
(2012) 01 AHC CK 0173
In the Allahabad High Court
Case No : Writ C No. 46307 of 2006

Gopalji

APPELLANT

Vs

The Addl. Commissioner (Judicial-II) Varanasi Mandal and
Others

RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Limitation Act, 1963 — Section 5
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 52
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B, 333

Citation : (2012) 01 AHC CK 0173

Hon'ble Judges : Sabhajeet Yadav, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Sabhajeet Yadav, J.—Heard learned counsel for the petitioner and learned Counsel appearing for private respondents. By this petition, the petitioner has challenged the judgement and order dated 24.5.2006 passed by Additional Commissioner (Judicial) Varanasi Division, Varanasi in Revision No. 181 of 2003, Bagesar Tiwari Vs. Gopal Ji and others u/s 333 of U.P.Z.A. & L.R. Act. The aforesaid revision was filed against the order dated 25.8.2003 passed by Additional Sub Divisional Officer, Ghazipur in Case No. 530 of 1993, Bagesar Tiwari Vs. Bhadesar Tiwari, u/s 229-B of U.P.Z.A. & L.R. Act, whereby the ex-parte order dated 3.12.1995 and pursuant decree dated 4.1.1996 passed in the said suit was set aside by restoring the suit to its original number and by transposing the petitioner Gopal Ji Tiwari in place of Sri Bhadesar Tiwari in the said suit.

2. The brief facts leading to the case are that respondent no.4 Sri Bageshwar Tiwari S/o Sri Ram Sunder Tiwari instituted a suit being original suit no. 530 of 1993 u/s 229-B of U.P.Z.A. & L.R. Act regarding the property situated in village Kulhariya, Pargana and Tehsil Jamania, District Ghazipur by claiming 1/4 share in

the disputed property stating therein that the opposite party no. 4 have a good relation with Bhadesar Tiwari and Siddha Nath Tiwari, hence, they have permitted his name in "Akarpatra-11" to the extent of 1/4 share in the disputed property, but the said entry had never been done in the consolidation records. However, it was further stated in the plaint that consolidation proceeding had ended by notification issued u/s 52 of U.P.C.H. Act. It is stated that in the said suit on 3.12.1995 in pursuance of alleged compromise dated 8.11.1995 the Up - Ziladhikari had passed decree on 4.1.1996. It is further stated in the writ petition that Bhadesar Tiwari had died and after his death the name of petitioner Gopal Ji Tiwari being the son of Bhadesar Tiwari and the successor of Siddha Nath Tiwari was mutated on 8.3.1997 in the revenue records under the guardianship of his real mother Rukmani Devi. A true copy of the extract of Khatauni of 1406 Fasli is on record as Annexure-3-A to the writ petition. It is further stated that thereafter the petitioner came to know that the opposite party no.4 has manipulated the ex-parte order dated 3.12.1995 regarding the property of father of the petitioner, as such he filed an application for recall/restoration of the ex-parte order dated 3.12.1995 alongwith the application u/s 5 of the Limitation Act on 25.9.1997. However, said recall/restoration application was objected by opposite party no.4 on the ground that the petitioner is not the son of Bhadesar Tiwari and mother of petitioner Rukmani Devi is not wife of Late Bhadesar Tiwari.

3. In support of his case through his natural guardian, his mother the petitioner has filed voluminous documents i.e. (i) Educational testimonials (ii) death certificate of Bhadesar Tiwari (iii) identity card of Rukmani Devi issued by Election Commission of India (iv) copy of registered marriage certificate of Rukmani Devi with Bhadesar Tiwari dated 23.6.1984 (v) copy of Kutumb Register which bears the name of petitioner's mother Rukmani Devi as the wife of Bhadesar Tiwari (vi) The certificate of Village Pradhan (vii) copy of Sulahnama dated 31.7.1998 in which the opposite party no.4 himself has admitted the mother of petitioner is the widow of Late Bhadesar Tiwari and (viii) the copy of revenue receipt by which the tax was paid. After going through the aforesaid documents the Up-Ziladhikari by order dated 25.8.2003 allowed the recall/restoration application filed by petitioner whereby ex-parte order dated 3.12.1995 and pursuant decree dated 4.1.1996 were set aside and the suit was restored to its original number. The aforesaid order is on record as Annexure-13 to the writ petition.

4. Learned counsel for the petitioner has submitted that from the perusal of aforesaid order dated 25.8.2003 passed by Additional Sub Divisional Officer Ghazipur, it is clear that on the basis of material placed by the petitioner before the court, the trial court has found that the petitioner is interested person for moving the said recall/restoration application. The trial court has also held that the compromise decree was passed without any issuance or service of notice/summon upon the defendant of said suit and alleged written statement filed by defendant of the suit was not verified by the defendants and the suit filed against Bhadesar Tiwari and Siddha Nath Tiwari was for a property which was more than

to the existing property of Bhadesar Tiwari and Siddha Nath Tiwari and lastely the facts stated in notice u/s 80 C.P.C. is contrary to the facts stated in plaint about the area of land in dispute which was subject matter of suit. Thus, the trial court has found that the aforesaid compromise decree was obtained by the opposite party no.4 by playing fraud upon the court, as such the ex-parte decree has been set aside and the suit was restored to its original number. While allowing the delay condonation application moved in the said restoration application, the trial court has also held that since ex-parte order and decree was obtained by playing fraud upon the court and there would be no limitation for setting aside the decree obtained by playing fraud upon the court, therefore, finding sufficient ground for condoning delay in given facts and circumstances of the case, the trial court has also condoned the delay in moving said restoration application. For ready reference it would be appropriate to extract the findings of the trial court as under:

5. Learned counsel for the petitioner has submitted that while deciding the said revision, the revisional court has committed serious illegality in holding that no sufficient ground exists for condoning the delay, whereas the trial court has categorically held that judgement and order dated 3.12.1995 and decree dated 4.1.1996 was obtained by the respondent no.4 and plaintiff of the suit by playing fraud upon the court and there would be no limitation for setting aside such decree, thus it was sufficient ground for condoning the delay in moving the restoration application, besides this once the delay has been condoned by trial court, the revisional court or superior court should not have closed the matter which was opened by trial court by condoning the delay and by affording the opportunity of hearing to the parties to establish their rights and interest before the court.

6. Learned counsel for petitioner has further submitted that although the trial court has discussed the evidence adduced by the petitioner for the purpose of showing interest in the said suit property for moving restoration application for setting aside ex-parte decree but under wrong notion of law the revisional court has held that the trial court has discussed the merit of the suit, therefore, committed illegality. Besides this, while setting aside the order passed by trial court the revisional court did not advert to the finding of trial court in respect of service of summon upon the defendants of the suit and verification of written statement allegedly filed by the defendant of the suit and wrong description of area of disputed property in the plaint and with variance in the area of disputed property in notice u/s 80 C.P.C. and other aspect of the matter between the notice u/s 80 C.P.C. and plaint which has been dealt with by the trial court, therefore, he has submitted that the order passed by revisional court is not sustainable in the eye of law.

7. The submission of learned counsel for the petitioner, in my opinion, appears to be correct. For ready reference it would be useful to extract the findings recorded by revisional court as under:

8. From the perusal of order dated 25.8.2003 passed by Additional Sub Divisional Officer, Ghazipur, it is clear that while passing the said order of restoration of suit, the trial court has dealt with the question as to whether the petitioner is interested person to move said restoration application or not and after going through the details of various documents filed by petitioner, has held that the petitioner has sufficient interest to move the restoration/recall application for setting aside the ex-parte order dated 3.12.1995 and pursuant decree dated 4.1.1996. While discussing the question of limitation in respect of delay in filing restoration application, the trial court has categorically held that since ex-parte decree was obtained by playing fraud upon the court and there would be no limitation for setting aside such ex-parte decree, therefore, in given facts and circumstances of the case, has found that the delay in moving restoration application was sufficient and liable to be condoned, accordingly, in my considered opinion, the trial court has rightly condoned the delay in moving restoration application.

9. Besides this, while discussing the merit of restoration application the trial court has further held that there is no material on record on the basis of which it can be held that summon/notice of plaint /said suit was served upon the defendants namely Siddh Nath and Bhadeshwar Tiwari and further the written statement filed in the said suit was not verified by the defendants and there is variation regarding the area of property in dispute between the notice u/s 80 C.P.C. and plaint. Thus, the trial court has found that the ex-parte order and decree was obtained by playing fraud upon the court and is accordingly liable to be set aside. In my opinion also the trial court was justified in setting aside the aforesaid ex-parte order and decree by condoning the delay in moving restoration application.

10. From the perusal of impugned order passed by revisional court, as contended by learned counsel for the petitioner, in my considered opinion, the revisional court did not advert to the aforesaid findings recorded by trial court and did not discuss the aforesaid relevant aspect of the matter indicated hereinbefore, therefore, the order passed by Revisional court is wholly erroneous and cannot be sustained.

11. Besides this, while restoring the suit to its original number, the trial court has afforded opportunity to the parties of the suit to agitate their rights and interest before the trial court but revisional court by setting aside the order dated 25.8.2003 passed by trial court has deprived the parties including the petitioner to establish his right and interest in respect of suit property, as such on this count also, in my considered, in the interest of justice, the impugned judgement and order passed by revisional court cannot be sustained and accordingly the same is hereby quashed. The judgement and order passed by trial court, referred herein before, is affirmed and restored to its file. In the result, the writ petition succeeds and is allowed. The trial court is directed to proceed in accordance with law as directed by the judgement and order dated 25.8.2003 passed by

Additional Sub Divisional Officer, Ghazipur in the said suit.