

Devendra Kumar Mishra Vs. Ramendra Kumar and ors.

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Court : Allahabad

Decided On : Aug-29-2005

Reported in : AIR2006All82

Judge : N.K. Mehrotra, J.

Acts : Uttar Pradesh Code of Civil Procedure (CPC) (Amendment) Act, 2003 - Sections 115 and 115(1); ;Central Act; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 92 and 96

Appeal No. : C.R. No. 119 of 2005

Appellant : Devendra Kumar Mishra

Respondent : Ramendra Kumar and ors.

Judgement :

ORDER

N.K. Mehrotra, J.

1. This is a revision under Section 115 of the Code of Civil Procedure against the judgment and order dated 21.7.2005 passed by the Additional District and Sessions Judge, Court No. 5 Lakhimpur Kheri by which the learned Judge has granted permission to the opposite parties to file suit under Section 92 of the Code of Civil Procedure.

2. The opposite parties appeared by finding the caveat and I have heard the learned Counsel for the revisionist and the opposite parties finally on merit.
3. The opposite parties Nos. 1 to 5 moved an application under Section 92 C.P.C. for permission to file a suit for removal of trustees from the Trust and for breach to the terms and conditions of the trust of the temple of Thakurji Maharaj in Mohalla Dixitaana Goal Gokaran Nath which was admittedly constructed by Smt. Vidya Kunwari. It was alleged that a trust was created for public purposes and the opposite parties Nos. 1 to 5 in this revision are Hindus and are followers of Sanatan Dharm. It was alleged that the applicants used to perform the religious rites i.e. Puja and Archana and the temple is a public temple. It was pleaded that Smt. Vidya Kunwari created a trust on 22.7.1947 under a registered deed of trust with respect to the properties mentioned therein and formed a committee for the management of the said trust. It was provided in the trust deed that Smt. Vidya Kunwari will be Sarvakar during her life time and thereafter the revisionist, Badri Prasad and Bansh Gopal were appointed as trustees and they were given the right to manage the properties of the trust and to utilise the same for the object of the trust and no rights were conferred on them to alienate the property belonging to the trust. It was alleged that after the death of Bansh Gopal, one of the trustees, no other trustee was appointed in terms of the deed of the trust and the trust is being managed by the revisionist and Badri Prasad the remaining two trustees who are not taking any interest, rather they are utilising the property of the trust for their own benefit as their personal property.
4. The application for seeking permission for filling of the suit was contested by the revisionist alongwith Smt. Shanti Pandey who died during the pendency of the application under Section 92 of the C.P.C. on the ground that Smt. Vidya Kunwari constructed a private temple and installed deity of Thakurji Maharaj and created a private trust for its management through registered trust deed dated 22.7.1943. It was alleged that under the said trust deed, Smt Vidya Kunwari appointed herself to be the trustee for the management of the trust in her life time and thereafter revisionist, Badri Prasad and Bansh Gopal were appointed as trustees. It was alleged that right to manage the trust was conferred on the revisionist as a trustee for his life time and thereafter his generation after generation will remain Mutwali

(trustees). Beside three trustees referred to above appointed by Smt. Vidya Kunwari, she had also made a provision in the deed of trust for the appointment of five arbitrators who will provide assistance to the trustees in the management of the trust properties.

5. The case of the revisionist before the trial court is that the temple of Thakurji Maharaj is a private temple and public functions are not being organised thereon nor any offerings are put by public at large. It was contended that no outsiders had ever managed the properties of the trust or the temple nor the respondents Nos. 1 to 5 had ever performed any Pooja and Archana and other religious ceremonies. It was argued that since the temple of Thakurji Maharaj is a private trust, the respondents Nos. 1 to 5 have got no legal right to seek permission to institute a suit against the trust by alleging it to be a public trust.

6. The question whether the temple of Thakurji Maharaj, Gola Gokaran Nath is a private trust or it is a public trust has been decided by the impugned order by holding that since there was other trustees appointed by Smt. Vidya Kunwari, one of whom namely Badri Prasad was Vaishya by caste and other one namely Bansh Gopal who was a Brahman did not belong to the family of the trustee hence it is a public trust which is also evidenced by one of the conditions of the deed of trust wherein five panchs were appointed for the management of the trust. After seeing the caste of the panchs who were not of the same caste or the family of the trustees, the trial court concluded that the trustee had given the actual control of the management of the properties of the trust to the persons belonging to the different caste, hence it is a public trust. After recording this finding, the trial court accorded permission to the respondents Nos. 1 to 5 to institute the suit under Section 92 of the Code of Civil Procedure.

7. The learned Counsel for the respondents Nos. 1 to 5 has contended that the revision against the order under Section 92 of the Code of Civil Procedure according permission to file a suit is not maintainable against the order is not a case decided.

8. In support of his statement, the learned Counsel for the respondent Nos. 1 to 5 has placed reliance on a judgment of this Court in Leela Nanda Thakur Pagal

Baba Trust Prabandh Samitit v. Thakur Radha Govindji Maharaj Mrindavan: 2000(3) AWC 2064. A perusal of this judgment goes to show that the trial court had granted permission to only for institution of the suit without deciding any issue on merit as is clear from paragraph 7 of the report that the leave Was granted only for institution of the suit which was also subject to revocation on merit if it was pointed out by any of the parties that the leave could not have been granted or any ground whatsoever. It was also observed that it is always open to the court to decide this questions on merit in the suit itself even before proceeding with the suit. These observations give impressions that the impugned order in that case was not passed on merit after taking into consideration the respective contentions of the parties.

9. Learned Counsel for the revisionist has relied on a decision of this Court in Sultan Leather Finishers Pvt. Ltd. v. Addl. District Judge, Court No. 4, Unnao : 2005 (23) LCD 476 in which this Court has held that 'in case an application is decided finally moved for a particular relief or order during the pendency of a suit, in pursuance to provisions contained in the Code of the Civil Procedure, its final disposal shall amount to decide an issue in the course of a suit. In the absence of any remedial provision, a revision was allowed against such order under Section 115 of the Code of Civil Procedure.'

10. Besides the above, I find that there is a provision of appeal under Section 96 of the Code of Civil Procedure against an order refusing the permissions to file a suit under Section 96 C.P.C. but there is no provision of appeal if the competent court accords the permission to file suit under Section 96 C.P. C. In such cases where there is no provision of appeal a revision can be filed under Section 115 C.P.C. if the grounds as mentioned under Section 115 C.P.C. are available.

11. In Sadhana Lodh v. National Insurance Co. Ltd.: : [2003]1SCR567 Supreme Court has held that whether remedy of appeal is not available to aggrieved person against the order passed by the District Judge, then such person may prefer a revision before the High Court under Section 115 of the Code of Civil Procedure.

12. The provision under Section 115 C.P.C. as amended by Act No. 46/1999 is as follows:

115. Revision - (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

a) to have exercised a jurisdiction not vested in it by law, or

b) to have failed to exercise a jurisdiction so vested, or

c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High court may make such order in the cases as it thinks fit:

(Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.)

((2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.)

((3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.)

Explanation - In this Section, the expression 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.)

13. Later on the State Legislature passed Code of Civil Procedure (Uttar Pradesh Amendment Act, 2003) by which Section 115 C.P.C was amended as applicable in Uttar Pradesh. The provision under Section 115 C.P.C as amended in its application in the State of Uttar Pradesh is as follows :

115. Revision. (1) A Superior Court may revise an order passed in a case decided in an original suit or other proceedings by a subordinate court where no appeal lies against the order and where the subordinate court, has,

a) Exercised a jurisdiction not vested in it by law: or

b) Failed to exercise a jurisdiction so vested; or

(c) Acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under Sub-section (1), when filed in the High Court shall contain a certificate on the first page of such application, below the title of the case to the effect that no revision in the case lies to the District Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the District Court

(3) The Superior Court shall not, under this section, vary or reverse any order made except where,

(i) the order, if it had been made in favour of the party applying for revision would have finally disposed off the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or can irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before court except where such suit or other proceeding is stayed by the Superior Court.

Explanation I - In this section,

(i) the expression 'Superior Court' means-

(a) the district court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in case decided by the District Court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the district court exceed five lakh rupees.

(ii) the expression 'order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II. The provisions of this section shall also be applicable to order passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencements.'

14. In the Central Act, the phrase 'used' in Section 115 C.P.C. is 'in case which has been decided by any court' while in the provision as applicable in the State of Uttar Pradesh from the date of the aforesaid amendment i.e. 22.3.2003 the phrase 'used' in Section 115 C.P.C. is 'an order passed in a case decided in an original suit' and the expression 'order' has been explained by explanation (1) by providing that the expression 'order' includes an order deciding an issue in any original suit or other proceedings.

15. In the instant case, the impugned order is an order by which an issue whether the temple of Thakurji Maharaj, Gola Gokaranath is a private trust or public trust, has been decided. It is not an ex parte order The impugned order is an order passed on merit after hearing both the parties by which this issue has been finally decided and matter is not open for further hearing by the trial court. Therefore, the revision against such an order is maintainable.

16. In *S.S Khanna v. F.J. Dillon* : AIR 1964 SC 467 and *Baldev Das Shiv Lal v. Philmistan Distributors* : : [1970]1SCR435 , it was laid down by the Supreme Court that a particular order would come within the expression 'case decided' if thereby the court adjudicates or the purpose of suit, some rights and obligations of the parties in controversy.

17. The trial court has held that temple is public trust. For this finding, the provision under Section 92 C.P.C. is to be considered. To invoke Section 92 C.P.C., three conditions have to be satisfied namely; 1) The trust is created for created for public purpose of a charitable or religious nature; ii) There was a breach of trust or direction of a court is necessary in the administration of such a trust and; iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the three conditions is not satisfied, the suit falls outside the scope of the said Section 92 C.P.C.

18. A suit under Section 92 C.P.C. is of special nature which presupposes the existence of a public trust of a religious or charitable character.

19. Now the question is how the nature of the trust is to be determined. The trial court has decided the nature of the trust on the basis of the averment in the deed that certain persons who do not belong to the family of the creator were appointed as trustees and panchs to assist but to my opinion it is not the correct criteria to decide the nature of the trust.

20. In *Ram Dularey v. IVth Additional District Juge, Varanasi and Ors.*: 1996 (29) (SIC): *Ram Dularey v. IV Additional District Judge, Azamagarh 31*, it has been held by this Court after following certain decisions of the Supreme Court that whether a 'Matth' or a temple is a public religious institution depends upon the finding as to whether the public has right in such religious institutions. The basic test is who are the beneficiaries of the endowed property. If the beneficiaries are the general public or the section of the same and not an independent body of individuals, it can be treated as public trust. In case, where there is temple and the public is permitted by the Shivayat to worship or make their offerings to the deity that by itself may not create any right in the public, it has to be established that the public has a right and the endowment was made for the benefit of the public. A perusal of the trust deed goes to show that there is nothing to show that the public was given any right in any capacity or the public was the beneficiary of this temple. Mere management in consultation with certain persons, who do not belong to the caste or family of the creator of the trust is not sufficient to infer that trust is a public trust.

21. Since the learned trial court has decided the question of nature of the trust illegally and with material irregularity, the revision is to be allowed.

22. It appears from the averment of the trust deed that temple of Thakurji Maharaj Dixitaana, Gola Gokaranath which was constructed by Mussammat Vidya Kunwari by executing the trust deed was a private trust and therefore, the suit does not lie within the scope of Section 92 C.P.C.

23. In view of the above, the revision is allowed and the impugned judgment and order dated 21.7.2005 passed by the Additional District and sessions Judge, Court No. 5, Lakhimpur Kheri is quashed.

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