
(2016) 08 AHC CK 0095
In the Allahabad High Court
Case No : Writ B No. 61095 of 2010

Nisar Husain

APPELLANT

Vs

Board of Revenue, U.P. At Allahabad

RESPONDENT

Date of Decision : 17-08-2016

Acts Referred:

Uttar Pradesh Land Revenue Act, 1901 — Section 34(5)

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 210

Citation : (2016) 133 RD 24

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

Bench : Single Bench

Advocate : B. Malik and D.D. Kushawaha, Advocates, for the Petitioner;
C.S.C. and Rishikesh Tripathi and V.K. Gupta, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ram Surat Ram (Maurya), J.— Heard Sri B. Malik, for the petitioners and Sri Rishikesh Tripathi, for respondents-9 to 17.

2. This petition has been filed against the orders of Sub-Divisional Officer dated 11.01.2010, Additional Commissioner dated 15.05.2010 and Board of Revenue U.P. dated 20.07.2010, passed in suit under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the "Act").

3. The dispute between the parties is in respect of plots 2247 (area 0.46 acre) and 2250 (area 1.30 bigha) of village, pargana and district Mahoba. Nisar Husain and Mahboob alias Mahmood Ali (the petitioners) filed a suit (registered as Suit No. 28 of 2007-08) under Section 229-B of the Act, on 25.04.2007, for declaring them as "bhumidhar with transferable right" along with defendants-2, 3 and 4 of the disputed land. They took plea that the disputed land was their ancestral property and recorded as "sir" of Sajjad Husain and Abdul Wahid, having equal share in it. After death of Sajjad Husain, his ? share was inherited by his sons Mohd. Ishaq and Ibrahim. Mohd. Ishaq, with consent of his wife Smt. Aqeela orally gifted his ? share to his brother Ibrahim. Ibrahim was inherited his sons

Mahboob Ali (plaintiff-2) and Mohd. Idris, who was inherited by his sons Lukman, Rizman and Irfan (defendants-2 to 4). Abdul Wahid executed an unregistered will dated 05.11.1964 in favour of Nisar Husain (plaintiff-1), who inherited his ? share after death of Abdul Wahid. Disputed land was recorded in the names of Abdul Wahid and Mohd. Ishaq till 1372 F. By making forgery in khatauni 1372 F, name of Mukunda was recorded. After death of Mukunda names of his sons Dhanni and Nandi were recorded. Dhanni and Nandi sons of Mukunda executed a sale deed of plot 2250 (area 0.178 hectare) in favour of Abdul Hamid son of Shekh Natthu, who executed a sale deed dated 19.11.1991 of this land in favour of Dharm Das and Vinod Kumar (defendants-6 and 7), whose names were recorded without any notice to the plaintiffs. An area of 0.085 hectare of plot 2250 was recorded as road. Dhanni son of Mukunda executed a sale deed dated 21.05.1992 of plot 2247 (area 0.185 hectare) in favour of Vinod Kumar and Pramod Kumar (defendants-13 and 14). Names of the transferees were also recorded over the land in dispute. The plaintiffs and defendants-2 to 4 were through out in possession of the land in dispute and were paying land revenue. Mukunda, his sons and transferres were never in possession of disputed land.

4. Defendant-6, Defendant-7, Defendants-8 to 12 and Defendants-13 and 14 filed their separate written statements and contested the suit. They took plea that Mukunda was in possession of the land in dispute since before date of vesting and recorded as tenant of "sir" in revenue records. After date of vesting on 01.07.1961, Mukunda acquired sirdari right. Thereafter, he obtained bhumidhari right on 23.03.1967. Names of Ibrahim and Ishaq were illegally recorded in column-IX of the khatauni 1376 F. Mukunda, therefore, filed a suit (registered as Suit No. 44 of 1970) under Section 209 of the Act, for their ejectment. Trial court dismissed the suit by order dated 25.08.1971. However, Additional Commissioner, by order dated 11.07.1974, allowed the appeal of Mukunda. Second Appeal No. 169 of 1973-74 filed by Ibrahim and Ishaq was dismissed by order of Board of Revenue, U.P. dated 17.10.1989. Thereafter, they did not challenge decree dated 11.07.1974 and handed over possession of disputed land to the heirs of Mukunda, namely Dhanni and Nandi. On the basis of sale deeds executed by Dhanni and Nandi or their transferee, other defendants have become bhumidhar of the land in dispute. After obtaining permission for construction, from competent authority, they had constructed their buildings over it, in 1994. This suit has been filed in 2007 on false allegations.

5. Sub-Divisional Officer framed issues and recorded evidence of the parties. The petitioners examined Nisar Husain, Mahmood Ali, Hamid Ali Jalal and Babu Lal Chaurasia as witnesses and filed documentary evidence. The defendants examined Virendra Kumar, Dhuram Yadav, Dharm Das, Vinod Kumar (defendant-7), Vinod Kumar (defendant-13), Lal Viman Kushwaha and Chandra Shekhar Dwivedi as witnesses and filed their documentary evidence. Sub-Divisional Officer, after hearing the parties, by his order dated 11.01.2010 held that name of Mukunda was recorded as tenant of sir in 1360 F, 1371 F and 1372 F over plot 2247 (area 0.46 acre) and 2250/1 (area 0.65 acre). In 1372 F

khatauni, by order of Sub-Divisional Officer, Mukunda was recorded as sirdar, w.e.f. 1369 F. This entry was continued in 1374 F to 1376 F. In this khatauni names of Ibrahim and Ishaq were recorded in column-IX. Mukunda filed a suit for ejectment of Ibrahim and Ishaq, which was decreed by order of appellate court dated 11.07.1974. Names of heirs of Mukunda and transferees were mutated time to time over disputed land, without any objection of the petitioners. Although Nisar Husain claimed his right on the basis of unregistered will dated 05.11.1964. But after death of Abdul Wahid, he never applied for mutation of his name on its basis. Ibrahim never applied for mutation of his name on the basis oral gift of Ishaq. The suit is barred under Section 34 (5) of U.P. Land Revenue Act, 1901 and on the principle of res-judicata. Although Ishaq had died but his name was wrongly recorded in column-IX of the khatauni. Title and possession of the plaintiffs were not proved. Various sale deeds executed by heirs of Mukunda in favour of other defendants were valid. After taking permission of the competent authority, buildings and shops were contracted by transferees in plot 2250. On these findings, suit was dismissed. The petitioners filed an appeal (registered as Appeal No. 114 of 2009-10) from the aforesaid order. Additional Commissioner, by order dated 15.05.2010 affirmed the finding of trial court and dismissed the appeal. The petitioners filed a second appeal (registered as Second Appeal No. 36 of 2009-10). Board of Revenue, U.P., by order dated 20.07.2010, dismissed the second appeal. Hence, this petition has been filed.

6. The counsel for the petitioners submitted that in Part II of khatauni 1360 F, the name of Mukunda was recorded for the first time without any order of competent authority. The name of Mukunda was not recorded either prior to 1360 F or thereafter. There is no evidence to prove that Mukunda of tenant of "sir" holding. Thereafter, by making forgery, name of Mukunda was recorded in Part I of khatauni 1374 F, w.e.f. 1369 F. A fabricated and unauthorized entry cannot be given any status under law. Howsoever, it may be long, it can not confer any title. The suit of the petitioners has been dismissed by all the three courts below, relying upon this forged and unauthorized entry and its continuance in subsequent years, which were made without any notice to the petitioners and their predecessors. So far as the suit under Section 209 of the Act is concerned, the decree has been passed by Appellate Court on 11.07.1974. This decree was never executed and judgment debtors were never dispossessed. After expiry of period of limitation for execution of decree, the petitioners acquired sirdari right under Section 210 of the Act, as held by Supreme Court in *Muneshwar v. Raja Mohd. Khan*, AIR 1990 SC 1980. The respondents based their title on a fabricated and unauthorized entry in khatauni, while the petitioners are the heirs of recorded tenure holders, therefore, the petitioners are entitled to protect the property, by filing a suit and provisions of Section 34 (5) of U.P. Land Revenue Act, 1901, are not applicable, as held by this court in *Ram Charan v. Board of Revenue and others*, 1977 RD 200. So far as judgment of Revenue Court in suit under Section 209 of the Act is concerned, the predecessor of Nisar

Husain (petitioner-1) was not party in that suit, as such, the judgment does not operate as res judicata against Nisar Husain, as has been held in Radha Binode v. Sri Gopal Ji Thakur and others AIR 1927 Privy Council 128; Jai Narain v. Jafar Beg, AIR 1926 Allahabad 324; Chebrolu Latchayya v. Kucherlapati Venkatapatiraju and others AIR 1940 Madras 201, Surajpati and others v. D.D.C., and others, AIR 1981 Allahabad 265; Smt. Shamlata Raut v. Vishweshwara Tukaram Giripunje and another, AIR 2008 Bombay 155; Narendra Akash Maharaj Petkar v. Shahaji Baburao Petkar, AIR 2009 Bombay 165 and Supreme Court in Canara Bank v. Canara Sales Corporation (1987) 2 SCC 666. The cause of action in the present suit, as mentioned in the plaint itself, arose on 01.01.2007 and the suit was filed on 25.04.2007, as such, it was well within limitation. Original will executed by Abdul Waheed in favour of Nisar Husain dated 05.11.1968, was filed before the court below and its due execution was also proved from the statement of attesting witness. In these circumstances, dismissal of the suit was illegal and liable to be set aside.

7. In reply to the aforesaid arguments, counsel for the respondents submitted that the land in dispute was let out to Mukunda on batai, as such, his name was recorded in Part II of khatauni as tenant of "sir". Section 105 of Transfer of Property Act, 1882 defines lease. Section 2(23), of U.P. Tenancy Act, 1939 defines "tenant" and Section 2(25), defines "rent". Batai is rent within the meaning of aforesaid provisions. Mukunda was tenant of "sir". Zamindari of the land in dispute was abolished by notification dated 12.06.1961 w.e.f. 01.07.1961, corresponding to 1369 F, under U.P. Urban Areas Zamindari Abolition Act, 1956. Before abolition of zamindari, detailed survey was conducted under the provisions of Section 8 of U.P. Urban Areas Zamindari Abolition Act, 1956. In the survey, Mukunda was found in possession of the disputed land, therefore, Compensation Officer accessed the compensation of the land in dispute and awarded compensation to "sir" holders and directed for recording the name of Mukunda as sirdar w.e.f. 1369 F. This order was duly incorporated in khatauni 1372 F. Mukunda obtained bhumidhari certificate on 23.03.1967. After death of Mukunda, his sons, Dhanni and Nandi inherited the disputed land and their names were recorded. Dhanni and Nandi executed various sale deeds, time to time, in favour of other respondents. Names of Dhanni and Nandi, as well as the transferees were mutated in the revenue record from time to time, without any objection of the petitioners. Thereafter, some of the transferees, after obtaining permission of competent authority under U.P. (Regulation of Buildings Operations) Act 1958, raised construction in the year 1994. The petitioners were never in possession of the disputed land but no relief for possession was prayed and the suit was not maintainable. Although, petitioner-1 based his title upon the will executed by Abdul Waheed dated 5.11.1964 and petitioner-2 on oral gift of Ishaq of the same period but till today, they never made any effort for getting their names mutated over the disputed land. Suit of the petitioners is barred under Section 34(5) of U.P. Land Revenue Act, 1901. So far as, the decree of Additional Commissioner, passed in the suit under Section 209 of the Act, is

concerned, predecessor of petitioner-2 challenged the decree dated 11.7.1974 in Second Appeal No. 169 of 1973-74, which was dismissed by order of Board of Revenue, U.P. dated 17.10.1989. Thereafter, they handed over possession of the land in dispute and never challenged the order of Board of Revenue in High Court. The petitioners have not raised any plea that their right was matured under Section 210 of the Act. Right under Section 210 of the Act depends upon the continuance in possession of the disputed land, which is a fact and required to be pleaded and proved from the evidence. In the absence of any pleading and evidence, the petitioners cannot be permitted to argue that their right has accrued under Section 210 of the Act. The suit itself was filed in the year 2007, while various transferees have obtained permission and raised construction over the land in dispute, in the year 1994 or shortly thereafter. For a period of about 13 years, their possession was never disputed by the petitioners. In the absence, of any relief for possession, the suit for declaration is not maintainable. All the revenue courts held that title and possession of the petitioners were not proved. Writ petition has no merit and is liable to be dismissed.

8. I have considered the arguments of counsel for the parties and examined the record. Suit was filed for plots 2247 (area 0.46 acre) and 2250 (area 1.30 bigha). Plot 2250 (area 0.65 acre) alone was recorded in the name of Mukunda while remaining area of 0.65 acre of plot 2250 was recorded in the name of Parmanandi but no suit has been filed against Parmanandi nor any explanation has been given in this respect.

9. Admittedly, zamindari was abolished by notification dated 12.06.1961 w.e.f. 01.07.1961, of the village under U.P. Urban Areas Zamindari Abolition Act, 1956. Mukunda filed a suit under Section 209 of the Act, for ejectment of Ibrahim and Ishaq from the land in dispute, claiming that being tenant of disputed land, he had acquired sirdari right under Section 18 of U.P. Urban Areas Zamindari Abolition Act, 1956 and name of Ibrahim and Ishaq were wrongly recorded in column-IX of the khatauni 1376 F. The suit was decreed by appellate court. A perusal of judgment of Additional Commissioner passed in appeal filed by Mukunda shows that Additional Commissioner found that Mukunda was recorded as bataidar in khasra 1359 F. Thereafter his name was recorded in khatauni 1360 F as tenant of sir, 1368 F, 1369 F, 1371 F and 1372 F. Mukunda was tenant of sir as such after date of vesting, he has become sirdar under Section 18 of U.P. Urban Areas Zamindari Abolition Act, 1956. Name of Mukunda came to be recorded as sirdar in 1374 F, w.e.f. 1369 F (year when zamindari was abolished). Under paragraph-87 of U.P. Land Records Manual, Lekhpal can record name of actual occupier found during partial in crop season, in column-6 of the khasra. According to paragraph-123 of U.P. Land Records Manual, khatauni is required to be prepared by Lekhpal from khatauni of previous years, incorporating all changed made in khasra. In this judgment it was found that name of Mukunda was recorded as occupier in 1359 F khasra and his name was recorded in Part-II khatauni 1360 F as tenant of sir. It was held that entry was made according to the provisions of U.P. Land Record Manual and not a fabricated entry. This entry

was found continuing in 1368 F and 1369 F, which are relevant dates for conferring title under Section 18 of U.P. Urban Areas Zamindari Abolition Act, 1956 and entry of the name of Mukunda was found to be genuine and not fake. Judgment of Additional Commissioner has become final, it operates as res judicata against petitioner-2, as admitted by the counsel for the petitioners also.

10. Mukunda claimed same right against both the petitioners. The claim of both the petitioners is common also as such it has to be seen as to what would be effect of this judgment upon petitioner-1. This judgment is relevant and admissible under Section 13 of Evidence Act, 1872. Supreme Court in *Tirumala Tirupati Devasthanams v. K.M. Krishnaiah*, (1998) 3 SCC 331, held that in *Srinivas Krishnarao Kango v. Narayan Devji Kango*, AIR 1954 SC 379 speaking on behalf of a Bench of three learned Judges of this Court, Venkatarama Ayyar, J. held that a judgment not inter parties is admissible in evidence under Section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under Sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K. Mukherjea, J. (as he then was) speaking on behalf of a Bench of four learned Judges in *Sital Das v. Sant Ram*, AIR 1954 SC 606, held that a previous judgment not inter partes, was admissible in evidence under Section 13 of the Evidence Act as a "transaction" in which a right to property was "asserted" and "recognised". In fact, much earlier, Lord Lindley held in the Privy Council in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani*, ILR (1902) 29 Cal 190 (PC) that a previous judgment, not inter partes was admissible in evidence under Section 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the judgment in *Dinomoni v. Brojo Mohini*, ILR (1902) 29 Cal 190 (PC) and *Ram Ranjan Chakerbati v. Ram Narain Singh*, ILR (1895) 22 Cal 533 (PC) by Sir John Woodroffe in his *Commentary on the Evidence Act* (1931, p. 181) was not accepted by Lord Blanesburgh in *Collector of Gorakhpur v. Ram Sundar Mal*, AIR 1934 PC 157. In view of law laid down by Supreme Court, even if judgment of Additional Commissioner in previous litigation is not res-judicata against petitioner-1, it is relevant and heirs of Mukunda can base their right on it. The courts below have not committed any illegality in relying upon it, in order to hold title of the contesting defendants.

11. So far as possession over disputed land is concerned, courts below found that the petitioners could not adduce any evidence to prove their possession. On the other hand, the transferees defendants have obtained permission for construction from competent authority and have raised construction over disputed land in 1994 or shortly thereafter. The right under Section 210 of the Act depends upon the fact of continuity in possession after decree for more than a period provided for execution of the decree. Neither any pleading has been raised in this respect, nor any evidence has been filed. For the first time, in the writ petition, this plea cannot be entertained. Otherwise also, the petitioners were not found in possession, as such, no right can be given to them under

Section 210 of the Act. The petitioners did not claim relief for possession and suit for mere declaration was not maintainable.

12. Petitioner-1 derived his title on the basis of a will executed by Abdul Waheed dated 05.11.1964 and petitioner-2 derived his title on the basis of oral gift by Ishaq, but neither petitioner-1 nor petitioner-2 ever applied for mutation of their names under Section 34 of U.P. Land Revenue Act, 1901, on the basis of aforesaid transactions. The contesting defendants cannot be said as a rank trespasser. The present suit is barred under Section 34 (5) of U.P. Land Revenue Act, 1901. In *Ram Charan v. Board of Revenue, U.P., 1977 RD 200*, the plaintiff claimed that his father was recorded occupant in 1356 F and 1359 F. Suit was filed for ejectment by son. It was held that Section 34(5) of U.P. Land Revenue Act, 1901, applies in the cases covered under Section 34 of the Act. Section 34 (5) provides as follows: -

"Section 34 (5)—No Revenue Court shall entertain a suit or application by the person so succeeding or otherwise obtaining possession until such person has made the report required by this section."

Thus, the suit u/s 229-B of U.P. Act No. 1 of 1951 is barred u/s 34(5) of U.P. Land Revenue Act, 1901. The case law relied upon by counsel for the petitioners is in respect of a person who is a rank trespasser, while Mukunda cannot be said to be a Rank Trespasser, in as much as, he was a tenant of "sir, and acquired sirdari right under Section 18 of U.P. Urban Areas Zamindari Abolition Act, 1956 and thereafter he obtained bhumidhari certificate.

13. Concurrent findings recorded by three Revenue Courts against the petitioners is not liable to be interfered by this Court, in exercise of writ jurisdiction. The writ petition has no merit and is dismissed.