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**(2017) 01 AHC CK 0196**

**In the Allahabad High Court**

**Case No :** Writ B. No. 16786 of 2015 Connected with Writ B. No. 18240 of 2011

Atiq Zama Khan

APPELLANT

Vs

Board of Revenue Alld.

RESPONDENT

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**Date of Decision :** 05-01-2017

**Acts Referred:**

Constitution of India, 1950 — Article 226

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

**Citation :** (2017) 121 ALR 576 : (2017) 134 RD 539

**Hon'ble Judges :** Anjani Kumar Mishra, J.

**Bench :** Single Bench

**Advocate :** A.P. Tiwari and Dr. Vinod Kumar Rai, Advocates, for the Petitioner in Writ B. No. 16786 of 2015; C.S.C., R.B. Yadav, Vineet Kumar Singh, Advocate, for the Respondent in Writ B. No. 16786 of 2015; S.K. Srivastava, Advocate, for the Petitioner in Writ B. No. 18240 of 2011; C.S.C., Awadhesh Kr. Mishra and Mukhtar Alam with S.C. Verma, Advocates, for the Respondent in Writ B. No. 18240 of 2011

**Final Decision :** Dismissed

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## Judgement

Anjani Kumar Mishra, J.— Heard Shri Ashok Kumar Singh, learned counsel for the petitioner and Shri H.N. Singh, learned Senior Advocate for the contesting respondents 4 to 7.

2. The instant writ petition arises out of a suit for declaration under Section 229B of the U.P. Zamindari Abolition and Land Reforms Act, filed by the petitioner and one Nizamuddin Ujjma, the petitioner in writ petition no. 18240 of 2011.

3. This suit was filed with regard to plot no. 18 area 9-3-3 situated in Village Salikpur, Pargana and Tehsil Bhadohi, District Sant Ravidas Nagar.

4. The claim of the plaintiffs was based upon a registered sale deed in their favour, alleged to have been executed by one Quresha Bibi, the grand mother of the respondents 4 to 7.

5. This suit was decreed ex-parte.
6. The contesting respondents filed an application under Order 9, Rule 13 CPC with the prayer that the orders dated 30.03.2002, 20.05.2002 and 20.06.2002 be set aside.
7. The Sub Divisional Officer by his order dated 23.08.2002, allowed the application under Order 9, Rule 13 CPC restoring the suit. A further direction was issued that amaldaramad of the order restoring the suit be incorporated in the revenue records.
8. Aggrieved by this order, the petitioner in the instant writ petition and the petitioner in the connected writ petition preferred a common revision.
9. The Commissioner by his order dated 27.08.2002, allowed the revision, set aside the order passed by the Sub Divisional Officer and directed that the application under Order 9, Rule 13 CPC be considered afresh.
10. The order passed by the Commissioner was challenged by the contesting respondent by means of a revision before the Board of Revenue.
11. The Board of Revenue by the impugned order dated 23.03.2007 allowed the revision, set aside the order passed by the Commissioner and affirmed that passed by the Sub Divisional Officer on 23.08.2008. Hence this writ petition challenging the order dated 23.03.2007 passed by the Board of Revenue.
12. The contention of Shri Ashok Kumar Singh, learned counsel for the petitioner is that the application under Order 9, Rule 13 filed by the contesting respondent was allowed ex-parte. He further submits that as many as three orders were sought to be recalled by this application, including an order dated 30.03.2002.
13. Against this order of 30.03.2002, the respondents had preferred a recall application, which had already been dismissed. This order, therefore, could not have been challenged by means of the application under Order 9, Rule 13 CPC and could have been challenged only before a superior forum or else an application for review of this order could have been entertained, as this order was not ex-parte and had been passed after hearing the parties.
14. Learned counsel for the petitioner has also relied upon the second proviso to Order 9, Rule 13 CPC, as applicable in U.P., which reads as follows:-

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."
15. He submits that the defendants-respondents were aware of the pendency of the suit as they had put in appearance and had filed their written statement. Therefore, also the application under Order 9, Rule 13 CPC, in view of the proviso quoted above, could not have been allowed.

16. Shri H.N. Singh, learned Senior Advocate appearing for the contesting respondents has submitted that the suit was filed by the petitioner-plaintiff claiming on the basis of a registered sale deed dated 25.05.1974 alleged to have been executed by Quresha Bibi, the grand mother of the contesting respondents, in favour of the petitioners in these writ petitions. He submits that this sale deed had been executed, setting up an imposter.

17. On coming to know of this fraudulent act, a First Information Report was lodged against the petitioners on 10.10.1975. In the criminal case, the petitioners were prosecuted and also underwent incarceration. It is further submitted that on an application filed on behalf of contesting respondents, the original sale deed has never been released in favour of petitioner-vendees and is still lying in the custody of the Sub Registrar.

18. On the merits, he submits that the order passed by the Sub Divisional Officer allowing the application under Order 9, Rule 13 CPC, was not an ex-parte order. In this order, the Court has categorically observed and held the service upon the petitioners, to be sufficient. He next submits that although admittedly a written statement had been filed in the suit, the trial Court decided it without framing any issues. His third and last contention is that although the claim in the suit was based on the alleged sale deed dated 25.05.1974, yet this document was never filed before the trial Court.

19. Elaborating further, he submits that in any case this original sale deed could not have been filed as it is still in the custody of the Sub Registrar, its release having been stayed, on an application filed by the respondents.

20. Shri Ashok Kumar Singh in rejoinder has submitted that it is clear from a perusal of the order passed by the Sub Divisional Officer that oral and documentary evidence was adduced by the petitioner. Even a copy of the sale deed was filed and was on the record of the trial Court and, therefore, the contention that the suit had been decided without any evidence having been adduced, is incorrect. He further admits that no issue was framed by the trial Court.

21. I have considered the submissions made by learned counsel for the parties and have perused the record.

22. The first submission, which requires consideration is as to whether the order passed on the application under Order 9, Rule 13 CPC, was ex-parte as alleged by counsel for the petitioner, the same had been passed without any notice having been issued to the petitioner.

23. This submission lacks substance. The Sub Divisional Officer, in his order allowing the application under Order 9, Rule 13 CPC, has categorically stated that the notice of this application was served upon the petitioner and despite such service they deliberately absented themselves. There is no material on record nor has any such material upon referred to, by counsel for the petitioner, which

would lead to even a prima facie the conclusion that this observation made in the order of the trial Court, is either vitiated or perverse. Under the circumstances, this Court is constrained to hold that the application under Order 9, Rule 13 CPC has been allowed after due notice to the petitioners.

24. On the question as to whether the order dated 30.03.2002, could have been challenged by means of an application under Order 9, Rule 13 CPC, especially when an earlier recall application has already been dismissed by the trial court, this Court finds, from a careful perusal of the record, that upon the suit being filed, the defendants-respondents had put in appearance and filed their written statement on 08.11.2000. Admittedly, the order to proceed ex-parte was passed on the same date and an application to recall of this order has been dismissed by the order dated 30.03.2002.

25. This Court fails to understand as to how the trial Court could have been passed an order to proceed ex-parte against the defendants, on the date they had filed their written statement. Once the written statement was filed, the next thing to be done by the court concerned was to fix a date for framing of issues. Neither any such date was fixed, nor issues ever framed in the suit.

26. It is therefore established on record that the trial Court had proceeded illegally and with material irregularity and, therefore, this Court while exercising equity jurisdiction under Article 226 of the Constitution of India refuses to interfere on the ground that the order dated 30.03.2002, could not have been challenged by means of an application under Order 9, Rule 13 CPC. Also by the order impugned, substantial justice has been done between the parties. This Court refuses to interfere on this ground.

27. For the same reason, I do not consider it fit to interfere on the ground that the application under Order 9, Rule 13 CPC, could not have been allowed in view of proviso to Order 9, Rule 13 CPC, as applicable in U.P.

28. Besides, Shri H.N. Singh, learned Senior Advocate appearing for the contesting respondents has submitted that the ex-parte judgment and decree passed by the trial Court was on account of collusion between the plaintiffs and the Court concerned. After dismissing the recall application filed by the respondents on 30.03.2002, no dates were fixed and all the subsequent proceedings are on paper alone. The Presiding Officer had carried the file to his residence and has passed the ex-parte judgment.

29. In view of the aforesaid discussion and since the contention raised on behalf of petitioner does not find favour with this Court and also because substantial justice has been done by the order impugned, this Court is of the opinion that the writ petition is liable to be dismissed.

30. There is yet another reason for not interfering. By the orders impugned, the suit stands restored to its original number and the same shall be decided after hearing the parties and after affording them adequate opportunity to adduce

evidence. The petitioner therefore, cannot be said to be unduly aggrieved as he is still has every opportunity of canvassing his claim before the trial Court, both on facts and on law.

31. The writ petition is accordingly dismissed.

32. It is however provided that the trial Court may proceed with the matter expeditiously and endeavour to take it to its logical conclusion, preferably within a period of six months from the date a certified copy of this order is filed before it.

33. Writ petition no. 18240 of 2011 filed by Nizamuddin Ujjma is also directed against the same impugned order as are impugned in the instant writ petition.

34. In this case, a withdrawal application has been filed on behalf of petitioner stating therein that he does not want to press the writ petition.

35. However, since the orders impugned have already been affirmed by me by dismissal of writ petition no. 16786 of 2015, it is immaterial as to whether this writ petition is dismissed on merits or is dismissed as not pressed.

36. The order passed in writ petition no. 16786 of 2015, shall therefore, govern this writ petition also and this writ petition also stands dismissed.