

Phool Chand Tewari Vs. iind Additional District Judge and ors.

Phool Chand Tewari Vs. iind Additional District Judge and ors.

SooperKanoon Citation : sooperkanoon.com/486974

Court : Allahabad

Decided On : Jul-15-2008

Reported in : 2008(4)AWC3398

Judge : Bharati Sapru, J.

Appellant : Phool Chand Tewari

Respondent : iind Additional District Judge and ors.

Disposition : Petition allowed

Judgement :

Bharati Sapru, J.

1. Heard Sri D.S.M. Tripathi for the petitioner and Sri H.S.N. Tripathi for the respondents.

2. This writ petition has been filed by the petitioner seeking writ of certiorari to quash the impugned order dated 5.1.1988 passed by the respondent No. 1 and to quash the order dated 25.3.1986 and the order dated 24.9.1985 passed by the respondent No. 2. A second prayer has been made for the grant of writ of mandamus directing the respondent No. 2 to dismiss the application of the respondent No. 3 and to restore the order dated 14.3.1983 passed by the Munsif City, Jaunpur in Suit No. 113 of 1978 by which the suit itself was decided.

3. The brief facts of the case are that the petitioner is defendant in the Suit No. 113 of 1978 filed by one Kewala Prasad-respondent No. 3 for specific performance of the contract on the basis of an unregistered agreement dated 5.5.1976.

4. The defendant-petitioner filed written statement denying the allegations in the plaint and asserted that Ram Lakhan, respondent No. 4 was the owner of the disputed plot who had executed a registered sale deed in his favour on 9.11.1978 and from that date onwards, the petitioner had been in actual possession of the land in dispute. The petitioner further averred in the written statement that the alleged agreement dated 5.5.1976 was a forged document, which was never executed by the respondent No. 4 and the respondent No. 3 Kewala Prasad had no concern with the land and trees in dispute nor was he in possession of the land in dispute at any given time.

5. The respondent No. 4 also filed written statement and denied the allegations in the plaint and said that the agreement dated 5.5.1976 was forged document and he was the original owner of the land. He had sold the land and had executed a registered sale deed in favour of the petitioner on 9.11.1978.

6. The respondent No. 3, as said earlier, filed Suit No. 113 of 1978. After filing of the suit, the respondent No. 3 filed no evidence, even though he was granted more than 30 times to file his evidence. It is alleged in the writ petition that on 3.3.1983 the Court gave time to the respondent No. 3 to file evidence but on that date also, he asked for deferment of the date and a date was fixed on 14.3.1983.

7. On 14.3.1983 the respondent No. 3 failed to give evidence but moved an application for giving expert opinion. This application was rejected on that date itself. As the plaintiff failed to give evidence on that date, the case was closed against him and the trial court proceeded under Order XVII, Rule 3, C.P.C. and dismissed the suit of the plaintiff holding that there was no evidence whatsoever in support of the plaintiff.

8. Once the suit was dismissed, the plaintiff filed an appeal. At the time when the appeal was filed, there was deficiency in the court fee but the plaintiff appellant did not make good deficiency of the court fee and the appeal was dismissed on

1.10.1983.

9. After the appeal was dismissed, neither the plaintiff-respondent filed any restoration application in the said appeal nor had he filed any, second appeal or any writ petition against the order dated 1.10.1983. In fact, till today, nothing has been filed by the plaintiff-respondents against the order dated 1.10.1983.

10. However during the pendency of the appeal, the plaintiff-respondents took recourse of filing of an application under Section 151 of C.P.C. on 1.7.1983 with a prayer that the order dated 14.3.1983 be recalled. The application dated 1.7.1983 is on record of the writ petition as Annexure-3. The application for recall does not mention that the plaintiff respondents had also moved an appeal for setting aside the impugned order dated 14.3.1983. The application for recall is completely silent on this point.

11. The petitioner appeared and opposed the application under Section 151 of C.P.C. which had been filed alongwith the application under Section 5 of the Limitation Act. The application for condonation of the delay under Section 5 of the Limitation Act was allowed on 24.9.1985, which is one of the orders impugned and thereafter the application under Section 151, C.P.C. was allowed on 25.3.1986. Against the order dated 25.3.1986 and the order dated 24.9.1985, the petitioner filed a revision. The revision of the petitioner was dismissed on 5.1.1988. As a result of which the suit of the plaintiff was restored to its original number.

12. Learned Counsel for the petitioner has argued that the application under Section 151, C.P.C. against the order dated 14.3.1983 was not legally maintainable and was wrongly allowed by the court below.

13. It is the contention of the petitioner that the order dated 14.3.1983 dismissing the suit was passed on merits and in the presence of the respondent No. 3 while proceeding under Order XVII, Rule 3, C.P.C. and as such only an appeal would be maintainable against such an order or at the most review application may be filed.

14. Learned Counsel for the petitioner has argued that by the order dated 14.3.1983 the suit had been concluded and it had become final and therefore the

application under Section 151 of C.P.C. was completely misconceived and not maintainable as the application under Section 151 of C.P.C. is only moved or resorted to wherein matters is pending and not concluded.

15. Learned Counsel for the petitioner has argued that the inherent jurisdiction of this Court is only invoked in the circumstances where the matter is not concluded and not in circumstances where the order is passed against, which the litigant has a statutory or other proper remedy available.

16. Learned Counsel for the petitioner has further argued that in fact the plaintiff respondent had taken recourse to the filing of an appeal against the order dated 14.3.1983 but did not pursue the appeal vigilantly and allowed the appeal also to be dismissed on 1.10.1983 and thereafter took no steps against the order dated 1.10.1983.

17. Learned Counsel for the petitioner has further argued that in any case the suit of the plaintiff had been dismissed for want of evidence, therefore no purpose would be fulfilled in getting the suit decided without evidence and for this reason, the impugned orders passed by the court below were bad.

18. In order to substantiate the argument as made by him, the learned Counsel for the petitioner has cited several decisions of various Courts. He has relied on a decision of Madras High Court rendered in the case of H. J. Dorairaj v. Vishwanatha Rupa and Co. : AIR1973 Mad135 . In this case the Madras High Court has held that the application under Section 151, C.P.C. was not maintainable when the appellant's remedy was to file an appeal against the final order.

19. The second decision cited by the learned Counsel for the petitioner was Maruthi Enterprises v. Smt. Muniyanjamma and Ors. AIR 1987 Kar 264, in which Karnataka High Court came to the conclusion that inherent jurisdiction of the Court can only be exercised subject to the rules that if the Code did not provide any specific provision which would meet the necessities of the case in question, there being a specific remedy under the Code by way of an appeal or review, it was not open for the litigant to invoke the inherent jurisdiction under Section 151, C.P.C.

The Karnataka High Court came to the conclusion while relying on a decision of the Hon'ble Apex Court in the case of Ram Chand and Sons Sugar Mills Pvt. Ltd. v. Kanhayalal Bhargava AIR 1966 SC 1899, wherein the Hon'ble Apex Court observed that the inherent power of the Court 'is in addition to and complimentary to the powers expressly conferred under the Civil Procedure Code. But that power will not be exercised if its exercise is inconsistent with, or conies into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code.'

20. Learned Counsel for the petitioner further placed reliance on a decision of Hon'ble Apex Court rendered in the case of State of W.B. and Ors. v. Karan Singh Binayak and Ors. 2002 ACJ 1092 (SC), wherein the Hon'ble Apex Court held that the inherent powers of the Court could not be exercised to reopen the settled matters and cannot be resorted to when there is specific provisions in the Act to meet the situation.

Learned Counsel for the petitioner also relied on another decision of the Hon'ble Supreme Court in the case of Budhia Swain and Ors. v. Gopinath Deb and Ors. : 1998(5)KarLJ43 , in which also the Hon'ble Apex Court laid down the parameters when the inherent powers of the Court can be invoked.

21. Learned Counsel for the petitioner also placed reliance on a decision of the Allahabad High Court in the case of Lalji and Ors. v. VIIth Additional District Judge . In this case, the Allahabad High Court discussed at length the circumstances when the provision of Section 151, C.P.C. can be invoked and came to the conclusion that it cannot be invoked when the matter is concluded and there is remedy available to challenge the same as provided in the Code itself. Allahabad High Court further held that where the remedies are available under the Act, inherent powers cannot be invoked simply because such remedies have become time barred and has further held that the party who is not diligent and who had wasted his chances in not availing the remedies available, is precluded from invoking inherent powers of the Court.

22. Here I may add that in view of the fact that the plaintiff had availed the remedy by filing an appeal against the order dated 14.3.1983 and the appeal was

dismissed on 1.10.1983 it cannot be said that the appellant was not aware of his statutory rights. The application under Section 151, C.P.C. filed on 1.7.1983 was in addition to his invoking his statutory rights and was filed as an afterthought. The plaintiff was simultaneously taking recourse to two remedies one by filing an appeal and another by filing application under Section 151, C.P.C. Once the party had invoked proper remedy under the Code, his application under Section 151, C.P.C. was clearly misconceived and deserved to be rejected being not maintainable.

23. In reply to all these arguments, learned Counsel for the respondents has argued that once the Court has exercised discretion for the hearing of the matter on merits, the superior court should not disturb such finding and has placed reliance on a decision of the Hon'ble Apex Court in the case of N. Balakrishnan v. M. Krishnamurthy, 1998 RD 607.

24. Having heard learned Counsel for the parties at length and having examined the material on record, I am of the opinion that the arguments as advanced by the learned Counsel for the petitioner have substance and are liable to be accepted by this Court for the reasons that the plaintiff firstly allowed the suit itself to be dismissed without giving evidence. Thereafter the plaintiff filed a revision, which too was dismissed being deficiency of Court fee and he did not peruse it. If the litigant had been serious at all, he would have sought to get the appeal restored, which was dismissed on 1.10.1983 or at least would have filed a second appeal against the same.

25. The litigant on the other hand was playing hide and seek with the Court. He was pursuing two remedies simultaneously-on one hand he had filed an statutory appeal which it was not pursued by him diligently and on other hand, he had filed an application under Section 151, C.P.C. which was clearly not a remedy in the matter, especially when the suit itself had been concluded finally and was decreed also.

26. Taking into consideration the entire facts and circumstances of the case, I am of the opinion that the inherent powers as conferred under Section 151. C.P.C. may only be invoked in certain situations but not in a case where the party has a

right of filing an appeal or of revision under the Code itself.

27. In the present case, it seems that the litigant was well-informed about the remedies available to him and therefore had taken recourse to two remedies simultaneously. In my opinion the application under Section 151, C.P.C. was wrongly allowed by the court below as well and the revisional order also suffers from error of law, which are hereby set aside.

The writ petition is allowed as above. The impugned orders dated 5.1.1988, 25.3.1986 and 24.9.1985 are quashed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com