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Court : Delhi

Decided On : May-01-2012

Judge : The Honourable Acting Chief Justice Mr. a.K. Sikri & Rajiv Sahai
Endlaw

Appeal No. : LPA No.306 & 307 OF 2012

Appellant : Ravi Kumar Jain

Respondent : Dda and Others

Advocate for Pet/Ap. : Mr. Bose

Judgement :

A.K. Sikri, Acting Chief Justice:

1. Before we point out the nature of orders passed in the writ petitions filed by the petitioner and thereafter in the applications filed by the petitioner for recall of those orders, we briefly trace out the history of the present litigation.

2. The appellant claims to be in possession of land measuring 19 bhigas and 18 biswas in Khasra No. 1569 in the revenue estate of village Mehrauli, Tehsil Mehrauli, Delhi. As per the averments he owned 18 bhiga and 10 biswas of land and in respect of remaining 1 bhiga and 8 biswas he entered into an agreement to sell with the co-owners of the said land and has obtained possession from the vendors under the said agreement to sell. The dispute today has arisen about the

way/passage for accessing the aforesaid land of the appellant. The way/passage of the appellant is through the main road where a gate has been constructed by the respondent no.3 which further leads to another gate also constructed by respondent no.3. The metalled road ends at this point i.e. the second gate. Thereafter, the unmetalled/kacha passage moves ahead passing through other lands and leading eventually to the said land. According to the appellant, when he purchased the land in question, the previous land owners granted the right to way/passage to him and he was using this passage/right of way since the purchase of the land by him without any obstruction. This is the northern side of the land of the appellant which passes through Khasra No. 1561-64. The area in question contains old/ancient structures and ruins. The land in question stands acquired by the DDA (Respondent no.1). As per the Archaeological Survey of India (Respondent No.3), this land through which the appellant wants passage to access his land falls within the boundaries of the protected sites under the Archaeological Survey Act.

3. On these grounds, the respondents have their reservations in allowing the appellant to make use of this land as path way. When the appellant found certain construction workers engaged at the site who informed the appellant that they had clear instructions from the respondent to block the opening as well by connecting the walls and thereby plugging the gap. According to the appellant, on the western side of the appellant's land, an unauthorized colony known as the "Christian Colony" has come up which is mushrooming till the boundary of the appellants land, and is bounded by boundary wall. Since this boundary wall needed repairs and when the appellant wanted to carry out these repairs in August, 1995, the respondent no.3/ASI objected to the repair of the said boundary wall. This forced the appellant to file W.P.(C) 92/1996 claiming right to access through the aforesaid land by way of passage. By interim orders the appellant was allowed to construct/repair the boundary wall.

4. It is further the case of the appellant that when he sought to proceed with the construction of the boundary wall, respondent no.1 raised an objection on the ground that it would itself, after the demarcation, erect the boundary wall on the southern and western boundaries. The appellant did not raise objection as it would

have perfected the demarcation of appellant land from the government land. Accordingly, the wall was constructed by the DDA. However, as per the appellant, the said wall constructed by the DDA was well inside the land of the appellant and, therefore, vide letter dated 26.11.1996 he requested the DDA to shift the wall. The DDA, on the other hand, took the position that the wall was correctly built on its own land. In order to sort out the matter, the DDA vide letter dated 25.3.1997 wrote to the Revenue Assistant to get the land demarcated. The Revenue Assistant directed the Tehsildar to conduct the demarcation but it could not be done because of the alleged non-cooperation of the DDA. Since the issue of demarcation remained pending, the appellant filed another writ petition i.e. W.P.(C) 3777/2000 seeking directions upon the Revenue authorities to carry out the demarcation. Certain interim orders were passed in this petition also from time to time. These orders included directions dated 29.11.2000 to the Revenue Authorities to conduct the demarcation. Needful was not done. This writ petition was disposed of. According to the appellant, in November, 2003, the ASI Constructed a wall/stone path/platform of about 3ft. in height, about 20 ft in width and about 200 ft. in length in the passage leading to the said land, thereby completely blocking the access to the said land. The appellant again approached the Court by filing Writ Petition (C) 9525/2003. Certain interim orders/directions were given in this writ petition to which we will revert back at a later stage.

5. Coming to the events which have lead to controversy and present appeal, these two writ petitions came up for final hearing before the learned Single Judge. The matter was heard at length on 24.11.2011. It appears that there was a serious reservation about the maintainability of these petitions under Article 226 of the Constitution of India as these issues could be sorted out in appropriate civil or revenue Court. At this juncture, the learned Senior Counsel for the appellant sought permission to withdraw the petitions with the liberty to pursue rights before the appropriate civil or revenue Court. The petitions were allowed to be withdrawn. As this order is the bone of contention, we would like to reproduce the same in its entirety:-

“After substantial arguments, learned senior counsel for the petitioner, on instructions from the petitioner who is present in Court wishes to withdraw this

petition with liberty to pursue the petitioner's rights before the appropriate civil or revenue Court. In case the petitioner invokes Section 14 of the Limitation Act while pursuing his other remedies, the concerned Court shall take into consideration the fact that connected petition being W.P. (C) 92/1996 has been pending since the year 1996.

Petition stands disposed of. Interim orders stands vacated."

The order was passed in the open Court in the presence of the appellant. Obviously, the appellant who is a highly educated person had come to know of this order there and then.

6. Notwithstanding the fact that, as per the order, writ petition was withdrawn on instructions of the appellant himself, exactly one month from the passing of that order, i.e. 23.12.2011 application was filed by the appellant for recall of that this order and for reviving the petitions. In this application, the appellant alleged that the petitions were withdrawn at the sole behest of the Advocate who instructed the Sr. Counsel independently on his own volition without obtaining the "informed consent" of the appellant to the adoption of such course of action. It was further stated that the appellant's advocate ought to have reasonably explained the appellant the circumstances that give rise to the withdrawal of these petitions and should have communicated to him immediately the advantages and disadvantages of the proposed course of action so as to have given the appellant a fair, reasonable and adequate opportunity of weighing the pros and cons of his options and alternatives in the matter. According to the appellant, he has a cast iron case on merits and had right of way over the said land which had been acquired on easement of necessity. It was also urged that the Court may itself take a passionate and sympathetic lenient and liberal view of matter keeping in mind the age of the appellant, his impeccable reputation and enviable credentials and also the fact that he had relentlessly pursued and prosecuted the two writ petitions with the utmost diligence and vigour over a substantial period of time at considerable personal financial cost, mental anxiety and physical hardship. Application filed in one petition has been dismissed by the learned Single Judge vide orders dated 24.1.2012 inter alia with the following observations:

“Considering the fact that the aforesaid order came to be passed in the presence of the petitioner, there is no ground available for the petitioner to now seek recall of the said order, merely because he has had a second thought about pursuing the writ petition. The reputation and credentials of the petitioner or his advanced age are not relevant consideration for recalling the order. Further, if the petitioner has a grievance against his previously engaged counsels, then his remedy lies elsewhere.

In any case it is not as if the doors of justice have been closed for the petitioner. While dismissing the writ petition as having been withdrawn, the petitioner was granted liberty to pursue his rights before the appropriate civil or revenue court.”

The application filed in other petition is dismissed vide orders dated 27.1.2012. It is in these circumstances both these appeal are preferred questioning the validity of orders dated 24.11.2011 passed in the writ petition thereby dismissing this writ petition as withdrawn and order passed in the CM's rejecting the prayer of revival of the writ petitions.

7. Mr. Bose learned counsel appearing for the appellant argued the matter with all the passion and force at his command narrating the history of the two cases and submitting that when the appellant had filed the first writ petition way back in the year 1996 and secured many interim orders therein, there was no reason for him to withdraw the petitions. Highlighting the same argument advanced before the learned Single Judge for recalling the order namely impeccable credentials of the appellant and his advanced age and that the appellant was not properly informed about the repercussions of the orders, plea of compassion was again insisted upon with much vehemence with passionate plea that the matter be sent back to the learned Single Judge for decision on merits. An attempt was made to show that the appellant had very good case on merits.

8. We may state at the outset that we do not find any reason to interfere with either orders dated 24.11.2011 or the orders passed in the application refusing to recall the order dismissing the writ petition as withdrawn. We have already extracted above the order dated 24.11.2011. It will demonstrate the following:-

(i) The learned Senior Counsel for the appellant had advanced the arguments substantially before the decision to withdraw the petition was taken.

(ii) The appellant was himself present in the court and was thus privy to these proceedings, not only this, as per the orders, statement was made by the learned Senior Counsel on instructions from the appellant.

(iii) The matter was not decided on merits and permission was granted to the appellant to pursue his alternative remedy. Even limitation for filing such proceedings was taken care by referring to Section 14 of the Limitation Act. Thus, the appellant is not rendered remediless.

9. It is difficult to accept the argument of the appellant that he had not given instructions when it is so recorded specifically in the order which was passed in the open court in the presence of the appellant. This course of action for withdrawal of the writ petitions was taken after detailed arguments had already been advanced from which one can infer that the counsel for the petitioner had got an inkling that the writ petition was not the appropriate remedy. It would be pertinent to note that when the matter came up for hearing on an earlier occasion on 6.9.2011 (in W.P. (C) 92/1996) the learned Single Judge had expressed prima facie reservations about the maintainability of these petitions and passed the following order:-

“1. The writ petition has been filed impugning the action of the respondents of closure of passage leading to the land of the petitioner in village Mehrauli.

2. It is the contention of the counsel for the DDA that the passage which is claimed is through the protected monuments and the petitioner cannot have any right to the same. It is further the contention that the petitioner has alternate passages.

3. Vide order dated 29th August, 2008 a Local Commissioner was appointed who has filed his report. The Local Commissioner has suggested an alternate passage through the land of Govt. of NCT of Delhi which was originally not party to the petition and has since been impleaded on 7th November, 2008. The NCTD is not willing for providing a passage through its own land. The counsel for GNCTD also

contends that the petitioner has alternate passages.

4. It has been enquired whether the land is governed by the Delhi Land Reforms Act, 1954. The counsels state that probably the land would be so governed. The senior counsel for the petitioner has been asked whether the W.P.(C) 92/1996 and W.P.(C) 9525/2003 remedy if any of the petitioner for a Rasta to his land would not be under the said Act and if so, as to how the present petition is maintainable.

5. It has also been asked from the senior counsel for the petitioner as to what is the right if any of the petitioner to the passage which is claimed. Though attention has been invited to the Aks -shijra at Page 178 of the paper book in W.P.(C) No. 9525/2003 and it is stated that the passage claimed at point 'A' (put today) on the said Aks-shijra but the land of the petitioner is shown to be at point 'B' (also put today) on the said Aks-shijra. Prima facie, the passage does not show any link to the petitioner's land. The senior counsel for the petitioner at this stage invites attention to a site plan at Page 182 to contend that the passage is as shown therein.

6. The petitioner however has not placed on record any site plan of his own and from which it can be understood as to with respect to which passage the petition has been filed.

7. At this stage, at request of the senior counsel for the petitioner, list on 19th October, 2011”

10. It becomes apparent that when the matter was argued on 24.11.2011 the arguments were addressed on the maintainability and finding that the Court was not convinced and presumably the aforesaid course of action was adopted by the counsel for the appellant and specific instructions from the appellant were taken before making such a statement to the Court seeking permission to withdraw the petitions with liberty to pursue the remedy elsewhere. Therefore, the learned Single Judge has rightly remarked that there is no ground available for the appellant to seek recall of that order merely because he has a second thought about pursuing the writ petitions.

11. We would like to refer to the judgment of the Apex Court in Bakshi Dev Raj and Anr. Vs. Sudhir Kumar, JT 2011 (8) SC 520 where almost in identical circumstances, the statement of counsel, on instruction, to withdraw the bail was treated as binding on the client. The Court took note of some earlier judgments including in Jagtar Singh Vs. Pargat Singh and Ors. (1996) 11 SCC 586 and discussed the legal position as follows:-

14. In Jagtar Singh v. Pargat Singh and Ors. (1996) 11 SCC 586, it was held that counsel for the Appellant has power to make a statement on instructions from the party to withdraw the appeal. In that case, Respondent No. 1 therein, elder brother of the Petitioner filed a suit for declaration against the Petitioner and three brothers that the decree dated 04.05.1990 was null and void which was decreed by subordinate Judge, Hoshiarpur on 29.09.1993. The Petitioner therein filed an appeal in the Court of Additional District Judge, Hoshiarpur. The counsel made a statement on 15.09.1995 that the Petitioner did not intend to proceed with the appeal. On the basis thereof, the appeal was dismissed as withdrawn. The Petitioner challenged the order of the appellate court in the revision. The High Court confirmed the same which necessitated filing of SLP before this Court. Learned Counsel for the Petitioner contended that the Petitioner had not authorized the counsel to withdraw the appeal. It was further contended that the court after admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial Court and the conclusions either agreeing or disagreeing with it. Rejecting the said contention, the Court held as under:

3. The learned Counsel for the Petitioner has contended that the Petitioner had not authorised the counsel to withdraw the appeal. The Court after admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial court and the conclusions either agreeing or disagreeing with it. We find no force in the contention. Order III Rule 4 Code of Civil Procedure empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. The question then is whether the court is required to pass

a reasoned order on merits against the decree appealed from the decision of the Court of the Subordinate Judge? Order 23 Rules 1(1) and (4) give power to the party to abandon the claim filed in the suit wholly or in part. By operation of Section 107(2) of the Code of Civil Procedure, it equally applies to the appeal and the appellate court has co-extensive power to permit the Appellant to give up his appeal against the Respondent either as a whole or part of the relief. As a consequence, though the appeal was admitted under Order 41 Rule 9, necessarily the Court has the power to dismiss the appeal as withdrawn without going into the merits of the matter and deciding it under Rule 11 thereof.

4. Accordingly, we hold that the action taken by the counsel is consistent with the power he had under Order III Rule 4 CPC. If really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere and the procedure adopted by the court below is consistent with the provisions of Code of Civil Procedure. We do not find any illegality in the order passed by the Additional District Judge as confirmed by the High Court in the revision.

15. The analysis of the above decisions make it clear that the counsel who was duly authorized by a party to appear by executing Vakalatnama and in terms of Order III Rule 4, empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere. Though learned Counsel for the Appellant vehemently submitted that the statement of the counsel before the High Court during the course of hearing of Second Appeal No. 19 of 2005 was not based on any instructions, there is no such material to substantiate the same. No doubt, Mr. Garg has placed reliance on the fact that the first Appellant was bedridden and hospitalized, hence, he could not send any instruction. According to him, the statement made before the Court that too giving of certain rights cannot be sustained and beyond the power of the counsel. It is

true that at the relevant time, namely, when the counsel made a statement during the course of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the Appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the Code Civil Procedure as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in *Byram Pestonji (supra)*, in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing.

12. In the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr.* (1982) 2 SCC 463, the Apex Court made the following observation:-

“4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". Per Lord Atkinson in *Somasundaran v. Subramanian* A.I.R. 1926 P.C. 136 We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of

the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent, upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. Per Lord Buckmaster in *Madhusudan v. Chanderwati* A.I.R. 1917 P.C. 30 That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *Rev. Mellor v. Cox* 7 Cox. C.C. 454 Martin B was reported to have said "we must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity".

6. In *King Emperor v. Barendra Kumar Ghosh* 28 C.W.N. 170 said,

...these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version.

7. In *Sarat Chandra v. Bibhabati Debi* 34 C.L.J. 302. Sir Asutosh Mookerjee explained what had to be done

It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment.

8. So the judges, record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.”

13. In the aforesaid circumstances, though it was not even necessary to go into the issue raised by the appellant in the writ petitions, we gave hearing to the learned counsel for the appellant on the subject matter. He drew our attention to some interim orders which included order dated 29.11.2000 vide which Local Commissioner was appointed to ascertain as to what were the passages available to the appellant, the width of the passage at various points and as to whether there were any other motorable approaches to the said land. He also read the report of the Local Commissioner in this behalf. He also drew our attention to the order passed by the learned Single Judge dated 7.11.2008 whereby the Govt. of NCT of Delhi was impleaded and the reply was filed by Government.

14. All these submission do not advance the case of the appellant. Major portion of the report of the Local Commissioner record the submissions of the appellant and refutation thereof by the respondent. On going through the said pleas itself one can make out that various contentions are advanced by either side which raise disputed question of facts and these can be more appropriately considered in civil/revenue proceedings after proper trial. We had also seen the site plan, the passage through which the appellant is claiming access to pass through the land belonging to the DDA and admittedly it is a surrounding area near protected monument. Moreover, it is situated in the protected area of the Qutub Archaeological Complex. It is submitted that so-called passage to the petitioner's land falls partially in the protected area and partially in the prohibited area of the Qutub Archaeological complex. The ownership and control of the prohibited area is with respondent no.1, wherein there is also existence of Old Ruined Structure. It is submitted that it may not be ethical to provide access to a private property, partially through protected area of world Heritage site and partially through an area having old Ruined Structures. It is submitted that for the purpose of the construction of the boundary wall, passage for men and material necessary may be allowed to the petitioner through the Iron gate as and when required. The access to the appellant is available from other side. These are our prima facie observations and we do not want to make any concluding or further observations.

Suffice it to state that from whatever angle the matter is looked into, the impugned orders of the learned single judge do not call for any interference. Since the present appeals are found to be totally devoid of merits, a misuse and abuse of process of the court, we would have imposed heavy cost but we are restraining ourselves having regard to the age and high sounding credentials of the appellant projected by his counsel.

15. These appeals are accordingly dismissed.

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