
(2014) 11 AHC CK 0015
In the Allahabad High Court

Case No : Review Application No. 359341 of 2010 in Writ-B No. 49610 of 2009

Ram Larate

APPELLANT

Vs

Board of Revenue

RESPONDENT

Date of Decision : 12-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(6)
Transfer of Property Act, 1882 — Section 53-A, 54

Citation : (2015) 126 RD 20

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

Bench : Single Bench

Advocate : Rajesh Ji Verma and S.P. Lal, Advocates for the Appellant; R.D. Dauholia, R.K. Upadhyay, R.N. Upadhyay, T.C. Sharma and V.K. Singh, Advocates for the Respondent

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri Rajesh Ji Verma, Senior Advocate, assisted by Sri S.P. Lal, for the review applicant and Sri R.D. Dauholia, for contesting respondents 4 & 5. The writ petition was filed against the orders of Assistant Collector dated 12.12.1984 decreeing the suit filed by Tota Ram and declaring him as bhumidhar of the land in dispute. Additional Commissioner dated 19.8.1996, modifying aforesaid decree, in the appeal of the petitioner and decreeing suit for ejectment of the petitioner from the land in dispute and Board of Revenue U.P., dated 16.8.2007, dismissing second appeal of the petitioner. The writ petition was dismissed by the judgment dated 7.5.2010 after hearing the Counsel for the petitioner. The petitioner has filed this clarification/recall application on 8.12.2010 along with delay condonation application although it is virtually a review application. Delay in filing the review application was condoned and review application was heard on merit.

2. The dispute between the parties is in respect of sirdari plot 1010 (area 2.66 acre) and 1/2 share in bhumidhari plots 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1049, 2082, 2083, 2084 and 2085 (total area 2.25 acre) of village

Lakhaura, pargana Kurawali, district Mainpuri. In consolidation new plot 906 (area 5.06 acre) was carved out in the name of Tota Ram (now represented by respondents-4 and 5). According to the petitioner, Tota Ram entered into an agreement to sell dated 6.2.1968 (registered on 19.3.1968) of the land in dispute with the petitioner and took entire sale consideration of Rs. 7,000/- and handed over possession over the land in dispute to the petitioner. Plot 1010 was sirdari land and village was under consolidation operation as such it was agreed between the parties that after finalization of consolidation operation, bhumidhari certificate of sirdari land would be obtained and sale-deed be executed. After close of consolidation operation, execution of the sale-deed was avoided by Tota Ram, then the petitioner filed a suit (registered as O.S. No. 39 of 1970) for specific performance of the contract on 20.10.1970. This suit was dismissed by Trial Court. The petitioner filed Civil Appeal No. 78 of 1973 from the decree of the Trial Court, which is pending in the Court of Additional District Judge, Court No. 3, Mainpuri.

3. In the meantime, dispute between the parties in respect of possession over the land in dispute took place as such proceedings under section 145 Cr.P.C. was initiated on the application of Tota Ram by the preliminary order dated 7.9.1970 in which Additional Sub-Divisional Magistrate by order dated 24.11.1970 held that the petitioner was in possession of the land in dispute on the date of attachment and directed to release the property in favour of the petitioner. Criminal Reference No. 366 of 1971 submitted by District Judge for allowing the revision of Tota Ram was rejected by this Court by judgment dated 21.7.1971. The petitioner was again put in possession over the land in dispute. Tota Ram filed a suits (registered as Suit No. 187 of 1980) under section 229-B/209 of U.P. Act No. 1 of 1951 on 23.4.1980 for ejectment of the petitioner from the land in dispute. Assistant Collector by judgment dated 12.12.1984 decreed the suit filed by Tota Ram and declared him as bhumidhar with transferable right but no decree for ejectment was passed. The petitioner filed an appeal (registered as Appeal No. 209 of 1984-85) from the aforesaid decree. Additional Commissioner, by judgment dated 19.8.1996, did not accept the arguments of the petitioner but instead of dismissing the appeal modified the decree of the Trial Court and decreed the suit for ejectment the petitioner from the land in dispute. The petitioner filed a second appeal (registered as Second Appeal No. 53 of 1995-96) from the aforesaid decree, which was dismissed by Board of Revenue U.P., by judgment dated 16.8.2007. The writ petition was also dismissed by the judgment dated 7.5.2010 after hearing the Counsel for the petitioner.

4. The petitioner filed this review application on the grounds that on the findings of Trial Court that agreement to sell dated 6.2.1968 was a valid document, the suit under section 209 of U.P. Act No. 1 of 1951 was not maintainable so long as earnest money (in this case, full sale consideration was paid) taken by Tota Ram is not returned to the petitioner as held by this Court in Durani and others v. Board of Revenue, U.P. 1980 RD 275. In any case, possession over the land in dispute was given by Tota Ram at the time of agreement to sell dated 6.2.1968

while suit was filed on 23.4.1980 which was barred by limitation and ought to have been dismissed. Possession given to the petitioner over the land in dispute, in part performance of the contract, he has right to protect his possession in view of section 53-A of Transfer of Property Act, 1882; possession of the petitioner was not unlawful and suit under section 209 of U.P. Act No. 1 of 1951 was not maintainable. Trial Court decreed the suit only in respect of title of Tota Ram and did not decree the suit for ejectment of the petitioner. Tota Ram neither filed any appeal from the decree of Trial Court nor filed any cross-objection in the appeal of the petitioner, even then Additional Commissioner modified the decree of the Trial Court and granted decree for ejectment of the petitioner. Board of Revenue, U.P. committed an illegality in not framing correct substantial question of law although grounds were taken by the petitioner in the memorandum of second appeal. In the judgment dated 7.5.2010, this Court held that findings recorded by criminal Court in the proceeding under section 145 Cr.P.C. are summary in nature and they are always subject to decision by a competent Civil Court. On its basis the Counsel for the petitioner submitted that on its own findings, the suit before Revenue Court was not maintainable and the writ petition ought to have been allowed.

5. I have considered the arguments of Counsel for the parties and examined the record. So far as arguments of the Counsel for the petitioner that on the findings of Trial Court that agreement to sell dated 6.2.1968 was a valid document and the suit under section 209 of U.P. Act No. 1 of 1951 was not maintainable so long as earnest money (full sale" consideration in this case) taken by Tota Ram is not returned to the petitioner as held by this Court in Durani and others v. Board of Revenue, U.P., 1980 RD 275, is concerned Trial Court in the judgment dated 12.12.1984 found that the plaintiff admitted that the defendant got the agreement to sell from him by committing fraud. However, the defendant could not obtain sale-deed on its basis. The village was under consolidation operation, permission for sale ought to have been taken from Settlement Officer Consolidation. Suit for specific performance of the contract can be decreed by Civil Court and not by Trial Court. If the finding of the Trial Court is taken as such only conclusion can be drawn from it that the defendant got the agreement to sell executed from the plaintiff by committing fraud. It is not a finding that agreement to sell was valid. The agreement obtained by committing fraud is not a valid agreement. Argument made in this respect is wholly misconceived.

6. So far as the arguments that possession over the disputed land was given to the petitioner in part performance of the contract and the petitioner has right to protect his possession in view of section 53-A of Transfer of Property Act, 1882. In any case, possession of the petitioner was not unlawful and suit under section 209 of U.P. Act No. 1 of 1951 was not maintainable, is concerned, a perusal of the agreement to sell shows that possession over the land in dispute was not delivered to the petitioner at the time of agreement. Tota Ram was sole sirdar of plot 1010 but remaining land was in joint ownership and possession in which Tota Ram was having 1/2 share. It has been mentioned in the alleged agreement

to sell that after close of consolidation, sale-deed had to be executed of new plots. Thus it is apparent that by that time chak was not carved out in the name of Tota Ram in consolidation the allegation that the petitioner was given possession over new plot 906 (area 5.06 acre) cannot be accepted. Trial Court as well as Additional Commissioner has clearly held that the petitioner could not give time of taking possession over the land in dispute. Case of the petitioner that he was given possession in part performance of the contract has not been accepted by the Courts below and findings in this respect are finding of fact and do not suffer from any illegality. Thus the petitioner has not taken possession over the disputed land in accordance with law.

7. So far as arguments that the suit was barred by limitation is concerned, this Court in the judgment dated 7.5.2010 held that the petitioner has not raised plea in this respect before the Court below nor an issue has been framed in this respect. In the memorandum of Second Appeal also no ground in this respect has been raised. Thus the arguments in this respect was not entertained by this Court. Issue relating to limitation is a mixed issue of law as well as fact for which evidence is required. In the absence of pleading in this respect in the written statement, new pleading cannot be entertained for the first time in the writ petition. Vide Entry No. 30 (iv) of Appendix III of U.P. Zamindari Abolition and Land Reform Rules, 1952 as amended by notification dated 9.3.1977, period of twelve year has been provided for filing suit for ejectment under section 209 of U.P. Act No. 1 of 1951. At the most possession of the petitioner can be treated from two month prior to proceeding under section 145 Cr.P.C., in which preliminary order was passed on 07.09.1970. The suit was filed on 23.4.1980, was within twelve years.

8. Order passed in proceeding under section 145 Cr.P.C. is a preventive order for maintaining peace. Section 145(6) Cr.P.C. itself provides for suit. Supreme Court in Bhinka and Others Vs. Charan Singh, , held that section 145, Code of Criminal Procedure does not confer on a Magistrate any power to make an order directing the delivery of possession to a person who is not in possession on the date of the preliminary order made by him under section 145(1) of the Code. "Under section 145(1) of the Code, his jurisdiction is confined only to decide whether any and which of the parties was on the date of the preliminary order in possession of the land in dispute. The order only declares the actual possession of a party on a specified date and does not purport to give possession or authorise any party to take possession. Even in the case of any party who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, the Magistrate is only authorised to treat that party who is dispossessed as if he had been in possession on such date. If that be the legal position, the appellants could not have taken possession of the disputed lands by virtue of an order made under the provisions of section 145 of the Code of Criminal Procedure. They were either in possession or not in possession of the said lands on the specified date, and, if they were not in possession on that date, their subsequent taking possession thereof could not have been under the

provisions of the Code of Criminal Procedure. This judgment was again followed in Shanti Kumar Panda Vs. Shakuntala Devi, .

9. Section 180 of U.P. Tenancy Act, 1939 also provided for a suit for ejectment of the person taking possession or retaining possession otherwise than in accordance with the provisions of the law. Phrase "taking" and "retaining" came for consideration of Supreme Court in Bhinka and Others Vs. Charan Singh, , in which it has been held that the word "taking" applies to a person taking possession of a land otherwise than in accordance with the provisions of the law, while the word "retaining" to a person taking possession in accordance with the provisions of the law but subsequently retaining the same illegally. So construed, the appellants' possession of the lands being illegal from the inception, they could not be described as persons retaining possession of the said lands in accordance with the provisions of any law for the time being in force, so as to be outside the scope of section 180.

In this case, Revenue Courts concurrently found that the petitioner had failed to prove that he was given possession by Tota Ram at the time of agreement to sell dated 6.2.1968 or at any time thereafter as such section 53-A of Transfer of Property Act, 1882 has no application. Under section 54 of Transfer of Property Act, 1882, an agreement to sell does not create any interest in or charge on the property under the agreement. Possession taken by the petitioner without the decree for specific performance of the contract was not in accordance with law and cannot be treated as legal possession . The petitioner was retaining possession over the land in dispute not in accordance with law and suit for his ejectment under section 209 of U.P. Act No. 1 of 1951 was maintainable. In the judgment dated 7.5.2010, holding that the proceeding under section 145 Cr.P.C. are summary in nature and they are always subject to decision by a competent Civil Court is mean to say competent Court. In view of section 331 of U.P. Act No. 1 of 1951, Revenue Court has exclusive jurisdiction to try suit for ejectment of unauthorised occupant from the agricultural land and jurisdiction of Civil Court is barred.

10. So far as arguments that Tota Ram did not file any appeal from the decree of Trial Court nor file any cross-objection in the appeal of the petitioner, even then Additional Commissioner modified the decree of the Trial Court and granted decree for ejectment of the petitioner, is concerned under Order XLI, Rule 33, C.P.C., Appellate Court is given power to pass appropriate order. The decree granted by the Appellate Court cannot be treated as without jurisdiction. In view of the aforesaid discussion, the review petition has no merit and is dismissed.