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(1992) 01 AHC CK 0019

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 1051 of 1992

Satyadeo and Others APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 13-01-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 4(2), Order 9 Rule 13, 151
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 107, 108
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 210, 229B, 333A

Citation : (1992) 2 AWC 773

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Sankath Rai, for the Appellant;

Final Decision : Dismissed

Judgement

S.R. Singh, J.—Present petition under Article 226 of the Constitution of India is directed against the judgment and order dated 30-10-1991 (Annexure 13 to the writ petition) passed by the Board of Revenue U.P. Allahabad thereby allowing the revision and setting aside the exparte decree dated 27-6-1975 passed by the Sub-Divisional Officer Jaunpur in a suit u/s 229B of UP ZA and LR Act 1950 (U.P. Act No. 1 of 1951) and also setting aside the orders dated 30-5-1978 and 10-8-1979, whereby the restoration application filed by the contesting Respondents was rejected by the trial court and Additional Commissioner Varanasi Division Varanasi in revision u/s 333A of U.P. Act No. 1 of 1951.

2. Matrix of the facts in short is that the Petitioners filed a suit it being suit No. 669 u/s 229B of U.P. Act No. 1 of 1951 impleading Munni the 4th Respondent besides Respondents 1 to 3 as party Defendants. The suit aforesaid was decreed exparte by means of the judgment dated 27-6-1975 and for ready reference the same is quoted below;

The Plaintiffs have filed this suit u/s 229B of the UP ZA and LR Act with the allegations that since they are in possession over the plots in dispute since long so they be declared as Sirdar of the disputed land.

Summons were issued but the Defendants did not appear in the court Hence the suit proceeded exparte against the Defendants.

The Plaintiffs have produced documentary evidence. Plaintiff Satya Dev has examined himself and has produced PW 2 Bhagwati Prasad and PW 3 Mahendra Narant in support of his case. Thus the case of the Plaintiff is fully proved that the Plaintiffs are the Sirdars of the disputed land.

The suit is, therefore, decreed exparte. Let the Parwana Araaldaramad be issued accordingly.

Sd. Illegible 27-6-75 (S. J. Upadhaya) S.D.O. Jaunpur.

3. The Respondent No. 4 Vishwanath Prasad filed an application u/s 151 CPC for setting aside the ex parte decree dated 27-6-1975 inter-alia on the ground that he had been in possession over the suit property for more than 12 years prior to the commencement of the suit and that the Plaintiffs had no concern with the suit land it was further alleged that Munni was wrongly impleaded as a party Defendant in the suit and on the basis of fraudulent service of notice upon Munni, a fraudulent exparte decree was obtained. The application u/s 151 CPC for setting aside the exparte decree was supported with an affidavit. The Petitioners filed objection and also a counter affidavit in opposition to the application for setting aside the exparte decree subsequently by means of an application dated 4-10-77, the Respondent No. 4 Vishwanath Prasad brought to the notice of the trial court that Munni who was impleaded as a party Defendant in the suit, had died long before the institution of the suit and the exparte decree dated 27-6-1975 was void. The trial court rejected the application by order dated 30-5-1978 (Annexure 10 to the writ petition) which was maintained by the Additional Commissioner, Varanasi Division Varanasi, who dismissed the revision filed by 4th Respondent Vishwanath u/s 333A of U.P. Act no. 1 of 1951 vide order dated 10-8-19/9. The Board of Revenue set aside these orders and allowed the revision and also set aside the exparte decree by means of the order dated 30-10-91. It is against this order that the instant petition has been filed by the Petitioners-decree holders.

4. I have heard Sri Sangatha Rai, learned Counsel appearing for the Petitioners at length. The first contention raised by the learned Counsel for the Petitioners is that the third Petitioner being a purchaser from Petitioners 1 and 2 vide sale deed dated 14-8-1975, was not impleaded as a party Respondent in the application moved by the Respondent No. 4 for setting aside the exparte decree and the Board of Revenue was not justified in passing the order prejudicial to the interest of Petitioner no 3 without affording him an opportunity of hearing. The exparte decree was passed on 27-6 1975 and the application for setting aside the exparte decree was moved on 19-8-1975. The Petitioner No. 3 claims himself

to have purchased the property in suit from the Petitioners 1 and 2 by means of sale deed dated 14-8-1975 The transferors (Petitioners 1 and 2) who were the original decree holders were duly afforded opportunity of hearing on the restoration application and the Petitioner No. 3, have not been visited with any prejudices for his non impleadment in the restoration application. Even in this Court, he has the status of only a co-Petitioner alongwith Petitioners Satyadev and Babu Ram, who were afforded opportunity of hearing by the Board of Revenue, In view of this, the fact that the purchaser (Petitioner no, 3) was not afforded opportunity of hearing, would not vitiate the order impugned in the writ petition.

5. Sri Sankatha Rai then contended before me that application for setting aside the exparte decree was not maintainable at the behest of Vishwanath who was not a party to the suit It is true that an application for setting aside an exparte decree can be moved only by party Defendant under Order 9 Rule 13 Code of Civil Procedure, but the third party may also apply for setting aside the exparte decree u/s 151 Code of Civil Procedure, The contention of Sri Sankatha Rai that there being a specific provision under order 9 rule 13 CPC for setting aside the exparte decree an application for the same purpose cannot be entertained u/s 151 CPC has not impressed me for the reasons that the provisions of Order 9 Rule 13 CPC may be availed of only by a party Defendant and not by a stranger. The power of the Court to set aside the exparte decree at the instance of a stranger to the suit, in appropriate cases, in exercise of powers u/s 151 Code of Civil Procedure, is not taken away simply because a party to a suit has a specific remedy available to him under the CPC The remedy under order 9 rule 13 CPC being available only to a party Defendant would not bar an application u/s 151 CPC at the behest of a stranger who may, in appropriate cases, make out case for setting aside the exparte decree.

6. The next and third contention advanced by the learned Counsel for the Petitioners is that the board of Revenue was not justified in setting aside the exparte decree on the ground that Munni Respondent no 3 would be presumed to have died before the institution of the suit by virtue of the provisions of law enacted in Sections 107/108 of the Evidence Act. His contention is that the presumption under Sections 107 and 108 of the Evidence Act was not available before the institution of the suit. This contention of the learned Counsel for the Petitioner is misconceived, for presumption of death under Sections 107 and 108 of the Evidence Act arises if a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive. In fact, Section 108 is a proviso to Section 107 of the Evidence Act which provides that when the question is whether a man is alive or dead and it is shown that he was alive within 30 years, the burded of proving that he is dead, is on the person who affirms it but as provided in Section 107 of the Evidence Act the burden of proving that such a person is alive is shifted on to the person who affirms it if the man has not been heard of for seven years by those who would naturally have heard of him if he had been alive Admittedly, Munni Ahir, the Respondent No. 3

who was recorded in the revenue papers as tenure holder when the suit was filed by the Petitioners 1 and 2, was reported to be ''makhbudel Khabar'' i.e. unheard of in the khitauni of 1352 fasli. The suit as stated hereinbefore, was filed in 1975 corresponding to 1382-83 Fasli The entry of Makhbudul Khabar'' was repeated in the khatauni of 1359 fasli. It may be pertinent to mention here that 1352 Fasli corresponds to the period between 1-7-1943 to 30-6-1944. In view of this, the Board of revenue was justified in holding that Munni Ahir would be deemed to have died in 1951 much before the date of the institution of the suit which was filed on 26-4-1975 It was thus filed against a dead man and the decree was also against a dead person. The Plaintiff/Petitioners 1 and 2 who filed the suit against Munni Ahir a dead man should have stated this fact in their plaint. Omission to do so. leads to a presumption of fraud having been committed upon the court, As held in the case Suraj Deo v. Board of Revenue AIR 1987 23, decree obtained exparte by fraud or collusion may be set aside at the behest of a stranger who claims right, title or interest in the property.

7. There is yet another ground on which this Court could be justified under Article 226 in refusing to interfere with the order passed by the Board of Revenue and that is, the exparate judgment dated 27-6-1975 extracted hereinbefore is not a judgment in the eye of law. It does not conform to the requirements of Order 20 Rule 4(2) CPC which is quoted below for ready reference.

4. judgments of small cause courts. (1) judgments; of a court of Small Causes need not contain more than the points for determination and the decision there on.

(2) judgments of other courts;--judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

8. It is evident from the provisions of order 20 rule 4 (2) of the Code that exparte judgment dated 27-6-1975 is not a judgment in the eye of the law in as much as it does not contain a concise statement of Plaintiffs'' case points for determination, the decision thereon and the reasons for such decision. The Plaintiffs Petitioners 1 and 2 were claiming right on the basis of possession and not finding has been recorded in the exparte judgment dated 27-6-1975 that the Plaintiffs acquired sirdari right by adverse possession u/s 210 of U.P. Act No. 1 of 1951 which necessarily postulated a finding that the Plaintiffs were in possession for more than the statutory period of limitation. No such finding has been recorded in the exparte judgment and it contains no reasons whatsoever for declaring the Plaintiffs as Sirdar of the land in dispute. Reasons being link between the material and conclusion, are conspicuously absent from the exparte judgment. Such an exparte judgment if set aside by the Board of Revenue, the order setting aside the exparte judgment does not call for interference in the extraordinary jurisdiction of this court under Article 226 of the Constitution of India. In view of this the writ petition is liable to be dismissed in limine.

9. In the result, the petition is dismissed in limine No order as to the costs.

