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Court : Uttaranchal

Decided On : Jan-02-2012

Judge : Tarun Agarwala

Appeal No. : Writ Petition No. 798 (M/S) of 2003

Appellant : Surendra Singh and Others

Respondent : A.D.J./1st Fast Track and Others

Judgement :

Heard Shri Sharad Sharma, the learned Senior Counsel assisted by Shri Anirudha Joshi, the learned counsel for the petitioners and Shri Arvind Vashistha, the learned counsel for the respondents.

The land, in question, was acquired in the year 1962 in favour of B.H.E.L. Subsequently, it was transferred to Avas Vikas Parishad in the year 1993. The petitioner alleges that the Avas Vikas Parishad subsequently allotted a plot in favour of the petitioner. One suit No. 35 of 1990 was filed by Avas Vikas Parishad against Yashpal praying for an injunction and for possession was decreed on 11th May, 1994 and, in the execution proceedings, possession of the land was given to Avas Vikash Parishad in the year 1997 from Yashpal. Yashpal is the father of present respondent No.5 Vikas. One Hemraj filed a suit against the defendants being suit No. 254 of 1998 for permanent injunction alleging that they are the bhumidhars of the plot in question. This suit was subsequently pursued by

Yashpal to whom a power of attorney was executed in his favour. In this suit, an injunction was granted in favour of the plaintiffs on 29th September, 1998 but, in a miscellaneous case filed by the petitioners, the injunction was stayed by an order dated 28th October, 1998. The plaintiff Hemraj as well as Vikas filed two writ petitions which were disposed of by separate orders dated 16/12/1998 restraining the parties from making any construction during the pendency of the suit.

At this stage, it may be stated here that during this temporary injunction proceedings, the power of attorney holder Yashpal executed a sale deed dated 17/10/1998 of the property in question in favour of his son Vikas and, based on this sale deed, a writ petition against the injunction order was filed by Vikas as well as an application for impleadment. On 21st December, 1998, the suit was dismissed for want of prosecution and an application under Order 9 Rule 9 C.P.C. was filed for the recall of the order which was numbered as miscellaneous case No. 133 of 1998 by the power of attorney holder. During the pendency of this miscellaneous application, the original plaintiff Hemraj filed an application praying that he does not wish to pursue the suit. Vikas who is the subsequent transferee also moved an application for impleadment in miscellaneous case No. 133 of 1998. This application of Vikas for impleadment was dismissed as not pressed. Further, the application under Order 9 Rule 9 C.P.C. was also not pressed and was dismissed on 17th February, 2000.

In the meanwhile, Vikas moved an application dated 7th February, 2000 u/S 146 C.P.C. praying that he may be transposed as a plaintiff and should be permitted to contest the suit against the defendant and, consequently, prayed that all orders dismissing the suit should be recalled and should be restored to its original number. This application was allowed by the impugned order dated 24th February, 2000 against which the petitioner preferred a revision which was also dismissed and, consequently, the present writ petition has been filed.

From the aforesaid narrative of facts, two things are clear, namely, that the original plaintiff did not wish to pursue his suit and, accordingly, it was dismissed for want of prosecution on 21st December, 1998. The application under Order 9 Rule 9 of the C.P.C. was also dismissed on 17th February, 2000. On the other hand, Vikas

alleges himself to be a transferee and had filed an application u/S 146 C.P.C. on 7th February, 2000 during the pendency of the application under Order 9 Rule 9 C.P.C.

The question that boils down for consideration is, whether an application u/S 146 C.P.C. could be filed by a third person praying that the order dismissing the suit should be recalled and that he should be transposed as the plaintiff and further be permitted to pursue the suit against the defendant? In the opinion of the Court, once a suit has been dismissed, it can only be recalled under Order 9 Rule 9 of the C.P.C. by the plaintiff alone and cannot be recalled at the instance of the third party. A third party can move an application u/s 146 C.P.C. during the pendency of the suit. In the present case, the application filed by Vikas was only filed during the pendency of the miscellaneous case under Order 9 Rule 9 which was also dismissed. Consequently, the application filed by Vikas u/S 146 C.P.C. had virtually become infructuous and could not be adjudicated in a suit which had already been dismissed. The trial court committed an error in allowing the application filed u/S 146 C.P.C. The revisional court also fell in error. In the light of the aforesaid, the impugned orders cannot be sustained and are quashed. The writ petition is allowed.

Certified copy of the order shall be sent by the Registry to the court below within ten days from today for necessary information and action.

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