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Court : Rajasthan

Decided On : Jul-25-1968

Reported in : AIR1969Raj41

Judge : D.S. Dave, C.J. and; C.M. Lodha, J.

Acts : Constitution of India - Article 226; Code of Civil Procedure (CPC) - Sections 4(1) - Order 9, Rule 9

Appeal No. : Civil Writ Petn. No. 369/66

Appellant : Ramsingh

Respondent : State of Rajasthan and ors.

Advocate for Def. : R.K. Rastogi, Adv. for Respondent No. 7 and; M.M. Vyas, Addl. Adv. General

Advocate for Pet/Ap. : M.M. Tewari, Adv.

Disposition : Petition dismissed

Judgement :

Lodha, J.

1. By this writ application the petitioner has challenged the correctness of the judgment of the Board of Revenue, Rajasthan, dated 24-12-60, whereby the

respondent No. 7, namely Smt. Roop Kanwar, daughter of Thakur Jait Singh, the last holder of the jagir of Charwas, was recognised as his heir and compensation on account of the resumption of his jagir was ordered to be paid to her.

2. We do not think it necessary to act out the facts stated in the writ application in detail, as. in our opinion, the writ application deserves to be disposed of on the preliminary objection raised by the learned counsel for the respondent No. 7. The preliminary objection is that the present writ application is not maintainable. In order to appreciate the preliminary objection, it Would be necessary to give a few facts leading to the filation of this writ petition,

3. The impugned decision of the Board of Revenue was given on 24-12-60. A writ application challenging the correctness of the said decision of the Board of Revenue was filed in this Court by the petitioner on 23-5-61 and was registered as D. B. Civil Writ Petition No. 273 of 1961. It was admitted on 30-5-61 and after service of notices on the opposite parties, it was listed for hearing on, 13-1-65. On this date no body appeared on behalf of the petitioner with the result that it was dismissed in default. An application for restoration was filed and the writ application was restored on 7-4-65. Unfortunately for the petitioner, the writ application was again dismissed in default on 13-4-66 in the presence of Shri D. P. Gupta, counsel for respondent No. 7. This time also an application for restoration was made on 18-4-66, but it was dismissed after hearing the learned counsel for the petitioner on 20-4-66. It would be proper to reproduce the order of the Court dated 20-4-66 dismissing the application for restoration. It is as follows;

'We have heard learned counsel and perused the application and affidavits filed on behalf of the petitioner for restoration of his writ application. We are sorry to have to say that the affidavit filed by Mr. R. S. Kejriwal that this case was taken up at 3 O' clock in the day and that he was watching it until that time is factually incorrect for we fully remember that this case was taken up before lunch and we dismissed it then and Om Prakash's case which was No. 5 on day's list was started immediately after lunch. In these circumstances, we are entirely unable to accept the petitioner's application for restoration as it fails to disclose sufficient cause for the same. The application is accordingly dismissed.'

This is the second writ application which has been filed on 3-5-66 on the same facts. In the reply filed on behalf of respondent No. 7, an objection has been taken that the previous writ application having been dismissed in default in the presence of the counsel for respondent No. 7 and the application for its restoration also having been dismissed, this second writ application does not lie.

4. We have heard learned counsel for the parties at considerable length. Mr Tewari, learned counsel for the petitioner, has vehemently argued that this second writ application is not bad and . in support of his contention, he has relied on a number of decisions of their Lordships of the Supreme Court. He has referred to Daryao v. State of U. P. : [1962]1SCR574 , Devendra Pratap Narain Rai Sharma v. State of U. P.. : (1962)ILLJ266SC . State of Uttar Pradesh v. Dr. Vijay Anand Maharaj. : [1962]45ITR414(SC) , Amalgamated Coalfields Ltd. v. Jana-pada Sabha. Chhindwara : AIR 1964 SC1013 , Gulabchand Chhotalal Parikh v. State of Gujarat. : [1965]2SCR547 and Sheodan Singh v. Daryao Kunwar : [1966]3SCR300 . We have gone through all these decisions and do not think it necessary to discuss the propositions of law laid down by their Lordships of the Supreme Court in them, because, according to us none of them has a direct bearing on the facts and circumstances of the present case. Suffice it to say that the propositions of law, in this connection, have been laid down by their Lordships of the Supreme Court in : [1965]2SCR547 , referred to above, and we cannot do better than to reproduce them hereunden

1. If a petition under Article 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.

3. If the petition under Article 226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because It is held that the party had an alternative remedy available to it the dismissal of the writ

petition would not constitute a bar to a subsequent petition under Article 32.

4. Such a dismissal may, however, constitute a bar to a subsequent application under Article 32 where and if the facts thus found by the High Court be themselves relevant even under Article 32.

5. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32, because, in such a case, there had been no decision on the merits by the Court.'

Learned counsel for the petitioner submits that in the above case one of the propositions of law laid down is that if a writ petition under Article 226 of tha Constitution is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata. The learned counsel for respondent No. 7, on the other hand, submits that he has no quarrel with the proposition submitted by the learned counsel for the petitioner on the basis of the various decisions given by their Lordships of the Supreme Court, but his contention is that the present writ application is barred not on the principles of res judicata but on account of the principle contained in Order 9, Rule 9 of the Code of Civil Procedure and Rule 382 of the Rules of this Court. We may also state, at once, that the question of res judicata is not involved in the present case as it is not the case of any of the parties that the institution of the present writ application is hit by Section 11 C.P.C. or by the general principles of Res Judicata. The only question, therefore, is, whether the petitioner is precluded from filing this writ petition on account of the principles contained in Order 9, Rule 9, C. P. C. and/or the provisions contained in Rule 382 of the Rules of this Court. Order 9, Rule 9, C. P. C reads as follows:

'Order 9, Rule 9 (1):-- Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.' At this stage, we may also reproduce Rule 382 of the Rajasthan High Court Rules, 1952. It runs as follows:

'Rule 382 -- Where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts.'

The argument of the learned counsel for respondent No. 7 proceeds thus. By making reference to Section 141 C. P. C. he submits that a petition under Article 226 of the Constitution falls within the ambit of a civil proceeding as used in that section. He contends that a writ application under Article 226 is a civil proceeding to which the procedure provided in the Code of Civil Procedure in regard to suits will apply. Consequently, he submits that by pressing into service Order 9, Rule 9, C. P. C. the present writ application would be barred as the previous writ application has been dismissed in the presence of the opposite party and the application for its restoration was also dismissed. In the alternative, he submits that even if the provisions contained in the Code of Civil Procedure are not made applicable in terms, the principle behind Order 9, Rule 9 would nevertheless be applicable. Lastly, he contends that apart from the provisions of the Code of Civil Procedure, the present application would also be barred under Rule 382 of the Rules of this Court which lays down that where an application under Article 226 of the Constitution has once been rejected, it shall not be competent for the applicant to make a second application on the same facts.

5. Before embarking upon the consideration of the contentions raised by the learned counsel for the respondent No. 7, we may state that there is no dispute between the parties that the present writ application is based on the same facts on

which the previous writ application, referred to above, was filed by the petitioner. Now, it remains to be considered whether the present writ application is barred under Order 9, Rule 9 C. P. C. Learned counsel for the respondent No. 7 has invited our attention to a number of decisions in support of his contention that a writ application filed before this Court under Article 226 is a civil proceeding- In Krishnalal Sadhu v. State of West Bengal : AIR1967 Cal275 it was observed that Section 141 C. P. C. was directly attracted to an application under Art 226 of the Constitution and, therefore, such provisions of the Code of Civil Procedure as can be suitably applied to writ proceedings were applicable to such proceedings.' In this view of the matter, the learned Judges of the Calcutta High Court held that the provisions of Order 22 C. P. C. would be applicable to writ proceedings.

6. Again, in Assistant District Pan-chayat Officer, Rae Bareli v. Jainarain Pradhan : AIR1967 All334 , it was held that 'when the proceedings in a High Court on a petition under Article 226 of the Constitution relate to civil rights, they are civil proceedings.' It was further held that 'writ proceedings being civil proceedings, the provisions of the Code of Civil Procedure apply to them under Section 141 C.P.C., in so far as the provisions of the Code can be made applicable.'

7. Learned counsel for the respondent No. 7 also invited our attention to three decisions of our own High Court. Firstly, in Taxi Motor Association, Kankroli v. Appellate Authority, Transport to which one of us was a party, it was held that 'the Court has an inherent power to deal with an application to set aside an ex parte order made on an application for issue of a writ under Article 226 of the Constitution on a proper case having been made out.' It was further held that 'even though Section 141 CPC may not be specifically applicable, the Court has inherent powers on the analogy of Order 9, Rule 13 CPC to set aside its ex parte order for the ends of justice and preventing the abuse of process.'

8. A question again cropped up before this Court whether an application for issue of a writ under Article 226 is to be treated as a civil proceeding for the purpose of grant of leave to Supreme Court under Article 133 of the Constitution, In Nahar Singh v. State of Rajas-than, AIR 1955 Raj 56, it was held that 'under the Rules of the Rajasthan High Court, writ proceedings are dealt with in two Chapters, namely

Chapter XXI and Chapter XXII. Chapter XXI deals with writs of Habeas Corpus or with applications under Section 491 Cr, P. C., while Chapter XXII deals with all writs under Article 226 of the Constitution other than a writ in the nature of the Habeas Corpus. It is obvious from this distinction made in the Rules that writs of Habeas Corpus are criminal proceedings, while all other writs are treated as civil proceedings in this Court, There can be no doubt, therefore, that an application for a writ other than the writ of Habeas Corpus, challenging the validity of an Act is a civil proceeding.'

9. We may then refer to State v, Ugamsingh . In that case, while dealing with a matter arising out of the proceedings under Section 479A, Cr. P. C., it was observed that the expression 'Civil Court' was not defined anywhere and if the proceedings before a duly constituted court were of such a nature that they will involve a decision of the civil rights of the parties and the Court has jurisdiction to decide those rights, it would be in consonance with the general principles of interpretation to hold that the court exercising jurisdiction in such a matter was acting as a civil court. It was further observed that 'on the broad principle this Court must be taken to be acting as a civil court while deciding a writ application pertaining to a civil right of a party'. On the basis of the aforesaid decisions, learned counsel for the respondent No. 7 has submitted that according to the view taken fay this Court in the earlier decisions, a writ application under Article 226 of the Constitution must be held to be a civil proceeding and as a necessary corollary, the procedure laid down in the Code of Civil Procedure must, as far as it can be, made applicable to it, by virtue of Section 141 C. P. C.

10. In this connection, the learned counsel for the petitioner has placed strong reliance on the following observations of their Lordships of the Supreme Court in AIR 1962 SC 1384 referred to above:

'The High Court has disallowed to the appellant his salary prior to the date of the suit. The bar of Order 2 Rule 2 of the Civil Procedure Code on which the High Court apparently relied may not apply to a petition for a high prerogative writ under Article 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would

be justified in interfering with the exercise of its discretion by the High Court.'

To lend further force to his argument, he has referred to a still later decision of their Lordships of the Supreme Court in : [1965]2SCR547 referred to above. In that case, while dealing with the impact of the principles of res judicata on writ proceedings, their Lordships also examined the applicability of Order 2 Rule 2 CPC to such proceedings and expressed themselves in the following terms:

'It is urged that if a decision in a writ application on merits be held to operate as res judicata in a regular suit, the provisions of Order 2, Rule 2, CPC would also be applicable to the institution of the subsequent suit with respect to such part of the cause of action for which no relief was sought in the writ petition. The contention is not sound as the provisions of Order 2, Rule 2 apply only to suit. Sub-rule (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit.'

On the question, whether in a writ application filed under Art 226 of the Constitution the procedure laid down in the Code of Civil Procedure would be applicable or not, the learned counsel for the petitioner has placed reliance on a Bench decision of this Court in Chandmal Nauratmal v. State of Rajasthan . So far as the observations made by their Lordships of the Supreme Court are concerned, we may state at once that in : (1962)ILLJ266SC referred to above, the question had not arisen at all as to whether a writ is a civil proceeding and whether the procedure laid down in the Code of Civil Procedure would be applicable to writ procedure. In that case, the writ application was dismissed by the High Court on the ground that the petitioner's claim for salary was barred by virtue of Order 2, Rule 2 CPC. On appeal, their Lordships of the Supreme Court concurred with the view expressed by the High Court and did not feel persuaded to interfere with the

order of the High Court passed in the exercise of its writ jurisdiction and it was observed that the bar of Order 2, Rule 2 CPC may not apply to writ proceedings. Thus, the question whether the writ proceedings fall within the ambit of civil proceedings was not at all canvassed before their Lordships of the Supreme Court.

11. Again in : [1965]2SCR547 . Supra, the question whether the writ proceedings before the High Court under Article 226 of the Constitution are civil proceedings was not at all dealt with. What was contended in that case was that Order 2, Rule 2. CPC would not apply to writ proceedings and their Lordships by interpreting Order 2, Rule 2. CPC on its very language held that these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit. The rationale of the decision therefore is that If in a writ application certain portion of a claim is omitted, such an omission in the writ application would not bar its inclusion in a suit subsequently instituted. Thus, the point which we are called upon to determine was not the subject matter of decision before their Lordships of the Supreme Court in any of these cases.

12. Another decision relied upon by Mr. Tewari in support of his contention that a writ under Article 226 is not a civil proceeding is : [1962]45ITR414(SC) . All that their Lordships of the Supreme Court were pleased to lay down in that case was that 'it is clear from the nature of the power conferred under Article 226 and the decisions on the subject that the High Court in exercise of its power under Article 226 exercises original jurisdiction though the said jurisdiction shall not be confused with its original civil jurisdiction,'

It was further observed that 'this jurisdiction, though original in character as contrasted with its appellate and revi-sional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may. for convenience, be described as extraordinary original jurisdiction.' This extraordinary original jurisdiction, however, may, in our opinion, be civil or criminal, It may be observed that if a writ application under Article 226 is made before the High Court for enforcement of any civil rights, then the extraordinary original jurisdiction which the High Court would exercise in such a matter would amount to a civil

proceeding. We have been able to lay our hands on a later decision of their Lordships of the Supreme Court in S. A. L. Narayan Row v. Ishwarlal Bhagwandas : [1965]57ITR149(SC) where such a view has been taken. In that case, while dealing with the question of applicability of Article 133 of the Constitution to writ proceedings before the High Court, their Lordships of the Supreme Court were pleased to observe as follows:

'A civil proceeding is therefore one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relied such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status, etc.'

Again, after discussing the law on the subject, their Lordships were pleased to arrive at the following conclusion:

'By a petition for a writ under Article 226 of the Constitution, extraordinary jurisdiction of the High Court to issue high prerogative writs granting relief in special cases to persons aggrieved by the exercise of authority statutory or otherwise by public officers or authorities is invoked. This jurisdiction is undoubtedly special and exclusive, but on that account the nature of the proceeding in which it is exercised is not altered. Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the Civil rights of the party aggrieved and when relief is claimed in that behalf it is a civil proceeding, even if relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs.'

Thus, it is idle to argue that when a writ application is filed before the High Court invoking its extraordinary jurisdiction under Article 226 of the Constitution for enforcement of the civil rights, it is not a civil proceeding.

13. The question still, however, remains whether Section 141 CPC would apply in terms to writ proceedings instituted under Article 226 of the Constitution. We may

state at once that the judicial opinion is divided on this question and we have not been able to lay our hands on any pronouncement of their Lordships of the Supreme Court on this point. A few authorities have been cited by the learned counsel for respondent No. 7, as mentioned above, in support of his contention that Section 141 C.P.C. applies to writ proceedings and to those we may further add two more authorities, one of the Punjab High Court Sonaram Rangaram v. Central Government and the other of the Andhra Pradesh High Court Annam Adinarayana v. State of Andhra Pradesh : AIR 1958 AP16 . A contrary view has been taken by the Calcutta High Court in Bharat Board Mills Ltd. v. Regional Provident Fund Commissioner : AIR1957 Cal702 and the Madras High Court in Management of Rain Bow Dying Factory. Salem v. Industrial Tribunal AIR 1959 Mad 137. But so far as this Court is concerned, we must bear in mind that in the Rules made by this Court special procedure has been provided with respect to petitions under Article 226 of the Constitution. Chapter XXII of the Rules of this Court deals with direction, order or writ under Article 226 of the Constitution other than a writ in the nature of habeas corpus. Thus, as observed in an earlier decision of this Court in , referred to above. Art 226 of the Constitution has conferred an extraordinary jurisdiction on the High Court and the mode of exercising the same is governed by Rules that the Court has framed.' It was further emphasised that the provisions contained in the Code of Civil Procedure will not be attracted to this special jurisdiction in terms, because Section 4(1) of the Code of Civil Procedure provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force. It is thus clear that special procedure has been provided in the Rules of this Court for writ proceedings under Article 226 of the Constitution and, therefore, the provisions of the Code of Civil Procedure cannot apply in terms to such proceedings. This, however, does not mean that the principles contained in the Code of Civil Procedure would have not application at all to the writ proceedings. In our view, those provisions of the Code of Civil Procedure which do not come in conflict with the Rules made by this Court and which can be suitably made applicable to the writ proceedings, will apply to writ proceedings. In other

words, even though the provisions of the Code of Civil Procedure may not apply with full rigour to writ proceedings we are of the opinion that writ proceedings would nonetheless be governed by the principles analogous to those contained in the Code of Civil Procedure so far as they are not inconsistent with the Rules made by this Court on the subject.

14. Learned counsel for respondent No. 7 submits that there is no provision in the Rules of this Court either setting aside the ex parte proceedings in a writ matter or for making an application for restoration of the writ application dismissed in default and, therefore, the provisions contained in the Code of Civil Procedure, in this respect, can be suitably applied to the writ proceedings.

In referred to above, it was observed by this Court that even though Section 141 CPC may not be specifically applicable, the Court has inherent powers on the analogy of Order 9 Rule 13 CPC to set aside its ex parte order! for the ends of justice and preventing the abuse of process. Learned counsel submits that on the same principle the present writ application is not maintainable in view of the fact that the earlier writ application on the same facts was dismissed in default in the presence of the opposite party and the application for restoration too was dismissed. He also submits that the principle contained in Order 9, Rule 9 CPC is indeed a salutary principle, inasmuch as there is no reason why a party should be harassed for the same cause over and over again when the Court has once held that the petitioner has been guilty of laches.

It is further submitted by him that if the proposition submitted by the learned counsel for the petitioner is accepted, it would result not only in great harassment of the parties, but would also entail unnecessary waste of Court's time. We are of the view that the submission made by the learned counsel for the respondent No. 7 is not without force, and if the contenton raised on behalf of the petitioner to the effect that the petitioner has a right to invoke the extraordinary jurisdiction of this Court under Art, 226 of the Constitution successively unless the matter has been disposed of on merits, is driven to its logical conclusion, it would result in reductio ad absurdum.

The result of acceptance of such a proposition would mean that even though a writ application may have remained pending for a few years and then it has been dismissed in default or may have been disposed of for any other reason except on merits, the petitioner would have a right to move such an application on the same facts again and again till it is disposed of on merits. Looked at from another point of view, such a procedure would result in disregarding and circumventing the earlier orders of this Court. In these circumstances, we are of the opinion that the principle contained in Order 9, Rule 9, CPC :an be suitably applied to writ proceedings. As has already been stated above, the earlier writ application in this case based on the same facts was dismissed in default in the presence of the opposite party and the application for its restoration was dismissed on merits. Thus, applying the principle contained in Order 9, Rule 9, CPC, the present writ application is not maintainable. Even otherwise we may state that, in the circumstances of the present case, we are not prepared to exercise our inherent and extraordinary jurisdiction in favour of the petitioner on this second writ application. The preliminary objection raised by the learned counsel for respondent No, 7 has, therefore, force and must prevail.

15. The result is, that this writ application is dismissed as not maintainable. In the circumstances of the case,however, the parties are left to beartheir own costs.

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