

Radhika Pruthi vs Cantonment Board on 3 January, 2025

Author: Javed Iqbal Wani

Bench: Javed Iqbal Wani

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
(Th virtual mode)

Reserved on 29.11.2024
Pronounced on 03.01.2025

FAO No. 31/2024 c/w
CM(M) No. 142/2024

Radhika Pruthi

.....Appellant(s)/Petitioner(s)

Through: Mr. Hakim Suhail Ishtiyag, Adv.

VS

Cantonment Board, Badami Bagh,
th. its Chief Executive Officer

..... Respondent(s)

Through:

Mr. Muzaffar Ahmad Dar, Adv.
Mr. T. M. Shamsi, DSGI with
Mr. Faizan Ahmad Ganie, CGSC

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. The instant miscellaneous appeal has been filed by the appellant herein being aggrieved of order dated 05.10.2024 by virtue of which the interim application filed by the appellant herein along with the suit has been dismissed by the court of 1st Additional District Judge, Srinagar (for short 'the trial court').

2. Facts emerging from the record reveal that the appellant herein claims to be a displaced Kashmiri Pandit, unable to return to her hometown due to the disturbances in the Kashmir Valley, however, with the improvement in the situation and the Government's assurances to safeguard their lives she decided to return to her native place and claims to have purchased a plot of land measuring 10 marlas covered under Khasra No. 70, Khewat No. 1107, and Khata No. 1396, situated at Mouza Sonwar, Tehsil South, District Srinagar, within the jurisdiction of the respondent.

3. The sale of the said plot of land is claimed to have been formalized through a sale deed executed on 14.05.2022 and registered by the competent authority on 30.05.2022. The land in question is

stated to have been purchased by the appellant herein from one Tariq Ahmad Mir, who had obtained the said land vide an exchange deed dated 30.05.2015, executed between the Deputy Custodian (HQ) of the Evacuee Property Department, Srinagar, and himself, and subsequently registered by the competent authority.

4. It has been further stated that after execution of the sale deed, the appellant herein, on 27.06.2022 applied for a building permission for construction of the residential house thereon the said land before respondent 1, which was neither granted nor refused by the respondent 1, as such, the appellant herein informed the said respondent 1 herein about her intention to start construction in view of the legal consequence in the form of Deemed Permission as envisaged under Section 238(6) of the Cantonments Act, 2006 (for short the Act) and when the construction had reached the plinth level, the appellant herein was stopped from doing the same by agents/employees of the respondent 1 herein and was thereafter served with a communication dated 05.01.2023, by virtue of which her application for grant of building permission was returned without any action

5. The appellant herein challenged the said communication in WP(C) No. 803/2024, before this Court, which was subsequently withdrawn on 20.05.2024, with liberty to take recourse to the remedy under law. The decision to withdraw the petition was based on legal advice that the communication was immaterial, as the appellant's right to construct had already crystallized under section 238(6) of the Act and the delay on the part of the respondent 1 herein in returning the application without any action.

6. Aggrieved by the alleged unlawful interference by respondent 1 herein in raising the construction in question, the appellant herein filed a suit for injunction before the Principal District Judge, Srinagar, which case was transferred to the court of Sub-Judge/Judge Small Causes, Srinagar, on 24.06.2024. On the same day, the Court issued a short notice to the defendant (respondent 1 herein) and scheduled the next hearing for 29.06.2024. The appellant herein contended in the suit that under Section 238(6) of the Act, , failure by the respondent 1 to process the application within the statutory period entitled her Deemed Permission to construct. However, due to a communication gap with her counsel, this crucial fact was not explicitly pleaded in the suit and recognizing that such an omission could be detrimental under Order 6 Rule 6 of the CPC, which mandates that conditions precedent must be distinctly specified in pleadings, the appellant herein sought to withdraw the suit with liberty to file a fresh one including all relevant facts.

7. It is stated that during the hearing of the withdrawal application on 29.06.2024, the Presiding Officer of the court of Sub Judge/Judge Small Causes announced that the application stood allowed, and that a detailed order would follow. However, no subsequent hearing date was fixed in the main case and despite multiple visits by the appellant's counsel to the court's civil section, the file remained with the Presiding Officer, and no formal order was issued, and believing in good faith that the withdrawal application stands allowed and considering the urgency to proceed with the construction, the appellant herein filed a fresh suit on 12.07.2024 before the learned Principal District Judge, Srinagar, which suit, later came to be transferred to the trial court and included the necessary plea regarding her communication to the Board and her reliance on the Deemed Permission clause. However, the appellant herein did not mention the filing of the earlier suit, as no

formal withdrawal order had been issued by the concerned court till then.

8. It is further stated that the appellant herein did not add or delete any fact except adding the pleading based on which the withdrawal of the earlier suit was sought, while stating further that the appellant herein had no intention of concocting the factum of filing of the earlier suit and in absence of the order of withdrawal and in view of the urgency in the matter, thought it proper in the facts and circumstances of the case as also in the view of the legal advice tendered in this regard.

9. The appellant has stated that she became aware of the pre-dated order passed in the withdrawal application dated 29.06.2024 on 31st July 2024, when it was uploaded on the e-Courts website and contends that if her intention had been to mislead the Court, she would have allowed the earlier suit to remain pending and let it be dismissed in default. However, acting in good faith, she, appellant herein promptly filed a review petition before the court of Sub- Judge/Judge Small Causes, Srinagar on 10.08.2024 and therein the said review petition, notice was issued to the respondent 1 herein, who appeared and sought time to file objections and as on the date of filing the present appeal, the respondent 1 has not submitted its objections. Thus, the appellant herein asserts, demonstrates her bona fide conduct and lack of any intent to deceive the court.

10. It is next stated that upon filing of the written statement by the respondent 1, the trial court upon hearing the parties on 17.09.2024 reserved the applications under Order 39 Rule 1 and 2 and Rule 4 of the CPC for orders and vide the impugned order the application filed by the appellant was dismissed with costs of Rs. 5,000/-.

11. The appellant herein has challenged the impugned order dated 05.10.2024 on the following grounds:

(i) That the Ld. Trial Court has dismissed the interim application of the Appellant without providing an opportunity to allow the Appellant to explain the circumstances in which the two suits were filed. As stated above, the withdrawal application was announced to have been allowed, however, thereafter, for one month no detailed order was passed and thereafter the application was dismissed. Paras 24 to 31 detail out the circumstances which occurred and resulted in the filing of the two suits.

(ii) That Hon'ble Court of Sub-Judge/Judge Small Causes, Srinagar passed the order dated 29.06.2024 on misconception of law. By virtue of order dated 29.06.2024, the Appellant had sought withdrawal of the suit filed by her even before the summon was served upon the defendant and he had caused his appearance. Order 23 of the Code of Civil Procedure governs the withdrawal of suit. It is a settled principle of law that withdrawal of a suit is a unilateral act to be done by the plaintiff, requires no permission or order of the Court and it not subject to any condition, it becomes effective as soon as the application is filed. Even no order allowing the withdrawal of the suit is required to be passed by the Court. However, in cases where the plaintiff seeks liberty to file fresh suit under Order 23 Rule 1(3) of the Code, that the Court is required to pass an order either granting or refusing to grant the liberty.

The Court cannot refuse withdrawal of the suit and continue the proceedings thereupon.

(iii) That in terms of the principle of dominus litus, once the application was filed, the suit stood withdrawn and under the bona fide belief that the application has been allowed, the Appellant filed the subsequent suit. It had never been the intention of Appellant to mislead the Hon'ble Court.

(iv) That the Ld. Trial Court has passed the impugned order on the ground since the Appellant had filed the first suit, abandoned the same and filed the subsequent suit. The Ld. Trial Court has failed to appreciate the fact that legal consequence of filing of a withdrawal application under Order 23 of the Code', the fact that the Appellant immediately filed the review petition and is prosecuting the same diligently, understanding the consequence of the same on the subsequent suit.

(v) That the Ld. Trial Court without appreciating in its proper perspective the circumstances and the steps taken by the respective counsels for the Appellant to set the things right has made observations against the counsels and attributed malice to them.

(vi) That the Ld. Trial Court has failed to appreciate the law in its proper perspective and has been influenced by the pendency of the first suit, which in law, stood withdrawn on 29.06.2024 when the application for withdrawal was filed. Mere continuation of the proceedings in a withdrawn suit by the Hon'ble Court of Sub-Judge/Judge Small Causes, Srinagar, against the principles of law, cannot be held against the Appellant.

(vii) That the judgments relied upon by the Ld. Trial Court are distinguishable on facts and are not applicable to the case at hand, as in the said cases, the earlier suits/appeal had been disposed after trial/contest and the factum of same were concealed in subsequently filed writ petitions. In the present case, the Appellant had filed a suit, withdrawn it and in anticipation of the detailed order, filed the subsequent suit. Withdrawal of earlier suit would not bar filing of the subsequent suit more so when the suit was for injunctive relief and considering Section 22 of the Limitation Act.

(viii) That on merits, the Ld. Trial Court has observed that since the application of the Appellant was rejected by the Respondent vide communication dated 05.01.2023, therefore, provision of deemed permission clause being Section 238(6) of the Cantonment Act does not apply. With respect it is submitted that the Ld. Trial Court has failed to appreciate the fact that the Appellant had specifically pleaded in the plaint that she had applied for permission on 27.06.2022 and had placed on record the undertaking and building plans filed along with the application, which fact has not been denied by the Respondent in its written statement. Once the application remained unprocessed and right of deemed permission crystallized, the returning of application after six months is of no consequence.

12. When the matter was considered by this Court for admission on 16.10.2024, the impugned order was stayed and the Defence Estates Officer, Badami Bagh, Srinagar, who had filed an application seeking impleadment in the second suit filed by the appellant herein and had filed a caveat viz-a-viz the impugned order dated 16.10.2024 was impleaded as respondent 2 in this appeal as also in the suit pending before the trial court.

13. Respondent 1 herein subsequently filed an application seeking vacation of the order dated 16.10.2024.

14. In view of the urgency expressed by the counsels for the parties, the said application was directed to be listed along with this appeal on 29.11.2024, on which date the parties consented to the hearing of the appeal on merits. Heard learned counsel for the parties and perused the record.

15. Besides reiterating the grounds urged in the appeal, the counsel for the appellant herein has also urged that the trial court has made unnecessary out of context and uncalled for remarks against the counsel appearing in the suit.

16. Before proceeding further in the matter, it would be significant to refer to the maxim dominus litis, which means that the plaintiff is the master of the suit. It gives the plaintiff right to choose a forum, parties and the nature of the relief sought, subject to the limitation of law. This principle is particularly relevant in cases involving procedural issues, such as multiple suits or withdrawal and refiling of the suits. Once the appellant herein, being plaintiff in the court below filed an application for withdrawal of the suit with liberty sought the suit is deemed to have been withdrawn and the court is required to pass an order to the extent whether liberty sought is to be granted or not and in case of a withdrawal simpliciter, even if no order is passed by the concerned court, the suit would stand withdrawn without there being any formal requirement of passing an order under Order 23 CPC.

17. Since the review petition filed by the appellant herein is pending adjudication before the court below and any observation on the same might prejudice the outcome of the same, therefore, this Court at this stage would not enter into this issue.

18. It is also a fact that in the second suit filed, the appellant herein had made the changes, i.e. paragraph 16, as was pleaded in the application seeking withdrawal of the first suit.

Para 16 of the first plaint is reproduced below:

"16. That once the application of the Plaintiff was not rejected by the Defendant, the legal consequence in the form of deemed permission as envisaged under Section 238(6) of the Cantonments Act, 2006 would ensue"

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Para 16 of the second plaint is reproduced below:

"16. That once the application of the Plaintiff remained unprocessed by the Defendant for more than a month, the Plaintiff approached the Defendant and informed it about her intention to start construction in view of the legal consequences in the form of deemed permission as envisaged under Section 238(6) of the Cantonments Act, 2006 ensue".

19. It is evident from a plain reading of the aforesaid two paras in the two complaints that the appellant herein in fact, did incorporate the plea which was taken in the application for withdrawal of the first suit. Thus, it is not true that the appellant herein filed the fresh suit which was a ditto copy of the first suit as has been observed by the trial court at paragraph 11 of the impugned order. It is also not forthcoming from the record as to how the trial court came to such a conclusion when the complaint filed to institute the first suit was never placed on its record by any of the parties; instead, the defendant respondent 1 herein had placed on record the order dated 29.06.2024 dismissing the application seeking withdrawal of the suit. Once the said complaint was not on record before the trial court, how did it come to the conclusion of concealment of the factum of filing of first suit was a material fact and thus fatal for the second suit. Even after having concluded that the second suit was ditto copy of the first suit, the trial court has neither dismissed the second suit nor stayed the same in terms of Section 10 CPC instead has proceeded in the main suit after passing of the impugned order. This manifestly shows that the trial court was itself not sure as to whether the first suit was fatal to the second suit, presumably so, because the entire record of the first suit was not available before the trial court. The trial court seemingly has been influenced by mere non-mentioning of the factum of filing of the first suit.

20. Perusal of the record reveals that the impugned order has been primarily passed by the trial court on the ground of concealment of the factum of filing and pendency of the first suit yet observations on the merit of the case have been made and in paragraph 10 of the impugned order, the trial court has rendered a finding on merit that the case of the appellant herein, in view of the subsequent returning of her application on 05.01.2023, did not fall within the ambit of Section 238(6) of the Act and has towards the end of the same paragraph observed that the plaintiff appellant herein had not served any notice in terms of Section 238(6) of the Act. The said observation was made in view of the denial of the defendant respondent 1 herein to have received any such notice.

21. Besides, the pleas raised by the appellant herein in the complaint and the consequent denial by the defendant respondent 1 herein raised triable issues which could have been proved or disproved by the parties by leading evidence. The trial court ought not to have ventured into deciding the merits of the case at the stage of consideration of an application under Order 39 CPC. By making such observations, the trial court has virtually dismissed the suit under the guise of dismissal of the application for interim relief and what is left in the suit is nothing at all for determination.

22. It is significant to mention here that there is distinction between "mistake"

and "trickery". What is forthcoming from the record, particularly in view of the fact that the appellant herein did not abandon the first suit but is contesting the review petition against the order dismissing the application for withdrawal of the suit, it cannot be said that the appellant herein tricked the trial court into entertaining the second suit, yet at the most it can be said to be a mistake. Also, the fact that the appellant herein had brought into the notice of the trial court that review had been filed has not been denied by the counsel for the respondents, however, there is no mention of the said review petition in the impugned order and if the said review petition filed by the appellant herein is found to have merit by the court before which the same as also the first suit is pending, and

the same is allowed, the same would have effect of withdrawal of the suit w.e.f. the date of filing of the application i.e. 29.06.2024, i.e. before the second suit was filed. In this context, a reference to the judgment of the Apex Court passed in the case titled Arunima Baruah v. Union of India and Others (2007) 6 SCC 120 would be profitable, wherein following has been held:-

"12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question."

23. It is pertinent to mention herein that it is settled law that concealment of a material fact might be fatal to a suit and dismissal of a suit on the ground of concealment of a material fact has very serious consequences and cannot be resorted to by speculations or inferring by a process of deduction from the statement made in the written statement. In the instant case, there is not a single observation worth the name in the impugned order to show how the trial court concluded that the first suit was a concealment of a material fact in the facts and circumstances of the case. Mere stating that concealment was a concealment of a material fact would not absolve the trial court of its duty the law has put on it, more so in view of the consequences of such an observation.

24. The trial court ought not to have dealt with the application seeking interim relief in the manner it has dealt with it by dismissing the same with costs, besides making unnecessary and uncalled allegations of deceit against the conduct of the counsels. A perusal of the details about the filing of the two suits online would show that both the suits have been filed by the same advocate. The Trial Court seems to have been swayed away by the factum of filing of two suits.

This Court thus, feels that the Appellant has demonstrated bona fide conduct by acting transparently and promptly when discovering the order in the first suit by taking remedial action against the same. Had there been an intent to mislead the Court, the Appellant could have let the earlier suit lapse without pursuing its withdrawal or review. Failure to mention the earlier suit does not seem to be deliberate, but stemmed from the absence of a formal withdrawal order at the time the second suit was filed.

25. For what has been observed, considered and analyzed hereinabove, the instant appeal succeeds.

26. Resultantly the impugned order dated 05.10.2024 is set aside. Mr. Salih Peerzada, Adv. for the applicant Mr. Hakim Suhail, Adv. for non-applicant During the pendency of the instant appeal, an application bearing CM No. (6677/2024) was filed by one Reapan Tickoo, son of Late Shiban

Krishan, seeking impleadment as a Respondent in the appeal. The applicant, currently residing in Mumbai, sought to be included in the appeal. Notice was issued to the appellant herein on 04.11.2024, and the matter was scheduled for hearing on 25.11.2024. On the scheduled date, the counsel for the applicant informed the Court that the applicant had already filed a petition (CM(M) No. 142/2024) and sought its adjudication alongside the present appeal. Upon reviewing the record of CM(M) No. 142/2024, it became evident that the petition pertains to a suit filed by the applicant herein against the respondent- Board seeking a restraining order to prevent interference with the construction he is raising under the deemed permission clause of Section 238(6) of the Cantonments Act, 2006. The interim application filed by the applicant in the suit filed by him has been dismissed by the court of Sub-Judge/Judge Small Causes, Srinagar vide order dated 05.10.2024, which has been thrown challenge to by the appellant herein in CM(M) No. 142/2024 (supra).

This Court finds that the applicant herein has no right or interest that would be affected by the decision in the appeal supra. This is especially true as the applicant is neither a party to the suit filed by the appellant herein pending before the trial court nor has he sought impleadment in it. Being merely a neighbor to the appellant herein does not provide the applicant with any legitimate interest or prejudice resulting from the outcome of the appeal. Without showing any specific legal interest or how the outcome would adversely affect him, the applicant cannot be allowed to seek impleadment.

Accordingly, the application is dismissed.

Petition being CM(M) No. 142/2024 to be segregated and list accordingly.

(JAVED IQBAL WANI) JUDGE Jammu 03.01.2025 Rakesh Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No