
(2015) 07 AHC CK 0005
In the Allahabad High Court
Case No : Writ - C No. - 25226 of 2015

Samar Jahan

APPELLANT

Vs

Addl. Commissioner (Admin.) and Others

RESPONDENT

Date of Decision : 01-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 226
Land Acquisition Act, 1894 — Section 18, 30
Uttar Pradesh Land Revenue Act, 1901 — Section 34
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 176

Citation : (2015) 6 ADJ 495 : (2015) 5 AWC 4828 : (2015) 129 RD 51

Hon'ble Judges : Ran Vijai Singh, J

Bench : Single Bench

Advocate : T.A. Khan, for the Appellant; Arun Kumar Srivastava and Shujauddin, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ran Vijai Singh, J.—Heard Sri T.A. Khan, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents, Sri Ram Raj along with Sri Shujauddin, learned counsel for the respondent Nos. 3, 4 and 5 and Sri A.K. Srivastava, learned counsel for the Gaon Sabha.

2. By means of the present writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 13.9.2013 passed by the Sub Divisional Officer, Amroha on the restoration application filed in Suit No. 153 of 2009 (Smt. Samar Jahan v. Shamshad Ahmad Khan and others) under section 176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the Act) as well as the order dated 10.2.2015 passed by the Additional Commissioner (Administration) Moradabad Division, Moradabad in Revision No. 39 of 2013-14 (Smt. Samar Jahan v. Avez Naseem and others).

3. Vide order dated 13.9.2013 the restoration application filed by respondent

Nos. 3, 4, and 5 was allowed and the preliminary decree dated 24.6.2009 as well as final decree dated 10.8.2009 were set aside whereas vide order dated 10.2.2015 the revision filed by the petitioner against order dated 13.9.2013 has been dismissed.

4. The facts giving rise to the present writ petition are that the petitioner had filed filed Suit No. 157 of 2009 under section 176 of the Act before the Sub Divisional Officer, Amroha without impleading respondent Nos. 3, 4 and 5. In the aforesaid suit a preliminary decree was passed on 24.6.2009 and thereafter final decree was prepared on 10.8.2009.

5. The respondent Nos. 3, 4, and 5 happen to be the sons of late Naseem Ahmad. Late Naseem Ahmad had two wives. From first wife there are three sons and from the second wife there are four sons. The petitioner, herein, claims herself to be the second wife of late Naseem Ahmad and on the basis of the registered will has filed partition suit impleading other co sharers excluding the respondent Nos. 3, 4 and 5. In the suit a preliminary decree was passed on 24.6.2009 and thereafter final decree was prepared on 10.8.2009.

6. Prior to the filing of the suit the petitioner had filed an application under section 34 of the U.P. Land Revenue Act, 1901 before the Tehsildar for mutating her name over the land belonging to late Naseem Ahmad on the basis of the registered will. The name of the petitioner was mutated in the revenue record by the Tehsildar vide order dated 20.4.2009. Seeking recall of this order the respondent Nos. 3, 4 and 5 who claim to be sons and heirs of late Naseem Ahmad have filed an application on the ground that on the basis of the collusive will mutation order was obtained without any notice or proclamation as required under the relevant Statute. The recall application was allowed on 31.3.2012. The mutation case proceeded and ultimately the application filed by the petitioner was rejected vide order dated 2.5.2014.

7. Aggrieved petitioner had filed an appeal against the order dated 2.5.2014 that was dismissed by the Sub Divisional Officer, Amroha. The petitioner has filed revision against the appellate order that too has been dismissed.

8. It is after recording her name in the revenue record, on the basis of the order passed in mutation proceeding, the petitioner filed Suit No. 157 of 2009 under section 176 of the Act before the Sub Divisional Officer, Amroha without impleading respondent Nos. 3, 4 and 5 as defendants who are sons of late Naseem Ahmad. In the aforesaid suit a preliminary decree was passed on 24.6.2009 and thereafter final decree was prepared on 10.8.2009. Against this the respondent Nos. 3, 4 and 5 have filed an application seeking recall of the orders which was allowed vide order dated 13.9.2013. The revision filed by the petitioner against order dated 13.9.2013 has been dismissed.

9. Sri T.A. Khan, learned counsel, who appears for the petitioner submits that since the respondents Nos. 3, 4 and 5 were not parties in the suit, therefore, the recall application on their behalf was not maintainable and it was liable to be

rejected. In his submission, utmost they could take this ground in appeal. In support of his submissions, Sri Khan has placed reliance upon the judgment of the Apex Court in (Ram Prakash Agarwal and another v. Gopi Krishnan (D) and others (2013 (98) ALR 269) wherein the legal issues involved have been summarised as under:--

"(i) An application under Order IX Rule 13 CPC cannot be filed by a person who was not initially a party to the proceedings;

(ii) Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the CPC;

(iii) In the event that an order has been obtained from the Court by playing fraud upon it, it is always open to the Court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court;

(iv) Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

(v) A person aggrieved may maintain an application before the Land Acquisition Collector for reference under Section 18 or 30 of the Act, 1894, but cannot make an application for impleadment or apportionment before the Reference Court."

10. Sri Ram Raj, learned counsel appearing for the contesting respondents submits that proper remedy for the petitioner is to get declaration of her title on the basis of the registered will and thereafter file suit for partition or both can be done simultaneously. In his submission the very basis of the partition suit, that is revenue entry in the name of the petitioner on the strength of the order dated 20.4.2009 passed in the mutation proceeding is now no more in existence, therefore, the Sub Divisional Officer has not committed any illegality in recalling the order and setting aside the preliminary as well as final decree.

11. Considering the law laid down by the Apex Court in Ram Prakash Agarwal (supra), prima facie, I find that there is substance in the submission of the learned counsel for the petitioner that the recall application was not maintainable because petitioner was not the party in the aforesaid suit before the court below but considering the facts that the very basis of preparation of preliminary decree and the final decree, i.e. recording the petitioner's name in the revenue record is now no more in existence, therefore, even if the order dated 13.9.2013 passed by the Sub Divisional Officer, Amroha and the order dated 10.2.2015 passed by the Additional Commissioner, Mordabad Division, Moradabad in Revision No. 39 of 2013-14 are quashed, another illegal decree would revive. The Apex Court in Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, AIR 1966 SC 828 : (1966) 2 SCR 172 , Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, AIR 1970 SC 645 : (1970) 76 ITR 692 :

(1971) 3 SCC 20 , Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, AIR 1999 SC 3609 : (1999) 8 JT 45 : (1999) 6 SCALE 393 : (1999) 8 SCC 16 : (1999) 3 SCR 518 Supp : (1999) AIRSCW 3623 , Mallikarjuna Mudhagal Nagappa and Others Vs. State of Karnataka and Others, AIR 2000 SC 2976 : (2000) 10 JT 176 : (2000) 6 SCALE 311 : (2000) 7 SCC 238 : (2000) 3 SCR 102 Supp : (2000) 2 UJ 1420 : (2000) AIRSCW 3289 : (2000) 6 Supreme 209 , Chandra Singh Vs. State of Rajasthan and Another, AIR 2003 SC 2889 : (2003) 6 JT 20 : (2003) 5 SCALE 361 : (2003) 6 SCC 545 : (2003) SCC(L&S) 951 : (2003) 1 SCR 674 Supp : (2004) 1 SLJ 401 : (2003) 2 UJ 1325 : (2003) AIRSCW 3518 : (2003) 5 Supreme 128 , S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. and Others, AIR 2003 SC 2186 : (2003) 4 SCALE 604 : (2003) 9 SCC 439 : (2003) 1 SCR 101 Supp : (2003) 2 UJ 1148 , State of Uttranchal through Collector, Dehradun and Another Vs. Ajit Singh Bhola and Another, (2004) 3 CTC 549 : (2004) 5 JT 513 : (2004) 5 SCALE 811 : (2004) 6 SCC 800 : (2004) 3 SCR 627 Supp and State of Orissa and Another Vs. Mamata Mohanty, (2011) 112 CLT 46 : (2011) 2 SCALE 377 : (2011) 3 SCC 436 : (2011) 2 SCC(L&S) 83 : (2011) 2 SCR 704 : (2011) AIRSCW 1992 : (2011) AIRSCW 1332 as well as this Court following the aforesaid cases of Hon"ble Apex Court in Smt. Shanti and Another Vs. Board of Revenue Lko. and Others, (2013) 8 ADJ 424 : (2013) 6 AWC 5603 ; have held that if by setting aside an illegal order, another illegality revives in that eventuality, the Court should not interfere with such orders sitting under Article 226 of the Constitution of India.

12. Following the law laid down in the aforesaid cases, I refuse to interfere with the impugned orders passed by the courts below.

13. The writ petition is dismissed.