
(2011) 08 AHC CK 0300

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 7422 of 2007

Baboo Ram

APPELLANT

Vs

Shiv Ashrey and Others

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 68
Hindu Succession Act, 1956 — Section 11, 8, 9
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 171, 171(2), 229B

Citation : (2011) 9 ADJ 48 : (2011) 6 AWC 5976 : (2011) 114 RD 698

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble A.P. Sahi, J.—The petitioner Baboo Ram, claiming rights of adverse possession over the land in dispute, which is a holding governed by the provisions of the Uttar Pradesh Zmindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as "the U.P.Z.A. & L.R. Act, 1950"), has come up before this Court assailing the orders of the Courts below non-suiting him on the ground that the petitioner has failed to establish his claim, and that the land cannot be said to have devolved on the petitioner or even otherwise inherited by him.

2. The contention of the petitioner is that late Ram Pher, the father of the respondents 1, 2 and 3, was the recorded tenure holder and the petitioner's uncle Hari Prasad @ Prasad had entered into possession adverse to late Ram Pher and since the possession was continued long and uninterrupted since 1358 Fasli (1951 AD), he had perfected a right by adverse possession.

3. The respondents Zamir and Musir claimed that they had purchased the land from one Mata Saran on 6.10.1962 and also one of the tenants-in-chief alongwith Ram Pher. There was an inter se dispute between Ram Pher, Zamir and

Musir. One Ram Jatan also filed a suit for declaration against Bona (father of Ram Pher) and Zamir claiming rights over the land in dispute. This was a suit u/s 229-B of the U.P.Z.A. & L.R. Act, 1950 which was decreed on 28.5.1985 but on appeal, the same was reversed. A second appeal was filed against the same before the Board of Revenue and the matter was remanded back to the appellate Court.

4. In the said inter se dispute between the said parties, the petitioner Baboo Ram, nephew of Hari Prasad @ Prasad filed an application for impleadment but his prayer was rejected on 13.9.1989 on the ground that he claims possession through Hari Prasad @ Prasad on the basis of an entry in Class IX of the Land Record Manual (entry relating to a trespasser) and on the ground that he was an unnecessary party therein and it will not prejudice his claim, if any.

5. It will be relevant to mention that late Hari Prasad @ Prasad through whom the petitioner is claiming his devisable interest had never filed any suit for declaration in his favour on the ground that he had perfected his title through adverse possession against Ram Pher, the father of the contesting respondents. Hari Prasad @ Prasad had no issue. The petitioner claims to be the successor of Hari Prasad under the provisions of Section 171(2) of the U.P.Z.A. & L.R. Act, 1950 being the next reversioner under the aforesaid provisions entitled to succeed to the estate of the deceased Hari Prasad @ Prasad.

6. Hari Prasad @ Prasad died on 31st July, 1991. The suit, which has given rise to the present proceedings, was instituted in the year 1999 long after the death of Hari Prasad @ Prasad by the present petitioner. Ram Pher, the father of the respondents 1, 2 and 3 and the recorded tenure holder, was arrayed as defendant No. 1, a copy whereof is Annexure 1 to the writ petition. The pleadings therein narrated that plot No. 534/1 area 0.238 hectares was recorded in the name of one Vishwanath and that Hari Prasad was in adverse possession over the same. Ram Pher had absolutely no right, title or interest or concern with the said land. The name of Hari Prasad @ Prasad was entered in Class IX, which is the remarks column relating to a trespasser. The respondents started interfering with the possession of the petitioner who had allegedly succeeded to the said property being the nephew of Hari Prasad @ Prasad and was also in possession thereof, therefore, the suit was filed on the said ground. Evidence was led on behalf of the petitioner and he was examined and also was cross-examined. A copy of the statement of the petitioner is annexure 8 to the writ petition. The petitioner in his cross-examination admitted that Hari Prasad @ Prasad was his uncle and that Ram Prasad is his father, who was alive and was living after the death of Hari Prasad @ Prasad.

7. The statement of other witnesses produced by the petitioner was also recorded and the Sub-Divisional Magistrate, who tried the suit, came to the conclusion that the petitioner could not have claimed any right to succeed to the said land as he was not in adverse possession. It was further held that the adverse possession of Hari Prasad as recorded came to an end on his death and

whatever rights he had were extinguished with nothing left to the petitioner to succeed. It was further held that the entry relating to adverse possession of Hari Prasad @ Prasad was also not in accordance with law, and therefore, the suit deserves to be dismissed. The finding recorded is that none of the entries were made in accordance with the Land Record Manual, and therefore, the suit has to fail.

8. The petitioner went up in appeal and the judgment of the trial Court was affirmed whereafter a second appeal was filed before the Board of Revenue which was dismissed. The first appellate Court also held that the claim of adverse possession on the basis of inheritance in relation to a Class IX entry is impermissible in law, and since late Hari Prasad @ Prasad had died issueless, there was no occasion to consider the claim of the petitioner. After the second appeal was dismissed, a review petition was also filed, which came to be rejected on 16.1.2007. In the aforesaid background, the present writ petition has been filed.

9. Sri S.K. Verma, learned Senior Counsel for the petitioner submits that the trial Court has committed an error by refusing to tack the period of adverse possession of Hari Prasad @ Prasad with that of the petitioner, inasmuch as, the petitioner had a jural relationship with his uncle under the U.P.Z.A. & L.R. Act, 1950 being his successor and even otherwise, entitled to succeed to his estate under the personal law as defined under the Hindu Succession Act, 1956. He further submits that a Will had also been executed in favour of the petitioner, and therefore, the petitioner had a jural relationship that was established. He had a right to sue and the claim of adverse possession of Hari Prasad @ Prasad had to be tacked with that of the petitioner in law. This having not been done, the judgment and decrees of the trial Court and the first appellate Court were vitiated and this was a substantial question of law which the Board of Revenue failed to appreciate in the second appeal hence all the judgment and decrees deserve to be set aside.

10. He further contends that the documentary evidence of adverse possession is only an indicator of the possession of late Hari Ram and it was nobody's case that the entries were either fake or forged. This was further substantiated by the oral evidence that had been adduced to demonstrate to the hilt that the petitioner's possession alongwith that of late Hari Prasad @ Prasad was established, and therefore, tacking of the period of adverse possession as claimed by the petitioner with that of Hari Prasad @ Prasad was permissible in law. The Board of Revenue, therefore, failed to frame an appropriate substantial question which had arisen, hence, the petition deserve to be allowed.

11. His further submission is that the oral evidence could not have been discarded as it was neither prompted nor tutored and as such there was no reason to disbelieve the said evidence. He further contends that mutation or entry does not either create or extinguish any right and it was the evidence, which was on record which ought to have been considered and appreciated.

Having not done so, the trial Court erred in arriving at a contrary finding, which had been wrongly affirmed by the higher Courts ignoring the statements of the witnesses. It was also a substantial irregularity, and therefore, the error was such that ought to have been corrected by the Board of Revenue. Another argument that has been advanced is that the Board of Revenue could not have proceeded to dismiss the appeal summarily without framing a substantial question of law and having not done so, the judgment of the Board of Revenue also deserves to be set aside on this ground as well. Written submissions had also been handed down which also reiterate the said points and the following decisions have been relied upon to support the submissions aforesaid:

1. Dulara Devi and others v. Mahdei, 2006 (24) LCD 352.
2. Kashmir Singh Vs. Harnam Singh and Another,
3. Kale and Others Vs. Deputy Director of Consolidation and Others,
4. Mohan Vs. The Director of Consolidation, U.P., Kanpur and Others,
5. Smt. Rajkali v. Board of Revenue U.P. at Allahabad and others, 2007 (102) RD 244.
6. Moin Uddin and others v. Dy. Director of Consolidation and others, 1977 RD 378
7. Bal Kishan v. Board of Revenue U.P. and others, 1994 RD 318.
8. Ram Avadh v. Bindeshwari and others, 1977 RD 203.
9. Nellikkottu Kolleriyil Madhavi v. Kavakkalathil Kalikutty and others, 1998 RD 182.
10. Dilbagrai Punjabi Vs. Sharad Chandra,
11. Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.,
12. Sajjad Husain Vs. Qurban Ali Beg
13. Sher Singh v. Joint Director of Consolidation and others, 1969 ALJ 38.

12. Coming first to the last point raised by Sri Verma in relation to non-framing of a substantial question of law by the Board of Revenue, suffice it to say that an appeal which is akin to a second appeal described u/s 100 C.P.C. has to proceed only after a substantial question of law is framed. To that extent, the judgment of the Apex Court in the case of Dulara Devi (supra) comes to the aid of the petitioner. However, the said judgment does not say that even if the Board of Revenue does not find any substantial question of law to have arisen, then too, the same has to be framed, if the second appeal has to be dismissed summarily. The argument of Sri Verma to that extent cannot be accepted as it would be stretching the proposition as laid down in Dulara Devi's case (supra) too far. In the instant case, the Board of Revenue did not find any substantial question of

law that arose on the facts of the case and as such it was not compulsory for the Board to have framed a question for dismissal of the appeal.

13. The second most important issue is now relating to the claim of adverse possession of Hari Prasad being tacked with that of the petitioner.

14. Here Sri B.K. Gautam learned counsel for the contesting respondents submits that the claim of the petitioner is unfounded and the reliance placed by Sri S.K. Verma, learned Senior Counsel in the case of *Sher Singh v. Joint Director of Consolidation*, 1969 ALJ 38, is misplaced, inasmuch as, the said decision has already been overruled by the Apex Court reported in AIR 1978 SC 1341. It is, therefore, urged that the said decision would not come to the aid of the petitioner. It is further submitted by Sri Gautam that the petitioner cannot claim inheritance under the provisions of the U.P.Z.A. & L.R. Act, 1950, as on the date when Hari Prasad @ Prasad died, according to the admitted case of the petitioner his father Ram Prasad was alive, and since the brother of the deceased, namely father of the petitioner, was alive, there was no occasion for the petitioner to succeed to the disputed land u/s 171 of the U.P.Z.A. & L.R. Act, 1950. He further submits that personal law does not govern succession of holding under the U.P.Z.A. & L.R. Act, 1950, and therefore, the petitioner had no jural relationship so as to allow him to institute the suit and continue to claim rights of adverse possession over the land in dispute or any declaration over the same. It is further contended that Section 8 read with Sections 9 and 11 of the Hindu Succession Act, 1956, the petitioner could not have succeeded even otherwise, as a Class II heir as claimed by the petitioner. There cannot be a dispute that Section 171 of the U.P.Z.A. & L.R. Act, 1950 is a provision for succession to the holding of a Bhumidhari, Asami or lease holder. The said section does not make provisions of succession to a trespasser. The petitioner's uncle Hari Prasad @ Prasad was at the best a trespasser as he had not got his rights declared as a Bhumidhar as on the date of the institution of the suit. His name was continued and entered in the revenue records as a trespasser. There was, therefore, no formal declaration in his favour as a Bhumidhar over the land in dispute so as to allow the petitioner to claim succession. The said contention can be understood in the context of Section 171 of the U.P.Z.A. & L.R. Act, 1950. If the petitioner succeeds in getting a declaration, only then he succeeds to the holding of late Hari Prasad @ Prasad. Even otherwise unless the petitioner is able to prove his possession that may be liable for being tacked as urged, he does not succeed as an heir. What has to be established is a jural relationship to institute a proceeding for such declaration.

15. So far as, succession under Hindu Law is concerned, the 1956 Act prescribes the mode of succession in favour of classified heirs. The petitioner at best is a Class II heir as defined in the schedule. The brother of a deceased Hindu under Class II heir is in the first entry. So far as, the brother's son is concerned, he is in a separate entry thereafter. Thus, it is only when the first entry is exhausted that the second entry can be relied on. The petitioner's father Ram Prasad was admittedly alive who was the real brother of late Hari Prasad @ Prasad. In such a

situation, even otherwise, the petitioner could not have succeeded under the personal law so long as the father was alive. The petitioner's father Ram Prasad never instituted any proceedings for declaration of his rights. There was no jural relationship in the limited sense of succession that existed so as to entitle the petitioner to succeed to the claim of adverse possession of Hari Prasad @ Prasad. The question of setting up a Will by the petitioner does not appear to have been pressed before the Courts below nor was the Will proved by any evidence as required u/s 68 of the Indian Evidence Act, 1872. The argument of Sri Verma, therefore, that a Will had also been executed cannot be gone into in the exercise of jurisdiction under Article 226 of the Constitution of India.

16. Sri Verma relied on a large number of decisions apart from the decision in the case of Sher Singh (*supra*) to contend that a trespasser has also a right to succeed if he is able to establish a jural relationship with his predecessor in interest. Sri Verma has relied on two judgments of ancient origin one in the case of Babu Ram v. Banke Bihari Lal and another, 1906 (3) ALJ 377 and other in the case of Gobind Prasad v. Mohan Lal, ILR 24 All 158. There can be no dispute with the said proposition that if there is a jural relationship then a person can claim rights, even if, he is a trespasser.

17. Ajural relationship pertains to rights and obligations or privileges created by law. Such a relationship should in turn bring about permissibility and availability of any legal rights or obligations. Succession or its prescribed modes are one of the tenets of jural relationship. They are limited to statutory rights as they are prescribed forms of succession either under tenancy laws or personal law. The instant case is one where a jural relationship is being claimed on the basis of the relationship of the petitioner with the deceased being nephew and uncle respectively and by virtue of such relationship, the possession is also alleged to have continued with the petitioner. Whether such jural relationship did exist so as to allow the petitioner to raise a substantial question of law, is the short point that has to be gone into in the present writ petition. The trial Court and the first appellate Court have concentrated on the fact that since the entry in Clause IX was in favour of the petitioner's uncle, the same extinguished. The claim of the petitioner as such on the basis of an entry in the name of the uncle is not heritable.

18. The law is settled that two independent trespassers claiming adverse possession independently are not entitled to the tacking of their separate periods of possession as they have no jural relationship. The entry in Clause IX is only a reflection of the possession of the deceased in the present case. The question is of continuance of the possession of the petitioner by virtue of being related to the deceased and the evidence related to possession in this respect. The petitioner does not contend that he is claiming independent rights as a trespasser against that of his late uncle. He claims continuity of possession and whether such continuity claimed results in a jural relationship or not is the issue involved in the present case. For the purpose of consideration of a jural

relationship, the proximity and association of the petitioner with his deceased uncle, his conduct and claim about possession of the land in dispute as well as his intention to sue the pre existing right of his uncle were relevant factors in order to assess the existence of a jural relationship. The petitioner was not a stranger to his uncle. The connotation of jural relationship has a wider meaning and is more inclusive of different forms of relationship that may reflect a jural relationship. It is this question which can be said to be relevant for the purpose of considering the claim of the petitioner for tacking his possession with that of his late uncle. The question as to whether he has a jural relationship has to be adjudged on the aforesaid parameters.

19. The petitioner has been held not to have proved his title as the name of his predecessor in interest has not been entered in accordance with the relevant paragraphs of the Land Record Manual. In short, the finding is that the entry being irregular, and not in accordance with the Land Record Manual, the entry of Clause IX was unacceptable. The second reason given by the trial Court and the appellate Court is that the person in whose favour the entry existed died. The said entry therefore automatically stood wiped out. There is no conclusive finding in relation to the claim of continuity of possession of the petitioner by the Courts below, even though the evidence was led by the petitioner.

20. Learned counsel for the respondents contends that as a matter of fact, the petitioner was never in possession and hence the findings recorded by the trial Court and the appellate Court cannot be faulted with.

21. The aforesaid contention cannot be accepted as the trial Court and the first appellate Court do not appear to have focused on the claim of continuity of possession of the petitioner vis-a-vis the jural relation that was necessary for the purpose of accepting or rejecting the claim of the petitioner. The issue of tacking was, therefore, dependent on the said findings and even otherwise, on the evidence that was available on record. The Board of Revenue has simply rejected the second appeal on an observation that since no substantial question of law arises, and therefore, the appeal deserved to be dismissed.

22. In my opinion, the said approach of the Board of Revenue was erroneous as a substantial question, as to whether there was a jural relationship between the petitioner and his uncle existed did arise. The other finding relating to non-filing of a suit by the uncle of the petitioner being detrimental is also not acceptable. If, the uncle of the petitioner did not choose to file a suit, the question that arises is whether the petitioner was also entitled to institute the same and this was get another question of law which had to be gone into. The petitioner may succeed or loose on merits is a different question altogether, but if a substantial question of law did arise on the facts of the case then in the opinion of the Court, the Board of Revenue ought to have framed the same and then answered it accordingly. The Board of Revenue also did not enter into the claim of continuity of possession by the petitioner which was necessary to indicate as to whether there was a jural relationship or not.

23. Such a issue had to be determined in view of the principles laid down in the judgments as relied on by the learned counsel for the petitioner. However, the Court was able to lay hands on another decision of the Apex Court in the case of Gurbinder Singh and Another Vs. Lal Singh and Another, , where the law relating to claim of trespassers for the purpose of tacking of possession has been more clearly dealt with and it has been held that any independent trespasser, who is not able to establish any jural relationship, cannot claim tacking, but if there is a connection between two, then the law does not preclude the tacking of possession of successive trespassers. The law as explained in the aforesaid judgment of the Apex Court, therefore, indicates that this was a substantial question of law and the same ought to have been framed and tried by the Board of Revenue at least on the facts of the present case.

24. Learned counsel for the respondents has been unable to place any law to the contrary before the Court on this issue.

25. Accordingly, the petition is partly allowed. The impugned order of the Board of Revenue dated 27.12.2005 and the consequential orders passed in the proceedings before the Board of Revenue including the rejection of the review petition are set aside.

26. The matter is remanded back to the Board of Revenue to frame the appropriate substantial questions of law in the light of the observations made hereinabove and then proceed to decide the same. Since the litigation has been going on for a fairly long time, it is expected that the Board of Revenue shall proceed to decide the matter as expeditiously as possible but not later than six months from today.

27. A certified copy of the order shall be placed by the petitioner before the Board of Revenue for proceeding accordingly without further delay and without granting any unnecessary adjournments.