "When ghosts of the past stand in the path of justice clanking their medieval chains, the proper course of the Judge is to pass through them undeterred." So should we.

17. Delays in disposal of cases are mounting. Lord Denning remarked *Alien v. Alfred McAlpine*, 1968 (1) All ER 543 "Law's delay have been intolerable. They have lasted so long as to turn justice sour". It is equally if not more-true about us. In these times, if:

- (i) the parties settle their differences among themselves ; and
- (ii) there is no dispute among them ; and
- (iii) there is no objection to their compromise.

even then to insist that the writ petition cannot be decided on basis of such compromise-on the ground that writ can be Issued only if there was error apparent on the face of the record--is something that I fail to understand.

DECISIONS UNDER RENT CONTROL ACT--NOT APPLICABLE

18. The analogy of decisions rendered under Rent Control Acts are not applicable. Rent Control Acts have been enacted in public interest in order to meet scarcity of accommodation. Any accommodation within purview of the Rent Control Act cannot be released unless bona fide need is proved. Even if the State is not a party in these proceedings, it has interest in the sense that accommodations may not go out of the purview of Rent Control Act till bona fide need is proved. A contract without there being bona fide need would be against statutory provision and public policy. It is for this reason that the Courts have held that compromise decree, unless there is finding of bona fide need, is not binding and cannot be given effect to. These cases stand on a different footing and have no relevance where there is neither such public interest nor compromise is against public policy, as is in the present case.

DDC--NOT A NECESSARY PARTY

19. It is true that in the writ petition, the Deputy Director of Consolidation, whose order is challenged, has been made party. This is a common practice in this Court. There is no compromise on its behalf but this practice is neither correct nor necessary the sooner we leave it the better it is. The Deputy Director of Consolidation is a Court or atleast a Tribunal. This Court has power of superintendence over Deputy Director of Consolidation in view of Article 227 of the Constitution. There could be some justification in saying that Tribunals or Courts that are not within ambit of Article 227 are necessary parties in the writ petitions but the Courts or Tribunals that are within ambit of Article 227 are not necessary parties in the writ petitions ; there is no need to implead them. If the Deputy Director of Consolidation is not a necessary party, then it is irrelevant whether there is any compromise on its behalf or not.

20. The practice of impleading Courts has been disapproved by the Supreme Court. The Court has observed :

"There was no necessity for impleading the judicial officers who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court ; nor is there any justification for impleading them as parties in the SLP and describing them as contesting respondents. We do not approve of the course adopted by the petitioner, which would cause unnecessary disturbance to the functions of the concerned judicial officers. They cannot be in any way equated to the officials of the Government. It is high time that the practice of impleading judicial officers disposing of civil proceedings as parties to writ petitions under Article 226 of the Constitution of India or special leave petitions under Article 136 of the Constitution of India was stopped. We are strongly deprecating such a practice. Savitri Devi v. District Judge, Gorakhpur, 1999 (2) AWC 1249 (SC), JT

1999 (1) 643.

I am fortified by these observation"s.

OTHER PRACTISES : SOME OBSERVATIONS

21. I take this opportunity to observe that impleading judicial officers is not the only unnecessary practice that we are still following. It is often insisted that relief clause should mention name of the specific writ that petitioners are seeking. This is unnecessary. It is sufficient to claim relief without stating any specific Latin name of the writ. High Courts are empowered to pass many orders that specific writs do not cover. The Courts can always award appropriate relief on the facts established before them. This has been done by policy formulation in England. Here there is no rule that petition should specifically state name of the writ claimed but in practice, it is sometimes forgotten without realising that it has been abolished even in England where these writs originated and borrowed by us. Perhaps, we should also amend our rules specifically prohibiting this practice.

CONCLUSION

22. My conclusions are as follows :

(i) A writ petition in the nature of certiorari unless there is any contrary public interest or specific reasons-can and should be decided on the basis of compromise.

(ii) The second appeal and writ petitions are decided in terms of the compromise :

(a) The Second Appeal of the defendants-appellants is allowed in terms of compromise.

(b) The terms of compromise, namely, sub-paragraphs (1) to (7) of paragraph No. 21 of the Compromise Application No. 52531 of 2001 in the second appeal along with description of three sets of applicants as explained in paragraph 5 of this Judgment will form part of the decree.

(c) The defendant-appellants will be entitled to withdraw the money deposited in pursuance of order, dated 7.8.1989 as agreed between the parties in the compromise.

(d) The writ petition filed by the plaintiffs is allowed and the order of the Deputy Director of Consolidation is set aside and that of the Assistant Settlement Consolidation Officer is restored.

(iii) The parties will bear their own cost throughout.