

CASE NO.:
Appeal (civil) 1367 of 2006

PETITIONER:
Jet Ply Wood Private Ltd. & Anr

RESPONDENT:
Madhukar Nowlakha & Ors

DATE OF JUDGMENT: 28/02/2006

BENCH:
H.K.Sema & Altamas Kabir

JUDGMENT:
J U D G M E N T
(Arising out of SLP) No.10024 of 2005)
with
CIVIL APPEAL NO.1368 OF 2006
(Arising out of SLP) No. 9761-9762 of 2005)

Biswarup Banerjee & Ors.

...Appellants

Versus

Madhukar Nowlakha

...Respondent

ALTAMAS KABIR, J.

Leave granted in both the matters.

One Madhukar Nowlakha, the respondent No. I in these appeals, entered into an agreement for sale in respect of premises No. 4A, Lansdowne Place, P.S. Lake, Kolkata-700029, together with the building and structures thereon, with one Shri Biswarup Banerjee and five others on 20th September, 1988. Inasmuch as, the said agreement was allegedly not acted upon for a long time, the same was purportedly cancelled by the owners on 15th June, 2002.

On 24th September, 2003, Shri Madhukar Nowlakha filed Title Suit No. 32 of 2003 in the Court of Civil Judge, (Senior Division) 9th Court at Alipore, for specific performance of the agreement purported to have been cancelled and for temporary injunction to restrain the petitioners from alienating the suit premises. Thereafter, on 30th October, 2003, the said Respondent No. I applied to the Court for leave to withdraw the suit on the ground that since there were talks of settlement between the parties, he no longer wished to proceed with the suit. No leave was prayed for to file a fresh suit on the same cause of action.

On 11th July, 2004, the learned Judge allowed the respondent No. I to withdraw the suit, but without liberty to file a fresh suit on the same cause of action.

On 23rd August, 2004, after termination of the agreement and after withdrawal of the suit filed by the Respondent No. I, Shri Biswarup Banerjee and the other co-owners sold the premises to M/S. Jet Ply Wood Company Limited, the petitioner in SLP (C) No. 10024/2005.

Within a month thereafter, on 24th September,

2004, Shri Madhukar Nowlakha applied to the learned Civil Judge (Senior Division) 9th Court at Alipore, for recalling of the order by which the suit had been permitted to be withdrawn on the ground that he had been misled into making such application on account of the misrepresentation of Shri Biswarup Banerjee and the other co-owners that they would sell the property to him provided he withdrew the suit. The learned Civil Judge (Senior Division) 9th Court at Alipore, rejected the said application filed by Shri Madhukar Nowlakha.

After rejection of his said application for recalling the order allowing withdrawal of the suit, Shri Madhukar Nowlakha filed a second suit, being Title Suit No. 87 of 2004, which is said to be pending. His prayer for interim injunction in the said suit was rejected. Thereafter, on 23rd December, 2004, Shri Madhukar Nowlakha filed an application before the High Court at Calcutta under Article 227 of the Constitution, being C.O. No.3982 of 2004, challenging the Trial Court's order dated 24th September, 2004, refusing to recall its earlier order of 11th February, 2004. While admitting the said application, the High Court directed service of notice on the opposite parties and directed status quo to be maintained for a period of eight weeks.

On 4th February, 2005, the learned Single Judge of the Calcutta High Court heard and allowed the revisional application, being C.O. 3982 of 2004, and restored Title Suit No. 32 of 2002 for trial before the Civil Judge, (Senior Division) 9th Court at Alipore.

Since according to Shri Banerjee and the other co-owners of the premises, their learned advocate was unable to attend the hearing on 4th February, 2005, on account of personal reasons, they filed an application, being CAN No. 1999 of 2005, before the said learned Judge for recall of his order dated 4th February, 2005.

The same was heard and dismissed on contest on 14th March, 2005 with the learned Single Judge reaffirming his order restoring the suit on 4th February, 2005.

Both these two Special Leave Petitions have been filed challenging the first order of the learned Single Judge dated 4th February, 2005 restoring the suit of respondent No. I. In addition, Shri Banerjee and the other co-owners of the property have also questioned the legality of the second order passed by the learned Single Judge on 14th March, 2005 rejecting their application for recalling the order dated 4th February, 2005.

Since the Special Leave Petitions have been preferred against the common order dated 4th February, 2005 of the Learned Single Judge of the Calcutta High Court, we have taken them up together for hearing and they are being disposed of by this common judgment. It will be evident from the facts mentioned hereinabove that the only question to be decided in these appeals is whether the learned Single Judge of the Calcutta High Court acted within his jurisdiction in restoring the suit of the Respondent No. I when the same had been withdrawn by the said Respondent without any specific prayer for leave to file a fresh suit on the same cause of action. In other words, we are required to consider whether having regard to the provisions of Order XXIII Rule 1 of the Code of Civil Procedure, the Learned Single Judge of the Calcutta High Court could restore the suit when no leave had been granted to file a fresh suit.

Although, in his order dated 4th February, 2005, the

Learned Single Judge was of the view that there was no reason to allow the withdrawal of the suit without permission or liberty to file another suit, which reasoning we are unable to agree with, since the plaintiff had not made any specific prayer for such leave, the same is not relevant for the purpose of considering as to whether the Court was within its jurisdiction to restore the suit despite leave not having been asked for nor granted but specifically refused.

Appearing for the appellant, M/s. Jet Ply Wood Private Limited and Ors., Mr. Mukul Rohtagi urged that having regard to the provisions of Order XXIII Rule 1 of the Code of Civil Procedure, in the absence of any prayer for leave to file a fresh suit and a specific prohibition having been included in the order of the Learned Judge permitting withdrawal of the suit, there was no further scope either for the Trial Court or for the High Court to allow the Respondent No. 1's application for withdrawal of the order passed by the Trial Court on 11th July, 2004, permitting withdrawal of the suit.

Mr. Rohtagi urged that the appellants had acquired lawful title to the suit premises and had incurred considerable costs in getting the property vacated and starting construction thereon and it would be inequitable at this stage to allow the Respondent No. 1's application for restoration of the suit.

Mr. Rohtagi submitted that the order of the Learned Single Judge of the Calcutta High Court impugned in these appeals was erroneous and was liable to be set aside.

Mr. Abhishek Manu Singhvi, learned senior counsel, who appeared for the Respondent No. 1 in the first two appeals on the other hand urged that pursuant to the agreement arrived at between Shri Nowlakha and the owners of the property, Shri Nowlakha had taken steps to get the property vacated and made ready for construction. However, on the assurance given by the owners of the property, the respondent No. 1 had agreed to withdraw his suit which fact will be reflected from the application filed by him before the Learned Civil Judge (Senior Division) 9th Court at Alipore for withdrawal of the suit.

Mr. Singhvi urged that the owners of the property had resorted to subterfuge to wriggle out of the agreement and had misled the Respondent No.1 into withdrawing the suit and it is on account of such misrepresentation that the Respondent No. 1 was entitled in law to have his suit restored.

Mr. Singhvi submitted that it would not be correct to contend that the Learned Trial Judge did not have the jurisdiction to withdraw the order passed by him permitting the respondent No.1 to withdraw his suit.

What was relevant was whether in the circumstances such a power should have been exercised or not.

Since the learned Trial Judge had chosen not to exercise such power, the High Court stepped in, in exercise of its powers under Article 227 of the Constitution to restore the suit filed by the Respondent No.1.

Mr. Singhvi urged that while dismissing the application filed by Shri Biswarup Banerjee and others recalling the order dated 4th February, 2005, the learned Single Judge of the Calcutta High Court in his order dated 11th March, 2005, had referred to and relied upon a Division Bench judgment of the Calcutta High Court in the case of Rameswar Sarkar Vs. State of West Bengal &

Ors. reported in AIR 1986 Calcutta 19, in support of his order that when through mistake a plaintiff withdraws his suit, the court is not powerless to set aside such order of dismissal in exercise of inherent powers even if no leave to file a fresh suit had been prayed for.

Mr. Singhvi urged that the order passed by the learned Single Judge of the Calcutta High Court and impugned in these appeals did not call for any interference by this Court.

Mr. Soli J. Sorabjee, learned senior counsel for the Respondent No.1 in the second set of appeals while adopting Mr. Singhvi's submission, added that since the Learned Single Judge of the Calcutta High Court had acted within his jurisdiction to do justice between the parties, the same did not warrant any interference by this Court. Mr. Sorabjee submitted that this was not a case of the Court having acted without jurisdiction but having acted in the exercise of its inherent powers to do justice between the parties.

As indicated hereinbefore, the only point which falls for our consideration in these appeals is whether the Trial Court was entitled in law to recall the order by which it had allowed the plaintiff to withdraw his suit. From the order of the Learned Civil Judge (Senior Division) 9th Court at Alipore, it is clear that he had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that by passing such an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the Court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order passed by it earlier. In the circumstances set out in the order of 24th September, 2004, the learned trial court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the conscious decision of the Court not to exercise such jurisdiction in favour of the plaintiff.

The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005, though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005, in which reference has been made to a bench decision of the Calcutta High Court in the case of Rameswar Sarkar (supra) which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. This Court had occasion to observe in the case of Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527, as follows:

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."

Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar's case, allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when through mistake the plaintiff had withdrawn the suit, the Court would not be powerless to set aside the order permitting withdrawal of the suit.

We are of the view that the law having been correctly stated in the aforesaid case, the learned Single Judge of the Calcutta High Court in making an order on the same lines did not commit any error of jurisdiction which calls for any interference in these appeals. The appeals are, therefore, dismissed, but without any order as to costs.