
(2005) 02 UK CK 0013
In the Uttarakhand High Court
Case No : Writ Petition No. 581 of 2003

Bhairab Dutt Joshi

APPELLANT

Vs

Additional Chief Revenue Commissioner and Others

RESPONDENT

Date of Decision : 21-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 145
Uttar Pradesh Panchayat Raj Act, 1947 — Section 106
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 154, 155, 163, 164, 209

Citation : (2005) 02 UK CK 0013

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Lokendra Dobhal, assisted by, D.C.S. Rawat, for the Appellant; U.P.S. Negi, A.G.A. for Respondents Nos. 1, 2 and 3 and Nand Prasad, Learned Standing Counsel for Respondents Nos. 5, 6 and 7, for the Respondent

Final Decision : Allowed

Judgement

Prafulla C. Pant, J.—By means of this petition, moved under Article 227 read with Article 226 of Constitution of India, the Petitioners has challenged the Judgments and orders dated 29-05-2002 and 13-06-2003, passed by Additional Commissioner, Kumaon Division, Nainital and Additional Chief Revenue Commissioner, Circuit Court, Nainital, respectively.

2. Brief facts of the case, are that Respondents No. 5,6 and 7 filed a suit u/s 209 of U.P. Zamindari Abolition and Land Reforms Act, 1950, for ejectment of the Petitioner and Respondent No. 8. The said suit was numbered as Revenue Case No. 22/92 of 1979-80 in the Court of Assistant Collector, Kashipur, District-Nainital. The Petitioner and Respondent No. 8 filed their written statement in said suit in which it was pleaded that mother of Respondent No. 5, 6 and 7 agreed to sell the land in question and delivered possession on non payment of loan of Rs.

4,000/- in the year 1974. The Assistant Collector, Kashipur initially decreed the suit on 08-10-1992 against which Petitioner preferred appeal No. 112 of 1994-95 which was allowed vide order dated 17-04-1997 and the case was remanded. After remand the Assistant Collector after hearing the parties this time dismissed the suit vide his order dated 25-09-2000 (copy Annexure-3 to the writ petition). Aggrieved by which Respondents No. 5,6 and 7 preferred Z.A. appeal No. 6/23 of 2000-2001 before Additional Commissioner, Kumaon Division, Nainital, which was allowed vide his order dated 29-05-2002 (copy Annexure-4 to the writ petition). Against said Judgment, a Second Appeal No. 44 of 2002-2003 was filed by the Petitioner, which was dismissed on 13-06-2003 (copy Annexure-6 to the writ petition) by said Authority. Challenging both these orders, the present petition has been moved on the ground that the Respondent No. 1 and 2 while passing the impugned orders, committed illegality by not treating the documents executed by Respondents No. 5, 6 and 7 in favour of the Petitioner. It is further alleged that the authorities concerned have failed to appreciate the transfer of possession by the Respondents No. 5, 6 and 7 themselves to the Petitioner.

3. On behalf of the Respondents No. 5, 6 and 7, the Respondent No. 7 has filed a counter affidavit in which it has been stated that the contesting Respondents are the bhumidhars of the land in dispute which was illegally occupied by the Petitioner without their consent. It is further stated in the counter affidavit that the Petitioner himself has admitted possession of Shri Prem Singh (Respondent No. 8) over the land in suit as such the Petitioner has no concern whatsoever with the same. It is further stated in his counter affidavit by Respondent No. 7 that even if any agreement has taken place between Kishan Singh (Respondent No. 5) and the Petitioner, in transaction of loan of Rs. 4,000/-, it has not been specified if the land mentioned therein is plot No. 170/2. It is also stated in the counter affidavit that in the proceedings u/s 145 of Code of Criminal Procedure, 1973, also the Petitioner, Bhairav Dutt Joshi was not found in lawful physical possession of the land in dispute. Defending the impugned Judgments and orders, it is stated that the claim of Petitioner was rightly rejected by said courts. It is denied by the contesting Respondents if Smt. Nandi Devi (mother of the contesting Respondents) had transferred the land in suit to Prem Singh (Respondent No. 8) through agreement dated 30-04-1970.

4. Respondent No. 8 has filed a separate counter affidavit in which he has supported the Petitioner by stating that Petitioner and the said answering Respondent are in continuous joint permissive possession over the land in dispute since the lifetime of Shri Chatur Singh (father of Respondents No. 5,6 and 7). It is further stated by the Respondent No. 8, in his counter affidavit that after death of Shri Chatur Singh, against the consideration of Rs. 6,000/- which was paid through a cheque No. 037526, on 30-04-1970 mother of Respondents No. 5,6 and 7 executed an agreement to sell land in suit and she even sought permission from District Judge, Nainital to execute a sale deed on behalf of her minor sons, in respect of land in dispute. In the rejoinder affidavit the Petitioner has reiterated the facts as stated in their affidavit with the petition and the

counter affidavit of Respondent No. 8. With the rejoinder affidavit, a copy of the application dated 29-04-1970 moved by Smt. Nandi Devi (mother of Respondents No. 5, 6 and 7) has been filed through which she sought permission to execute sale deed on behalf of the minor sons, regarding the land in suit as they have to pay the loan taken by her deceased husband to the tune of Rs. 5,500/-, which remained unpaid. Annexure-2 to the rejoinder affidavit shows that the said application was allowed by the District Judge of Kumaon, Nainital, on 23-05-1970.

5. I heard Learned Counsel for the parties and perused the record.

6. This Court has to see if the Petitioner was in joint permissive possession with Shri Prem Singh (Respondent No. 8) over the land in dispute with the consent of the recorded tenure holders and further this is to be examined if the Respondents No. 1 and 2 have committed illegality in passing the impugned orders.

7. Admittedly, late Shri Chatur Singh (father of Respondents No. 5, 6 and 7) was the original tenure holder of plot No. 170/2 of village Bhagwa Bangar. This fact also stands admitted that Petitioner is in occupation of said land suit has been filed u/s 209 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (herein after for brevity the Act) with the prayer to eject Shri Bhairav Dutt Joshi (the Petitioner) from the land in dispute. The dispute relates as to the fact if the possession of the Petitioner is a permissive one. Before further discussions, it is pertinent to quote Section 209 of the Act, which reads as under:

209. Ejectment of persons occupying land without title-(1) A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force, and-

(a) Where the land forms part of the holding of a bhimidhar or asami without the consent of such bhumidhar, or asami;

(b) Where the land does not form part of the holding of a bhumidhar or asami without the consent of the Goan Sabha, shall be liable to ejectment on the suit in, cases referred to in Clause (a) above of the bhumidhar or asami concerned, and in cases referred to in Clause (b) above, of the Goan Sabha and shall also be liable to pay damages.

(2) To every suit relating to a land referred to in Clause (a) of Sub-section (1) the State Government shall be impleaded as a necessary party.

8. The above quoted provision makes it very clear that if the possession is with the consent of the concerned tenure holder, a suit for ejectment cannot be maintained under this Section.

9. On behalf of the Petitioner, my attention was drawn to the document dated 10-04-1974 (Annexure-2 to the Writ Petition) which is copy of an agreement, executed by Shri Kishan Singh (Respondent No. 5) and Smt. Nandi Devi (mother

of Respondents No. 5,6 and 7) wherein, it has been mentioned that a loan of Rs. 4,000/- was taken from Shri Bhairav Dutt Joshi (Petitioner) by them and if the same is not paid within a period of three years, they will execute sale deed of land measuring area of 4 Bighas and 10 Biswas at the rate of Rs. 1,500/- per Bigha. There is pronote and receipt, signed on the same date by Smt. Nandi Devi and Shri Kishan Singh, which is part of said document and these pronote and receipt support the advance taken by the Respondent No. 5 and Smt. Nandi Devi (mother of the minor Respondents No. 6 & 7). In reply to this, Learned Counsel for the contesting Respondents drew my attention to copy of written statement filed by the Petitioner before the trial court, which is Annexure CA-3 to their counter affidavit. In para 10 of said written statement, it is mentioned that land of 4 Bigha 10 Biswa which finds place in the aforesaid document is apart from the land in dispute. On its basis, it is argued on behalf of the contesting Respondents that the aforesaid document dated 10th April, 1974 do not pertain to the disputed property, as such it has nothing to do with the permissive possession over the disputed land. However, this Court feels that there is little force in the contention of the contesting Respondents for the reason that from Annexure-1 to the Writ Petition, which is a copy of the notice given u/s 80 of Code of Civil Procedure, 1908 and u/s 106 of U.P. Panchayat Raj Act, 1947, it is clear that the contesting Respondents who filed the suit u/s 209 of U.P. Zamindari Abolition and Land Reforms Act, 1950, have admitted that when the contesting Respondents were young and unable to cultivate the land they did take assistance of Shri Prem Singh (Respondent No. 8) and Shri Bhairav Dutt Joshi (Petitioner) who thereafter refused to vacate the land. The relevant para 2 of the aforesaid notice reads as under:

2. ? - ? ? ? , : ? ? : - ? ? ? ? ? ? ? ? , ? ? ? ? ? ? ? ?

In para 5 of the counter affidavit of the contesting Respondents, they have not denied the contents of the aforementioned notice given by them to the concerned authorities before filing the suit in question. That being so, in the opinion of this Court, both Respondents No. 1 and 2 have committed illegality by not accepting the pleas taken by the Petitioner before them.

10. The Respondent No. 8, in his counter affidavit categorically stated that he is in joint permissive possession over land in suit. The possession according to the Respondent No. 8 is since the life time of Shri Chatur Singh (father of Respondents No. 5,6 and 7). He has further stated that Smt. Nandi Devi (mother of Respondent No. 5,6 and 7) executed agreement of sale in respect of plot No. 170, on 30-04-1970 after taking loan of Rs. 6,000/- which she received through cheque No. 037526. Annexures filed with rejoinder affidavit of Petitioner show that Smt. Nandi Devi did obtain permission to sell land on behalf of her minor sons (i.e. Respondents No. 5,6 and 7) on 23-05-1970. Possession of the Petitioner and Respondent No. 8 over the land in suit is also protected u/s 164 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, which reads as under:

164. Transfer with possession by bhumidhar to be deemed a sale-Any transfer of

any holding or part thereof made by a Bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan, any existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Section 154 and 163 shall apply.

In Banjara Singh Vs. Board of Revenue and Others, Allahabad High Court has held that the plea raised by the Defendant that he was in possession in view of the agreement to sale and by virtue of amount advanced by him, cannot be said to be unauthorized possession for the purposes of Section 209 of the Act. In said case also an agreement was arrived at on 28-05-1974 to execute sale deed of the land in suit and amount of Rs. 11,000/- was paid and rest of Rs. 1,000/- was to be paid at the time of execution of sale. The Allahabad High Court treated the possession of the Defendant protected u/s 164 of the Act. It has been held in said case that the transaction u/s 164 is a transaction sandwiched between a mortgage and actual sale. No doubt, the mortgage by bhumidhar is prohibited u/s 155 of the Act but as to the permissive possession, the fact remains undisturbed for the purposes of Section 209 of the Act. The facts and circumstances in the present case are similar to the one referred above.

11. Lastly, on behalf of the contesting Respondents, my attention was drawn to judgment dated 22-09-1998 of the Allahabad High Court passed in Criminal Revision No. 1528 of 1983, Bhairav Dutt v. Kishan Singh, copy of which is Annexure CA--4 to the counter affidavit of the contesting Respondents, and it is argued that in proceedings u/s 145 of Code of Criminal Procedure 1973, the possession of Shri Kishan Singh (Respondent No. 5) was found to be lawful. I have perused the said Judgment. It pertains to plot No. 170/1 and 175 and has nothing to do with the land in dispute in this case which relates to plot No. 170/2. As such the document does not help the contesting Respondents in respect of the land in suit.

12. In the circumstances, this Court is of the view that Respondent No. 2 has committed error in law by setting aside judgment and order dated 25-09-2000, passed by Assistant Collector, Kashipur and Respondent No. 1 has also committed the same mistake by dismissing the second appeal. As such for the reasons discussed above, both the impugned orders are liable to be quashed. Accordingly, the Writ Petition is allowed. No order as to costs.