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Court : Rajasthan

Decided On : Apr-26-2004

Reported in : AIR2004Raj241; RLW2004(4)Raj2298; 2004(3)WLC307

Judge : N.N. Mathur and; K.K. Acharya, JJ.

Acts : [Constitution of India](#) - Article 226; Code of Civil Procedure (CPC) - Order 39, Rules 1 and 2 - Order 43

Appeal No. : D.B.C.S.A. No. 581 of 2003

Appellant : Munna Ram

Respondent : State of Rajasthan

Advocate for Def. : B.C. Mehta, Adv. for Respondents 1 and 2 and; N.L. Joshi, Adv. for Respondent 3

Advocate for Pet/Ap. : G.R. Punia, Adv.

Disposition : Appeal dismissed

Judgement :

Mathur, J.

1. We have heard learned counsel for the appellant and perused the order of the learned single Judge dated 1-9-2003.

2. The appellant filed a writ petition seeking direction to quash the order dated 20-1-2003 (Annex. 1) on the ground that no notice for opening the new water course through the land of the appellant was given nor any compensation or land in lieu thereof. It was further submitted that the water course was sanctioned in favour of third respondent in complete disregard to the provisions of Rajasthan Irrigation and Drainage Rules, 1955 and further in violation of the principles of natural justice. Learned single Judge dismissed the writ petition on the ground that the CAD Scheme was sanctioned much earlier in the department and, therefore, such an order which has the effect of setting aside the sanctioned scheme has rightly been set aside by the Superintending Engineer because the same was passed without there being any opportunity of hearing to the opposite party.

3. It is contended by the learned counsel that even if it is assumed that the order of Superintending Engineer is illegal as the opportunity of hearing was not given to the opposite party, in that event also, the matter could have been remitted to the Executive Engineer for passing a fresh order after giving opportunity of hearing to the parties concerned.

4. At this stage, a preliminary objection has been raised by the learned counsel appearing for the third respondent to the effect that writ petition itself was not maintainable in view of the fact that the appellant not only availed the remedy by way of filing civil suit but contested the matter and has taken a decision on an application under Order 39, Rules 1 and 2, CPC by a competent Civil Court. Reliance has been placed on a decision of learned single Judge of this Court in J.S. Rawat v. National Airport Authority, 1991 (1) Raj LR 210. In our view, the preliminary objection deserves to be upheld. It is of course true that the civil suit cannot be said to be an alternative remedy and the writ petition cannot be thrown out simply on the ground that a party has already availed the remedy of civil suit. There may be cases, where at a later stage, it is realized that filing of the civil suit was ill-advised and the party may withdraw the same and approach to High Court by way of petition under Article 226 of the [Constitution of India](#). Even after filing a writ petition, if an objection is raised as to the pendency of the civil suit, the party may withdraw the civil suit and press the writ petition. However, the situation would be different, where a party not only files a civil suit but also fully contests the

matter for temporary injunction. Once a party obtains a decision of the competent civil Court as to merits of the case, then it would not be permissible to turn round and approach to this Court under Article 226 of the [Constitution of India](#) ignoring the judgment of the competent Civil Court on an application for temporary injunction. Once a party has obtained a decision on merits on an application for temporary injunction, then the remedy is only by way of Miscellaneous Appeal under Order 43, CPC and not shifting to a remedy of writ under Article 226 of the [Constitution of India](#). Such sort of tendencies cannot be encouraged.

5. In the instant case, the respondent No. 3 has placed on record the order of the learned Civil Judge (JD), Anupgarh dated 29-7-2003. Learned Civil Judge after considering all the documents on record, has found no prima facie case in favour of the appellant. Thus, the application was dismissed by order dated 29-7-2003. A perusal of the order shows that the appellant challenged the order of the Superintending Engineer dated 20-1-2003 by way of filing suit. A prayer was also made for interim injunction of the order of the Superintending Engineer dated 20-1-2003. A reply to the application was filed. The matter was argued at length. Learned Civil Judge recorded a finding that there was no prima facie case in favour of the appellant. After the application under Order 39, Rules 1 and 2, CPC was rejected by the order of the Civil Court dated 29-7-2003, the present writ petition has been filed on 21-8-2003. Thus, the preliminary objection is upheld. No case is made out for interference by this Court with the order of the learned single Judge.

6. Accordingly the Special Appeal stands dismissed.