
(2013) 04 AHC CK 0256

In the Allahabad High Court

Case No : Civil Misc. Writ Application No. 71963 of 2013

Basant Lal Agrawal

APPELLANT

Vs

Vth Additional District Judge and Others

RESPONDENT

Date of Decision : 18-04-2013

Acts Referred:

Citation : (2013) 4 ALJ 332 : (2013) 99 ALR 395 : (2013) 6 AWC 6308

Hon'ble Judges : Sudhir Agrawal, J

Bench : Single Bench

Advocate : Prakash Gupta and Kshitij Shailendra, for the Appellant; S.B. Paul, A.P. Paul and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agrawal, J.—Heard Sri B.B. Paul, learned counsel appearing for applicant-respondent No. 3 and Sri K. Shailendra, Advocate, for petitioner. This is an application for recall of judgment dated 16.7.2012 passed by this Court deciding the writ petition in absence of counsel appearing on behalf of respondent No. 3 and 4. This application has been filed on behalf of respondent No. 3, Sri Rajendra Prasad Agarwal.

2. Sri B.B. Paul, learned counsel for applicant stated that the case could not be marked and, therefore, none could appear on 16.7.2012. This fact has been stated in para 5 of affidavit sworn by Sri Rajendra Prasad Agarwal himself on the basis of personal knowledge.

3. However, he (respondent No. 3) admits that he was not at Allahabad on 16.7.2012 and on 2.3.2013 came to know about decision of writ petition and on 4.3.2013 came to Allahabad and made enquiry from the Office of Sri B.B. Paul, Advocate when he was informed that case was listed on 16.7.2012, but the same inadvertently escaped from being marked in the list of the counsel for petitioner, due to which no one could appear on behalf of respondent No. 3.

4. It would be appropriate at this stage to notice the relevant para 5 of the

affidavit accompanying the Restoration Application which reads as under:

5. That on 4.3.2013 Respondent No. 3 came to Allahabad and on enquiry from the office of Shri B.B. Paul Advocate it transpired that the aforesaid writ petition was listed before this Hon"ble Court on 16.7.2012 but inadvertently the same escaped being marked in the Cause List of the counsel for the petitioner, due to which no one on behalf of the Respondent No. 3 could appear before the court at the time when the aforesaid petition was called out and the writ petition was dismissed.

5. This Court failed to understand if petitioner's counsel could not mark the case, then the case should have been decided in absence of petitioner's counsel, but in the present case Sri B.B. Paul is counsel for respondent No. 3, hence, non marking of case by petitioner's counsel would not have made any difference to him. Therefore, this averment in the affidavit is per se misleading and self contradictory. Further this paragraph has been sworn on the basis of personal knowledge though, admittedly, deponent of the affidavit could not have known this fact as to whether the case was omitted from being marked or the absence was deliberate.

6. Be that as it may, in the interest of justice, I permitted Sri Paul to point out any legal or otherwise error in my judgment dated 16.7.2012 which has been passed after considering various aspect of the matter, and, in particular, the real issues involved in the writ petition.

7. Sri B.B. Paul submitted that the initial tenancy was in the name of Sri Luchimal and after his death, tenancy of shop in dispute devolved upon his heirs and legal representatives. He admitted that respondent No. 3, Rajendra Prasad Agarwal, is the son of Sri Luchimal. He further submitted that there are two more sons of Sri Luchimal, i.e., Sri Heera Lal Agarwal; and Sri Umesh Chand Agarwal, who is now dead. He further pointed out that notices dated 19.2.1985 and 5.2.1987 were served upon Rajendra Prasad Agarwal only, as is evident from Annexures 1 and 4 to the counter-affidavit. In both the notices, only Rajendra Prasad Agarwal's name has been mentioned as if he is the only tenant. He, therefore, submitted that the notice having been issued only to Rajendra Prasad Agarwal, and not to other joint tenants, hence, it was vitiated in law. He also placed reliance on Apex Court's decision in Textile Association (India) Bombay Unit Vs. Balmohan Gopal Kurup and another, and this Court's decision in Gauri Shankar Gupta Vs. Anita Mishra and Another, .

8. In effect, submission is that notice was issued only to one of the joint tenants, therefore, it was not valid in law. Hence, without determining joint tenancy of others, the eviction proceeding initiated by petitioner-landlord was wholly illegal.

9. In my view, submission besides lacking bona fide, lacks substance and has to be rejected.

10. Before this Court, Rajendra Prasad Agarwal is the respondent No. 3, who is

son of Luchimal Agarwal. Admittedly landlord issued notices to Rajendra Prasad Agarwal, respondent No. 3. He was impleaded as defendant in S.C.C. suit instituted by landlord. He (respondent No. 3) had all opportunities to contest the matter and actually contested the same. No other person, claiming himself to be joint tenant, alleging that his rights have been affected, has come before Courts below or before this Court. So far as respondent Nos. 4 and 5 are concerned, they are not the heirs and legal representatives of Sri. Luchimal. Hence no such argument is entertainable at the instance of respondent No. 3.

11. In *Textile Association (India) Bombay Unit Vs. Balmohan Gopal Kurup and another*, after eviction proceedings attained finality, one of the joint tenants, who was not party in earlier proceedings, filed a suit alleging that the decree for eviction obtained by landlord without impleading him was illegal and that was the matter came up before Apex Court. It is this grievance of the joint tenant, which was upheld by Apex Court holding that petitioner in that case should have been impleaded in the suit and the decree obtained without impleading him cannot be enforced against him.

12. So far as this case is concerned, no alleged joint tenant has raised any complaint, either before the Courts below, or before this Court. Respondent No. 3, who is trying to take advantage of this plea, is the person who has been, throughout, given opportunity to contest the matter. This fact itself is sufficient to prove that, as a matter of fact, the tenancy rights are being enjoyed solely and only by respondent No. 3 and none else. The alleged joint tenants, if any, have/had no interest in the subject-matter or have surrendered the same. That is how no issue or contest on their part has come forth either before the Courts below or this Court. At the instance of respondent No. 3, who has throughout opportunity to contest the matter, the above plea, I do not find, can be entertained.

13. Even otherwise, this fact also shows that interest of all others has been, throughout and effectively, represented by respondent No. 3 himself and that is why none of them has any grievance. This also demonstrates that other heirs have impliedly surrendered their tenancy rights, if any, and are not willing to contest the matter.

14. In *Gauri Shankar Gupta (supra)*, the joint tenant applied for impleadment, but, it was rejected. Thereafter it was attempted to plead that decree for eviction would be binding on him, even if he is not party to the proceedings which contention has been negated by this Court. Cumulative reading of paras 3 and 4 of the judgment makes it clear that in case an application for impleadment during the pendency of suit for ejectment is moved and on the objection of the landlord such application is rejected, then the person seeking impleadment cannot be evicted under the decree of eviction obtained against the joint tenant or chief tenant.

15. It is, thus, clear that so far as the application in question is concerned, which

has come on behalf of respondent No. 3, I do not find any justification legally, equitably or otherwise to interfere with the judgments and orders impugned in this writ petition only on the ground that some other person(s) has/have not been impleaded though none of alleged non impleaded parties have raised themselves such a complaint or grievance either before the Courts below or before this court. In the circumstances, I do not find any manifest error in my judgment dated 16.7.2012 so as to warrant its recall. Application is, accordingly, dismissed.