
(1991) 10 AHC CK 0044

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 37778 of 1991

Banjara Singh

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 29-10-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 — Section 10(2)
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 154, 155, 163, 164, 209

Citation : (1991) 2 AWC 491 : (1992) RD 268

Hon'ble Judges : B.L. Yadav, J

Bench : Single Bench

Advocate : K.K. Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

B.L. Yadav, J.—By the present petition under Article 226 of the Constitution of India prayer is that impugned order dated 28-7-1987 passed by the Additional Commissioner in appeal u/s 331 of UP ZA & LK. Act 1950 (for short the Act) and order dated 20-8-1991 passed by the Board of Revenue in second appeal may be quashed by issuing a writ of certiorari.

2. Factual matrix of the case is that the Petitioner, filed a suit on 28-11-1984 in the court of Assistant Collector 1st Class Kichha Nainital u/s 209 of the Act against the Defendant/Respondent No. 3 seeking the relief for ejectment on the ground that the Defendant has occupied the agricultural land in dispute otherwise than in accordance with the law, whereas the land in suit was allotted to the Petitioner.

3. The Defendant Respondent No. 3 contested the suit alleging that Plaintiff has executed an agreement for sale dated 28-5-1974 in favour of Defendant and a sum of Rs. 11,000/- was paid in cash to the Plaintiff by the Defendant and it was decided that remaining sum of Rs. 1,100/- would be paid at the time of

execution of sale deed and possession was delivered to the Defendant at the time of execution of the agreement for sale.

4. The trial court decreed the suit, whereas lower appellate court allowed the appeal of Respondent No. 3 and dismissed the suit. The Board of Revenue dismissed the Second Appeal preferred by the Petitioner, the Plaintiff.

5. Mr. K.K. Srivastava, the learned Counsel for the Petitioner urged that the Defendant Respondent No. 3 should have filed a suit for specific performance of the contract and under the law he cannot acquire Bhumidhary rights. Reliance was placed on Gulab Shanker Tiwari v. Deputy Director of Consolidation 1982 ALJ 706 and Kedar v. Distt. Judge 1978 ALJ 836.

6. Mr. J.S. Dabbas, learned Counsel for the Respondent No. 3, who has filed caveat, urged that for the transaction between the parties Section 164 of the Act was applicable hence the suit has correctly been dismissed.

7. As the facts of the case are quite clear, counter affidavit is not necessary. The relief sought in the suit u/s 209 of the Act was that the Defendant/Respondent No. 3 may be ejected as he was in possession otherwise than in accordance with the law. The main question for consideration is whether the possession of Defendant Respondent No. 3 was that of a trespasser or otherwise. In case his possession over the land in dispute was that of a trespasser and the suit was; within time, certainly he would be liable to ejectment.

8. A bare reading of Section 164 of the Act makes it evident that any transfer of any holding or part thereof made by the bhumidhar by which the possession is transferred to transferee for the purposes of an engagement which may give rise of pecuniary liability shall notwithstanding and thing contained in the document of transfer or any other law for the time being enforce be deemed to a sale. In the present case by the agreement dated 28-5-74 the Plaintiff has agreed to execute a sale deed in favour of the Defendant by accepting a sum of Rs. 11,000/- and balance sum of Rs. 1000/-only was to be paid at the time of registration and the possession was transferred to the (transferee) Defendant/Respondent No. 3 The transaction accordingly is covered u/s 164 of the Act. The Defendant Respondent is entitled, in any case to its protection. Section 164 may be read along with Section 154, 155 & Section 164. Section 154 imposes a restriction for a transfer by a Bhumidhar if transferee becomes entitled to the land together with his earlier land, will in aggregate exceed 5.0586 hectares (12.50 acres) in U.P. Section 155 provides that a Bhumidhar can not mortgage a land in which possession is also transferred or is agreed to be transferred in future to the mortgagee as a security. Section 163 enacts provisions pertaining to consequences of void transfers. Section 164 is hedged with so many conditions and exceptions hence it is to be interpreted with judicial delicacy. Section 164 does not use the word mortgage but it still prohibits the transaction amounting to mortgage. The transactions u/s 164 is a transaction sandwiched between a mortgage and actual sale. In other words in case it becomes

mortgage, it is prohibited by Section 155, in case it is sale it shall be governed by Section 154, of the Act and other relevant provisions of Transfer of Property Act.

9. In the instant case the possession was transferred, handsome amount was received and balance was to be paid at the time of actual sale. The transfer of possession indicates that some right of vendor i.e. possessory title was transferred. In any way what is decisive is not the nature of transaction in the present case, but as to whether the possession of the Defendant was otherwise than in accordance with law so as to make him liable for ejectment. As the Defendant was in possession by virtue of his amount advanced, hence his possession could not be said to be otherwise than in accordance with law.

10. In *Gulab Shanker Tiwari v. Deputy Director of Consolidation* 1982 ALJ 706, (supra), the controversy was whether transferee or the person in whose favour possession has been delivered would acquire Bhumidhary rights or not, it was held that mere delivery of possession to the Defendant would not make him Bhumidhar. In the present case, Defendant Respondent No. 3 has not been held to be bhumidhar, so the case of *Gulab Shanker Tewari* (supra) is besides the point.

11. In *Kedar v. Distt. Judge and Ors.* 1978 ALJ 836, (supra) it was held that in the proceedings u/s 10(2) of U.P. Imposition of Ceiling on Land Holdings Act the land covered by the agreement cannot be excluded while determining ceiling area as such agreement cannot amount to sale. In the present case also transaction has not been held to amount to sale rather the possession of the Defendant has been held to be not that of trespasser, consequently that case is of no assistance to the Petitioner.

12. The findings recorded by the Board of Revenue and the Additional Commissioner that the Respondent No. 3 was not liable to ejectment in a suit u/s 209 of the Act are perfectly correct. There is no justification for interference under Article 226 of the Constitution. Petition fails and is consequently dismissed summarily.