

Smt. Kaniz Fatma and ors. Vs. Additional District Judge, Court No. 15 and ors.

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Court : Allahabad

Decided On : Nov-16-2007

Reported in : 2008(1)AWC680

Judge : Rakesh Tiwari, J.

Appellant : Smt. Kaniz Fatma and ors.

Respondent : Additional District Judge, Court No. 15 and ors.

Advocate for Pet/Ap. : Sri. I. K. Chaturvedi

Disposition : Application dismissed

Judgement :

Rakesh Tiwari, J.

1. Heard counsel for the parties and perused the record.
2. This second review/ modification application has been preferred by the petitioners against the judgment and order dated 7.9.2006, passed in Civil Misc. Writ Petition No. 52933 of 2002, as well as the judgment and order dated 20.3.2007, passed in Review Application No. 273173 of 2006.

3. The ground of review is that the judgments and orders dated 7.9.2006 and 20.3.2007 had been passed on the undertaking given by the counsel for the petitioners before the Court without any instruction on the subject matter by his client the petitioner.

4. Sri Khalil Ahmad, counsel engaged subsequently for the petitioners submits that the undertaking was given by the earlier counsel for the petitioners under the impression that the petitioners would not be having any hardship in vacating the disputed shop and is not willing to contest the writ petition. He has placed reliance upon paragraph 3 of the review application which is as under:

Because as per the law laid down by the Full Bench of the Apex Court in : [1998]3SCR1079 , no Court can foreclose a statutory or constitutional remedy only on the basis of undertaking given by the party to vacate the premises and it is further held that the appeal filed by the tenant against the order of eviction would be maintainable, notwithstanding any undertaking given by him before the High Court that he would vacate the premises within a specified time.

5. It is urged that the landlord has played fraud upon the Court by misleading that the disputed premises is house whereas it is a shop situated in a commercial building at Delhi Road, Meerut and further that the original tenant was an employee of Roadways whereas it is the son of the landlord who is employee of the Roadways.

6. He further submits that the issue whether the petitioners are legal tenants or not stands decided in the suit vide judgment and order dated 9.2.2001 filed by the landlord by the Judge, Small Causes Court, Meerut which has attained finality as the same was not challenged by the landlord ; that it is settled law that if an issue between the same party has been decided it cannot be agitated again as it is covered under the provisions of res judicata but the landlord has obtained the order of this Court by distorting the facts and misleading that the petitioners/tenants are occupying the disputed shop illegally.

7. In this regard he has placed reliance upon paragraph 5 of the Judgment rendered in U. P. Junior Doctor Action Committee v. Doctor B. Sheetal Nandwani

and Ors. : AIR 1991 SC909 . in which it has been held that-

where a person has obtained an order from the High Court by fraud or false representation that order, as well as all advantages obtained thereunder shall be cancelled.

8. He further submits that the compromise of agreement and rent deed signed by both the parties has material bearing and effect upon adjudication upon the rights of the parties as held by the Apex Court in the case of Adil Jamshed Frenchman (D.) by L.Rs. v. Sardar Dastur School Trust and Ors. : AIR 2005 SC996 :

The documents sought to be produced by tenants are material and if substantiated would have a material effect on plea of bona fide need in that event are admissible.

9. He has also relied upon the alleged agreement of compromise said to have been executed on 30.7.2006 between him and the landlord. It is vehemently urged that the aforesaid agreement is duly signed by both the parties and duly notarized by the Notary. The landlord now cannot claim it to be a forged document when in fact the said document was validly executed by the parties and its authorities have been confirmed by the police investigation report and the landlord has received increased rent from the petitioners and issued a receipt thereof in terms of the said agreement.

10. The counsel for the respondent landlord submits that a contract is entered into between the advocate and his client on the terms contained in the vakalatnama which specifically provide that the counsel can also make statement on behalf of his client to press or not to press the writ petition, enter into a compromise or file any agreement and do all acts on his behalf in the case. The terms in the vakalatnama filed by the petitioners are-

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gyQukek izoZru i= nj[okLr btjk; eqtckr vihy fuxjkuh bR;kfn gj izdkj ds vU; izkFkZuk&i;= i=kfn ,oa ys[kkfn dh izfrfyfi;ka vius gLrk{kj djds U;k;ky; esa izLrqR dj vFkok fdlh i= ij vko;'drkuqlkj 'kkifF;d iq'Vhdj.k djs vkSj vko;'d loky tckc djs vkSj ys[kkfn dh izfrfyfi;ka ,oa gekjs izkIFk /ku dks vius gLrk{kjksa ikorh nsdj izklr djsa] gekjh vksj ls fdlh e;/LFk rFkk lk{kh xokg ekus vkSj mlls IEcfU/kr izkFkZuk&i;= izLrqR djs rFkk mldk leZFku djsa rFkk rinhd djsa] okn&i;= mBkos NksM+s vFkok le>kSrk djsa rFkk lqygukek nkf[ky djs rFkk mlds IEcU/k esa izkFkZuk&i;= nkf[ky djsa mldk leZFku djsa vFkkZr~ izdj.k ls IEcU/k j[kus okyh dqy dk;Zokgh fMxzh ds HkjkbZ gksus ds le; rd Lor% la;qDr djsa A vko;'drk gksus ij fdlh vU; odhy egksn; dks odhy djsa A

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vr,o ;g vfHkHkk'kd i= fy[k fn;k fd izek.k :i ls le; ij dke vk;s A

11. He further submits that from perusal of the counter-affidavit it is apparent that he neither nor his client has misled the Court and has mentioned the premises in dispute as a shop in the plaint before the court below. It is only while transcribing the aforesaid Judgment the mistake entered in the Judgment, hence there is no question of misleading the Court for obtaining the order.

12. He also submits that the Court has considered the case of the petitioners on merits and held that-

Both the courts below have given concurrent findings of facts that the bona fide need and comparative hardship of the landlord are greater. The two sons of the landlord have been compelled to do their business in a shop taken on rent though, they are owners of the shop occupied by the petitioner under tenancy of Rs. 150 per month.

In E. Parushraman v. V. Dorai Swamy : AIR 2006 SC376 , it has been held that bona fide need and comparative hardship are the findings of facts. We should not interfere in findings of facts under Article 226 of the Constitution of India unless there is an error apparent on record or the findings of facts recorded by the courts

below are perverse.

No such illegality or infirmity has been established by the petitioner in this petition.

For the reasons stated above, no interference under Article 226 of the Constitution is required. The Court is not inclined to interfere with the finding of fact recorded by the courts below which have not been shown to be perverse or illegal or suffering from any error apparent on the face of finding of record.

The petition deserves to be dismissed.

The counsel for the petitioner has prayed that six months time be granted for vacating the shop in dispute. I find it fit and proper that the shop in dispute be vacated and peaceful possession be handed over by the petitioner to the landlord within a period of three months from today.

With the aforesaid observation, the writ petition stands dismissed.

13. On the basis of the aforesaid the counsel for the respondent submits that the counsel for the petitioners had in fact prayed for six months further time for vacating the shop in dispute after the Judgment had been delivered on merits.

14. It appears from the judgment and order dated 7.9.2006 that it had been delivered on merits and after noting that the petitioners failed to establish any illegality or any perversity in the order of the court below impugned in the writ petition wherein both the courts below had given concurrent findings of facts that bona fide need and comparative hardship of landlord was greater. The High Court held that petition deserves to be dismissed.

15. It was at that stage that the then counsel for the petitioners had made a request that the petitioners may be granted some time to vacate the shop in dispute and the Court after considering the request allowed time to the petitioners for vacating the shop in dispute within a period of six months from the date of the order after deciding the matter on merit.

16. It appears that Sri Mohd. Khalil, advocate the another counsel without consent of the original counsel Sri I. K. Chaturvedi in the case ; after elapse of the

aforesaid period of six months again filed Review Application No. 273170 of 2006 also making oral prayer for allowing further time to the petitioner to vacate the premises in his tenancy.

17. This application is supported by an affidavit of Sri Ameer Asthana, petitioner No. 3 doing pairvi on behalf of other petitioners. In Paragraphs 3 to 11 of the affidavit it is averred that-

3. That the previous Review Application No. 273173 of 2006 was withdrawn on 30.8.2006, in Para 4, it has been asserted that a fresh rent deed was executed between petitioner No. 2 and respondent No. 3 in respect of the disputed shops on a Non-Judicial Stamp Paper and the agreement deed was duly notarized and was duly verified by the advocate, bearing signatures of two witnesses and in the aforesaid deed, the rent was agreed to be enhanced from Rs. 150-200 per month and Rs. 1,600 was accepted as advance rent from August, 2006 till March, 2007 and Rs. 1 lac was also agreed to be paid as security by the petitioners to the respondents which is adjustable in the rent payable and further interest at the termination of tenancy in case petitioner No. 2 terminated himself.

4. That respondent No. 3 had also issued receipts for acceptance of Rs. 1,600 as rent from August, 2006 to March, 2007 as a consequence whereof the agreement deed became finally binding upon the parties but before the said fact could be brought into the knowledge of this Hon'ble Court. The matter was heard and disposed of vide Judgment dated 7.9.2006 and consequently the review application was filed elaborating this fact before this Hon'ble Court, which was, too, dismissed vide order dated 20.3.2007.

5. That the petitioners approached the Hon'ble Supreme Court by means of S.L.P. and the Apex Court disposed of the petition with the following directions:

However, it will be open to the petitioners to make an application before the High Court to apply for withdrawal of the undertaking given by the petitioners in the High Court.6. That as stated, the judgments and orders dated 7.9.2006 and 20.3.2007 should be reviewed/modified on the ground that it has been passed under misconception led by the counsel of the opposite parties that the disputed area is

a house whereas in fact the same is a Hair Cutting Shop and in commercial building in the first floor has already been constructed and is lying vacant, which is in possession of the contesting respondents and if there is any bona fide need on its part, the vacant portion on the first floor of the aforesaid building is very much vacant and ready for its use.

7. That apart from 'Corner Cafe' other shops situated in the ground floor of the aforesaid building, namely, Janta Book Stores and Harish Restaurant are also possessed and run by the contesting opposite parties and his two sons. Besides this, the whole portion of the first floor of the building is a covered roof structure and is ready for its use, if so required by the landlord opposite parties.

8. That as contended by the opposite parties in the counter-affidavit filed against the review application, it had been mentioned that he had filed an application under Section 156 (3), Cr. P.C. for registering a F.I.R. against the present petitioners for concocting forged deed dated 30.7.2006. In this regard it is relevant to state here that the above noted matter was investigated by the Police and in the investigation no forgery was found to have been taken place on part of the petitioners and the agreement deed was found to be legal and valid.

9. That till date the petitioner is in possession of the disputed shop and has not vacated the same.

10. That a Misc. Execution Case No. 29 of 2002 had been filed by the contesting respondents in which the judgments and orders of this Hon'ble Court dated 7.9.2006 and 20.3.2007 have been filed by them and the execution court is bent upon expediting the matter and no further dates are given and in case the directions contained in so far as the judgments dated 7.9.2006 and 20.3.2007 are not stayed during the pendency of this application, the petitioners shall be evicted and will suffer irreparable loss and injury.

11. That in view of the facts and circumstances stated above, it is expedient in the interest of Justice that this Hon'ble Court may graciously be pleased to stay its judgments and orders dated 7.9.2006 and 20.3.2007 pending disposal of the present review application and or further may be pleased to stay eviction of the

petitioners from the disputed shop till further orders of this Hon'ble Court and or to pass such further and other orders or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to secure the ends of justice.

18. In case the petitioner was aggrieved by the conduct of his counsel in seeking time for vacating the shop in dispute, he ought to have averred so in that application and affidavit for extension of time but not a word has been averred by the petitioner in it that her counsel had done anything against her instructions.

19. Even in the order dated 20.3.2007 the Court has observed that Inspite of undertaking given by the petitioner for vacating the shop in dispute, they are not complying with the judgment and order and has also imposed cost upon them amounting to Rs. 20,000. It is pertinent to mention here that the review application was filed by the petitioners beyond the time by a subsequent counsel, which was not maintainable at his instance as it was not filed by Sri I. K. Chaturvedi the counsel who had filed and argued the case.

20. The Court in the order dated 20.3.2007 had also observed that the matter cannot be reopened on merits again in the garb of a review application as it was not maintainable. The judgment and order dated 7.9.2006 was passed after hearing the counsel for the parties on merits in which the Court has considered all the aspects of the matter argued before it for its consideration.

21. The Court had also observed that the review application has been filed with mala fide in order to retract from the statement given by the petitioners' counsel for the petitioners and it is only for ornamental purpose. Further no rejoinder-affidavit has been filed rebutting the averments made in the counter-affidavit to the review application and that the case of the landlord was that the receipts etc., filed alongwith the review application are forged and manufactured for the purpose of the review application. In the circumstances, the averments made in the review application are to be taken as correct as it is to be first got adjudicated by a competent court whether the documents are forged or not on basis of oral and the documentary evidence before it. This is not feasible in writ jurisdiction at this stage in review application as the petitioners want review of order and judgment dated

7.7.2006 and any agreement or act of acceptance of rent by alleged disputed receipts is of subsequent date. These facts were not pleaded before the Court at the time of hearing and in any case such highly disputed facts requires evidence for determination which cannot be decided by the High Court under Article 226 of the Constitution.

22. The relevant portion of the order dated 20.3.2007 is as under:

Admittedly the petitioners have not vacated the shop as per the undertaking given before the Court which has been noticed in the judgment dated 7.9.2006. The learned Counsel for the petitioners now Sri Mohd. Khalil prays for further three months' time to vacate the shop in dispute for which costs must be imposed upon the petitioners which in the facts and circumstances of the case is assessed at Rs. 20,000 in view of Salem Advocate Bar Association Tamil Nadu v. Union of India : AIR 2005 SC3353 , for use and occupation of the shop in dispute in spite of order and judgment and this Court and non-compliance of own undertaking given on behalf of the petitioners by their counsel.

It is expected that the authorities will recover the costs as arrears of land revenue from the petitioners and conclude the execution proceedings in accordance with law within a period of one month.

It may be noted that the husband of petitioner No. 1 who has already expired has her own son working in the roadways and the shop is being illegally occupied and hence she is liable to pay penal rent at the rate of Rs. 3,000 per month till she hands over the shop.

In case the petitioners did not hand over the shop which is situate in front of the Bus Stand at Meerut by the end of this month penal rent @ Rs. 3,000 per month shall also be recoverable from the petitioners hence forth as arrears of land revenue.

The application is accordingly corrected with aforesaid directions.

23. It appears that the petitioners went to the Apex Court against the aforesaid judgment and order dated 7.9.2006 and the Judgment and order dated 20.3.2007.

The Apex Court while dismissing the Special Leave to Appeal (Civil) No. Nil of 2007 ordered-

Delay condoned.

We do not want to entertain this special leave petition and the same is accordingly dismissed.

However, it will be open to the petitioners to make an application before the High Court to apply for withdrawal of the undertaking given by the petitioners in the High Court.

24. As regards the second review application is concerned, the Stamp Reporter on the second review application has submitted his report that against the impugned order the second review is not maintainable in view of the Order XLVII, Rule 9, C.P.C. The counsel for the petitioners has neither argued for withdrawal of the undertaking nor has argued on the question of maintainability of the second review application.

25. I am therefore, of the considered view that once the writ petition has been decided on merits, the scope of review is very limited and successive review applications are not maintainable. The first review application has been filed by a subsequent counsel Sri Khalil Ahmad without consent of the original counsel who is alleged to have given a wrong undertaking before the Court has neither filed review application nor has appeared in the Court to admit or deny the allegations made against him. It would be laying down a bad precedent to allow successive review applications by subsequent counsel by making allegations against the original counsel engaged initially. In the first review application the Court has considered all the aspects of the matter in its judgment and order dated 20.3.2007 by holding that the matter cannot be reopened by engaging another counsel.

26. Now the second review application has been filed, which has been argued by Sri Man Mohan Sharma, another subsequently engaged counsel. Nothing wild allegations stating that the petitioners had not given any instructions to the counsel for praying for time for vacating the shop premises. As stated earlier the first

review application was filed by Sri Mohd. Khalil Ahamad which was supported by affidavit of petitioner No. 3 for himself and for other petitioners in which there was no allegation against the original counsel.

27. This appears to be an abuse of process of the Court. The Court has not even been informed about the payment of cost of Rs. 20,000 imposed upon the petitioners as to whether it has been paid by them or not in compliance of the order of the Court. The allegations made against the counsel for the respondents that he has misled the Court and has obtained order by fraud and misrepresentation is incorrect in the facts and circumstances of the case and is also against the record as stated earlier, hence Judgments cited by the petitioner i.e., U. P. Junior Doctor Action Committee v. Doctor B. Sheetal Nandwani and Ors. : AIR 1991 SC909 and Adil Jamshed Frenchman (D.) L.Rs. v. Sardar Dastur School Trust and Ors. : AIR 2005 SC996 are not applicable.

28. None of the counsels who have been subsequently engaged in the first and second review application were even there when the case was argued by Sri I. K. Chaturvedi, counsel for the petitioners, the second review application is also not maintainable under Order XLVII, Rule 9, C.P.C.

29. The cases cited by the counsel for the petitioners are not applicable on facts and law. The case having decided on merits, the petitioner has remedy of appeal as held in R.P. Deshpande v. Maruti Balram HAIBAIT : [1998]3SCR1079 which remedy has not been foreclosed by the High Court in this case. In fact the petitioner had gone to the Apex Court but when their petition was dismissed as the Hon'ble Apex Court did not want to entertain the special leave petition, they prayed for making an application before the High Court to apply for withdrawal of the undertaking given by the petitioner in this Court.

30. Instead of moving an application for withdrawal of their undertaking, the petitioner moved a second review application misusing the leniency of the Apex Court in the order and judgment dated 11.7.2007 in the petition for Special Leave to Appeal (Civil) No. ...of 2007 CC 5242/2007, filed against the orders and judgments dated 7.9.2006 and 20.3.2007 of this Court wherein the Apex Court had observed that we do not want to entertain the special leave petition and the same

is accordingly dismissed. However, it will be open to the petitioners to make an application before the High Court to apply for withdrawal of the undertaking given by the petitioners in the High Court.

31. A counsel has full authority to make statement to withdraw the writ petition or file compromise. This power is derived by him in terms of contract enumerated in vakalatnama on behalf of his client. The counsel for the petitioners did not give any undertaking to the Court for vacating the shop by his client the petitioner within a period of six months rather had made an appeal to the Court after the petition was decided on merits in the nature of prayer so that his client may get some breathing time to search for an alternate during this period after losing the same in the High Court, hence it cannot be said that the counsel for the petitioners had not acted in a bona fide manner or that the respondent's counsel has misled the Court. Merely because a new counsel has been engaged by the petitioners he cannot be permitted to make any allegations against the counsel who had filed the case to get the case decided again on merits in the garb of first review and thereafter second review application. Tomorrow another counsel may be engaged and allegations may be made against the subsequent counsels engaged now.

32. There is to be a limit to such review applications and the dispute is to attain finality sometime. It cannot be kept pending on basis of one or the other applications at the sweet will of the litigant.

33. For the reasons stated above, the second review application is dismissed with cost of Rs. 20,000 to be recovered as arrears of land revenue from the petitioners in addition to cost of Rs. 20,000 which has been imposed on the petitioners in the first review application in pursuance to the order dated 20.3.2007.