

Ram Kumar Vs. District Judge and ors.

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Court : Allahabad

Decided On : May-20-2004

Reported in : 2004(4)AWC3463

Judge : Arun Tandon, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 106

Appeal No. : C.M.W.P. No. 2039 of 1987

Appellant : Ram Kumar

Respondent : District Judge and ors.

Advocate for Def. : H.N. Tripathi, ;Rajesh Tripathi, ;A. Singhal and ;Ashwani Kumar Mishra, Advs. and ;Piyush Shukla, S.C.

Advocate for Pet/Ap. : Rajeev Misra, ;Haridwar Singh and ;R.S. Misra, Advs.

Disposition : Petition dismissed

Judgement :

Arun Tandon, J.

1. Heard Sri Rajeev Misra, learned counsel for the petitioner, Sri H. N. Tripathi, advocate assisted by Sri Rajesh Tripathi, learned counsel for the contesting respondents and Sri Piyush Shukla, learned standing counsel for the respondent

Nos. 1 and 2.

2. Original Suit No. 485 of 1982 was filed by one Smt. Saraswati Devi, who is the respondent No. 3 in the present petition for eviction and arrears of rent and damages against tenant Sri Ram Kumar, who is the petitioner. In the said suit Issue No. 5 was framed, as to whether the suit as filed by the plaintiff was maintainable or not. The said issue was decided as a preliminary Issue. Thereafter the trial court heard the matter on merits and vide judgment and order dated 12.12.1983 partly decreed the suit in favour of the plaintiff. The said suit was decreed to the extent of arrears of rent and damages while the relief of eviction was refused on the ground that the tenancy of the defendant had not been terminated after valid notice. It is admitted position that against the said judgment and order of the trial court, no appeal was filed by the defendant. As a consequence thereto, the finding recorded with regard to the maintainability of the suit stood decided finally between the parties.

3. The plaintiff filed an appeal against the part of the decree of the trial court whereby the relief of eviction was refused. The said appeal was registered as Appeal No. 19 of 1984 before the District Judge, Mathura. By means of the order dated 8th September, 1986 the learned District Judge had allowed the said appeal filed by the plaintiff and held that the notice was served upon the defendant was sufficient, the suit as filed by the plaintiff was decreed in respect of the eviction and arrears of rent and damages also.

4. Feeling aggrieved by the aforesaid judgment and decree of the District Judge dated 8th September, 1986, the petitioner filed a second appeal being Second Appeal No. 235 of 1986 before this Court. The second appeal filed by the petitioner was dismissed by this Court by means of the order dated 30th January, 1987, which is quoted herein below :

'Heard counsel for the appellant. In view of the first appeal itself not being maintainable, the present second appeal Under Section 102, C.P.C. cannot be maintained. This appeal is accordingly dismissed as not maintainable.'

5. The petitioner has now filed the present writ petition and the prayer made in the present writ petition, is that the order passed by the respondent Nos. 1 and 2 may be quashed without referring to the date of the order which are sought to be quashed.

6. On behalf of the petitioner it is contested that the suit as filed by the plaintiff was maintainable under the provisions of the Provincial Small Causes Court's Act and as such, the trial court, which has decided the suit as a regular civil suit was not competent for the suit and as a consequent thereto the first appeal filed by the plaintiff against the judgment and decree of the trial court was also legally not maintainable. In the alternative it is contended that the petitioner could be left remediless in view of his second appeal, having been dismissed against the judgment of the District Judge on the ground that the same is not maintainable.

7. It is further contended that since this Court vide judgment dated 30th January, 1987 while dismissing the second appeal filed by the petitioner had already recorded a finding that the first appeal was not maintainable, consequently the order passed by the District Judge in the first appeal are to be set aside.

8. On behalf of the respondents it is contended that the plaintiff had acquiesced to the order of the trial court dated 11.8.1985 whereby issue No. 5 in qua jurisdiction to try the suit has answered in favour of the plaintiff as no appeal or revision filed against the said judgment and consequently, the petitioner cannot be permitted to challenge the said order of the trial court deciding the issue No. 5 against the defendant for the first time in the writ petition filed in year 1987. It is further contended that the defendant did not file any appeal against the judgment and order of the trial court as a consequent thereto he accepted the order of the trial court holding that the suit was maintainable. Moreover in the appeal filed by the plaintiff against the part of the decree, which was decided against the plaintiff, no plea of want of jurisdiction was ever raised by the defendant, although, he contested the said civil appeal.

9. It is further contended that the, order passed by this Court dated 30th January, 1987 is an ex parte order passed without notice and without hearing the respondent-plaintiff and as such has no binding effect upon the plaintiff.

10. In any view of the matter, it is contended that the findings recorded by the first appellate court are legal and call for no interference under Article 226 of the Constitution of India even on merits.

11. I have heard learned counsel for the parties and have gone through the records of the writ petition.

12. From the record, it is established that by the order of the trial court the issue of jurisdiction after hearing the parties was decided by means of the order dated 11.8.1983. The said order was not subjected to any challenge by the defendant.

13. As a matter of fact in the civil appeal filed by the defendants against the part of the decree, which was decided against the plaintiff, no plea of jurisdiction was ever raised.

14. In, view of the said factual position, it is established beyond doubt that the petitioner had acquiesced to the jurisdiction of the trial court, so far as the suit proceedings were concerned. The petitioner cannot be permitted at this stage, i.e., after lapse of five, years to challenge the order of the trial court rejecting the objections raised by the defendant and holding that the Court had jurisdiction of the suit. If the petitioner is permitted now to challenge the said order, which has become final between the parties and was not challenged before any Court by way of appeal or revision, it will amount to re-opening of the controversy, which has been settled between the parties. Such a liberty cannot be said to be in the interest of justice, inasmuch as the finality must be attached to the order passed in the suit. In view of the aforesaid, this Court cannot permit the petitioner to question the jurisdiction of the trial court as well as the District Judge to decide the original suit and civil appeal for the first time, in proceedings under Article 226 of the Constitution of India.

15. It is no doubt that the Hon'ble Supreme Court has specifically held that the issue of jurisdiction can always be raised at any point of time, the said judgment of the Hon'ble Supreme Court is clearly distinguishable in the facts of the present case, inasmuch as the plaintiff had raised the issue of jurisdiction at the first instance before the trial court which was decided against the defendant and to

which he had acquiesced as he did not prefer any appeal or revision against same, therefore, he cannot be permitted to question the said order in the writ petition for the first time after 5 years.

16. The principle of acquiescence is squarely attracted' in the facts of the present case, thus this Court is not inclined to go into the question as to whether the trial court as well as the District Judge had Jurisdiction to try the suit and decide the appeal respectively or not.

17. So far as the contention raised on behalf of the petitioner that he cannot be rendered remediless this Court has permitted the petitioner to make submissions with regard to the merits of the findings recorded by the appellate court against him.

18. The petitioner has submitted that the trial court had recorded a finding in his favour that the notice which was issued by the landlord through an advocate terminating his tenancy was, in fact, on instructions of the husband of the landlady, namely, Sri Kumbhan Das and not on the instructions of the landlady herself and therefore, the notice was bad.

19. It is contended that the said findings of fact recorded by the trial court had not been upset by the appellate court while decreeing the suit in favour of the plaintiff. Therefore, the order of the District Judge is liable to be set aside.

20. From the order of the District Judge, it is apparently clear that the District Judge has recorded a finding that the notice was issued under signatures of an Advocate wherein it was mentioned that the said issue was being issued on instruction of Sri Kumbhan Das, who was none other than the husband of the petitioner. The trial court has recorded categorical finding that the rent was always realised on behalf of the land-lady by her husband. In the circumstances, it could not be said that Sri Kumbhan had no authority of law to instruct the counsel for issuing the notices of termination of tenancy. Even otherwise, the reasoning adopted by the trial court to the effect that in any other case husband and wife are legal one and the same yet the same principle will not apply in the present case is only hyper-technical in nature. In hearing one being on the merits of the notice.

21. In the facts and circumstances of the case referred to above, this petition calls for no interference under Article 226 of the Constitution of India.

22. In view of the aforesaid, this petition is dismissed.

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