
(1994) 05 AHC CK 0020

In the Allahabad High Court

Case No : Writ Petition No. 1295 (M/S) of 1994

Syed Nizam and others

APPELLANT

Vs

First Additional Civil Judge, Faizabad District and others

RESPONDENT

Date of Decision : 19-05-1994

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 7
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 23 Rule 1, 151
Constitution of India, 1950 — Article 226, 32

Citation : AIR 1995 All 255

Hon'ble Judges : I.S. Mathur, J

Bench : Single Bench

Advocate : Sri P. Chandra, for the Appellant;

Final Decision : Disposed Of

Judgement

1. This writ petition is directed against the order dated 27-11-1993 (Annexure No. 2 to the writ petition) passed by the First "Additional Civil Judge, Faizabad. The order has been passed on the application (95-C/2) of the petitioner praying that it be clarified as to whether the order dated 3-9-1985 staying the operation of the judgment and decree of the trial Court was still in operation.

2. The facts so far as they are relevant for disposal of the writ petition, are that a suit was filed by some of the respondents-opposite parties or their predecessor-in-interest for permanent injunction restraining the petitioners and others from interfering with their right to take offerings. The said defendant-opposite parties alleged that they were Khadim's and the aforesaid defendant-petitioners Were Mujawirs. On an application for temporary injunction, the trial Court granted the same. This order of the trial Court was later confirmed by the District Judge by order dated 12-8-1958. The suit was "ultimately decreed by the trial Court. The defendants petitioners filed appeal against the said judgment and order of the trial Court before the District Judge. They prayed for and were granted stay by order dated 5-9-1958 in the following terms:--

"Notice be issued fixing 14-11-1985 for hearing. Meanwhile the operation of lower Court's order shall remain-stayed."

The appeal was then transferred to the Court of First Civil Judge. In that Court, the petitioners (or some of them) moved an application dated 19-10-1993 (95-C/2) with the prayer that it is be clarified as to whether the Order dated 3-9-1985 staying the operation of the judgment and decree passed in suit No. 12 of 1958 was still operative. Learned First Additional Civil Judge heard the parties on this application and held that the order dated 3-9-1985 was no more operative and passed the following order : --

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3. The petitioners then filed suit petition, being Writ Petition No. 2781(MS) of 1993 with the same relief has been claimed in the present writ petition. A counter affidavit was filed in that petition by some of the opposite parties, inter alia, on the ground that some of the petitioners were dead even though the Vakalatnama bears their signatures and that a number of opposite parties are also dead. The particulars of such persons were mentioned in the counter affidavit. The petition was put up on a number of dates but had to be adjourned either because steps were not taken and further time was granted on other grounds. Ultimately, the learned counsel for the petitioner stated that the petition may be dismissed as not present. Accordingly, the petition was dismissed on 6-5-1994.

4. Some of the opposite parties have filed a counter affidavit. It is alleged that the petitioners had filed an earlier writ petition, being Writ Petition No. 2781 (MS) of 1993, with the same relief. But it was dismissed as not pressed and, as such, this writ petition is not maintainable. Further defence is that the petitioners have not impleaded some of the persons who were plaintiffs in the suit and he has again impleaded the opposite party No, 50, Qamrunnissan who is already dead.

5. The interest of the persons who were parties to the suit or the appeal is sufficiently and actively represented by the petitioners or the opposite parties and, as such, the petition was finally heard, with the consent of the learned counsel for the parties, without giving notice to remaining opposite parties.

6. Learned counsel for the opposite parties raised a preliminary objection in regard to the maintainability of the writ petition. It was submitted by him that the earlier writ petition was dismissed as not pressed and, as such, this writ petition for the same relief is not maintainable. There is much force in this submission. Rule? of Chapter XXII of the Rules of Court prohibits the filing of the second writ petition on the same facts. The said Rule reads as follows:

"7. No second application on the same facts: where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

Accordingly, if the first petition is dismissed as "not pressed" or is withdrawn without permission to file a fresh petition, the second petition will not be maintainable.

7. In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, the writ petition was dismissed as withdrawn on 4-10-1985. After a few months of that order, the petitioner moved another writ petition for the same relief. The Madhya Pradesh High Court dismissed the second writ petition on the ground that no second writ petition lies against the same order. On appeal, it was contended before Hon'ble Supreme Court that the earlier petition has not been decided on merits and as such, the second petition could not have been dismissed. Hon'ble Supreme Court rejected this contention and held that even though Order XXII, Rule 1, C.P.C. may not in terms apply to a writ petition, the principle underlying that provision must be held to be applicable and observed:-

"But we are of the view that the principle underlying R. 1 of O.XXIII of the Code should be extended in the interest of administration of justice to cases of withdrawal of writ petition also, not on the ground of *res judicata* but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit "or a petition under Art. 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdrew it without such permission."

8. The decision of Hon'ble Supreme Court in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, was relied upon by this Court in *Pradeep Goel v. Regional Manager, Region-11, State Bank of India, Zonal Office, Meerut* 1992 (10) LCD 84 and it was held that after the first petition of the petitioner was dismissed as withdrawn, his second writ petition in respect of the same cause of action was not maintainable.

9. It is evident from the aforesaid rule and the decisions of Hon'ble Supreme Court in *Sarguja Transport* and of this Court in *Pradeep Goel's* case that, if an earlier writ petition has been dismissed as withdrawn or as not pressed without permission to file a fresh petition, the second petition for the same relief shall not be maintainable.

10. Learned counsel for the petitioners however, relied upon *M. Ramnarain*

Private Limited and Another Vs. State Trading Corporation of India Limited, in support of his submission that the second writ petition will be maintainable. I am unable to accept this submission and, in my opinion, this decision is quite distinguishable and does not support the submission of the petitioners in the facts of the present case. In the case relied upon by the learned counsel for the petitioners, an appeal was filed against the judgment of a learned single Judge before a Division Bench of Bombay High Court. According to the rules of the Court, it was necessary to file a certified copy of the judgment against which the appeal is preferred. The very next day after filing the appeal, the counsel for the appellants sought to withdraw the appeal without obtaining leave of the Court to file any fresh or subsequent appeal. The Court allowed the appeal to be withdrawn. Just after a week of the withdrawal of the appeal, the appellants filed an appeal against the same judgment of the single Judge on various grounds, a part of which relates to the judgment and decree on merits and another part in regard to the provision as to installments. The earlier appeal, was filed against the provision of installments. It was contended before Hon''ble Supreme Court that the second appeal was not maintainable. Hon''ble Supreme Court rejected this contention but on the grounds that the first appeal was an incompetent appeal, having been filed without certified copy of the decree and that it was not in respect of the entire subject matter. Hon''ble Supreme Court observed as follows:--

"The withdrawal of an incompetent appeal which will indeed be no appeal in the eye of law cannot in any way prejudiced the right of any appellant to file a proper appeal, if the right of appeal is not otherwise lost by lapse of time or for any other valid reason."

11. It is evident that the ground on which Hon''ble Supreme Court has held the second appeal to be maintainable was that the first appeal was not a competent appeal and, as such, not appeal at all in the eye of law. This would be quite different from a case where, as in the instant case and the case of *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, , there is no such infirmity attached to the first writ petition and earlier writ petition was not bad or incompetent on any such legal ground.

12. Accordingly, it is obvious that the decision relied upon by the learned counsel for the petitioners is quite distinguishable. It does not lay down anything contrary to what has been laid down by Hon''ble Supreme Court in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, and by this Court in *Pradeep Goel's* cases and will be no help to the petitioners.

13. The learned counsel for the petitioners has sought to distinguish the decision in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, on some factual premises. It was contended by him that the decision is based on the ground that a petitioner cannot be permitted to go about "bench hunting". It is true that Hon''ble Supreme Court has made such an observation

but, in my opinion, that is not the ratio of the decision. The ratio of the decision) is that it would be against public policy to allow "a litigant to abuse" process of the Court by instituting suits again and again on the same cause of action without any good reason" and that "the principle underlying R. 1 of O. XXIII of the Code should be extended in the interest of administration of justice to the cases of withdrawal of writ petition also".

14. In the present case, the record of Writ Petition" No. 2781(MS) of 1993 clearly indicates and it is not disputed that the cause of action and the relief sought in that writ petition were exactly the same as has been claimed in the present writ petition. It is also not disputed that the said earlier writ petition was dismissed as withdrawn without permission to file fresh writ petition. In fact, no application was moved indicating the reasons and request for withdrawal of the writ petition was made orally without assigning any reasons. It has not been shown that the earlier writ petition would have failed on account of any legal infirmity. Accordingly, in view of the legal position noted above, the second writ petition must be held to be not maintainable.

15. Even if it were possible to entertain this writ petition, I find it devoid of merit. As noted above, the impugned order has been passed by the learned Civil Judge on the application for clarification of the order dated 3-9-1985, moved by the petitioner himself. The Civil Judge has held the order dated 3-9-1985 was only time bound till the next date only and that the order was no more operative. It appears to me unnecessary to give any finding in regard to the interpretation of this expression "meanwhile" in this writ petition for the simple reason that, by this order, the learned Judge has directed status quo to be maintained till 30-11-1993. Therefore, even if the earlier order meant what is being contended by the learned counsel for the petitioners, there is no legal infirmity in the order passed by the learned Civil Judge for maintaining status quo. The Court is fully entitled to modify its earlier interlocutory order (Smt. Sushila-Devi v. District Judge, Gonda 1983 (1) LCD 145).

16. Therefore, even If the term "meanwhile" means what is being suggested by the learned counsel for the petitioners, that is, the stay shall be until further orders, the order passed by the learned Civil Judge is obviously "further order". It would have been proper for the petitioner, to have appeared before the learned Civil Judge and made appropriate prayer for passing any different order because the order was only till the next date and was not a final order. Accordingly, there is no reason for interfering with the order passed in exercise of extraordinary jurisdiction under Art. 226 of the Constitution.

17. Learned counsel for the opposite parties submitted that the trial Court had earlier passed an interim order of injunction in 1985 and that order was confirmed by the District Judge in appeal. It is pointed out by him that the order of temporary injunction continued until 1985. The submission made is that the order of injunction has continued against the opposite parties for sufficiently long time. I do not think that it is necessary for this court to take note of these facts

for the purpose of disposal of this writ petition. That may prejudice the case of the parties also. It will be for the concerned Court to consider the submissions and pass appropriate orders on the application for interim injunction or stay.

18. It would appear that the parties or their predecessors in interest have already been litigating for about 36 years. The suit was filed in 1958 and the appeal has been pending since 1985. Quite obviously, this is a very alarming state of affairs. It is necessary that this litigation must come to a close and the matter must be finally adjudicated without any further delay.

19. In view of the facts and legal position, the writ petition is liable to be and is hereby dismissed. It is, directed that the learned appellate court shall dispose of the appeal expeditiously, say within a period of three months.

20. There shall be no order as to costs.

21. Petition dismissed.