

(1973) 04 AHC CK 0002
In the Allahabad High Court
Case No : Sp. A. No. 472 of 1971

Ram Kumar

APPELLANT

Vs

Board of Revenue and others

RESPONDENT

Date of Decision : 25-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 22
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 176, 178, 180

Citation : (1973) 43 AWR 658

Hon'ble Judges : Satish Chandra, J;N.D. Ojha, J

Bench : Division Bench

Judgement

Satish Chandra, J.—The Appellant instituted a suit for division of a holding u/s 176 of the ZA and LR Act. On 28-9-1962 the trial court passed a preliminary decree determining the share of the Plaintiff at one-fourth. Ram Kishori Respondent No. 4 was also declared to have one-fourth, while Ram Sahai Respondent No. 8 had a half share in the holding. The court, however, found that the area of the holding in dispute was less than six and a quarter acres. u/s 178, ZA and LR Act it declared that it was not divisible. It therefore, directed its sale. Accordingly the court valued the holding at Rs. 714/- and finding that of the various co-sharers Ram Kumar the Plaintiff was landless, it held that he had a preferential right to purchase the holding and by its order dt. 29-4-1967, the trial court directed the Plaintiff to deposit an amount of Rs. 535.50 P. by 12-5-1967, which should be distributed among the other shareholders. Aggrieved, Ram Sahai, one of the Defendants, filed an appeal on 22-5-1967. It appear that during the pendency of the appeal namely, on 17-8-1967 Bhagirath who was the father of Ram Kumar Plaintiff and Ram Kishori Defendant, was (sic). He left some holdings in the same circle where the land in dispute was situate which was inherited by the Plaintiff Ram Kumar and the Defendant Ram Kishori. At the hearing of the appeal it was urged on behalf of the Defendant Appellant that since by now Ram Kumar had come to own land in the same circle, he was no

longer landless and so, he was not a preferential claimant to purchase the holding. It also appears that even before the filing of the appeal, the two Defendants, had transferred part of their shares in this holding to Smt. Beni Bai and Smt. Shyam Bai. Thereupon, the two purchasers applied to be impleaded as parties to the appeal with a view to claim that they (being) co-sharers and landless were equally entitled to purchase the holding.

2. The appellate court rejected the application of the purchasers for being impleaded as parties. It also refused to take into consideration the subsequent event of the death of the Plaintiff's father. It held that the Plaintiff's inheritance of the property will not debar him from getting his land, because he had a preferential right when the holding was offered to him by the trial court. The preferential rights of the parties will be decided in between those parties who were parties on the date of the institution of the suit and so, the purchasers could not now come in.

3. Ram Sahai Defendant filed a second appeal before the Board of Revenue. The Board upheld the findings and the decree and dismissed the appeal.

4. Ram Sahai then instituted a writ petition in this Court. A learned single Judge held that the fact of the death of the Plaintiff's father had a material bearing upon the question whether the Plaintiff was preferentially entitled to purchase the holding and the subsequent event was liable to be taken into consideration while holding the appeal. He repelled the objection raised on behalf of the Plaintiff-Respondent, that no appeal lay. On this view the writ petition was allowed and the orders of the Board of Revenue and the Add. Commr. were quashed. It was directed that the appeal shall be heard and decided in accordance with the observations made in the judgment. Aggrieved, the Plaintiff has come up in appeal.

5. The question whether an appeal lay was not raised before the lower appellate court or before the Board of Revenue. Nonetheless, since the question goes to the root of the jurisdiction of those courts, the point could validly be taken for the first time in the writ petition.

6. Section 331 of the UPZA and LR Act, by its Sub-clause (2) provides that no appeal shall lie from an order or decree passed under any of the proceedings mentioned in column 3 of the Second Schedule except as provided therein. Sub-section (3) then provides that an appeal shall lie from an order passed Under Sections 47, 104 and Order 41, Rule 1, Code of Civil Procedure, or any final order or decree passed by a court mentioned in column No. 4, in the proceedings mentioned in column No. 3, to the (sic) or authority mentioned in column No. 5 thereof. Proceedings u/s 176 are mentioned at serial No. 16 in column No. 3 of the Second Schedule. So an appeal is maintainable against any final order or decree passed by the trial court in such proceedings.

7. Section 176 provides for the division of a holding of a Bhumidhar or a sirdar. Section 178 provides that whenever in a suit for division a court finds that the

aggregate area of the holding or holdings to be divided, does not exceed three and one-eighth acres, the court shall instead of proceeding to divide the holding, direct the sale of the same and distribution of proceeds thereof in accordance with such procedure and principles as may be prescribed. It is evident that when the court proceeds to sell the holding, instead of dividing it, it is continuing proceedings in the suit filed u/s 176 for the division of the holding. Section 178 provides for an alternative mode of the disposal of the suit for the division of the holding; the alternative being its sale instead of actual division. When a court comes to the conclusion that by reason of the area being less than the prescribed limit, the holding cannot be divided, but should be sold; the order for sale and the order for distribution of the proceeds thereof are orders in the suit for division of holding. Till such orders are passed, it cannot be said that the suit has been finally disposed of. Rule 159 of the Rules framed under the Act provides that any order for sale made by the court Under Sub-section (1) of Section 178 shall be deemed to be a decree within the meaning of Section 22 of the Code of Civil Procedure. The order for sale being a decree was clearly appealable.

8. Section 179 of the Act provides that where a court has, u/s 178 ordered a sale of the holding or holdings, it shall order a valuation of the same to be made in such manner as may be prescribed and shall offer to sell the same at the price so ascertained to the co-tenure holders in such order of preference as may be prescribed. Section 180 deals with the preferential right to purchase, while Section 181 provides for sale in default of purchase u/s 180. Section 182 gives the procedure for such sale. The order determining the valuation and determining the preferential right of purchase Under Sections 179 and 180 being orders passed after the order of sale, are also orders determining those matters; an order of valuation determines the question of the valuation of the holding, while an order determining the preferential right of purchase determines that question. In our opinion, these orders are final orders within meaning of Section 331(3) and since these orders are passed in proceedings u/s 176, they are appealable.

9. The fact that the second Schedule does not provide for specific appeal in proceedings u/s 179 or 180 is immaterial, because the orders passed under those sections are not passed in independent proceedings, but in the suit filed u/s 176. In our opinion the learned single Judge was right in holding that the appeals filed by the Defendants were maintainable.

10. On the merits it was urged that the Plaintiff had a preferential right of purchase, because he was landless while the other co-sharers held land in the same circle, other than their share in the holding in dispute. The submission is justified in so far as the trial court is concerned; but since the order of the trial court determining preferential right to one co-sharer is appealable, the preferential right determined by the trial court is not binding on the appellate court. It is well settled that an appeal is a continuation of the suit; the appellate court rehears the suit and determines the rights of the parties according to its

own findings. Suppose, in a case the question whether one of the co-sharers is landless while the others are not, is disputed; the trial court recorded its findings thereon and as a consequence of its findings, determines which of the co-sharers has a preferential right to purchase. If the matter ultimately goes to the appellate court, the finding as well as the consequential order are both up for rehearing and read judication in this view, it cannot be said that the parties in whose favour the trial court recorded its finding, acquired an infeasible right to have a preferential right to purchase. That right is subject to the findings of the appellate court. The appellate court u/s 107, CPC has full and as much powers of disposal over the suit as the trial court. In that background, it cannot be said that the preferential right became fixed and unalterable when the trial court determined that question.

11. It is equally well settled that events which happened subsequent to the decision of the suit can be taken into consideration by an appellate court. If an event takes place subsequent to the decision by the trial court and that event has a material bearing upon any question, which is up for adjudication before the appellate court it is incumbent upon the appellate court to take that fact into consideration, if it has been otherwise brought on the record. As to what weight can be attached to that event in the context of the other evidence on the record is a matter for the appellate court to decide, but it cannot refuse to take it into consideration on the plea that the rights of the parties stood unalterably fixed when the trial court decided the matter. In the present case the Addl. Commr. as well as the Board of Revenue were in error in refusing to take into consideration the effect of the death of the Plaintiff's father and the admitted consequence that as a result the Plaintiff's as well as Defendant Ram Kumar acquired land in the same circle where the holding in dispute was situate.

12. Rule 159-B gives the order of preference for sale to co-tenure holders u/s 179. The co-tenure holder who does not hold land in the circle other than his interest in the holding in dispute has the first preference. If the fact of the Plaintiff's father's death and the fact that as a consequence, the Plaintiff immediately became entitled to land in the same circle, is taken into consideration the result is that when the appellate court came to decide the matter the Plaintiff could no longer claim to be a co-tenure holder who does not hold any land in the circle other than his interest in the holding in dispute. Consequently, he did not have any right of preferential purchase. The other co-sharers admittedly had land other than their interest in the holding in suit in the same circle. During the pendency of the suit they transferred a part of their share in the holding in suit to two ladies. There is no allegation that they transferred the land owned by them other than their share in the holding in dispute for any one. Consequently, they (sic) to be co-tenure holders who possessed land other than their interest in the holding in dispute, even when the appeal came to be decided. Hence, they could not claim to be landless co-tenure holders. The sale deeds executed by them had no material bearing upon the decision of the appeal.

13. The transferees from the Defendants Respondents made an application for being impleaded at parties. That application was, in our opinion, rightly rejected. Moreover, they came to acquire some interest in the holding in suit as a result of a voluntary act? of transfer made by the Defendants. They being successors in interest of the Defendants had no locus standi to intervene in the proceedings for the sale of the holding. The sale of the holding could be ordered between co-sharers whose rights had been declared by the preliminary decree. Subsequent transfers by the co-sharers in the holding could not effect the question of sale of the holding amongst the co-tenure holders.

14. The position is that the Plaintiff as well as both the Defendants were on the same footing i.e. of persons who had interest in land other than their interest in the holding in dispute. Therefore, it cannot be said I that either of them had a preferential right to purchase the holding u/s 179 of the Act. Therefore the only option with the court was to sell the holding u/s 180 of the Act. This, in our opinion can more properly be done by the trial court.

15. In the result, the appeal succeeds and is allowed in part. The judgment of the learned single Judge is modified. The writ petition is allowed in part, The orders of the Addl. Commr. and the Board of Revenue are quashed. The order of the trial court is modified. It is declared that none of the co-sharers had any preferential right to purchase the holding. The matter is sent back to the trial court, with the direction that it shall proceed to sell the holding in accordance with the provisions of Sections 180 and 181 of the ZA and LR Act. In view of the divided success, the parties may bear their own costs.