
(1994) 10 AHC CK 0076
In the Allahabad High Court
Case No : Civil M.W.P. No. 29485 of 1994

Akhil Kumar and Others

APPELLANT

Vs

Board of Revenue, Lucknow and Others

RESPONDENT

Date of Decision : 05-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

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

Citation : (1994) 10 AHC CK 0076

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 3081994, Annexure I passed by the Board of Revenue, by which revision of the petitioners has been dismissed and order dated 1061991, passed by Assistant Collector First Class/SubDivisional Officer, Sadar Bulandshahr by which he allowed application of respondents No. 4 to 6 for setting aside the ex pane decree and implead them as defendant in the suit filed by petitioner No(. 1, under Section 229B/176 of U.P. Z.A. and L.R. Act (hereinafter referred to as the Act).

2. Facts giving rise to this petition are that plot No. 57, area 8214 of Khata No. 75 and plots Nos. 66 and 67, area 150 and 11210 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 Nos. 2 to 4 for declaration and partition 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 saying 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 Gaon 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 2741989 dividing the land in dispute in five shares. Respondents No. 4 to 6 on knowing about the aforesaid final, decree, moved an application on 2761989 (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 tenureholder of the land in dispute. This is his selfacquired property.

(ii) That the applicants (respondents 4 to 6) purchased the land in dispute by two registered saledeeds executed in their favour on 1101986 and 24101986 for a total consideration of Rs. 69,000.

(iii) That other brothers of respondent No. 7 had no interest. Applications for mutation of their names on the basis of the saledeeds are pending as case Nos. 110 of 1987 and 18 of 1987 respectively.

(iv) That Raghuraj Singh, father of 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 had 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 petitioners filed objection on 1741990 and contested this application of respondents 4 to 6. Respondent No. 3 by order, dated. 1061991 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 3031992 recommended to the Board; dated 3031992 recommended to the Board of Revenue to set aside the order of the trial court. The Board of Revenue, however, by order, dated 3081994 after hearing parlies, 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 respondent 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 pane decree. The submission of learned counsel for petitioners is that the only option for the respondent 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 Kumar Jain v." Jagdish Prasad Chaudhary and others, AIR 1990 Gau. 66.

Mt. Jagrup Gir v. Dy. Director of Consolidation, Ballia and others, 1919 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"1 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, 1982(8) ALR 24, is a judgment per incurium as the judgments of Division Bench and Single Judge of this Court mentioned above and case reported ia 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 large bench for an authoritative decision. Reliance for this submission has been placed in cases of Shri Dhar v. Nagar Palika, Jaunpur and others, AIR 1990 SC 307; State of Bengal v. Falguni Dutta and another, JT 1993 (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 sale deed in favour of respondents Nos. 4 to 6. No. doubt, suits have been filed for cancellation of sale deeds which are pending but merely by filing suits, the existence of the sale: deeds is not wiped out. They are only under challenge in Court. Until the sale deeds are actually set aside by the decree of the Court, ,it cannot be said in any way that respondent 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 sale deeds 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 set aside. Learned Single Judge of this Court in case reported in AIR 1982 Allahabad 234 has considered the question at length, and has rightly laid down that where the ex. pane decree affects the interest of person not party in 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 land in dispute cannot be denied till the sale deeds in their favour are subsisting. In their application 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 pane 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 chances 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 became obligatory on the Court to rectify the mistake 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 1982 (8) ALR 24, 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 petitioner 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 pane 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 AIR 1982 Allahabad 23. In my opinion, there is no necessity of referring the matter to a larger bench as in 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 AIR 1964 SC 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 the present writ petition in any way.

10. At this stage, it may also be noticed that the trial court decreed the suit filed by petitioners No. 1 on 2011989 in a 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 Qaon Sabha and State of U.P. either conceded to such a compromise or that the proceedings were ex parte against them. This was in obvious illegality 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 tenureholders. In my opinion for this illegality, also, the judgment and decree dated 2011989 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.