

(2003) 05 AHC CK 0055
In the Allahabad High Court
Case No : C.M.W.P. No. 1551 of 1986

Ram Chandra

APPELLANT

Vs

5th Addl. District Judge and Others

RESPONDENT

Date of Decision : 13-05-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, Order 21 Rule 32(5), Order 31 Rule 2, 151, 152
Constitution of India, 1950 — Article 226
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 143, 143(1), 143(1A), 167, 168A(1)

Citation : (2003) 5 AWC 3926

Hon'ble Judges : D.P. Singh, J

Bench : Single Bench

Advocate : N.D. Kesari, for the Appellant; Radhey Shyam and Rajesh Dwivedi and S.C., for the Respondent

Final Decision : Allowed

Judgement

D.P. Singh, J.—Heard Sri N.D. Kesari, learned Counsel for the Petitioner and Sri Radhey Shyam learned Counsel for the contesting Respondents.

2. This writ petition is directed against an order dated 16.11.1985, whereby an application u/s 151/152, CPC has been rejected by the appellate court for correction of the decree.

3. Brief facts are that Petitioner filed Suit No. 176 of 1971 for specific performance of contract and injunction for sale of a portion of plot No. 142. The trial court decreed the suit and on appeal, the said decree was confirmed on 23.12.1975, with a modification that the judgment-debtor should get a declaration u/s 143 (1A) of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as "the Act") and thereafter execute the sale deed as decreed by the trial court. The appellate court further in the operative portion directed that in case no declaration as aforesaid is granted, the suit shall stand

dismissed. The aforesaid modification was in pursuance of an objection raised by the judgment-debtor that the suit was hit by Section 168A of the Act, as fragmentation of any bhumidhari plot was not allowed. It appears that an application u/s 143 was made by the judgment-debtor but purposely it was got dismissed for non-prosecution on 29.7.1983. The Petitioner, thereafter, moved an application for execution of the said decree wherein an objection was raised on behalf of the judgment-debtor that since the application u/s 143 has been rejected, the suit of the Petitioner stands rejected in view of the modified decree by the appellate court. When the matter was being argued before the executing court, the Court opined that the Petitioner may approach the appellate court for remodification/ modification of the decree. This observation of the executing court was made on 25.2.1984, therefore, on 30.4.1984 an application u/s 152 was made before the appellate court. This application came to be rejected by the impugned order. Learned Counsel for the Petitioner submits that the object and spirit of the modified decree by the appellate court was that in order to overcome the bar of Section 168A, declaration u/s 143 was necessary, so, even if the judgment-debtors refused to have his application decided on merits, the executing court or the appellate court could pass an order under Order XXI Rule 32, C.P.C., permitting the Petitioner, the decree holder to seek a declaration u/s 143 (1A). It was also urged that since the judgment-debtor had acted in contrary to the spirit of the decree, he was liable to be punished. The further argument is that application u/s 152, CPC was maintainable and in any case the application could have been treated as an application under Order XXI Rule 32, CPC. In the alternative, it has been urged that the appellate decree itself may be modified as the same is under challenge before this Court.

4. Before dealing with the argument of the learned Counsel for the Petitioner, it would be useful to quote Section 168A of the U.P. Zamindari Abolition and Land Reforms Act :

168A. Transfer of fragments. -

(1) Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure holder (the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred).

(2) The transfer of any land contrary to the provisions of Sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of Sub-section (1) the provisions of Section 167 shall mutatis mutandis, apply.

A perusal of the said provision shows that fragmentation of a consolidated plot was barred except where the entire plot itself was being transferred or where bhumidhari rights of a fragment of such plot is transferred. Any transfer in

contravention would be treated to be void.

5. It has come on evidence, in fact it is the admitted case of the judgment-debtor himself, that the disputed portion of the plot was being used for abadi purposes and not for agricultural purposes. Keeping all these facts in mind, the appellate court had directed the judgment-debtor to obtain a declaration u/s 143 (1A). It would be useful to quote Section 143 (1) and (1A) of the U.P. Zamindari Abolition and Land Reforms Act, which reads as under :

143. Use of holding for industrial or residential purposes.-(1) Where a (bhumidhar with transferable rights) uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector incharge of the sub-division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(1A) Where a declaration under Sub-section (1) has to be made in respect of a part of the holding, the Assistant Collector Incharge of the sub-divisions may in the manner prescribed demarcate such part for the purposes of such declaration.

A perusal of Section 143 shows that such declaration could be made by the authority even suo motu or on an application. Such declaration could also be made for a portion of the holding.

6. A perusal of Section 143 shows that it is not necessary that the tenure holder himself should make an application for such declaration, as the declaration could be made by the authority itself. In the present case, the appellate court had directed making of the application by the judgment-debtor who substantially complied with it by filing the application but not prosecuting it. By this action of the judgment-debtor, the entire decree itself was sought to be put at naught. When the application for execution was made before the executing court, the executing court could have exercised its power under Order XXI Rule 32 (5) and permitted the decree holder or any other person to move the authority for declaration u/s 143. Even otherwise, the Petitioner himself could have made an application u/s 143, as there was no bar for him to move such application.

7. As I have already held herein above that both, the executing court and the appellate court, could have either themselves exercised power under Order XXXI Rule 2 or asked the Petitioner to approach the authority for such declaration. But looking to the facts of this case and also that this writ petition has been pending for about 16 years before this Court, it would not be appropriate to relegate the Petitioner once again to the Courts below. As already noted above, that, that part of the modified decree of the appellate court has been challenged in this writ petition itself and in my view, it would be appropriate, in the present case, that this Court should exercise its extraordinary power to amend/modify the appellate decree by permitting the Petitioner to get a declaration u/s 143 (1) and 143 (1A) of the Act whereafter within a month, the judgment-debtor be directed to convey the property in favour of the Petitioner.

8. In view of the discussions herein above, the writ petition succeeds and is allowed. The impugned order dated 16.11.1985 is hereby quashed. The decree of the trial court as modified by the appellate court vide its order dated 23.12.1975 shall further be modified to the extent that the Plaintiff be directed to obtain declaration and demarcation u/s 143 (1) and (1A) of the Act No. 1 of 1951 from the authority concerned. The Defendants are further directed to convey the suit property to the Plaintiff within one month of the said declaration and in case they fail to do so, the executing court shall execute the same at the costs of the judgment-debtor. The Petitioner shall be entitled to the costs of the entire proceedings at the rate of Rs. 500 per year from 29.7.1983, i.e., the date on which application u/s 143 made by the judgment-debtor was dismissed for non-prosecution till date.

9. In the result, the writ petition is allowed with the aforesaid observation.