(1995) 11 AHC CK 0026

In the Allahabad High Court

Case No : C.M.W.P. No. 9533 of 1988

Raj Bahadur APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 21-11-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 — Section 29, 38(1), 4A

Citation : (1996) AWC 550 Supp

Hon'ble Judges : B. Dikshit, J

Bench : Single Bench

Advocate : R.K. Srivastava, for the Appellant;

Judgement

B. Dikshit, J.—This writ petition has arisen as a notice was issued to Petitioner u/s 29 to show cause as to why 19.02 acres of irrigated land belonging to him be not declared as surplus. The notice has been contested by Petitioner. The prescribed Authority under U.P. Imposition of Celling on Land Holdings Act (in short prescribed Authority) held that Petitioner had only 13 acres of irrigated land and, therefore, he did not declare any land of Petitioner surplus. State preferred an appeal. The appellate court reversed the finding of prescribed Authority in respect of minority of Petitioner''s son and held him major. The appellate court remanded the case for decision afresh in respect of determination of irrigated land held by Petitioner. It directed that the dispute in respect of land to be Irrigated or unirrigated be decided by prescribed Authority in the light of Section 4A of U.P. Imposition of Ceiling on Land Holdings Act (in short ''Act''). The prescribed Authority on remand considered the case in respect of land being irrigated or unirrigated and declared only 1.67 acres of irrigated land as surplus. The appellate court held plot Nos. 18, 19, 74 and 134 to be single crop land. The tenure-holder went in appeal against declaration of 1.67 acres irrigated land as surplus. The State neither filed appeal nor any cross-objection against the order of prescribed Authority. The appellate court reconsidered the whole case and by impugned order held 19.03 acres of irrigated land as surplus being an area held by Petitioner beyond ceiling limit.

2. Counter-affidavit and rejoinder-affidavit have been exchanged and, therefore, the writ petition is being disposed of finally at the stage of admission in accordance with rules of the court.

3. The learned Counsel for Petitioner argued that in absence of appeal or cross-objection by State, the appellate court did not had power to reopen the findings recorded in favour of Petitioner and hold that Petitioner had 19.03 acres Irrigated land as surplus when prescribed Authority declared only 1.67 acres as surplus. He also argued that the appellate court could determine plot Nos. 18, 19, 74 and 134 as irrigated only on the basis of test laid down u/s 4A of the Act by considering Khasra entries of 1376 to 1378 Fasli and appellate court applied wrong test by determining said plots as irrigated land on the basis of Sajra of 1376 to 1378 Fasli. The learned Standing Counsel in opposition argued that under Order XLI, Rule 33 of Code of Civil Procedure, the finding of prescribed Authority could be reversed and more land could be declared surplus than what was declared by prescribed Authority. He also argued that so far plot Nos. 18, 19, 74 and 134 are concerned, they have been declared surplus in view of Sajra entries of 1376-77 Fasli to the effect that the land is within command area of a canal as well as after considering also oral evidence in this respect.

4. Section 38 (1) of the Act provides that in hearing and deciding an appeal under the Act, the appellate court shall have all the powers and privileges of a civil court and follow the procedure for hearing and disposal of appeals laid down in Code of Civil Procedure. Relying upon said provisions, the appellate court has held that it has the power under Order XLI, Rule 33 of the CPC to correct the error of prescribed Authority and it can pass order which should have been passed by the prescribed Authority. Order XLI, Rule 33 of CPC has been subject-matter of consideration by Apex Court in the case of Commissioner of Income Tax, U.P. Lucknow Vs. The Maheshwari Devi Jute Mills Ltd. Kanpur, , wherein It has held as under:

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the Appellant necessitates Interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjudge the rights of the parties. Wherein an appellate Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the Appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order XLI, Rule 33 may properly be invoked. The rule, however, does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from." /

The last part of the observation of the Hon''ble Supreme Court that the rule, however, does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from is fully applicable in this case. Here there was no reason before appellate court to reopen that part of the order which had become final as the State did not feel aggrieved and did not approach the appellate court by challenging it. If the state was dissatisfied with the findings recorded by prescribed Authority, it ought to have filed an appeal before the appellate authority. in absence of an appeal by the State, the appellate authority exceeded its Jurisdiction in reversing the findings and declaring 19.03 acres of land as surplus. Thus, the argument of learned Counsel for Petitioner to this effect is sustained.

5. The second contention of the learned Counsel for Petitioner also has substance. The remand order was specific that the prescribed Authority will determine whether plot Nos. 18, 19, 74 and 134 are irrigated in accordance with Section 4A or Section 29 in case they have subsequently become Irrigated. After remand, the prescribed Authority and appellate Court were required to consider only if u/s 4A the land is to be treated irrigated. The prescribed Authority and appellate court have not declared land to be surplus on the basis of Section 29 but they have considered the case in respect of said plots on the ground of being within command area of a canal. This could be done if the land was covered by the test laid down u/s 4A. Firstly and Thirdly where test provided is that the determination of irrigated land will be on the basis of Khasra entries but if it is u/s 4A. Secondly then land becomes Irrigated on a date after the enforcement of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972.

The appellate court has not considered the land to be irrigated on the basis of test laid down in Section 4A but taking into consideration that the land was shown in Sajra of the village in 1976-77 Fasli within command area of canal that it has held It to be irrigated. The test laid down u/s 4A of the Act has to be followed in all cases where ceiling area is to be re-determined after coming Into operation of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 which has not been taken into consideration for declaring the land to be irrigated. The appellate court has considered the matter on the basis of different test and, therefore, the finding of appellate court cannot be upheld and the case is to be sent back to the appellate court for decision afresh in the light of aforesaid observations.

6. For aforesaid reasons, the writ petition succeeds and is allowed. The order of Additional Commissioner, Jhansi, Mandal, Jhansi dated 28th April, 1988 (Annexure VI to writ petition) is quashed and he is directed to redetermine the dispute in respect to plot Nos. 18, 19, 74 and 134 by applying test laid down u/s 4A.

There shall be no order as to costs.

