
(2016) 07 AHC CK 0044
In the Allahabad High Court
Case No : Writ-B No. 46371 of 2015

Manoj Kumar

APPELLANT

Vs

Board of Revenue, Allahabad

RESPONDENT

Date of Decision : 08-07-2016

Acts Referred:

Citation : (2016) 132 RD 333

Hon'ble Judges : Ram Surat Ram (Maurya), J.

Bench : Single Bench

Advocate : R.K. Pandey, Advocate, for the Appellant; C.S.C, Brij Kumar Yadav, D.K. Verma and S.C. Verma, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri R. K. Pandey for the petitioners and Sri S.C. Verma for the respondents.

2. The writ petition has been filed against the order of Additional Commissioner dated 30.8.1997 allowing the appeal and the plaintiffs were declared as co-sharer of ? share along with defendant-1 in the land in dispute and the order of Board of Revenue, UP dated 13.5.2015 dismissing the second appeal of the petitioner filed against the aforesaid order.

3. A short question has been raised by the counsel for the petitioner in this case that the trial court framed issues and issue no. 2 was to the effect that as to whether the suit is barred under Section 49 of UP Consolidation of Holdings Act, 1953 (hereinafter referred to as the "Act"). The defendants insisted the trial court to decide issue no. 2 as preliminary issue. However, the trial court declined to decide issue no.-2 as preliminary issue. The defendants filed a revision before the Additional Commissioner. The revision was allowed by the Additional Commissioner by order dated 29.4.1994 and the trial court had been directed to decide issue no. 2 as preliminary issue. Thereafter the trial court has decided issue no. 2 holding that the suit is barred under Section 49 of the Act.

Accordingly the suit was dismissed by order dated 19.12.1996. The plaintiffs challenged the decree of the trial court in Appeal No. 119 of 1997. The appeal was heard by Additional Commissioner who by the impugned order dated 30.8.1997 allowed the appeal and set aside the order of trial court dated 19.12.1996 but at the same time he has also decided other issues in the suit and held that plaintiffs have ? share and defendant-1 is also co-sharer along with plaintiffs. The petitioners challenged the aforesaid decree before Board of Revenue, UP in Second Appeal No. 1 of 1997-98 which was dismissed by order dated 13.5.2015. Hence this writ petition has been filed.

4. Counsel for the petitioners submits that there was no trial before the trial court inasmuch as after framing the issues, the evidence has not been recorded by the parties. Only documentary evidence in respect of the suit being barred under Section 49 of the Act, has been adduced by the parties. The other evidences in respect of other issues have not been adduced. Therefore, in case, the appeal is allowed then in view of Order 41, Rule 23 CPC, the matter ought to have been remanded to the trial court for recording evidence of the parties and other issues be decided in accordance with law. But the appellate court without giving any opportunity of evidence, has decided the suit on merit. The order of appellate court was illegal but the second appeal had illegally been dismissed.

5. The counsel for the respondents however submits that the appellate court was competent to decide the suit finally according to the provisions of Order 41, Rule 24 CPC. Thus the order of appellate court does not suffer from any error. Otherwise also the plaintiffs and defendant-1 were real brother and they have equal share in the land in dispute. The judgement of appellate court does not suffer from any illegality.

6. I have considered the arguments of the counsel for the parties.

7. Order 41, Rule 23 CPC is quoted below.

23. Remand of case by Appellate Court.- Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and 3 shall send a cop of its judgement and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

8. Thus according to the provisions of Order 41, Rule 23 CPC, if the suit has been decided on the preliminary issue, the matter ought to have been remanded to the trial court for trial of remaining issues. But in the present case, the appellate court has, himself, decided the suit on merit without there being any trial of other issues and without giving any opportunity of evidence to the parties.

9. So far as the contention of the counsel for the respondents that plaintiffs as well as defendant-1 were co-sharer in the land in dispute is concerned, this fact has been disputed in the plaint. Thus the parties are liable to be given opportunity of evidence in respect to prove their pleadings.

10. In the results, the petition succeeds and is allowed. The order of Additional Commissioner dated 30.8.1997 and Board of Revenue dated 13.5.2015, so far as it has decided other issues apart from issue no. 2, are set aside. The matter is remanded to the trial court to decide remaining issues after giving opportunity of evidence to the parties. Since the matter is very old as such the trial court shall decide the suit expeditiously, without giving any unnecessary adjournment to either of the parties.