(2011) 03 UK CK 0070

In the Uttarakhand High Court

Case No : Writ Petition No. 132 of 2010 (M/S) (Old No. 7536 of 1985)

Gabar Singh and Others APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 05-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 41
Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 — Section 331(3), 52
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B, 321, 322, 323, 324

Citation : (2011) 03 UK CK 0070

Hon'ble Judges : Brahma Singh Verma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.S. Verma, J.—By means of this writ petition, the Petitioners have sought the following relief:

i) To issue a writ, order or direction in the nature of certiorari quashing the judgment and order dated 8.4.1985 passed by the learned Board of Revenue (Annexure No. 1).

ii) To issue a writ, order or direction in the nature of mandamus, directing the Respondent Nos. 3 and 4 not to dispossess the Petitioners from the land in dispute during the pendency of the writ petition.

iii) To issue any other suitable writ, order or direction which in facts and circumstances of the case, this Hon''ble Court deems fit and proper.

iv) To award cost of this petition.

2. Briefly stated facts of the case, giving rise to this petition, are that a suit u/s 229B of U.P. Z.A. & L.R. Act was filed by the Petitioners/Plaintiff Gabar Singh and others in respect of the land in question. The suit was contested by the private

Respondents/Defendants by filing a written statement. It was specifically pleaded in the written statement that the civil court had already decided the dispute in respect of the land in question and the decision of the civil court will operate as estoppel and the suit is also barred by principle of res-judicata. The trial court, after hearing the parties and perusing the record, dismissed the suit. Against the order of the trial court, the Petitioners preferred first appeal before Additional Commissioner, Pauri Garhwal, who vide order dated 25.10.1982 allowed the appeal and set aside the judgment and order of the trial court and remanded the case to the trial court for fresh decision. Feeling aggrieved by the order of the first appellate court, the private Respondents/Defendants preferred second appeal before the learned Board of Revenue, Allahabad. By the impugned order dated 8.4.1985, learned Board of Revenue allowed the second appeal of the Respondents/Defendants and set aside the order of the first appellate court. Hence, this petition.

3. I have heard learned Counsel for the parties and perused the record.

4. Learned Counsel for the Petitioners has contended that the learned Assistant Collector dismissed the suit of the Petitioners mainly on the ground that the suit of the Petitioners was barred by the principle of res-judicata. The first appellate court set aside the judgment and order dated 25.10.1982 of the trial court and allowed the appeal of the Petitioners and remanded the case to the trial court for deciding the issues in the light of the provisions of the Kumayun and Zamindari Abolition Act, 1960.

5. It was next contended by learned Counsel for the Petitioners that the learned Board of Revenue allowed the second appeal of the Respondents/Defendants on hypo-technical ground and not on merit holding that the Petitioners failed to implead the State Government and Nagar Palika as parties to the first appeal and that the first appeal filed before the learned Additional Commissioner by the Petitioners was defective by the reason that copy of memo of appeal was not accompanied by a copy of decree appealed against.

6. Learned Counsel for the Petitioners vehemently urged that the principle of res-judicata could not be attracted in this case since the previous suit was filed by the Respondent Nos. 3 and 4 for possession and demolition while the present suit was filed by the Petitioners for declaration of their bhumidhari rights over the land in dispute. He further argued that the State Government as well as Nagar Palika were made parties to the suit u/s 229B of the U.P.Z.A. & L.R. Act.

7. It has been further submitted that in view of paragraph No. 180 of the U.P. Revenue Court Manual, it shall not be necessary to draw up a decree. This fact has been pleaded in paras-15 and 16 of the writ petition. Further, the decree was not necessary to be accompanied by the memo of appeal, and if it was so, then before admitting the appeal, the first appellate court ought to have asked to furnish the copy of the decree within a particular time and in absence of any direction from the court, the Petitioners cannot be left to suffer. Thus the

judgment and order of the second appellate court suffers from illegality and material irregularity and is liable to be set aside.

8. Counter affidavit has been filed by Respondent Nos. 3 and 4 wherein at para-4 it is pleaded that the order dated 6.9.1979 passed by the Hon''ble High Court in second appeal will act as res-judicata in the present proceedings. In para-8 it is stated that the Petitioners did not implead the Nagar Palika and the State Government as Respondents in the first appeal. They were necessary party and were made party in the trial court but not in the first appeal. In para-18 it is further stated that the decree of trial court was not filed even during pendency of appeal and even no time was sought from the court for filing the same.

9. Learned senior counsel appearing for Respondent Nos. 3 and 4 submitted that Ratan Singh, the grandfather of the Petitioners/Defendants, by means of registered sale deed dated 27.10.1928 sold 51% of his share in a joint khata. Consisting of agricultural holdings as well as building for the sum of Rs. 2500/- in favour of Azim Bux, aforesaid, in pursuance of his registered sale deed, the name of vendee was duly mutated in the revenue records in favour of Azim Bux, that as Azim Bux was not able to enjoy the agricultural land on account of their being joint 9 khata. Therefore he filed a suit No. 23 of 1951-52 to get his share partitioned and the suit was decreed and specific plots were allotted to Azim Bux. In partition thereof, as a result of the partition decree, actual possession was delivered to Azim Bux on spot by the court Amin in the year 1952. Taking advantage of temporary absence of Azim Bux, the Petitioner/Defendant Gabar Singh entered into unlawful possession over the agricultural holdings as well as of the farmhouse and Gaushala standing thereon, that by subsequent amendment. Therefore, the suit for possession was filed before the civil court in plaint relief for demolition of certain constructions made by the Appellant Gabar Singh during the pendency of the suit. The suit was decreed. First appeal filed by the Petitioner Gabar Singh (now deceased) was also dismissed. Second appeal was also dismissed by the High Court. The judgment of the High Court has been annexed as Annexure-1 to the counter affidavit.

10. This fact is not disputed that the second appeal was dismissed and no SLP was preferred in the Apex Court, thus the judgment and decree of civil court is final.

11. This fact is also not disputed that the State Government and Nagar Palika were necessary parties but they were not made parties in the appeal and that the appeal is a continuation of suit. This fact is also not disputed that no decree was filed by the Petitioners at the time of filing the first appeal.

12. The learned second appellate court, in view of Order 41 Rule 1 of Code of Civil Procedure, has held that every appeal shall be preferred in the form of a memorandum signed by the Appellant or his pleader to the court and the provision of CPC is applicable to the suit proceedings. The said court has also held that no steps have been taken by counsel for the Petitioners/Plaintiff before

the first appellate court to sought permission to file the decree.

13. Learned first appellate court has committed manifest error of law and did not consider the fact that the civil suit was filed in the year 1962 against which the appeal of the Petitioner was dismissed and second appeal was also dismissed by the High Court. The Petitioner had raised this plea before the second appellate court (Board of Revenue), which was not accepted, and no appeal was preferred against the judgment of second appellate court before the Apex Court. Therefore, this question cannot be agitated again. Learned trial court has rightly held that the suit was barred by the principle of res-judicata and estoppel by acquiescence.

14. So far as the contention that there is no necessity of the decree to be filed along with the memo of appeal is concerned, it was contended that the provisions of Land Revenue Act would be applicable. This argument is misconceived. Section 52 of Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960, reads as under:

(1) The provisions of Sections 321 to 331-A, 333 to 336, 338 and 341 to 344 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, and of the rules framed u/s 344 of the said Act shall mutandis apply to Kumaun and Uttarakhand Divisions but the State Government may, by order published in the official Gazette, make such adaptation, modification, alteration or exception shall not be questioned in any court of law.

15. Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950 is applicable to the proceedings under The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960. In view of the provisions of Section 331 (3), appeal will lie against the decree. Therefore, in view of the provisions of Section 41 Rule 1 of Code of Civil Procedure, learned Board of Revenue has rightly held that the decree was to be filed along with memo of appeal and no time was sought to comply the provisions. It is pertinent to mention that since the appeal was not maintainable as such and was barred by principle of resjudicata, therefore, the learned Board of Revenue has rightly held that the order of remand was bad in law.

16. In view of the discussions made in foregoing paragraphs, I find no manifest error or perversity in the impugned judgment and order dated 8.4.1985 passed by the learned Board of Revenue. The writ petition lacks merit and is dismissed. No order as to costs.