
(1981) 05 AHC CK 0007

In the Allahabad High Court

Case No : Civil Misc. Will Petition No. 214 of 1977

Rashid Ahmad Khan

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 22-05-1981

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 209, 229B

Citation : (1981) AWC 542

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

Bench : Single Bench

Advocate : Hari Om Krishna Srivastava, for the Appellant; Saakatha Rai and K.B Garg, for the Respondent

Final Decision : Allowed

Judgement

K.P. Singh, J.—This is a Plaintiffs writ petition against the judgment of Sri J. P. Gupta, I. A. S. Member, Board of Revenue, U.P. Allahabad, dated 25-8-1976, whereby the Plaintiff's second appeal has been dismissed.

2. Brief facts giving rise to the present writ petition are that the Plaintiff Petitioner had filed a suit for declaration and in the alternative for possession under Sections 229B/209 of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) concerning plots nos. 31/2 and 33/1. The claim of the Plaintiff Petitioner was based on a sale deed dated 8-12-69 executed by Smt. Ruqiya Begum who was originally married to Sri Rashid Khan, son of the original Zamindar. It was also alleged that the name of the contesting Defendant opposite party was wrongly recorded over the disputed plots and that he was not in possession over (he same hence the suit for declaration of Bhumidhari right and in the alternative for recovery of possession).

3. The defence in the suit giving rise to the present writ petition was that the Defendant had got the disputed plots on Batni from Abdullah Khan who was Khudkasht holder of the same and that the Defendant had been in possession

over the disputed land since long hence he acquired sirdari right by adverse possession. It has also been suggested that Rashid Khan who was son of Abdullah Khan had left his widow Smt. Ruqiya Begum and the latter had remarried the Plaintiff-Petitioner, hence she had no right and title in the disputed plots and that she could not execute any sale deed in favour of the Plaintiff Petitioner and no title was acquired by the Plaintiff Petitioner in pursuance of sale deed relied upon by him for Bhumidhri right in the present case. Bar of res-judicata was also pleaded on the basis of decision in Suit No. 22 of 1965 filed by the Defendant opposite parties in the present writ petition against the Petitioner Rashid Ahmad Khan as well as Smt. Ruqiya Begum regarding some other plots.

4. The trial Court through its judgment dated 23-4-1968 negated the claim of the Plaintiff on the finding that Smt. Ruqiya Begum (wife of Rashid Ahmad Khan, son of Abdullah Khan) had remarried the Plaintiff-Petitioner about 12 or 13 years ago, hence she had no specific right to execute the sale deed in favour of the Plaintiff Petitioner. The trial Court deciding issue No. 7 held that the Plaintiff's claim was barred by the principle of res judicata. Aggrieved by the judgment of the trial Court the Plaintiff Petitioner preferred an appeal which has also been dismissed by the appellate Court through its judgment dated 23-9-1970. It appears that in the opinion of the lower appellate Court, evidence about remarriage of Smt. Ruqiya Begum with the present Plaintiff Petitioner was not satisfactory yet it held that the marriage was proved on the principle of res judicata (See Annexure 2" attached with the writ petition). Thereafter the Plaintiff Petitioner preferred a second appeal which has also been dismissed by the second appellate Court. The perusal of Annexure 4" attached with the writ petition (judgment of the second appellate Court) indicates that the second appellate Court disagreed with the finding of the lower appellate Court on the question of remarriage of Smt. Ruqiya Begum with the present Plaintiff-Petitioner and also held that the question of remarriage had already been decided between the parties in the earlier suit hence the aforesaid finding operated as res-judicata.

5. Aggrieved by the decision of the second appellate Court the Plaintiff Petitioner has approached this Court under Article 226 of the Constitution. The learned Counsel for the Petitioner has contended before me that the Revenue Courts have patently erred in applying the principle of res judicata to the facts and circumstances of the present case. It has also been stressed before me that the second appellate Court has exceeded its jurisdiction in disagreeing with the finding recorded by the first appellate Court on the question of remarriage of Smt. Ruqiya Begum with the present Plaintiff-Petitioner on the basis of evidence led by the parties in the case.

6. The learned Counsel for the contesting opposite parties has tried to refute the contentions raised on behalf of the Petitioner and has tried to support the judgments of the revenue courts in the suit giving rise to the present writ petition. According to the learned Counsel for the contesting opposite party when the Parties had joined issues on the question of remarriage in the earlier suit, the

finding recorded in that suit was rightly held as binding between the parties. In any event, according to the learned Counsel for the contesting opposite party the impugned judgments do not suffer from any patent error of law and the revenue courts have rightly negated the claim of the Plaintiff-Petitioner.

7. I have examined the contentions raised on behalf of the parties. It is noteworthy that in the earlier litigation the contesting opposite party Niyaa Ahmad and Faiz Ahmad had filed a suit for declaration of their Bhumidhari rights in plots Nos. 26A, 32B, 52, 54B and 55B for declaration of their own Bhumidhari right and had sought possession over the same against the Petitioner Rashid Ahmad Khan and Smt. Ruqiya Begum. In that suit the Petitioner Rashid Ahmad Khan had taken a plea that he had no concern with the disputed land and he had been unnecessarily impleaded in that case. He had also disowned Smt. Ruqiya Begum as his wife and he had asserted that Smt. Ruqiya Begum was Sirdar of the disputed land and he had been unnecessarily impleaded in that suit. Smt. Ruqiya Begum had also contested that suit with the allegation that she was not wife of the present Petitioner Rashid Ahmad Khan but was wife of another Rashid Ahmad who was son of the original Zamindar. She had claimed Sirdari right in the disputed plots of that suit. She had also alleged that the present Petitioner Rashid Ahmad Khan was wrongly impleaded in the suit and that the suit was bad for misjoinder of the parties. In view of the aforesaid pleadings in that suit an issue No. 6B was framed as below :

Whether the Defendant No. 1 is the wife of the Defendant No. 2 ? If so, to what effect ?

8. The aforesaid issue was decided by the trial Court which came to the conclusion on the evidence on record that Smt. Ruqiya Begum had remarried the present Petitioner Rashid Ahmad Khan and the trial Court in that suit expressed itself in the following words :

Besides this fact I am of the view that it is immaterial to this case as to whether Smt. Ruqiya Begum remarried with Rashid Ahmad Defendant No. 2 or not because in view of the finding on issues above, I have already held that Smt. Ruqiya Begum did not succeed to any tenancy rights in the land in suit from her deceased husband or son and as such no question arises of losing her such rights which did not devolve upon her even if she remarried. Issue is, therefore, decided accordingly.

9. In view of the facts mentioned above, I am now to examine the question whether the revenue courts have correctly decided the question of res judicata in the suit giving rise to the present writ petition.

10. In *Rekhab Das Vs. Musammatt Sheobai and Another*, in head note (b) it has been observed that a decision on an issue, which is not necessary for the determination of the real question in controversy between the parties, does not operate as res judicata.

11. In *Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai, Sardesai* their Lordships of the Supreme Court have observed in paragraph 10 as below :

...It is well settled that if the final decision in any matter at issue between the parties is based by a court on its decisions on more than one point-each of which by itself would be sufficient for the ultimate decision-the decision on each of these points operates as *res judicata* between the parties.

12. Viewed from this angle, I am to find out whether the decision on question of remarriage in the earlier litigation between the parties was by itself sufficient for ultimate decision in that case. In view of the findings recorded by the trial Court in that suit it is evident that the finding on the question of remarriage was not at all necessary for decision in that suit, hence I think that the revenue courts in the present case have patently erred in negating the claim of the Plaintiff petitioner in the principle of *res judicata*.

13. In *Jhamman Lal v. Deputy Custodian General* AIR 1975 All. 253 a Division Bench of this Court in paragraph 16 of its judgment has observed as below :

...If the previous application was dismissed on the ground that it was not maintainable any observations by the officer on the merits of the controversy cannot operate as *res-judicata* in a subsequent proceeding....

14. In the present case I find that in the earlier litigation between the parties it was held that Smt. Ruqiya Begum's husband Sri Rashid Ahmad Khan, son of Abdullah Khan was not tenant of the disputed plots hence no question of devolving those plots upon Smt. Ruqiya Begum arose and on that finding her claim could not be recognised and the trial Court in that suit rightly observed that the finding on question of remarriage was immaterial for that suit. In short, the ultimate decision of the trial Court was not based on the finding that Smt. Ruqiya Begum had married the present Plaintiff Petitioner Rashid Ahmad Khan. So, in my opinion, the revenue courts in the suit giving rise to the present writ petition have patently erred in negating the claim of the Plaintiff-Petitioner on the principle of *res-judicata*.

15. In *Smt. Ganga Bai Vs. Vijay Kumar and Others*, their Lordships of the Supreme Court in paragraph 25 of their judgment have observed as below :

....Whether the partition between the father and sons was sham or real had no impact on the judgment of the trial Court and made no material difference to the decree passed by it... the finding that the partition was sham can not operate as *res-judicata*.

16. From the above extract, I think that for a finding operating as *res-judicata*, it should have impact on the judgment of the Court and should have material bearing to the decree passed by the Court. In this view of the matter, I find that the finding on the question of remarriage of the Plaintiff-Petitioner with Smt. Ruqiya Begum in the earlier litigation was not a basis of the decree passed in

that suit, hence it was not a material question in that suit. Rather, it was an unnecessary finding in the circumstances of that suit. Thus, the finding recorded in the earlier litigation between the parties on the question of remarriage of Smt. Ruqiya Begum with the present plaintiff-Petitioner cannot operate as res-judicata in the suit giving rise to the present writ petition. All the revenue courts have patently erred in this regard.

17. In my opinion, the second appellate Court has also patently erred in disagreeing with the finding recorded by the lower appellate Court in this case on the point of remarriage of Smt. Ruqiya Begum with the present plaintiff-petitioner. In paragraph 6 of the impugned judgment it appears that the second appellate Court has tried to reappraise the evidence on record while disagreeing with the finding recorded by the lower appellate Court and agreeing with the finding recorded by the trial Court on the ground that the trial Court had a detailed discussion of the evidence on record. It is well known that on the question of fact the second appellate Court could not interfere with the finding recorded by the first appellate Court. In this aspect also it appears that the second appellate Court has exceeded its jurisdiction.

18. On the findings arrived at by the revenue courts that Smt. Ruqiya Begum had remarried about 13 years ago in the year 1965 and if on correct calculation the date of remarriage is fixed before the date of vesting a doubt arises whether a Mohammedan lady on remarriage loses her right in the property of her previous husband. In the present case the claim of the Plaintiff-Petitioner has been negatived on the ground that Smt. Ruqiya Begum had remarried the Plaintiff-Petitioner and as she had executed a sale deed in favour of the Plaintiff Petitioner in the year 1969, she had lost her right in the disputed land due to her remarriage which might be before the date of vesting. None of the revenue courts have applied their mind to the question if Rashid Ahmad Khan, son of Abdullah Khan was Khudkasht holder and the vendor of the Plaintiff-Petitioner had remarried the Plaintiff Petitioner before the date of vesting and whether she would lose her right in the disputed land only due to the circumstance that she had remarried the Plaintiff Petitioner. However, this question centres round the question of fact which has not at all been considered by any of the revenue courts. It is in the ends of justice that the judgment of the second appellate Court should be quashed and the second appellate Court should be asked to examine the claim of the plaintiff Petitioner afresh in accordance with law in the light of the pleadings of the parties and the evidence on record.

19. In the result, the writ petition succeeds and the impugned judgment of the second appellate Court dated 25-S-1976 in Second Appeal No. 55 of 1970-71/ M. Nagar Rasheed Ahmad Khan v. Niyaz Ahmad is hereby quashed and the second appellate Court is asked to re-examine the claim of the Petitioner in the light of the observations made above as well as in accordance with law. Parties are directed to bear their own costs.