
(2013) 12 AP CK 0103

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 1917 of 2013

The Vice-Chairman and Managing Director, The A.P. Mineral
Development Corporation Ltd. and Another

APPELLANT

Vs

M/s. GMK Minerals Private Limited

RESPONDENT

Date of Decision : 12-12-2013

Acts Referred:

Citation : (2014) 2 ALD 480 : (2014) 3 ALT 543

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J.; Sanjay Kumar, J

Bench : Division Bench

**Advocate : V. Subrahmanyam, for the Appellant; A. Samir Kumar Reddy
appearing and Sri V. Surya Prakash, for the Respondent**

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, C.J.—By consent of the parties, we dispose of this appeal finally today at the stage of admission itself. This appeal has been preferred against the judgment and order of the learned single Judge dt. 23.10.2013 by which the relief claimed by the respondent/writ petitioner was allowed. While preferring this appeal, the appellant/Corporation has taken various grounds and one of the grounds is pure question of law based on factual aspect as pleaded before the learned trial Judge.

2. It is submitted by the learned counsel for the appellants that the learned trial Judge has missed to decide legal implication of the fact that the respondent/writ petitioner had previously on the same cause of action filed a writ petition asking for identical relief, though couched in different language and the same was allowed to be withdrawn, but no permission to file a fresh one on the same cause of action, under Order XXIII Rule 1 of the CPC (CPC) was prayed for, as such it was not granted. He therefore submits that the subsequent writ petition on which the impugned judgment and order was passed is completely barred by virtue of provision of Order XXIII Rule 1(4) of CPC. He further contends that the provisions of CPC have been made applicable to writ jurisdiction of this Court by

virtue of Rule 24 of the Writ Proceedings Rules of this Court.

3. Learned counsel for the respondent/writ petitioner says that it is not correct to say that leave to file fresh one was not prayed for before the learned trial Judge at the time of withdrawal of the writ petition, in the order it was not mentioned in so many words, essence thereof suggests leave was granted. However, the learned counsel is very fair to admit that the Court did not record expressly that the leave has been granted.

4. In that view of the matter, we have examined the pleadings filed before the learned trial Judge. In paragraph-17 of the counter affidavit filed by the appellants-respondents in the writ petition, a specific point was taken which reads as follows:

In reply to para 14, I submit that admittedly the writ petitioner filed W.P. No. 6420 of 2013 and withdrew the same for the reasons best known to them. The writ petition is dismissed as withdrawn and no liberty has been given to the petitioner by this Hon"ble Court for filing another writ petition.

5. While dealing with the aforesaid statement of fact, the writ petitioner in paragraph 15 of the affidavit in reply has stated as follows:

The petitioner never suppressed the fact of earlier WP No. 6420/2013 and which was withdrawn due to their personal reasons and the same was mentioned in present writ petition, the Hon"ble Court is having elaborate powers to hear the matter under Article 226 of Constitution of India to issue direction or directions under writ of Mandamus.

6. Thus, it is clear that there is no denial of the fact that no liberty was granted to file fresh one by the said order allowing to withdraw the previous writ petition. Learned counsel for the respondent, however, says that in exercise of writ jurisdiction the Court should ignore all these technicalities and decide the matter on merit and that is what has exactly been done by the learned trial Judge.

7. We are unable to accept the contention of learned counsel for the respondent/writ petitioner that it is a mere technicality, and the reasons for our conclusion on this point are elaborated hereunder.

8. By virtue of Rule 24 of the Writ Proceedings Rules framed by this Court, the provisions of CPC have been made applicable to writ proceedings. Therefore, the provisions of Order XXIII and also other related provisions of CPC will be applicable in these proceedings. Order XXIII Rule 1 of CPC reads as follows:

"O. XXIII R.1: Withdrawal of suit or abandonment of part of claim.--(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon apart of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5)... ..

(emphasis supplied by us)

Thus, it is clear that if no leave is obtained, filing of subsequent proceedings in connection with same cause of action is barred.

9. It is well settled that provisions of CPC are not only procedural one, some portion thereof creates substantive right. The aforesaid bar accrues substantive right to the defendant (herein the appellants) of not being vexed or harassed by subsequent suit in respect of the same cause of action. The Legislature has made such provision perhaps to close the issue, if no leave is obtained while withdrawing suit, the suitor gives impression to the adversary he/she/it has settled his/her/its mind that no further action would be brought to the Court to assert the same claim, and that is why the aforesaid bar by way of prohibition has been created.

10. It is not pure procedural in nature, as we have already set out, it creates a substantive right to the defendant and this preclusion operates as a complete bar and this will appear from Section 12 of the CPC which reads as follows:

12. Bar to further suit.--Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to

institute a suit in respect of such cause of action in any Court to which this Code applies.

The word "Rules" mentioned in Section 12 of CPC has been defined in Section 2(18) which reads as follows:

2(18). "Rules" means rules and forms contained in the First Schedule or made u/s 122 or Section 125

Obviously First Schedule is the ordering portion of the code. Therefore, subsequent proceeding not obtaining any prior leave of the Court to file fresh one is completely barred.

11. In our considered view, the learned trial Judge, as rightly argued by the learned counsel for the appellants, should not have entertained the writ petition and should have rejected in limine under Order VII Rule 11 of CPC without giving any details of merits of the case as it is permissible under the provisions of Order VII Rule 11(d). The learned trial Judge, in our considered view has failed to do so.

12. We, therefore, dismiss the writ petition on the above ground alone and set aside the judgment and order of the learned trial Judge. However, we permit the respondent writ petitioner to take steps in accordance with law, as may be advised, and our judgment will not stand in its way. The writ appeal is accordingly allowed. There will be no order as to costs.

Consequently, pending miscellaneous petitions, if any, in this appeal, shall stand closed.