
(2010) 04 AHC CK 0336
In the Allahabad High Court
Case No : C.M.W.P. No. 53799 of 2006

Khalid Nizami alias Sullu

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 28-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 3
Constitution of India, 1950 — Article 19(1), 226
Partnership Act, 1932 — Section 69, 69(2)
Presidency Small Cause Courts Act, 1882 — Section 19
Uttar Pradesh Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 — Section 142, 143, 144, 145, 146
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 142

Citation : (2010) 4 AWC 4238

Hon'ble Judges : Vijay Manohar Sahai, J; Raj Mani Chauhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Raj Mani Chauhan, J.—This writ petition under Article 226 of the Constitution of India has been filed by the petitioner Khalid Nizami alias Sullu, s/o Sheikh Mohammad Nizamuddin, r/o Yusufpur, Railway Station, district Ghazipur against the respondents State of U.P. through the Secretary, Ministry of Panchayat Raj/ Local Self Government of U.P., Lucknow and 4 others for the following reliefs:

(i) Issue a writ, order or direction in the nature of mandamus declaring Clause (8) of the bye-laws framed by Zila Panchayat, Ballia approved by the Commissioner Azamgarh Division, Azamgarh and published in the U.P. Gazette dated 23.8.1997 filed as Annexure-7 to the writ petition as ultra vires Article 19(1)(g) of the Constitution of India; and ultra vires of Section 239(2) clause (H) Sub-clause (1) of the U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 and Clause (xxii) of Part A of Schedule 2 of the Adhiniyam, 1961; and the Model bye-laws framed by the State Government vide notification dated 14.2.1995.

(ii) Issue a writ, order or direction in the nature of certiorari quashing the order dated 26.4.2003 passed by the Upper Mukhya Adhikari Zila Panchayat, Ballia, in exercise of his powers as licensing authority vested under the bye-laws framed by the Zila Panchayat, Ballia, filed as Annexure-4 to the writ petition.

(iii) Issue a writ, order or direction in the nature of mandamus restraining the respondents from interfering in the holding of cattle fair by the petitioner in the bhumidhari land situate in Mauza Bharauli Khas and Baghama Khurd, Pargana Garh, district Ballia.

(iv) Issue any other writ, order or direction which this Hon"ble Court may deem fit and proper in the circumstances of the case.

(v) To award cost of the writ petition to the petitioner.

2. The relevant facts giving rise to the present writ petition may be summarized as under:

The dispute relates to holding of a cattle fair in Mauza Bharauli Khas and Baghama Khurd, Pargana Garh, district Ballia. As per allegation in the petition the revenue plots on which the cattle fair is being held belong to as many as 159 persons who are bhumidhar of the plots. The petitioner and all the 159 bhumidhars entered into a partnership agreement on 31.12.1994 to hold a cattle fair on the above plots. They executed deed of partnership in support of their partnership agreement. They executed a registered power-of-attorney in favour of petitioner for holding cattle fair to institute or defend suit and to manage the fair etc. without right to sell those plots. As per partnership agreement, the petitioner was allowed 50% of the profits earned from the fair which was to be held thrice in a year. The petitioner has alleged that he has been holding cattle fair thrice in a year on the plots under the partnership agreement since before 1990. The Zila Panchayat, Ballia also claimed that it was holding a cattle fair in Mauza Bharauli Khas and Baghama Khurd, Pargana Garh, district Ballia since 1976. The Zila Panchayat, Ballia, thereafter created some interference in holding the cattle fair to the petitioner. Therefore, the petitioner had to file original Civil Suit No. 155 of 1995 in Civil Court, Ballia for permanent injunction against Zila Panchayat, Ballia for restraining it as well as its officers from causing any interference in holding the cattle fair. The petitioner moved an application under Order XXXIX, Rule 1 of the CPC for ad interim injunction which was allowed by the trial court. The trial court vide order dated 4th May, 1995 granted temporary injunction in favour of the petitioner with the following two conditions:

(i) The opposite parties-defendants were restrained by temporary injunction from interfering in the plaintiffs holdings of cattle fair till according to the Government order the bye-laws are framed by the Zila Panchayat and approved by the Divisional Commissioner, published in the official Gazette and enforced.

(ii) The opposite parties-defendants were restrained from interfering in the plaintiffs holding cattle fair till the application of the plaintiff given to the Zila

Panchayat for grant of licence is not disposed of.

3. The Zila Panchayat, Ballia feeling aggrieved by the ad interim injunction granted by the trial court in favour of the plaintiff filed Misc. Civil Appeal No. 107 of 1995 before the District Judge, Ballia which was dismissed by the appellate court. The Zila Panchayat, Ballia being aggrieved by the appellate court's judgment filed Writ Petition No. 23945 of 1995 in the High Court of Judicature at Allahabad which was dismissed on 31st August, 1995. The Court while dismissing the writ petition had observed that the petitioner if so advised may apply for review of the order. The Zila Panchayat, Ballia thereafter moved an application for review which was dismissed by the Court on 25th September, 1998. The Zila Panchayat, Ballia thereafter moved an application before the trial court under Order XXXIX, Rule 4 of the CPC for vacating the ad interim injunction order dated 4th March, 1995 on the ground that the conditions imposed by the trial court while granting ad interim injunction order have been fulfilled, therefore, ad interim injunction order granted by the Court stands vacated. The trial court after hearing both the parties allowed the defendants application on 22nd March, 1999 and cancelled the ad interim injunction order dated 4th May, 1995. The trial court found that the bye-laws framed by the Zila Panchayat, Ballia had been published in the Gazette on 23rd August, 1997 after approval of the Commissioner, Azamgarh and the plaintiff's application for grant of licence to hold cattle fair had also been rejected by the competent authority. The petitioner-plaintiff feeling aggrieved by the order of the trial court filed civil misc. appeal before the District Judge which was rejected by the appellate court on 21st May, 1999. The petitioner had challenged the order passed by the trial court as well as the lower appellate court by filing Civil Misc.-Writ Petition No. 25609 of 1999 before the High Court, which was dismissed by the Court on 11.11.2005. In that writ petition the petitioner-plaintiff had challenged clause 8 of the bye-laws framed by the Zila Panchayat, Ballia as being ultra vires. He had also prayed for the relief that the order of rejection of his application for grant of licence for running cattle fair was illegal but the Court did not go through these reliefs rather; these reliefs were not pressed by the learned Counsel for the petitioner. The Court, however, observed that these reliefs could be gone into in an appropriate proceedings. Consequently, the petitioner has filed the present writ petition.

4. The petitioner has alleged that the Government of U.P. just to bring the uniformity in the bye-laws framed by the Zila Panchayat and Gram Sabhas within the State to control and regulate the holding of cattle fairs, cattle markets, cattle bazars and cattle exhibitions etc. in their respective areas including such cattle fairs, markets, bazars and exhibitions held by the private land owners in their own land, framed and published model bye-laws to be followed by the Zila Panchayats and Gram Sabhas. The model bye-laws framed by the State Government provided that no licence wilt be granted to any person for running cattle fair, cattle markets, cattle bazars, cattle exhibitions, etc within a radius of eight kilometres where a cattle fair, cattle markets, cattle bazars and cattle

exhibitions was already being held. But these provision will not apply to the cattle fair, cattle markets, cattle bazars and cattle exhibitions which were already being held before the model bye-laws was framed. The Zila Panchayat, Ballia ignoring the provision of model bye-laws, framed its own bye-laws in exercise of its power conferred under Sections 142 to 146 read with Section 239(2) of the Uttar Pradesh Kheshta Panchayat and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as Adhiniyam) which was approved by the Commissioner, Azamgarh and was published in U.P. Gazette dated 23th August, 1997. Clause 8 of the new bye-laws provides that no licence will be granted to any person for running cattle fair, cattle market, cattle exhibition etc. within the radius of eight kilometres where the cattle fairs, etc. were already being held without any exception. Clause 8 of the bye-laws framed by the Zila Panchayat, Ballia is against the model bye-laws framed by the State Government, which provides exception to the cattle fairs which were already being held before framing of the Model bye-laws.

5. The petitioner has further alleged that the revenue plots under partnership agreement are the Bhumidhari plots of 159 persons who had entered into partnership agreement with the petitioner authorizing him to run the cattle fair on their bhumidhari land. A bhumidhar in view of provisions of Section 142 of the U.P. Zamindari Abolition and Land Reforms Act, is entitled to use his bhumidhari land in any manner he likes. The bhumidhars are free to use their bhumidhari plots to hold cattle fair. Their rights cannot be curtailed by clause 8 of the bye-laws of the Zila Panchayat, Ballia. Moreover, a citizen has got fundamental right under Article 19(1)(g) of the Constitution of India to hold cattle fair. Clause 8 of the model bye-laws framed by Zila Panchayat, Ballia is against the fundamental right of a citizen which is ultra vires. Moreover, the State Government has framed model bye-laws to regulate the cattle fairs, cattle markets, cattle bazars and cattle exhibitions just to bring uniformity in the bye-laws framed by the Zila Panchayats and Gram Sabhas but the bye-laws cannot be framed by the Zila Panchayats or Gram Sabhas in derogation of the provision of model bye-laws. The bye-laws framed by the Zila Panchayat, Ballia is against the provision of the model bye-laws framed by the State Government. Moreover, the Zila Panchayat, Ballia is rival trader which holds cattle fair, cattle markets, cattle bazars, cattle exhibitions, etc. It, therefore, cannot frame bye-laws detrimental to the rights of the other traders in the same trade.

6. The petitioner has also alleged that since under the deed of the partnership agreement he has been holding cattle fair on the bhumidhari land of the bhumidhars. Therefore, no licence for holding cattle fair is required. The Uppar Mukhya Adhikari has illegally rejected his application for grant of licence for running cattle fair which is liable to be quashed.

7. The respondent Nos. 2 and 5 have contested the writ petition and have filed counter-affidavits. In the counter-affidavit filed by Sri Ramji Pandey for Zila Panchayat Ballia, he inter alia has taken the preliminary objection as to the

maintainability of the present writ petition. The objection taken by the deponent in his counter-affidavit is that the petitioner alleging himself to be bhumidhar of the revenue plots has filed the present writ petition in his personal capacity while he in the writ petition has alleged that 159 persons are bhumidhar of the plots on which he has been holding cattle fair. He has further alleged that there had been a written partnership agreement between him and 159 other bhumidhars to hold cattle fairs on the bhumidhari plots and all the bhumidhars have executed power-of-attorney in his favour to hold and manage such cattle fair on and to file or defend suit or any other proceedings in the court of competent jurisdiction but the written agreement of partnership deed is not registered agreement. Moreover, the petitioner has not filed the present writ petition either as attorney of the firm or partner of the firm. Since the partnership-deed as alleged by the petitioner is not registered partnership firm, therefore, the petitioner neither in the capacity of partner of the firm nor as attorney of the firm can institute suit or petition against third party, i.e., State of U.P., Zila Panchayat, Ballia and Ors. who are third party to the agreement. He as a partner can only file a suit or petition against the partners as well as against the firm only but not against third party. The writ petition as filed by the petitioner is not maintainable on this ground.

8. Since the respondent Nos. 2 and 5 have raised preliminary objection as to the maintainability of the present writ petition, therefore, we think it desirable and proper to consider the point of maintainability of the present writ petition as preliminary issue which is being framed as under:

Whether the present writ petition filed by the petitioner is not maintainable?

9. The submission of the learned Counsel for the respondent Nos. 2 and 5 is that the description of the name of parties as mentioned by the petitioner in the present writ petition shows that the petitioner has filed the present writ petition in his personal capacity. He has alleged that he is bhumidhar of the plots on which he has been holding cattle fair since 1990 but he is not bhumidhar of any plot rather as per averments of the petitioner made in the writ petition it appears that 159 other persons are bhumidhar of the plots in question. If the averments made in the writ petition are taken together as a whole it will appear that 159 persons are said to be bhumidhar of the plots on which the cattle fair is being held by the petitioner. The petitioner has alleged that 159 bhumidhars as well as he had entered into partnership agreement to hold cattle fair on the bhumidhar plots under the agreement. Petitioner has further alleged that all the partners have executed a registered power-of-attorney in his favour to hold and manage the cattle fair and to file or defend any suit or proceedings in the court of law and to do other act necessary for holding the cattle fair. At the most the petitioner can be said to have filed the present writ petition as attorney of the firm but the petition has not been filed on behalf of the firm rather he has filed the present petition in his personal capacity. The further submission of the learned Counsel for the respondents is that the partnership deed/agreement as relied on by the petitioner is an unregistered deed, therefore, the petitioner neither as partner of

the firm nor as attorney of the firm can institute a suit or writ petition against third party, i.e., State of U.P., Zila Panchayat, Ballia and others. He as a partner of the firm can only file suit or writ petition against the partner of the firm or against the firm only. The Firm may also institute suit against any partner of the firm. The firm cannot institute a suit or writ petition against third party in view of the provision of Section 69 of the Indian Partnership Act, 1932 (hereinafter referred to as the "Act" of 1932). The writ petition is, therefore, not maintainable on this ground alone and is liable to be dismissed.

10. The learned Counsel for the petitioner on the other hand argued that although the petitioner has not specifically mentioned in the array of the parties that he has filed the present writ petition either as partner of the firm or as an attorney of the firm but he has specifically alleged in the writ petition that he as well as 159 bhumidhars had entered into partnership agreement to run cattle fair on their bhumidhari lands. The profit of share is to be divided between the petitioner on one hand and the rest bhumidhars on the other hand as 50-50%. The partners have executed a registered-deed of power-of-attorney authorizing the petitioner to hold the cattle fair on their land, institute any suit or defend any proceedings in any court and to do other necessary acts in holding and managing the affairs of the cattle fair. The petitioner has filed the present writ petition as partner of the firm as well as attorney of the firm which is maintainable. The petitioner has filed the copy of the deed of the partnership agreement and the copy of the registered power-of-attorney executed by the bhumidhars in support of his averments. The writ petition is, therefore, maintainable and cannot be dismissed on this ground alone.

11. We have given thoughtful consideration to the arguments of learned Counsel for the petitioner as well as learned Counsel for the respondent Nos. 2 and 5. From a perusal of description of the parties of the present writ petition it appears that the petitioner has filed the present writ petition in his personal capacity. However, he has alleged in the writ petition that 159 persons were bhumidhars of plots situated in Mauza Bharaul Khas and Baghama Khurd, Pargana Garh, district Ballia. They entered into written partnership agreement with the petitioner for holding cattle fair thrice in a year on their bhumidhari plots as per terms of the agreement. The petitioner has been holding cattle fair on their plots since 1990. The petitioner has further alleged that the partners have executed a registered-deed/power-of-attorney in his favour to hold and manage the cattle fair, to institute or defend a suit or any other legal proceedings in any Court. If these averments of the writ petition are taken as a whole it can be said that the petitioner has filed the writ petition as partner as well as attorney of the firm. The petitioner has filed the copy of the deed of partnership agreement in support of his averments but admittedly the partnership firm is not a registered firm. Section 69 of the Indian Partnership Act, 1932 lays down the provision with regard to the effect of the unregistration of the firm, which is being extracted below:

69. Effect of non-registration.-(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of Sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect:

(a) the enforcement of any right to sue for the dissolution of a firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply:

(a) to firms or to partners in firms which have no place of business in [the territories to which this Act extends], or whose places of business in [the said territories], are situated in areas to which, by notification under [Section 56], this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

12. From a perusal of provision u/s 69(2) of the Act of 1932 as extracted above, it is clear that there is specific provision that no suit to enforce right arising from the contract shall be instituted in any court by or on behalf of firm against third party unless the firm is registered and the persons seeing or have been shown as partners in the registered firm. Admittedly in this case the partnership firm as relied upon by the petitioner is not registered one, therefore, in view of the clear bar u/s 69(2) of the Act the petitioner neither as a partner of the firm nor as attorney of the firm can file present writ petition. Therefore, the writ petition filed by the petitioner prima-facie does not appear to be maintainable and is liable to be dismissed on this ground alone. The preliminary issue as framed above for consideration is therefore being disposed of in affirmation. Although there are several other points involved in the present writ petition for consideration but as

we have held that the present writ petition is not maintainable, therefore, those points need not to be considered.

The writ petition is, therefore, dismissed as not maintainable.