

(2011) 11 AHC CK 0440
In the Allahabad High Court
Case No : C.M.W.P. No. 24821 of 2011

Akhbar Ali and others

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B

Citation : (2012) 1 ADJ 104

Hon'ble Judges : Amreshwar Pratap Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Amreshwar Pratap Sahi, J.—Heard Sri B.P. Singh learned senior counsel for the petitioners and Sri. A.K. Roy for the respondent 3 to 5, and the learned standing counsel for the respondent Nos. 1 and 2. As noted in the order passed by this Court yesterday, the respondent No. 6 has already been served with a notice but no one has put in appearance on its behalf. Affidavits have been exchanged between the contesting parties and the matter, therefore, with their consent is being proceeded with to be disposed of finally.

2. The dispute giving rise to the present writ petition arises out of a suit u/s 229B of the U.P.Z.A. and L.R. Act, 1950 filed by the petitioners for a declaration in respect of the holding in question. The suit was dismissed on 18th September, 1985. An appeal was preferred against the same which was allowed on 6th May, 1987 and the matter was remanded back to the trial for decision afresh. A copy of the said judgment is Annexure-1 to the counter-affidavit filed on behalf of the contesting respondents. After remand the suit was decreed on 11th September, 1987, copy whereof is Annexure-2 to this writ petition.

3. The contesting respondents No. 3 to 5 are the sons of late Habibulla who was defendant No. 3 in the original suit. These three respondents alongwith the others are alleged to have filed a restoration application on 28th May, 1999 for

setting aside the ex parte decree dated 11th September, 1987. A copy of the said application has been filed as Annexure-4 to the writ petition. This restoration application is said to have been dismissed in default on 11th February, 2000. Another application, to restore the restoration application so dismissed, is said to have been filed on 23rd February, 2000 which was allowed on 16th August, 2000. Consequently, the restoration application which had been dismissed in default is stated to have been heard on merits and finally rejected on 28th December, 2001.

4. Thereafter in the year 2010, three applications are filed dated 29th January, 2010, 5th June, 2010 and 18th June, 2010. These are applications of restoration including the restoration application filed by the respondent Nos. 3 to 5, copy whereof has been filed as Annexure-7 to the writ petition. This application is the main application filed in the year 2010 dated 29.1.2010 praying for setting aside the ex parte decree dated 11.9.1987 and the final decree dated 14.9.1987.

5. It is these applications which have been rejected on 23rd August, 2010 whereafter the respondents appear to have filed a revision against the same before the Board of Revenue. The Board admitted the revision and passed an order including staying of the operation of the judgment and decree dated 11th September, 1987.

6. Questioning the correctness and the legality of the said proceedings the petitioners, who are the plaintiffs in the suit have filed the present writ petition on the ground that the restoration application dated 29th January, 2010 and its filing and the subsequent proceedings as well as the entertaining of the revision by the Board of Revenue, are a clear abuse of process of the Court, inasmuch as, the proceedings have already attained finality with the passing of the order dated 28.12.2001. After the petition was filed, an interim order came to be passed on 28th April, 2011 staying the operation of the order of the Board of Revenue whereafter the contesting respondents have filed their counter-affidavit, supplementary counter-affidavit to which the petitioners have filed their rejoinder.

7. Sri Singh learned counsel for the petitioners submits that the restoration application dated 28th May, 1999 having been rejected on 28th December, 2001 a second restoration application on the same set of facts was not maintainable and clearly barred by the principles of res judicata. The trial court, therefore, rightly rejected the same and as such the Board of Revenue while entertaining the revision against the same, committed a manifest error by passing an interim order staying the operation of the original decree. The order passed by the Board of Revenue and the proceedings before the Board are, therefore, being assailed as being without jurisdiction on the aforesaid grounds.

8. Learned counsel for the petitioners has invited the attention of the Court to the various paragraphs of the application dated 29.1.2010 as also the statement of fact contained in the order dated 28.12.2001.

9. Sri A.K. Roy for the respondent Nos. 3 to 5 submits that the revision is still

pending, the petition should not be entertained and even otherwise on merits, the restoration matter which has proceeded is perfectly in accordance with law and does not suffer from any legal infirmity as pointed out by the learned counsel for the petitioner. To substantiate his submission Sri Roy submits that firstly the restoration application dated 28.5.1999 was never filed by the predecessor-in-interest of the contesting respondents or the contesting respondents themselves by engaging any lawyer. He, therefore, submits that the restoration application and the proceedings culminating in the order dated 28.12.2001 were absolutely without the knowledge of the contesting respondents and were totally ex parte.

10. The second submission of Sri Roy is that the order dated 28.12.2001 is incompetent and without jurisdiction as the dispute fell totally outside the territorial jurisdiction of the district Moradabad, once district J. P. Nagar has been carved out in 1997 and, therefore, if the proceedings were incompetent, then the order dated 28.12.2001 cannot be said to have attached any finality to the proceedings, hence the restoration filed on 29.1.2010 was maintainable.

11. The third submission of Sri Roy is to the effect that the entire judgment and decree is against a dead person, namely the father of the answering respondents and inspite of a clear direction by the appellate court in the remand order dated 6.5.1987, the answering respondents were never substituted, hence the subsequent proceedings are also ex parte to the answering respondents. He, therefore, contends that on all three counts the restoration application filed by the answering respondents deserves to be allowed and, therefore, the Board of Revenue has committed no error in entertaining the revision filed by the answering respondents and the same does not amount to any abuse of the process of the Court.

12. Having heard learned counsel for the parties and having considered the aforesaid submissions, the first issue is with regard to the claim of the respondents to the effect that they had not filed the restoration application dated 28th May, 1999. For this a bare perusal of paragraph 9 of the subsequent application dated 29th January, 2010 would suffice to indicate that the contesting respondents had full knowledge of the moving of the restoration application dated 28.5.1999, inasmuch as, they admit that an order was passed on 28.12.2001. This admission contained in paragraph 9 of the said application, therefore, belies the contention raised on behalf of the respondents that they had not moved the restoration application on 28th May, 1999. It would, therefore, be safe to presume that the respondents had moved the application and that the same came to be dismissed in default on 11.2.2000.

13. Not only this another application was filed on 23.2.2000 for setting aside the order dated 11.2.2000 which was allowed on 16.8.2000. It is thereafter that the restoration application came to be dismissed on merits on 28.12.2001 recording a clear finding to the effect that the defendants in the suit were represented through one Mr. Mohd Junaid Advocate throughout the proceedings and as such

the applicants had full knowledge of the proceedings and the restoration filed after almost 13 years was time barred and the plea set up therein was disbelieved.

14. It deserves to be noticed that the application dated 28.5.1999 in paragraph 2 categorically takes a case to the effect that the proceedings had commenced after remand without substituting the heirs of the dead defendants. Once the order dated 28th December, 2001 has been passed rejecting the said restoration application then the presumption is that the said issue was taken into account and a finding was recorded that the defendants were represented through Mohd. Junaid. This order dated 28th December, 2001, therefore, attained finality after contest including the issue relating to the substitution of the heirs of the defendants.

15. The issue raised by the respondents with regard to the want of jurisdiction by the authority to pass an order on 28.12.2001 is also not open to be raised by the respondents, inasmuch as, there is a distinction between a latent lack of jurisdiction and a patent lack of jurisdiction. The authority at Moradabad was approached by the respondents themselves through the application dated 28.5.1999. In this view of the matter they now cannot be permitted to turn around and take a plea of jurisdiction, inasmuch as, even otherwise a plea of territorial jurisdiction will not be a patent lack of jurisdiction when the judgment and decree was passed when the district was one and there was no bifurcation. This aspect also does not need any further elaboration and is hereby rejected.

16. It is admitted at the bar and even on record that the order dated 28th December, 2001 was never challenged. Even the subsequent application which has been filed on 29th January, 2010 does not make any prayer for setting aside the order dated 28.12.2001. In such a situation all the three contentions raised on behalf of the respondents cannot be accepted.

17. Accordingly, the contention raised on behalf of the petitioner that the proceedings on the basis of the application dated 29.1.2010 are barred by principles of res judicata and amount to an abuse of process of the Court deserves acceptance. The Board of Revenue, therefore, committed an error by staying the operation of the judgment and decree dated 11th September, 1987 in this second round of proceedings without taking care of the aforesaid facts as brought on record and accordingly this Court had rightly proceeded to grant an interim order on 28.4.2011. The writ petition, therefore, succeeds and is hereby allowed. The impugned order passed by the Board of Revenue dated 3rd November, 2010 is quashed. The proceedings arising out of the restoration application dated 29.1.2010 also stand quashed.