(2010) 03 AHC CK 0232

In the Allahabad High Court

Rajendra Singh APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2010) 03 AHC CK 0232

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—By means of the present petition, the petitioner has sought quashing of the orders dated 29.1.1981 whereby the second appeal filed by the contesting respondents was allowed and by the order dated 6.8.1982 the application to review and recall the order dated 29.1.1981 was dismissed. It may also be noticed here that by the order dated 29.1.1981, the Board of Revenue allowed the second appeal and set aside the judgments and decrees of the Courts below to it and remanded the matter to the Trial Court for framing an additional issue and to decide the dispute a fresh after affording the parties to adduce evidence there on.

2. The facts of the case may be noticed in brief.

3. The above petition arises out of a suit instituted u/s 229-B of U.P.Z.A & L.R Act by the contesting respondents herein against the petitioner in respect of certain agricultural plot which was jointly owned and recorded in the names of Balwant and Jewa, the two brothers. The suit No. 221 of 1971-1972 was filed by Ramchandra, S/o of Jewa Ram, respondent No. 4 herein against Rajendra Singh, the petitioner herein and others, for declaration of his rights over the plot in question on the pleas inter alia that Balwant Singh was married to Veera. No issue was born out of this wedlock and therefore after the death of Balwant Singh and Veera, the share of Balwant Singh and Veera in the plot in dispute has

been devolved on the plaintiff being son of Jewa Ram(brother''s son). The suit was contested by the petitioner on the pleas inter alia that out of wedlock of Balwant and Veera a daughter namely Surja Kunwar was born and the petitioner is the son of Surja Kunwar and as such inherited the share of Balwant and Veera.

4. On the pleadings of the parties, the issues as to whether the Court has jurisdiction to hear and decide the suit, whether the plaintiff being the heir of Balwant is co sirdar of the plot in question and that Rajendra Singh, defendant No. 1 is the son of Balwant Singh''s daughter, were framed. The parties led evidence in support of their respective cases. The evidence was more or less in the nature of oral depositions. The Trial Court namely Assistant collector, Ist Class, Aligarh considered the evidence of the respective parties and found that Balwant and Jewa had a daughter which is evident from the birth Register produced by the defendant. In the birth register it is recorded that a daughter was born to Balwant Thakur on 19.3.1904. The said fact was found corroboration from the oral depositions made on behalf of the defendant-petitioner and consequently by the judgment and order dated 21.1.1973 the suit was dismissed. The said decree has been confirmed in appeal being Appeal No. 159 of 1972-1973 by the Additional Commissioner by its judgment and decree dated 13.2.1975. These two judgments were challenged in second appeal No. 226 of 1974-1975 by Ram Chander, the plaintiff-respondent No. 4 herein before the Board of Revenue, U.P. Allahabad. The appeal was heard and decided ex parte as is evident from paragraph-3 of the judgment.

5. In the second appeal, it was argued that no issue was framed as to whether a daughter was born to Veera and Balwant Singh. Agreeing with the arguments of the learned Counsel for the appellant, the appeal was allowed and the matter was remanded to the Trial Court as noticed herein above to frame an issue and decide the case a fresh. An application to recall the above order and to restore the appeal to its original number, which was numbered as Review No. 12 of 1980-81, was filed by the petitioner. The said application has been dismissed by the order dated 6.8.1982 on the finding that the application is beyond time and the day to day delay has not been explained and therefore no sufficient cause for condonation of delay was found.

6. Challenging the legality and validity of the above two orders, the present writ petition has been filed.

7. Heard the learned Counsel for the parties and perused the record.

8. The impugned orders cannot be allowed to stand for the reasons more than one given herein below.

7. Firstly, the appeal was allowed by the order dated 29.1.1981 without framing the substantial questions of law involved in the appeal, as required u/s 100 CPC. The appeal was filed and decided u/s 100 CPC as was amended. It is the mandatory requirement that before allowing the appeal, the Court should have framed substantial question of law involved in the appeal. This having not been

done, the judgment dated 29.1.1981 allowing the appeal is vitiated under law and cannot be allowed to stand.

8. Reference can be made to Sri Net Bharti and others Vs. Board of Revenue and others, and Pawan Kumar v. Board of Revenue and Ors. 2007(25) LCD 1120.

9. Secondly, the two courts below the Board of Revenue, heard and decided the matter after appreciating the evidence led by the parties on various issues as mentioned in the order. Issue No. 3 is to the effect whether Rajendra Singh , defendant No. 1 is son of the daughter of Balwant Singh or not. The said issue was decided in affirmative by the Trial Court and the first appellate Court as well. The two Courts have recorded the said finding on appreciation of the evidence. It appears that the attention of the Board of Revenue was not drawn towards the issue No. 3 and the finding recorded therein. The sole basis of the judgment of the second appellate Court is that no such issue as to whether defendant No. 1 is son of daughter of Balwant was framed which is factually incorrect. The Board of Revenue without setting aside the findings recorded under issue No. 3 and on other issues by a mechanical order set aside the concurrent judgments delivered by the two Courts below to it. No error has been pointed out by it in concurrent judgments. Time and again it has been held that when a finding on a particular issue is required, the said issue at the most could have been remitted for recording the evidence and the finding to the Court below. Remanding of the entire case, has been held to be bad.

10. In Pasupuleti Venkateswarlu Vs. The Motor and General Traders, the Apex Court has held that if a finding is required on a particular issue then the entire order of the trial court should not be set aside. A finding on the said issue may be called for from the Trial Court.

11. The Apex Court in Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, has held that the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available.

12. Apex Court in P. Purushottam Reddy and Anr. v. Pratap Steels Ltd. 2002 (48) A.L.R 319 considered the powers of the appellate Court as conferred on it under Order 41 Rules 23, 23-A and 25 of the Civil Procedure Code. While setting aside the order of remand passed by the High Court, it has been laid down that the High Court was to examine whether such finding of the trial court was sustainable or not in eyes of law and on facts. Even otherwise also the question

could have been gone into by the High Court and a finding could have been recorded on the basis of available material in as much as the High Court being the court of first appeal, all the question of fact and law arising in the case were open before it for consideration and decision.

13. Thirdly, the remand order has been passed in a routine manner without realizing that the time and money spent by the parties go waste by passing a remand order. It should be passed only in exceptional circumstances and not in a routine manner.

14. The suit was filed in the year 1971-1972, and order of remand has been passed after about 10 years to decide an issue of fact which was already decided on which the evidence was already led by the parties. The said evidence or fact has not been even adverted by the second appellate Court before passing the impugned remand order. No error could be pointed out in the impugned judgment in appreciation of evidence done by the Courts below to it.

15. The contention of the learned Counsel for the respondent that the Court should not interfere in the present writ petition is without substance and is liable to be rejected.

16. Viewed as above, the Writ Petition is on terra firma and the impugned orders if allowed to stand will cause substantial injustice, irreparable loss and injury to the petitioner.

17. In the result, the writ petition succeeds and is allowed. Both the impugned orders dated 6.8.1982 and 29.1.1981 are hereby set aside and the matter is restored back to the Board of Revenue to re-hear and re-decide the above second appeal in accordance with law, keeping in view the observations made in the body of the judgment.

