

(2012) 10 AHC CK 0173

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 52622 of 2012

Brij Pal Singh and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Land Revenue Act, 1901 — Section 219, 32, 33, 35, 39
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 132,
132(a), 202, 204, 21(e)

Citation : (2012) 11 ADJ 381 : (2013) 3 AWC 2903

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Advocate : Ram Niwas Singh and Vinay Kumar Singh Chandel, for the Appellant;
D.D. Chauhan and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Misra, J.—Heard Sri Ram Niwas Singh, learned Counsel for petitioners and learned Standing Counsel on behalf of respondent Nos. 1 and 3 as also Sri D.D. Chauhan on behalf of the respondent No. 2. Notice need not be issued to the respondent Nos. 4 to 7 in view of the order being passed herein. At the very outset, learned Standing Counsel has raised a preliminary objection to state that against the impugned order dated 19.9.2012 passed by the Up Ziladhikari, Burhana, District Muzaffarnagar in Case No. 104 under Sections 33 / 39 of the U.P. Land Revenue Act, 1901 (for short "the Act"), State v. Harpal Singh and another, statutory revision is provided and the petitioners ought to have availed the statutory remedy, hence, this writ petition be not entertained at the stage.

2. Learned Standing Counsel has also referred to the decision of Hon'ble Supreme Court in the case of Hinch Lal Tiwari Vs. Kamala Devi and Others, , to state that no permanent rights can be matured by any person or tenure holder over the land which is a water body and comes within the category of Section 132 of the U.P. Zamindari Abolition and Land Reforms Act.

3. Sri. Ram Niwas Singh, learned Counsel for petitioners has referred to paragraphs 12, 13 and 14 of the writ petition to state that no opportunity whatsoever was given to the petitioners while passing the impugned order dated 19.9.2012 hence this writ petition can be entertained without relegating the petitioners to avail the statutory remedy.

4. He further states that in view of the fact that the petitioners have impleaded the Deputy Collector, the Tehsildar, the Supervisor Kanoongo and the Lekh Pal in person as respondent Nos. 4 to 7 in this writ petition and there are allegations of mala fide against them therefore, the petitioners be not relegated to avail the statutory remedy of revision against the order impugned.

5. Learned Counsel for petitioners has also stated that the impugned order is without jurisdiction in as much as the title of petitioners has already been finally adjudicated in consolidation proceedings up to the stage of the Deputy Director, Consolidation and Writ Petition No. 41678 of 2012, Brijpal Singh and another v. State of U.P. and others, is pending in this Court wherein an interim order dated 24.8.2012 has been passed in favour of the petitioners staying operation of the order of the Deputy Director, Consolidation whereby he has attempted to review his earlier order.

6. In support of his submissions, learned Counsel for the petitioners has placed reliance on a decision of Hon"ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , and referred to paragraph 15 therein.

7. Learned Counsel states that in view of aforesaid averments made in the writ petition regarding mala fide against the officials concerned and regarding jurisdiction in passing the order impugned, the petitioners be not relegated to avail statutory remedy since that would not be an effective or efficacious remedy for them.

8. Having considered the submissions of learned Counsel for petitioners and perused the record, in so far as the allegations of mala fide are concerned, a perusal of all the paragraphs of the writ petition do not indicate any personal malice of the respondent Nos. 4 to 7 against the petitioners. There is no such allegation made in any paragraph of the writ petition. The allegations made in the writ petition are that since in the consolidation proceedings the petitioners' title over the land in question had been adjudicated finally, therefore, initiation of proceedings under Sections 33 / 39 of the Act on a report of the Lekh Pal is malafide. Such vague averments made in the writ petition do not constitute mala fide against the officials who have passed the impugned order or submitted the report. Therefore, in so far as the malafide is concerned, no case of malafide is made out.

9. As far as the submission that the impugned order is without jurisdiction, it is apparent that a report of Lekhpal and Revenue Inspector was submitted before the Up Ziladhikari reporting that the land in question is Johar (pond) and Jheel

(large water body) and is in the category of land u/s 132 of the U.P.Z.A. & L.R. Act and is of public utility for the use of all villagers. On this report the proceedings under Sections 33 / 39 of the Act had started for correction of the revenue records hence it cannot be said that the proceedings under Sections 33 / 39 of the Act are without jurisdiction. The Up Ziladhikari is the competent authority. There is difference between an illegal order and an order without jurisdiction, therefore, the submissions to the contrary cannot be accepted.

10. In so far as the submission that no opportunity of hearing was given to the petitioners and therefore, this writ petition be entertained directly, is concerned, paragraph 15 the decision of Hon''ble Supreme Court in the case of Whirlpool Corporation (supra) relied upon by learned Counsel for petitioner is quoted herein:

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

11. From the aforesaid paragraph it is quite clear that it is discretion of the Writ Court to entertain or not to entertain a writ petition where statutory alternative remedy is available. The emphasis laid by learned Counsel for petitioners is on the words effective and efficacious remedy. In the facts of this case, a perusal of the impugned order indicates that notice was given to the petitioners in reply whereof the petitioners led their evidence. This fact has been seriously disputed by the petitioners in paragraphs 12,13 and 14 of the writ petition. Clearly it is a factual aspect which requires adjudication upon evidence in as much as on the one hand petitioners say that they were not noticed nor given opportunity and on the other hand the impugned order recites that the petitioners were noticed and they also led evidence. This factual dispute could be resolved by perusing the case file of the Trial Court in Case No. 104. The revisional Court u/s 219 of the Act has jurisdiction to summon the record of the Court below and satisfy himself with respect to illegality, irregularity or jurisdictional error in the order. There is no cogent reason given in this writ petition or in the submissions of learned Counsel for the petitioners to convince this Court that in writ jurisdiction, the Writ Court should summon the file of Trial Court and peruse the same for the purpose of recording a finding of fact on highly disputed factual questions that

can be done more effectively and efficaciously by the revisional Court. Therefore, in so far as the submission with respect to applicability of the decision of Hon"ble Supreme Court in the case of Whirlpool Corporation (supra), it appears that the petitioners have approached this Court without availing their statutory remedy which is more effective and efficacious than a Writ Petition when highly disputed questions of fact are involved in the case.

12. For the aforesaid reasons, the preliminary objection raised by learned Standing Counsel is to be upheld and the writ petition is liable to be dismissed on the ground of availability of statutory alternative remedy to the petitioners.

13. At this stage, Sri Ram Niwas Singh, learned Counsel for the petitioners proceeded to address the Court on merits hence consideration of his argument in light of the averments made in the writ petition is necessary since the Court cannot ignore the various submissions made by learned Counsel for the petitioner and when the submissions are considered, a decision has to be given.

14. Under such insistence of learned Counsel for the petitioners and in view of the contents of this Writ Petition, the Court proceeds to consider the submissions but at the same time is quite aware that such submissions are to be considered only on the basis of the records annexed by the petitioners in this Writ Petition. Therefore, the submission that the report of Lekhpal and Revenue Inspector is false to their knowledge and is malafide, requires to be considered. The report itself is quoted hereunder:

15. This submission of learned Counsel is based on factual aspect. The report was given on a direction dated 4.5.2012 passed in Writ Petition No. 47176 of 2009. The report states that in 1360F the land was recorded as Johar and Jheel (water body) and subsequently the name of the petitioners has been recorded in 1418-1423F. It is thus clear that the land was originally recorded as a water body and subsequently the petitioners got their names entered on the basis of consolidation proceedings over land of public utility. In case the report is false and incorrect but has been believed by the Trial Court, the petitioners could challenge the report and order of the Trial Court u/s 219 of the Act where all such issues could be decided.

16. He further states that the land in question is not vested in the Gaon Sabha and it was recorded in the name of ancestors of the petitioners prior to the date of vesting and such finding has been recorded in the consolidation proceedings by the Deputy Director, Consolidation.

17. The order of the Deputy Director of Consolidation has been filed as Annexure-1 to this writ petition. It has been recorded therein that by virtue of Section 21(e) of the U.P.Z.A. & L.R. Act the petitioners would become an asami of the land. It has then been held that since the Gaon Sabha or State did not bring any proceeding u/s 202 of the U.P.Z.A. & L.R. Act for eviction of the petitioners hence the petitioners became a bhumidhar with non-transferable rights u/s 204 of the U.P.Z.A. & L.R. Act. The stay order of the Deputy Director of

Consolidation passed thereafter in a review application is sub-judice in a Writ Petition No. 41678 of 2012 which is pending hence, no view can be expressed on this submission in this writ petition.

18. In so far as one plot is concerned, the petitioners admit in the writ petition that they are doing fish breeding and pesi culture and so far as the other plot is concerned, the petitioners allege that they are cultivating the land and their crops are growing thereupon and the decision in the case of Hinch Lal Tiwari (supra) is not applicable. He relies upon the decision of Hon"ble Supreme Court in the case of Mrs. Susetha Vs. State of Tamil Nadu and Others, , as also an unreported judgment dated 4th September, 2009 of a Division Bench in Writ Petition No. 45164 of 2009, Ravindra Nath Pandey v. State of U.P. and others.

19. Insofar as the above submissions are concerned, clearly the petitioners intend to say that the land in question does not come within the category of land defined u/s 132(a) of the U.P.Z.A. & L.R. Act. Section 132(a) of the U.P.Z.A. & L.R. Act is quoted herein:

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

20. A reading of Sub clause (a) indicates that pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation is land in the category of Section 132(a) of U.P.Z.A. & L.R. Act.

21. In this writ petition it has been clearly averred by the petitioners that in one plot they are doing pesiculture for fish breeding, therefore, the submission with respect to that plot validates the finding given in the impugned order. Insofar as the submission that in the other plot petitioners are doing cultivation is concerned, the report of the Lekhpal and Revenue Inspector shows that the land was originally numbered 822-Ga in 1360F and it was a Jheel (water body). Subsequently, by virtue of consolidation proceedings it was renumbered as Khasra No. 340 and then as Khasra No. 837 and 843. Therefore, it was one Plot No. 822-Ga renumbered as two plots. Thus both the two plots were always a water body and even if the averment of the petitioners that they are cultivating one of the plots it has to be a casual and occasional cultivation when the water recedes to some extent for limited period. Clearly sub clause (a) of Section 132 provides that the land which is used for casual or occasional cultivation is included in the category of land u/s 132(a) of the U.P.Z.A. & L.R. Act. The submissions of learned Counsel for the petitioners, therefore, cannot be accepted.

22. Learned Counsel for the petitioners further states that Johar is not defined in the Act and, therefore, does not come within the category of pond and as such is not covered in the category u/s 132 of the Act.

23. Johar is a word commonly used by the local people to denote a Jheel. It is

not a word defined. But Jheel is defined as a lake in the Universal Law Dictionary (Hindi to English) and as a natural lake in Allied Hindi to English Dictionary.

24. The report of the Lekhpal and Revenue Inspector clearly records that the land is Johar and Jheel. A Jheel is a large water body and land under it cannot be vested in a private individual for personal use.

25. While referring to the decision of the Hon"ble Supreme Court in the case of Hinch Lal Tiwari (supra) learned Counsel has cited an unreported judgment of a Division Bench of this Court in the case of Ravindra Nath Pandey Vs. State of U.P. and Others . He states that the decision of the Division Bench of this Court has clearly held that Hinch Lal Tiwari (Supra) is a guidance in law to protect encroachment of public property in the shape of ponds and to restore their position hence such decision is only a guidance. Upon going through the decision of the Division Bench of this Court in Ravindra Nath Pandey (Supra) it was held as quoted hereunder:

To say the least, the decision in the case of Hinch Lal Tiwari (supra) is a guidance in law to protect encroachment of public property in the shape of ponds and to restore their position, but on a closer scrutiny, we do not find that the said judgment in any way allows dispensation of the procedure prescribed in law to be adopted for removal of an encroachment or restoration of a pond. It is to be noted that whenever such a mandamus is issued by this Court, the same does not amount to a mandamus for uprooting even a trespasser without following the procedure prescribed by law. Such instances are not unknown to this Court and with experience it has been found that such public interest litigations disclose serious disputed questions of fact which are agitated. One such decision rendered by a Division Bench of this Court, in which one of us (Hon"ble C.K. Prasad, C.J.) was presiding over the bench held as follows.

In this public interest litigation, the grievance of the petitioner is that the respondent Nos. 5, 6 and 7 are selling the public Pond/Talab.

According to the petitioner, Khasra No. 1203 having an area of 5 bighas 15 biswas is a public Pond/Talab, which is being transferred to other persons. Petitioner himself has averred that on 5.1.1960, by the order of the Kanoongo, the name of father of respondent Nos. 5 to 7 has been recorded as landholder under Category-VIII.

Mr. Raj Kumar Dhama appearing on behalf of the petitioner, submits that the area in question being a pond, it is the obligation of the State Authorities to prevent its transfer. In support of his submissions, reliance has been placed on a decision of the Supreme Court in Hinch Lal Tiwari Vs. Kamala Devi and Others, .

Whether the area in question is a pond or property of respondent Nos. 5 to 7 is a question, which can appropriately be decided in appropriate proceedings before the Civil Court. According to the petitioner's own showing, the land in question has been recorded in the name of the father of respondent Nos. 5 to 7 in the

revenue record.

In that view of the matter, we are of the opinion that this public interest litigation is absolutely misconceived and is, accordingly, dismissed. 23.3.2009.

It is well-settled that a mandamus cannot be issued to disobey law. If the law prescribes a procedure to be followed then the procedure cannot be obviated by a mere filing of a public interest litigation. Deviation from law by the State would lead to unrestrained action reflecting tyranny. Unguided and unbridled action, without proper investigation on the basis of unfounded allegations, or on the strength of mere pretentious public outcry, should not stir the firm foundations of the tried and tested procedures of law. The State authorities while protecting public property are not to discard claims outright on sheer presumptions without attempting to find out the truth.

26. The decision is quite clear. It holds that Hinch Lal Tiwari (Supra) does not allow dispensation of the procedure prescribed in law to be adopted for removal of an encroachment or restoration of a pond.

27. In the present case, the impugned order dated 19.9.2012 reads as under:

28. These were proceedings u/s 33 and Section 39 of the U.P. Land Revenue Act. Both the provisions are quoted hereunder:

33. The annual registers.-

(1) The Collector shall maintain the record-of-rights, and for that purpose shall annually, or at such longer intervals as the [State Government] may prescribe, cause to be prepared an amended [register mentioned in Section 32].

The [register] so prepared shall be called the annual register.

[(2) The Collector shall cause to be recorded in the annual register-

(a) all successions and transfers in accordance with the provisions of Section 35;
or

(b) other changes that may take place in respect of any land; and shall also correct all errors and omissions in accordance with the provisions of Section 39:

Provided that the power to record a change under clause (b) shall not be construed to include the power to decide a dispute involving any question of title.]

(3) [No such change or transaction shall be recorded without the order of the Collector or as hereinafter provided, of the Tahsildar or [the Kanungo].].

[(4) The Collector shall cause to be prepared and supplied to every person recorded as bhumidhar, whether with or without transferable rights, assami or Government Lessee a Kisan Bahi (Pass book) which shall contain-

(a) such extract from the annual register prepared under sub-section (1) relating to all holdings of which he is so recorded (either solely or jointly with others);

(b) details of grants sanctioned to him; and

(c) such other particulars as may be prescribed:

Provided that in the case of joint holdings it shall be sufficient for the purpose of this sub-section of Kisan Bahi (Pass book) is supplied to such one or more of the recorded co-shares as may be prescribed.

(4-A) The Kisan Bahi (Pass book) referred to in sub-section (4) shall be prepared in such manner and on payment of such fee, which shall be realisable as arrears of land revenue, as may be prescribed.

(5) Every such person shall be entitled, without payment of any extra fee, to get any amendment made in the annual register under sub-section (2) incorporated in his Kisan bahi (Pass book.)]

(6) The State Government may make rules to carry out the purposes of this section, including, in particular, rules, prescribings, of entries in the [Kisan Bahi (Pass Book)], and the mode of its revision and authentication up-to-date and for issue of duplicate copies thereof, and the fees, if any, to be charged for any of the said purposes.

(7) In this section, "prescribed" means prescribed rules mad by the State Government.

(8) Nothing in sub-sections (4) to (7) shall apply in relation to any area which is either under consolidation operations or under record operations.]

[39. Correction of mistakes in the annual register.-

(1) An application for correction of any error or omission in the annual register shall be made to the Tahsildar.

(2) On receiving an application under sub-section (1) or any error or omission in the annual register coming to his knowledge otherwise, the Tahsildar shall make such inquiry as appears necessary and then refer the case to the Collector, who shall dispose it of, after deciding the dispute in accordance with the provisions of Section 40.

[Provided that nothing in this subsection shall be construed to empower the Collector to decide a dispute involving any question of title.]

(3) The provisions of sub-sections (1) and (2) shall prevail, notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947.

29. Under these Sections the annual registers have to be maintained and correction of mistakes in the annual register has to be done. Therefore, this is not a case of a direction to remove the encroachment or even to restore the pond. The impugned order directs correction of revenue records.

30. The case of Ravindra Nath Pandey (Supra) was a petition by an Advocate

seeking directions from the Writ Court to direct the District Magistrate to restore the status of a pond over plot No. 204 at village Shibli, Azamgarh. Clearly, no benefit can be derived by the petitioners from this judgment since here the proceedings are not for removal of encroachment or to restore the status of the pond but are for correction of the revenue records. It goes without saying that in case the respondents intend to remove the encroachment they will follow the procedure prescribed under law. Even a trespasser can be uprooted only by following the prescribed procedure.

31. In *Mrs. Susetha Vs. State of Tamil Nadu and Others*, , the Hon''ble Supreme Court was considering a circumstance where an artificial tank was in a dilapidated condition for a long time and was being used as a dumping yard and sewage collection pond. It was not a natural water body. The Hon''ble Supreme Court held that no direction needs to be issued to resurrect the artificial tank but issued direction to see that other tanks were properly maintained.

32. The present is a case of a natural water body a natural lake. It is a very large lake having an area of 1.5580 and 3.4500 hectares. It has been entered as such from 1360F or before. This entry is available from before the order of the consolidation authorities. Therefore, it is not a case of resurrecting a dilapidated water tank or a natural water body that has ceased to exist. The Johar and Jheel admittedly exist and that has not been denied by the petitioners.

33. In view of the above discussion, the conclusion is that the Trial Court had jurisdiction, full opportunity was given to the petitioners who have led their evidence, mala fide's against respondent Nos. 4 to 7 have been unsuccessfully pleaded on vague averments and there is no error or illegality in the impugned order dated 19.9.2012 passed in proceeding under Sections 33/ 39 of the U.P. Land Revenue Act.

34. The Writ Petition is dismissed. No order is passed as to costs.