

Dataram Singh and Others Vs. Brindawan Singh and Others

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Court : Madhya Pradesh

Decided On : Jul-11-2014

Judge : Sujoy Paul

Appeal No. : Writ Petition No.5903 of 2012

Appellant : Dataram Singh and Others

Respondent : Brindawan Singh and Others

Advocate for Def. : Shri. Harish Dixit

Advocate for Pet/Ap. : Shri. N.K.Gupta

Judgement :

1. Parties are in loggerhead on the same issue before this Court for the second time. The petitioners/plaintiffs filed a suit for declaration and permanent injunction. In the said suit, the respondent No.1 filed a fresh counter claim on 23.12.2005 and on the same date withdrew his earlier counter claim. The court below permitted the defendant to file second counter claim. Against the order dated 19.1.2006, whereby second counter claim was permitted to be filed, the present petitioners filed WP No.1940/2006. The order of trial court permitting the defendant to file second counter claim was challenged on the ground that the plaintiffs' objection was not taken into account and considered by the trial court. This Court allowed the petition on 5.4.2007 and opined that the petitioners raised a specific objection that counter claim was not maintainable in view of Order 11 Rules 2 and 3 and

Order 23 Rule 1 (4) CPC. The trial court erred in not considering the said objection. The matter was remitted back to the trial court to decide the said application afresh keeping in view the observation made by this Court in WP No. 1940/2006.

2. The parties again advanced arguments on application filed under Order 7 Rule 11 CPC. By impugned order dated 9.7.2012, the said application is rejected and counter claim is permitted to be filed.

3. Shri N.K.Gupta, learned counsel for the petitioners submits that the counter claim needs to be treated as a plaint in view of Order 8 Rule 6-A(2) CPC. By placing reliance on Order 2 Rule 2 CPC, it is submitted that the defendants' second counter claim is hit by principle of res judicata. Lastly, it is submitted that as per Order 23 Rule 1 (3) and (4), the court below has erred in permitting the defendants to file second counter claim. He submits that in absence of permission to file second claim at the time of withdrawal of first claim, filing of second claim was impermissible.

4. Per Contra, Shri Harish Dixit, learned counsel for the respondent No.1 supported the order passed by the court below. By drawing attention on the order sheets, Annexure P-2, it is submitted that the first counter claim had certain defects. The names of parties were not properly mentioned and, therefore, the trial court on 7.11.2005 directed the defendants to correct the same. In turn, on 23.12.2005, a proper counter claim with correct details was filed. After filing the second counter claim, earlier claim was not pressed on the same date. In this situation, Shri Dixit submits that Order 23 Rule 1 CPC has no application. No other point is pressed by the parties.

5. I have heard learned counsel for the parties and perused the record.

6. In the impugned order, the court below has recorded that on 7.11.2005, the defendant was directed to furnish complete details of the parties which must include the father's name and address etc. In turn, the defendant filed a new counter claim on 23.12.2005 and withdrew/ not pressed his earlier counter claim. The court below opined that in the aforesaid circumstances, it is clear that the

second counter claim was filed pursuant to the directions of the court and, therefore, it cannot be assumed that second counter claim cannot be filed.

7. The order sheet dated 23.12.2005, Annexure P-2, shows that a fresh counter claim was filed by the defendants and copy thereof was supplied to the plaintiffs. Lateron, on the same day, the first counter claim was rejected as not pressed. Shri Gupta has not disputed the finding of court below inasmuch as it is recorded that the court below itself directed on 7.11.2005 to correct the counter claim. The defendants thought it proper to file a duly typed newcounter claim containing correct details of the parties. Thus, the second counter claim is in fact filed pursuant to the directions of the court dated 7.11.2005.

8. Order 23 Rule 1 (3) and (4) CPC reads as under :-

"Order 23 Rule 1 (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."

9. No doubt, normally grant of permission to the plaintiff to withdraw from the suit is necessary. The liberty is also required to be given to institute another suit. However, in the peculiar facts of this case, it is clear that the second counter claim is filed to meet the direction of the court dated 7.11.2005. Thus, in this peculiar situation, it can be assumed that the second counter claim has an implied

permission of the Court. In other words, the second counter claim is filed in order to remove the defects directed to be removed by court order dated 7.11.2005. Thus, in the peculiar facts of this case, it cannot be said that the court below has taken any incorrect view. The court below has also held that in the first counter claim, the names of parties were not properly described and, therefore, second counter claim was filed. Thus, neither principle of res judicata is attracted nor second counter claim is hit by Order 2 Rules 2 and 3 CPC.

10. In the opinion of this Court, the court below has taken a view to advance the cause of justice and did not permit itself to be strangled by hyper-technicalities. This is settled in law that all the rules of procedure are the handmaid of justice. The Apex Court in AIR 1955 SC 425 (Sangram Singh v. Election Tribunal, Kotah) opined that A code of procedure must be regarded as such. It is "procedure", something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against. The Apex Court in (1975) 1 SCC 774 (Sushil Kumar Sen v. State of Bihar) opined that the mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence - processual, as much as substantive. In (1976) 1 SCC 719 (State of Punjab v. Shamlal Murari), the Apex Court held that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46 (Ghanshyam Dass v. Dominion of India) the Apex Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle. In (2005) 4 SCC 480 (Kailash vs. Nanhku and others) the Apex Court held that the provisions of CPC or any other procedural enactment

ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. In the light of aforesaid judgments, in the opinion of this Court, the court below has passed the impugned order in accordance with law in order to serve the cause of justice. The scope of interference under Article 227 of the Constitution is limited. Interference can be made if order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity. Even an erroneous order is not required to be corrected in these proceedings under Article 227 of the Constitution. The basic purpose of exercising the said jurisdiction is to keep the courts below within the bounds of their authority. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner. Another view is possible, is not a ground for interference. This view is taken in *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil* reported in (2010) 8 SCC 329.

12. In the present case, there is no ingredient on which interference can be made. Petition fails and is hereby dismissed. No cost.

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