

Makhan Singh Vs. Xith Additional District Judge and ors.

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Court : Allahabad

Decided On : Mar-24-2003

Reported in : AIR2004All136; 2003(3)AWC1908

Judge : D.P. Singh, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 17, Rule 2 - Order 9, Rules 9 and 13

Appeal No. : C.M.W.P. No. 31231 of 1993

Appellant : Makhan Singh

Respondent : Xith Additional District Judge and ors.

Advocate for Def. : Prakash Gupta and ;D.K. Aggarwal, Advs. and ;S.C.

Advocate for Pet/Ap. : A.K. Goyal, Adv.

Disposition : Writ petition allowed

Judgement :

D.P. Singh, J.

1. Pleadings have been exchanged and counsel for the parties agree that the writ petition itself may be disposed of finally under the Rules of the Court.

2. The petitioner filed Suit No. 693 of 1987 for cancellation of sale deed dated 9.4.1984 and further that the petitioner be declared owner of the disputed plot. The contesting respondents filed their written statement. A number of issues were framed on 21st March, 1988. However, subsequently an additional issue was framed on 10th February, 1989, which was to the following effect :

'Prastut Vad per jo ki bainame samvyavhar per adharit hai per Adhiniyam 45 San 1988 ka kya prabhao hat?'

3. This issue related to as to whether the provisions of Act No. 45 of 1988 dealing with 'benami' transactions were attracted. The trial court had also framed other issues including the issue Nos. 5 and 9 as to whether any cause of action had arisen and as to what relief the plaintiff is entitled to. The trial court fixed 27.2.1989 for disposal of issue No. 10 only. However, due to advocates strike the case could not be taken up, though it is averred that the plaintiff was present on that date. The Court, thereafter fixed 6th April, 1989, for disposal of issue No. 10, which date was adjourned on the request of counsel for the petitioner and 27th April, 1989, was fixed for disposal of issue No. 10. On 27th April, 1989, neither the petitioner nor his counsel appeared before the Court and the Court after disposing of issue No. 10 went on to dismiss the suit of the petitioner by its order dated 9th May, 1989. Having come to know of the aforesaid order, the petitioner moved an application for recall of the aforesaid ex parte order on the ground that he had fallen ill on the date fixed and he also annexed a copy of the medical certificate issued by his doctor. After giving opportunity to the parties, the trial court rejected the application by its order dated 18th July, 1991, holding that the application under Order IX Rule 9, C.P.C. was not maintainable. Aggrieved against the aforesaid, an appeal was preferred which was also rejected by an order dated 31st May, 1993. This writ petition challenges the aforesaid three orders dated 9th May, 1989, 18th July, 1991 and 31st May, 1993.

4. The principal contention of the learned counsel for the petitioner is that the order dated 9th May, 1989, was not an order passed under Order XVII Rule 3, C.P.C. but was referable to Rule 2 thereof and thus the application under Order IX Rule 9/13, C.P.C. was maintainable. The further contention is that the trial court totally

misapplied itself with regard to the applicability of the provisions of Act No. 45 of 1988. However, learned counsel for the respondent contends that since the order was passed on merits under Order XVII Rule 3, C.P.C. only an appeal lay against such an order and no application under Order IX was maintainable.

5. As has been noted hereinabove, though 27th April, 1989, was the adjourned date fixed for disposal of issue No. 10, the plaintiff petitioner nor his counsel appeared. It is apparent that the suit was fixed for disposal of only one issue that is issue No. 10 and not for disposal of the entire suit itself. A perusal of the order dated 9th May, 1989, would show that in fact it is an order disposing of the suit itself on merits, for which the Court had not fixed any date and no notice was given to the petitioner for final disposal of the suit. Looking to the tenor of the order and the attending circumstances, it is apparent that the order is referable to Rule 2 of Order XVII, C.P.C. A Full Bench of this Court while confronting a somewhat similar circumstances in the case of Seth Manna Lal v. Seth Jai Prakash, AIR 1970 All 257, has held that no strait-jacket formula can be adopted to find out as to whether the order was referable to Rule, 2 or 3 of Order XVII. It has been held that the tenor of the order and the attending circumstances can be examined by the Court to see if the order was passed under Order XVII Rule 3 or Rule 2, C.P.C. As already observed hereinabove, the order dated 9th May, 1989, has been passed under Rule 2 and not under Rule 3. Applying the ratio as set out in Seth Munna Lal case (supra), it is clear that an application under Order IX Rule 9 and Rule 13 was maintainable especially in view of the fact that there was no notice to the plaintiff-petitioner that the suit itself would be finally heard and disposed of. In my view, the application under Order IX was maintainable for recall of the order dated 9th May, 1989.

6. Even the second contention of the learned counsel for the petitioner has some force. The transaction impugned was of a date much prior to the enforcement of Act No. 45 of 1988. The suit itself was filed prior to the invoking of the aforesaid Act. Thus, in view of the ratio laid down by the Apex Court in the case of Heirs of Virarajlal Ganatra v. Parshotam S. Shah, 1996 All CJ 1043, provisions of Act No. 45 of 1988 were not attracted and thus the impugned order was patently erroneous.

7. As I have already held that the order dated 9th May, 1989, was referable to Order XVII Rule 2, C.P.C. thus, the application for recall under Order IX was maintainable, therefore, the order rejecting the application for recall dated 18th July, 1991, as not being maintainable is also erroneous. On similar reasons, the order of the appellate court dated 1st of May, 1993, also cannot be sustained.

8. In view of the discussions hereinabove, the writ petition succeeds and is allowed. The order dated 9th May, 1989, 18th July, 1991 and 31st May, 1993, are hereby quashed. The case is remanded to the trial court for deciding it afresh in accordance with law after giving full opportunity to the learned counsel for the parties. No orders as to costs.

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