
(2004) 05 AHC CK 0170
In the Allahabad High Court
Case No : C.M.W.P. No. 1478 of 1985

Gaon Sabha Kahotri

APPELLANT

Vs

Parshu Ram and Others

RESPONDENT

Date of Decision : 28-05-2004

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 202

Citation : (2004) 3 AWC 2748

Hon'ble Judges : Yatindra Singh, J; Mukteshwar Prasad, J

Bench : Division Bench

Advocate : S.C. Verma, for the Appellant; S.K. Verma and Siddharth Verma, S.C., for the Respondent

Final Decision : Allowed

Judgement

Yatindra Singh, J.—This writ petition is directed against the Judgment of the Additional Commissioner dated 28.10.1975 and the Board of Revenue dated 31.10.1984 allowing the appeal and dismissing the suit of the petitioner for eviction of respondent Nos. 1-4 (the contesting respondents) from the pond in question (consisting of plot Nos. 220 (area 3 bigha 1 biswa 3 biswansi) and 221 (area 9 bigha 11 biswa) (total area 12 bigha 12 biswa 3 biswansi) on the ground that the suit was not maintainable.

2. There was litigation in respect of property in dispute during consolidation operations under U. P. Consolidation of Holdings Act, 1953 (the Consolidation Act). In the basic year consolidation records, the predecessor-in-interest of the contesting respondents was recorded in Class 111 ("asami" of the Gaon Sabha). The contesting respondents filed an objection claiming that they were hereditary tenants before the abolition of zamindari and became sirdar under the U. P. Zamindari Abolition and Land Reforms Act, 1950 (the Z. A. Act).

3. The Gaon Sabha (the petitioner) also filed an objection claiming that :

? The property in dispute is a pond.

? It is public utility land and was let out to the contesting respondents for growing singhara.

? The contesting respondents are "asami" of the property in dispute.

4. The Consolidation Officer consolidated the objections and by his order dated 30.12.1962 upheld the objection of the petitioner holding that :

? The contesting respondents were not hereditary tenants before abolition of zamindari.

? The property in dispute, being pond, was a public utility land and was let out to the contesting respondents for growing singhara.

? No sirdari rights can accrue in a public utility land and the contesting respondents are asami of the Gaon Sabha.

5. The contesting respondents filed an appeal which was dismissed on 21.2.1963. They filed a revision, which was dismissed on 29.6.1963. They filed Civil Misc. Writ Petition No. 5276 of 1963 against the orders passed by the consolidation authorities. During pendency of that writ petition, the petitioner filed an original suit u/s 202 of the Z. A. Act in 1966 for arrears of rent and for eviction of the contesting respondents on the ground that they are filling up the pond, changing its nature, and are acting contrary to the purpose for which it was let out.

6. The proceeding of the aforesaid suit was stayed due to pendency of the writ petition. After dismissal of the writ petition on 23.1.1970, the order staying the further proceeding of the suit was vacated on 25.5.1970. The proceedings were started and the trial court decreed the suit on the following findings :

? The contesting respondents are asami u/s 21 (1) (e) of the Z. A. Act.

? They are asami from year to year and not asami for a fixed period.

? The cause of action arose in the year 1966 when the contesting respondents started changing the nature of the property in dispute. They were acting contrary to the purpose for which the pond was let out to them.

? There was nothing to show that the suit was not maintainable.

? The suit for the recovery of rent is not maintainable u/s 202 of the Z. A. Act.

7. The contesting respondents filed an appeal. The appeal was allowed on the following grounds :

? No notice was given to the contesting respondents determining their lease.

? The suit was filed during consolidation operations and was not maintainable.

8. The petitioner filed a second appeal. It was dismissed by the Board of Revenue on 31.10.1984 on the ground that no notice determining the lease was given to

the contesting respondents. Hence the present writ petition.

9. This case was taken up before a single Judge and he by his order dated 18.10.1995 opined that this case should be considered by a Division Bench. This is how it has come up before us.

10. We have heard Sri S. C. Verma counsel for the petitioner and Sri S. K. Verma, senior advocate, assisted by Sri Siddharth Verma, counsel for the contesting respondents. The counsel for the contesting respondents supported the impugned judgments and submitted that the suit was not maintainable as :

(i) no written notice determining the lease was served on the contesting respondents.

(ii) the consolidation operations were pending at the time when suit was filed.

(iii) there was no cause of action for filing the suit.

First and Second Submission : Notice -Waived ; Not Barred

11. The counsel for the contesting respondents, in support of the first submission, cited two Full Bench decisions in Prem Singh and Others Vs. Hukam Singh and Others, and Aziz Alam v. D.D.C. 1972 AWR 207 and submitted that the contesting respondents were lessees and unless their lease was determined by serving a written notice, no suit for their eviction could be filed.

12. The counsel for the petitioner submitted that :

? The contesting respondents were not lessees but were merely "asami", which is akin to a licensee and no notice is required. Filing of suit is sufficient notice.

? In view of Section 117 of the Transfer of Property Act (the T. P. Act), Chapter V (Of Leases of Immovable Property) of the T. P. Act (which includes Section 106) does not apply to the agricultural leases.

? In view of the decision of the Supreme Court in Dhampal Chattiari v. Yesidazi Ammal AIR 1979 SC 1974. No notice determining the lease is necessary unless the Act specifically provides for determining the lease. There is no provision under any Act or Rules for determining an agricultural lease before filing a suit. (See Full Bench decision of Board of Revenue in Randas v. Genida Tiwari 1981 RD 211.

? The observations made in the Full Bench decisions relied by the contesting respondents are obiter as this question was neither involved nor referred.

? The aforesaid Full Bench decisions cited by the contesting respondents are also not applicable as they relate to an "asami" u/s 21 (1) (b) of the Z. A. Act and not to an "asami" u/s 21 (1) (e) of the Z. A. Act. There is difference between the two. An "asami" u/s 21 (1) (b) of the Z. A. Act could become sirdar after expiry of period of limitation. However, an asami u/s 21 (1) (e) of the Z, A. Act can never become sirdar as sirdari rights do not accrue over a public utility land.

? The aforesaid plea was neither taken in the written statement nor before the trial court. Neither any evidence was led nor was it argued before the trial court. It is deemed to have been waived by the contesting respondents.

? Prejudice has been caused to the petitioner as the plea was not taken before the trial court.

13. The counsel for the contesting respondents, in support of his second submission, submitted that in view of Section 49 of the Consolidation Act, the suit was not maintainable during pendency of consolidation operations as an asami can be ejected during consolidation [Indal v. Sheo Mohan 1969 AWR 837 (paragraph 10)]

14. The counsel for the petitioner submitted that :

? An "asami" cannot be ejected under the Consolidation Act Ramdeo v. Board of Revenue 1980 ALJ 761 and as such the suit was not barred.

? In consolidation operations, rights in respect of pond are determined but pond is not subject matter of allotment. An asami of a pond cannot be ejected in the consolidation operations.

? Neither this plea was taken in the written statement nor before the trial court.

? Prejudice has been caused to the petitioner as the plea was not taken before the trial court.

? The proceeding in the suit were started after consolidation operations came to an end.

15. In the facts of this case, it is not necessary to decide whether a written notice determining the lease was necessary before filing a suit for eviction of an "asami". It is also not necessary to decide whether an asami of a pond can be ejected in the consolidation operation or not. Even if these points are held against the petitioner, the suit could not be dismissed.

16. The parties have filed copies of the plaint and the written statement. The contesting respondent had neither taken these pleas in the written statement nor were they raised before the trial court. They were raised for the first time before the appellate court. It is true that an issue was framed whether the suit is maintainable or not but it was not on basis of these pleas. These pleas are factual pleas. They are at the most defences available to the contesting respondents. They can always be waived. The fact that they were never taken by the contesting respondent means that they had been waived.

17. The petitioner has also been prejudiced due to the fact that these pleas were not taken before the trial court. If the contesting respondents had taken these pleas before the trial court, the petitioner could have withdrawn his suit and filed the same after serving a written notice determining the lease or after the consolidation operation was over. The contesting respondents could not raise

these questions the first time before the first appellate court.

18. Apart from above, the trial of the suit did take place after the consolidation operations were over. There was nothing on the record of the courts below to show as to on what date consolidation operations came to an end. The contesting respondents at the time of hearing of writ petition filed an affidavit stating that the notification u/s 52 of the Consolidation Act was published on 2.12.1969. The consolidation operations came to an end on this date. It is true that the suit was filed in the year 1966, but it was stayed due to pendency of the writ petition filed by the contesting respondents. After dismissal of the writ petition, the stay order was vacated on 25.5.1970 and the proceedings were started after this date. The proceeding in the suit commenced after the consolidation operations came to an end ; no prejudice has been caused to the contesting respondents. In view of this, it cannot be said that this suit was barred.

Third Submission : There was cause of action

19. It is incorrect to say that the petitioner had no cause of action to file the suit. The property in dispute is a pond and is public utility land. It is meant for the benefit of the general public and has to be maintained as a pond. A public utility pond cannot be filled up for personal benefits. The contesting respondents were changing the nature of the land and filling it up. They were acting contrary to the purpose for which it had been let out. This was also held by the trial court. Apart from it, the contesting respondents in the consolidation proceeding had claimed themselves to be sirdar of the property. They had set up a title in themselves denying the title of the petitioner. It is the Gaon Sabhas that are vested with the management of the ponds under the Z. A. Act, the petitioner had cause of action for filing the suit.

Some Observations

20. The pond in question is a public utility land and was for the benefit of the villagers. Water is scarce and is precious. It is everyone's duty to preserve water and ponds. The first and the second appellate court ought to have been careful. They ought not to have permitted frivolous pleas to be raised on the part of the contesting respondents especially when they had, already lost the case upto the High Court.

Conclusions

21. In view of the above, the impugned judgments of the first and the second appellate court dated 28.10.1975 and dated 31.10.1984, are illegal. They are set aside and the judgment of the trial court dated 30.9.1974, is upheld. The petitioner after taking possession of the property in dispute will maintain the pond and in case nature of the pond has changed, then it will see that it is to restored to its original status.

22. With these observations, the writ petition is allowed.