
(1994) 10 AHC CK 0074

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 29485 of 1994

Akhil Kumar and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 05-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 176, 229B

Citation : (1994) 10 AHC CK 0074

Hon'ble Judges : R.R.K.Trivedi, J

Final Decision : Dismissed

Judgement

R.R.K. Trivedi, J.—This writ petition has been filed for quashing the order dated 30.8.1994, annexure I, passed by the Board of Revenue, by which revision of the petitioners has been dismissed and order dated 10.6.1991, passed by Assistant Collector First Class / SubDivisional Officer, Sadar, Bulandshar by which he allowed application of respondents No. 4 to 6 for setting aside the ex parte decree and implead them as defendants in the suit filed by petitioners No. 1, under Section 229B/176 of U.P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter referred to as the Act).

2. Facts giving raise to this petition are that plot No. 57, area 8214 of Khata No. 75 and plots nos. 66 and 67, are 150 and 1120 respectively of Khata No. 26 were recorded as exclusive land holding of respondent No. 7 Sanjay Kumar. Petitioner No. 1 Akhil Kumar, real brother of respondent No. 7, filed the aforesaid suit on 4111987 against Sanjay Kumar and petitioners No. 2 to 4 for declaration and parition under Section 229B/176 of the Act. Gram Sabha and State of U.P. were arrayed as defendants Nos. 5 to 6 in the suit. In this suit, an application was filed on 26111988 saving that parties have compromised and each of the brother has 1/5th share in the land in dispute and prayed that the compromise may be accepted and preliminary decree may be prepared. On this application, the suit was decreed by respondent No. 3 on 2011989. The judgment has been filed as Annexure 4 to the writ petition. A perusal of the order dated 2011989

shows that the suit was decreed mainly on the basis of the compromise and there is no reference of the Gaen Sabha and State of U.P. as to whether they contested the suit or filed any written statement. By the said order Lekhpal was directed to be summoned for filing Kurras. A final decree was prepared on 27.6.1989 dividing the land in dispute in five shares. Respondents Nos. 4 to 6 on knowing about the aforesaid final decree, moved an application on 27.6.1989 (annexure VIII to the writ petition) and prayed that the ex parte decree may be set aside and they may be impleaded as defendants in the suit. The facts stated in this application were as under :

(i) that respondent No. 7 Sanjay Kumar was exclusive tenure holder of the land in dispute. This is his selfacquired property.

(ii) that the applicants (respondents No. 4 to 6) purchased the land in dispute by two registered saledeeds executed in their favour on 11.10.1986 and 24.10.1986 for a total consideration of Rs 69,000.

(iii) that other brothers of respondents no. 7 had No. interest. Applications for mutation of their names on the basis of the saledeeds pending as cases nos. 110 of 1987 a and 18 of 1987 respectively.

(iv) that Raghuraj Singh, father of a respondent No. 7 has filed Original Suit No. 118 of 1986 for cancellation of the saledeeds which is pending in Civil Court.

(v) that Sanjay Kumar, respondent No. 7 has also filed Original Suit No. 174 of 1987 for cancellation of saledeeds which is also pending in the Civil Court.

(vi) that petitioners were necessary parties in the aforesaid facts and circumstances but they were not deliberately impleaded as defendants.

(vii) that decree has been obtained behind their back just to defeat their valuable interest.

(viii) that the decree has been obtained by concealing facts and playing fraud on the Court in collusive manner.

3. The petitioner filed objection on 17.4.1990 and contested this application of respondents No. 4 to 6. Respondent no. 3 by order dated 10.6.1991 allowed this application, set aside the ex parte decree and impleaded respondents Nos. 4 to 6 as defendants. Order of respondent No. 3 was challenged by filing revision before Additional Commissioner who vide order dated 30.3.1992 recommended to the Board of Revenue to set aside the order of the trial court. The Board of Revenue, however, by order dated 30.8.1994 after hearing parties, has refused to accept the recommendation of the Additional Commissioner and has dismissed the revision. Aggrieved by the order of the Board of Revenue, petitioners have approached this Court under Article 226 of the Constitution.

4. Learned Counsel for the petitioners has submitted that as respondents Nos. 4 to 6 were not party to the suit, they could not move an application to set aside the decree passed in the suit filed by petitioner No. 1. It has also been submitted

that Section 151 of the Code of Civil Procedure could not be legally taken aid of for setting aside the decree as there is a specific provision for setting aside the ex parte decree. The submission of learned counsel for petitioners is that the only option for the respondents Nos. 4 to 6 was to file a suit. Learned counsel for petitioners has placed reliance on several cases which are being mentioned below :

U.P. State v. Sheo Saran Agarwal, 1959 ALJ 818 (D.B.)

Smt. Santosh Chopra v. Teja Singh and another, AIR 1977 Delhi 110

Subahu Kjumar Jain v. Jagdish Prasad Chaudhary and others, AIR 1990 Gauhati 66.

Mt. Jagrup Gir v. Dy. Director of Consolidation, Ballia and others, 1979 ALR 222.

Arjun Singh v. Mohinder Kumar and others, AIR 1964 SC 993.

5. Second submission of the learned counsel for petitioner is that as the petitioners and respondent No. 7 are real brothers and members of Joint Hindu family, they could partition the land in dispute on the basis of compromise and the third party could not allege the same collusive and the decree could not be legally set aside on their instance. For this submission reliance has been placed in case of Jai Singh Rais v. Harnam Das and others, AIR 1964 All 381.

6. Lastly, it has been submitted that the contrary view taken by this court in case of Suraj Deo v. Board of Revenue, U.P., Allahabad and others, AIR 1982 All 23, is a judgment per in quiriū as the judgments of Division Bench and Single Judge of this Court mentioned above and case reported in AIR 1964 SC 993 were not considered. It has also been submitted that if a learned Single Judge disagreed with the decision of another learned Single Judge, the appropriate course was to refer the matter to a larger bench for an authoritative decision. Reliance for this submission has been placed in cases of Shri Dhar v. Nagar Palika, Jaunpur and others A.I.R. 1990 S.C. 307, State of Bengal v. Falguni Datta and another JT1993 (3) SC 288.

7. I have seriously considered the submissions of learned counsel for petitioners and gone through the judgment of the learned Member, Board of Revenue, and in my opinion, the impugned orders do not suffer from manifest error of law justifying interference by this Court under Article 226 of the Constitution. It is not disputed that the land in dispute was exclusively recorded in revenue papers in the name of respondent No. 7 and he executed saledeed in favour of respondent Nos. 4 to 6. No doubt, suits have been filed for cancellation of saledeeds which are pending, but merely by filing suits, the existence of the saledeeds is not wiped out. They are only under challenge in Court. Untill the saledeeds are actually set aside by the decree of the Court, it cannot be said in any way that respondents Nos. 4 to 6 have no interest in the land in dispute. The petitioners as well as respondent No. 7 were fully aware of the existence of the saledeeds and if they had chosen to file the suit concealing this material fact and

to obtain decree behind the back of respondent Nos. 4 to 6 their conduct cannot be said to be fair either to Court or to the contesting respondents. The decree obtained by concealing necessary facts and avoiding necessary parties can only be termed a decree obtained by fraud on court and collusive. Such a decree can be set aside at any time by the Court on knowing the correct facts and circumstances. Even if for a moment it is accepted that the provisions of Order IX, Rule 13, C.P.C. could not strictly apply, the court could not be left powerless to do away with the injustice and prevent the abuse of the process of the Court. In such facts and circumstances, Section 151 C.P.C. could be invoked and the decree could be set aside. Learned Single Judge of this court in case reported in AIR 1982 All 234, has considered the question at length and has rightly laid down that where the ex parte decree affects the interest of a person not party to the suit, he may apply for setting aside the decree. It has been said that the true test is that the person applying for restoration of the suit or for setting aside the decree should have some interest in the subject matter of litigation. In the present case the interest of respondents in the land in dispute cannot be denied till the sale deeds in their favour are subsisting. In their applications they also mentioned that they had applied for mutation of their names which are pending. I am in respectful agreement with the view taken by the learned Single Judge in the case of Suraj Deo v. Board of Revenue (supra).

8. There is yet another aspect of this matter which has been rightly taken notice of by the learned Member, Board of Revenue. If the ex parte decree obtained by petitioners is set aside at this stage, the controversy between petitioners and respondents nos. 4 to 6 may be resolved in the present suit itself. In my opinion, it is neither necessary nor in public interest or policy to compel respondent Nos. 4 to 6 to file another suit. The course adopted is perfectly justified. The policy of the Courts should be to shorten litigation and minimise the changes of multiplicity of proceedings between the parties.

9. Learned counsel for petitioner has relied on various authorities mentioned above. Much reliance has been placed in case of U.P. State v. Sheo Saran Agarwal, 1959 ALJ 818. I have gone through the case. However, a perusal of the judgment will show that the court excluded such cases where the facts of the case are such that it becomes obligatory on the Court to rectify the mistake committed by it knowingly or when it is forced by the party to commit mistake by concealing the material facts and the mistake is brought to the knowledge of the Court to rectify the same, it may invoke power under Section 151, C.P.C. Thus, in my opinion, there is no conflict between the judgment reported in AIR 1982 All 23 and the aforesaid view expressed by the Division Bench. Similarly, in case reported in, 1979 ALR 222, the learned Judge of this Court in the facts and circumstances of the case in hand observed that the decree obtained from Civil Court in a suit in which petitioners was not party could not be binding on him and the mutation being applied on the basis of the said decree could be ignored so far as he was concerned and there was no occasion for him to move an application for setting aside the ex parte decree. The observations made by the

learned Single Judge were thus in the facts of that case and it cannot be said that the judgment is in any way in conflict with the view expressed by another learned Single Judge in the case reported in A.I.R. 1982 All 23. In my opinion, there is no necessity of referring the matter to a larger bench as hi the facts and circumstances of the case justice has been done and it shall be open to the petitioners to establish their claim in the suit filed by them after giving an opportunity to respondent Nos. 4 to 6. The case reported in A.I.R. 1964 S.C. 993 is also distinguishable on facts. In this case, Hon"ble Supreme Court was dealing with entirely different controversy and the case does not help petitioners in present writ petition in any way.

10. At this stage, it may also be noticed that the trial court decreed the suit filed by petitioner No. 1 on 20.1.1989 in mechanical manner. The Court did not apply its mind as to how the land which was recorded exclusively in the name of respondent No. 7 could be recorded in the name of plaintiff and other defendants. There is nothing on record on which basis it may be said that Gaon Sabha and State of U.P. either conceded to such a compromise or that the proceedings were ex pane against them. This was an obvious illegally committed by the trial Court. The suit was under Section 229B of the Act for declaration of rights and such suit could not be decreed lightly without investigation, as the tenancy rights are regulated by the provisions of the Act and could not be created by a mere compromise. It was not a simple suit under Section 176 of the Act for division of the holding where all parties were recorded as tenure holders. In my opinion, for this illegality also, the judgment and decree dated 20.1.1989 was liable to be recalled and it cannot be said that the Courts committed any error in doing so.

11. For the reasons stated above,, the writ petition has no force and is accordingly dismissed in limine.

Petitioner dismissed.