
(2012) 08 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 62285 of 2006

Nijamuddin

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3, Order 9 Rule 13
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B

Citation : (2012) 9 ADJ 264

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Advocate : R.K. Kushwaha and S.M. Iqbal Hasan, for the Appellant; K.N. Rai, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble S.U. Khan, J.—Heard R.K. Kushwaha, learned counsel for the petitioner and Shri Kalpnath Rai, learned counsel on behalf of contesting respondent No. 5. Father of respondent No. 5, i.e. Riyasat Hussain filed a suit u/s 229B of U.P.Z.A. & L.R. Act in the year 1980. Apart from formal parties State of U.P. and Gaon Sabha, there were two defendants. One was Jahoor (Zahoor), father of petitioner and the other was Sharif, Respondent No. 6. Both Jahoor and Sharif were real brothers. It was stated that in the suit compromise had taken place 4.4.1980, however the suit was decreed on the basis of compromise in the year 1995. The suit had been renumbered as Suit No. 610 of 1992. The compromise was shown to have been verified on 4.4.1981. Suit was decreed on the basis of compromise on 5.8.1995. It is not at all understandable as to why the Court took 14 years for decreeing the suit on the basis of compromise.

2. In the year 2004, petitioner, his brothers respondent Nos. 7 and 8 and respondent No. 6 filed restoration application, copy of which is Annexure-IV to the writ petition. In para- 5 of the restoration application it was mentioned that Jahoor father of applicant Nos. 2 to 4, who was one of the defendants in the suit

had not entered into any compromise and he had also died before the decision of the suit. Learned counsel for the petitioner states that Jahoor died on 20.9.1994 as stated in para-6 of the writ petition. In para-11 of the writ petition it is mentioned that for execution of compromise decree dated 5.8.1995, respondent No. 5 filed application for mutation in the year 2004. The restoration application was filed on 29.6.2004 (or 21.6.2004). Deputy Collector/S.D.O., Karvai, Ghazipur through order dated 29.5.2006 rejected the restoration application. Against the order dated 29.5.2006 petitioner filed Revision No. 118 of 2006, which was dismissed by Additional Commissioner, Judicial-II, Varanasi Division, Varanasi on 10.8.2006 hence this writ petition.

3. Shri Kalpnath, learned counsel for respondent No. 5 has argued the following points.

1. It is not proved that petitioner's father died in the year 1994.

2. As advocate of the petitioner's father appeared before S.D.O. and gave statement on his behalf in 1995 hence it is proved that in the year 1995 he was alive.

3. That merely because in para-6 of the counter-affidavit it has been stated that contents of para-6 of the writ petition are denied, it is sufficient denial regarding date of death of petitioner's father as given in para-6 of the writ petition.

4. The decree which has been passed in the year 1995 could not be set aside through some application filed before the same Court. Petitioner could only file separate suit for cancellation of the decree.

4. In para-8 of the writ petition it was stated as follows :

8. That on the next date i.e. 22.5.1980 Riyasat Husain fraudulently filed a compromise deed on behalf of the father of the petitioner. The father of the petitioner had never executed neither signed any compromise deed between the said Riyasat Husain. No summons regarding the pendency of the suit was served on the petitioner's father. For bare perusal of this Hon''ble Court an extract photo copy of the alleged compromise deed is being filed herewith and marked as Annexure 1 to the writ petition which also shows that the father of the petitioner namely Jahoor has not signed on the alleged compromise deed. A true copy of the order-sheet is being filed herewith and marked as Annexure-2 to the writ petition.

5. Photo-stat copy of the compromise at its bottom mentions that applicants are Sharif, Jahoor and Riyasat. However, at the bottom of that only signatures of Mohd. Sharif are mentioned and towards left side also signatures of Mohd. Sharif are there and below that thumb impression of Riyasat is there however, signatures of Zahoor are not there. In paragraph-7 of the counter-affidavit the reply to contents of paragraph-8 of the writ petition is given in the following manner;

7. That the contents of paragraph Nos. 7, 8 and 9 of the writ petition is matter of records and at present no needs to comments.

6. As far as paragraphs 6 and 11 of the writ petition are concerned it was stated therein that Jahoor died on 20.9.1994 (para 6) and after passing of the order dated 5.8.1995 respondent No. 5 kept mum for several years and in the year 2004 after about 9 years mutation proceedings were started and only then petitioner came to know about the ex parte decree dated 5.8.1995 (para 11). Reply has been given in paragraphs 6 and 8 of the counter-affidavit which are quoted below :

6. That the contents of paragraph No. 6 of the writ petition not admitted hence denied it is submitted that the petitioner father late Mohammad Jahoor and Mohammad Sarif has self completed a compromise between party in village. Party concerned have complete knowledge above such matter.

8. That the contents of paragraph Nos. 10, 11 and 12 of the writ petition is a matter of record, it is submitted that the suitable reply shall be given on the time of argument of this matter.

7. Accordingly, it is clear that the aforesaid allegations made in the writ petition have been admitted in the counter-affidavit. Even though in para-6 of the counter-affidavit contents of paragraph-6 of the writ petition giving date of death of Jahoor as 20.9.1994 have not been admitted but it is evasive and not specific denial hence it amounts to admission by virtue of principles of Order 8 Rule 3 C.P.C. In paragraph-6 of the counter-affidavit neither specific date of death was mentioned nor it was stated that petitioner's father died after 5.8.1995 when suit was decreed on the basis of compromise. As date of death of petitioner's father as given in the writ petition has not been denied specifically in the counter-affidavit hence it was not necessary for the petitioner to file death certificate etc. as argued by learned counsel for respondent No. 5. A fact which is admitted need not be proved.

8. Moreover in this writ petition an order was passed on 17.3.2008 on the order-sheet to the following effect :

Rejoinder-affidavit filed today may be taken on record.

The learned counsel for the respondent wants to verify about the death of Jahoor, the father of the petitioner. He also wants to verify as to when the contesting respondent apply for mutation in pursuance of the decree passed u/s 229B of the U.P.Z.A. & L.R. Act.

As prayed one week time is granted to file the Supplementary counter-affidavit.

List on 3.4.2008.

No Supplementary counter-affidavit has been filed by the learned counsel for respondent No. 5.

9. The authorities/Courts below have not considered the fact of death of Jahoor the father of the petitioner during pendency of the suit. After the death of Jahoor suit stood abated against him (as no substitution application was filed) hence it could not be decreed on the basis of compromise at least against Jahoor. The decree was therefore ex parte against legal representatives of Jahoor. Accordingly, it could be set aside under Order 9 Rule 13 C.P.C.

10. The fact that the advocate verified/attested the compromise cannot mean that the party was necessarily alive on the said date.

11. In any case the photo-stat copy of the compromise Annexure-1 to the writ petition does not contain the signatures of Jahoor father of the petitioner hence in-fact no compromise took place in between plaintiff and him. If compromise is not signed by a party his advocate cannot verify or attest the same.

12. Under the first proviso to Order 9 Rule 13 C.P.C. it is provided:

That where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also." (such defendants means the defendant applying for setting aside the decree against whom decree has been passed ex parte).

13. The nature of the decree passed on the compromise is such that it cannot be set aside only against Jahoor/his legal representatives. Accordingly the entire decree is liable to be set aside.

14. Accordingly, both the impugned orders are set aside and restoration application is allowed. The entire ex parte decree dated 5.8.1995 is set aside. The S.D.O. is directed to decide the suit afresh. The petitioner and his brothers respondent Nos. 7 and 8 are directed to file certified copy of this judgment alongwith substitution application seeking their substitution at the place of late Sri Jahoor within three months from today failing which writ petition shall be deemed to have been dismissed. The Sub-Divisional Officer shall decide the suit very expeditiously in no case beyond 30.6.2013. Writ petition is allowed as above.