

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CM(M) No.359/2024
CM No. 5803/2024

Reserved on: 24.12.2024

Pronounced on: 02.01.2025

Mohammad Ishaq Dar & Anr.

...Appellant/Petitioner(s)

Through: Mr. A.M.Dar, Sr.Advocate with
Mr. Danish Majid Dar, Advocate.

Vs.

Usman Syed Shah & Ors.

...Respondent(s)

Through: Mr. J.H.Reshi, Advocate.

CORAM:

HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

1. Impugned is the order dated 08.06.2024 passed by the court of learned 1st Additional District Judge, Srinagar (Trial court) in the present petition filed under Article 227 of the Constitution of India, whereby the application filed by plaintiffs/respondents 1 and 2 herein, moved in terms of Order 23 Rule 3A read with Section 151 of CPC, seeking to recall the order dated 09.08.2023, was allowed and the suit filed by respondents 1 and 2 herein withdrawn unconditionally to the extent of petitioners herein, was restored.
2. The facts of the present case giving rise to filing of the instant petition are:

- 2.1.** that, the respondents 1 and 2 herein are the joint owners in possession of a four storeyed building with a floor area of 6500 sft. and the land underneath and appurtenant thereto measuring 15 marlas 170 sft. comprising of khasra No.104, khata No.281 and khewat No.13, situated at Tashwan, Karan Nagar, Srinagar. In the year 2019 the respondent No.3 herein approached the respondents 1 and 2 to take the said premises as licensee to which they agreed to give on the terms and conditions contained in the duly executed and registered license deed dated 26.04.2019 and that the license fee was fixed at the rate of Rs.2.00 lacs per month and was to remain in force for a period of five years unless terminated earlier, by the either party with a prior written notice of sixty days;
- 2.2.** that, the respondent No.3 out of his own free will and volition decided to surrender the vacant peaceful possession of the aforesaid premises back to the petitioners on 15.12.2020 and also undertook to clear all the outstanding balance payment of license fee, amounting to Rs.6.70 lacs;
- 2.3.** that, in the meanwhile, respondent No.3 persuaded the petitioners herein to execute a fresh licensee deed with the respondents 2, 3 and 4 herein to be effective from 01.01.2021 for a period of five years on a reduced monthly license fee of Rs.1.80 lacs and
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that a license deed duly signed by the respondents 1 and 2 herein to this effect was taken by them for the signatures of the respondents 2, 3 and 4 herein but never returned back to the respondents 1 and 2 herein, as promised, the respondent No. 4, however, backed out from it, as such, the respondents 1 and 2 again requested to execute a fresh license deed, but this time in favour of the petitioners herein, who happen to be the real brothers; that the respondents 1 and 2, accordingly got drafted and executed another license deed of the said premises in favour of the petitioners but they avoided to sign the same on one or the other pretext and have left the same with respondents 1 and 2 and the petitioners have failed to pay the license fee;

- 2.4.** that, the petitioners and respondents No.3 herein are related to each other; that whatever may be the nature and state of the *inter se* personal or business relations between the petitioners and respondents No.3 herein, is of no concern, whatsoever, to the respondents 1 and 2 herein because the respondent No.3 has no competence or authority to create a third party interest of any kind in respect of the aforesaid suit property of the respondents 1 and 2 herein given to the respondent No.3 herein purely on a license basis for a period of five years out of a lawful business.

3. In view of the dispute a suit came to be filed by respondents 1 and 2 before the court of learned Principal District Judge, Srinagar, for declaration, for mandatory injunction for handing over the possession, recovery of arrears of license fee and damages;

3.1. that, the respondents 1 and 2 filed an application before the learned trial court for withdrawal of the suit against the petitioners herein and the learned court allowed the said application vide order dated 09.08.2023 and the suit was withdrawn unconditionally against the petitioners herein, however, despite the settlement dated 08.08.2023, respondents 1 and 2 failed to comply with the terms of the said agreement;

3.2. that, thereafter the respondents 1 and 2 filed an application under Order 23 Rule 3A read with Section 151 CPC seeking recall of the earlier order dated 09.08.2023.

4. It is alleged that despite the clear legal position and objections raised by the petitioners/defendants, the learned trial court erroneously allowed the recall application by passing the impugned order dated 08.06.2024 and that the learned trial court failed to appreciate that no application for condonation of delay has been filed rendering it barred by limitation. Hence the instant petition.

5. Respondents 1 and 2/plaintiffs filed their objections, wherein it is stated that the petition filed by the petitioners under Article 227

of the Constitution of India is untenable both on facts and in law; that the powers conferred on this Court under Article 227 of the Constitution of India are discretionary in nature, therefore, cannot be allowed to be abused to practice a fraud on the rights, title and the interests of a party; that under the garb of an outside court settlement, misrepresentation and deception by the petitioners/defendants, the respondents herein were made to withdraw the suit from the trial court but the petitioners eventually refused to vacate and handover the peaceful physical possession of the property in question belonging to plaintiffs/respondents 1 and 2.

6. It is asserted that the premises being under the unauthorized and illegal occupation of the petitioners, the respondents 1 and 2 were constrained to get the proceedings in the suit revived as against the petitioners in accordance with law; that it was not a case of unconditional withdrawal of a suit but withdrawal of a case in terms of an outside court settlement arrived between the parties; that the application filed before the trial court was not filed under Order 9 Rule 9 of CPC for restoration of the suit dismissed in default but it was an application filed under Section 151 read with Order 23 Rule 3A of CPC for recalling of the order of withdrawal of the suit; that the application was within time as it is covered by the Article 137 of the Limitation Act, which provides that the application for which no limitation is provided, can be filed within a period of three years; that the respondents 1 and 2 have a recurring and continuance cause of action as against the petitioners until they get back peaceful physical
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possession of their property in question which is under the unauthorized and illegal occupation of the petitioners.

7. Heard learned counsel for the parties, perused the material available on record and considered the same.
 8. The first and the foremost argument of learned counsel for the petitioners would be that under the mandate of Order 23 Rule 1(4) of CPC, once a suit is withdrawn unconditionally without liberty to file afresh, the plaintiff is barred from re-litigating on the same cause of action and by allowing the application for recall, the learned trial court has misapplied this provision. Learned counsel for the petitioners argued that the application filed by the respondents 1 and 2 relied on Order 23 Rule 3A CPC, which is inapplicable to the present case and that the suit was withdrawn without incorporating any compromise into the court records, meaning thereby that Order 23 Rule 3A could not be invoked. Learned counsel further submitted that even assuming for the sake of arguments that the application for recalling the order dated 09.08.2023 was maintainable but the respondents 1 and 2 failed to demonstrate any exceptional circumstances that would warrant recall of the said order.
 9. Learned counsel for the petitioners contended that under the provisions of The Limitation Act, 1963, to restore a suit or appeal or for that matter an application for review or revision, dismissed for default of appearance, the same should be moved within a period of thirty days from the date of dismissal, but in the instant case the suit filed by the respondents 1 and 2 herein was dismissed as withdrawn to the extent of petitioners herein
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beyond thirty day's period in terms of the order dated 09.08.2023, which order was recalled in terms of the impugned order dated 08.06.2024 i.e., after a gap of ten months, which under the provisions of Limitation Act, 1963, is impermissible.

10. Learned counsel for the respondents, ex-adverso, argued that Article 137 of The Limitation Act, 1963, provides that the application for which no limitation is provided, can be filed within a period of three years. He further stated that the application for recalling the order dated 09.08.2023 was filed on 14.10.2023, means within two months. His further argument is that the order dated 09.08.2023 came to be passed on a compromise/settlement between the petitioners and the respondents 1 and 2.

11. The contention of learned counsel for the respondents is that in terms of the settlement entered between the petitioners and respondents 1 and 2, the petitioners were required to vacate the four storeyed building of the respondents and the respondents had agreed to pay an amount of Rs.39 lacs to the petitioners within a period of 15 days of the execution of the said settlement, however, when the respondents approached the petitioners for handing over the possession in terms of the settlement and payment of the aforesaid amount, the petitioners failed to surrender the possession of the said building. Therefore, the order dated 09.08.2023 was conditional and not unconditional, as argued by the learned counsel for the petitioners.

12. Respondents 1 and 2 have filed the Civil suit for declaration, declaring the defendants 1 to 3 including petitioners herein or anyone, whosoever. holding the suit property on their behalf or working for them as rank trespassers and unauthorized occupants thereof; declaring the plaintiffs as *de facto* and *de jure* owners in possession of the suit property; declaring the documents annexed to the suit or any other similar documents as may have been fabricated or forged by the contesting defendants 1 to 3 vis-à-vis the suit property to the prejudice of the rights of the plaintiffs, as null and void, ineffective and inoperative, as against the plaintiffs or their successors in interest with mandatory injunction directing defendants 1 to 3 to hand over the immediate peaceful and physical possession of the suit property to the plaintiffs on as it basis or as it was delivered to the contesting defendant No.1 at the beginning with a decree for recovery of an outstanding amount of Rs.6.70 lacs due and payable to the plaintiffs, besides a decree for the payment of damages/mesne profits.

13. During the pendency of the suit, respondents 1 and 2/plaintiffs and the petitioners/contesting defendants are stated to have settled the matter out of the court by entering into outside court settlement on 08.08.2023 undertaking that the defendants agreed to surrender back the physical and peaceful possession of the suit property i.e. four storeyed building and the land underneath and appurtenant thereto comprising survey No.104 at Tashwan, Karan Nagar, Srinagar and that the respondents herein agreed in lieu thereto to pay the

defendants/petitioners herein an amount of Rs.39.00 lacs on account of the wooden paneling, metallic partitions, glass work and other electrical, decorative etc., and other material as per the list annexed to the settlement, and both the parties mutually agreed to execute the agreement within a period of 15 days. It was further undertaken that the suit between the parties will be withdrawn unconditionally in terms of the outside court settlement, from the trial court, besides seeking withdrawal of all the criminal complaints.

14. On execution of the aforesaid settlement between the parties, the contesting respondents, as plaintiffs, moved an application on 09.08.2023 seeking withdrawal of the suit captioned '*Usman Syed & Anr. Vs. Mohd. Ishaq Dar & Ors*'. to the extent of defendants 2 -4 in terms of the outside court settlement dated 08.08.2023 and the trial court vide order dated 09.08.2023, acting upon the application and recording the statement of plaintiffs, the defendants 2 to 5 were removed from the suit. Respondents, however, on 14.10.2023 moved an application in terms of Order 23 Rule 3A read with Section 151 of CPC for recalling of the order dated 09.08.2023, on the ground that though they had approached the defendants for handing over the possession in terms of the settlement and also had shown their willingness to make the payment of the agreed amount to them, they on one or the other pretext failed to surrender the possession of the aforesaid suit building in favour of the applicants and it was prayed that the order dated
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09.08.2023 be recalled, so that the applicants may prosecute their case against the defendants.

15. The defendants/ petitioners herein filed their objections to the application, stating that the application was not maintainable on the ground that no decree was passed by the court and that the applicants had abandoned their claim against the defendants 2 to 4 because they had not sought any liberty to file fresh suit, therefore, applicants are precluded for instituting fresh suit or application in respect of the claim or part of the claim.
 16. The trial court, after considering the matter and hearing the parties through their counsel, relied upon the judgment of the Apex Court passed in a case titled '**Jet Ply Wood Private Ltd. & Anr. Vs. Madhukar Nowlakha & Ors.**' (AIR 2006 SC 1260), wherein it had been held that when the suit was withdrawn on an application without leave to file fresh suit, the order permitting withdrawal of suit was permissible by resorting to Section 151 CPC. There is no specific provision in the CPC for recalling of an order permitting withdrawal of the suit.
 17. The case, as projected by the respondents/plaintiffs before the court below was that they had been made to withdraw the suit against the petitioners herein on the basis of the out of the court settlement reached between the parties, wherein the petitioners had agreed to hand over the vacant physical and peaceful possession of the suit property of the plaintiffs on receipt of an amount of Rs.39.00 lacs, however, it was alleged that the petitioners despite having committed to the agreement in the outside court settlement, had cheated the contesting
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respondents by not observing the agreement and, as such, they were made to suffer on account of their assurance about the dismissal of their suit vis-à-vis petitioners herein on the basis of the application moved for withdrawal of the suit against them.

18. It is the fact that the trial court had not passed a decree on the basis of the outside court settlement, as such, the respondents were left with no statutory remedy either to file an appeal or assail the same by any other mode and were rendered without any remedy. Respondents, as such, moved an application for revival of their suit on failure of the petitioners herein to observe the conditions of the outside court settlement, which was made basis for withdrawal of the suit against them.

19. In a recent judgment of Apex Court in a case titled **“Navratan Lal Sharma Vs. Radha Mohan Sharma & Ors.”** reported as **2024 SCC OnLine SC 3720**, in almost on similar facts and circumstances of the case on hand, held that *‘after careful consideration of the statutory framework and Order 23 Rules 3 and 3A, as informed by relevant judicial precedents, we have allowed the appeal. We have directed that, in such circumstances, restoration is the sole remedy, which the aggrieved party may exercise as a statutory right’*.

20. The contention made on behalf of the petitioners herein that while dismissing the case having been withdrawn by the contesting respondents against the petitioners herein, no liberty was sought or granted to avail remedy, as such, no such plea can be raised later, does not seem to be a correct position of law. In-fact, when there is a statutory remedy available to the

litigant, there is no question of a court granting liberty to avail such remedy as it remains open to the party to work out his remedies in accordance with law. Therefore, there was no occasion for the trial court to deny liberty to file restoration and the consequent grant of the recall application by the impugned order, on this ground alone, survives. Further, as a matter of policy, courts must not curtail statutorily provisioned remedial mechanisms available to the parties.

21. In a case titled '**Jet Ply Wood Private Ltd. & Anr. Vs. Madhukar Nowlakha & Ors.**' reported as **2006(3) SCC 699**, which had been relied upon by the trial court, had held that withdrawal of the suit by plaintiffs on the basis of mistake or misrepresentation/subterfuge by the defendants and later after withdrawal of the said suit, the defendants resiling from their stand and conveying property in question to another, held that the High Court had rightly permitted recall of the withdrawal order, as when through the said mistake plaintiffs had withdrawn the suit, court would not be powerless to set aside the order in exercise of its powers under Section 151 of CPC.

22. The plea with regard to the limitation having not been considered by the trial court was also argued by the learned senior counsel appearing for the petitioners, however, in view of the fact that the premises of the respondents i.e. four storeyed building being in possession of the petitioners unauthorizedly, the respondents had a recurring cause of action to seek possession of the property in question, therefore, in view of the

continuous cause of action, the contention with regard to limitation, is totally misconceived and is liable to be rejected.

23. In view of the facts and circumstances of the case on hand and the law laid down by the Apex Court discussed hereinabove, the impugned order is found to have been passed by the trial court perfectly in consonance with law and does not call for any interference by invoking supervisory jurisdiction of this Court, which otherwise has to be sparingly used.

24. Viewed thus, the petition is found to be without any merit and substance and is liable to be dismissed, as such, is **dismissed** with costs, which is quantified as Rs.10,000/- to be payable by the petitioners herein, as defendants before the court below, which shall be condition precedent to defend their suit before the trial court.

25. Copy of this order shall be forwarded to the trial court for information.

(M. A. CHOWDHARY)
JUDGE

Srinagar
02.01.2025
Muzammil. Q

Whether the judgment/order is reportable: Yes / No
