

(1977) 12 AHC CK 0064
In the Allahabad High Court
Case No : S.A. No. 197 of 1966

Shyam Narain Ahir and Others

APPELLANT

Vs

Ganesh Rai and Others

RESPONDENT

Date of Decision : 03-12-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4
Uttar Pradesh Tenancy Act, 1939 — Section 180
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 20, 240A
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4
Uttar Pradesh Tenancy Act, 1939 — Section 180
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 20, 240A
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4
Uttar Pradesh Tenancy Act, 1939 — Section 180
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 20, 240A

Citation : (1978) AWC 165 : (1978) RD 154

Hon'ble Judges : Mahavir Singh, J

Bench : Single Bench

Advocate : G.P. Bhargava and A.N. Bhargava, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Mahavir Singh, J.—This is a second appeal by the Defendants against the judgment and decree of the Civil Judge, Ghazipur, by which he confirmed the decree passed by the Munsif in favour of the Plaintiff-Respondent No. 1.

2. The allegations of the Plaintiff-Respondent were that he was an occupancy tenant of the plots in question prior to the abolition of Zamindari and had become Sirdar afterwards, that the Defendants-Appellants and Defendant-Respondent No. 2 had no connection with the land in question, that in 1358 Fasli, their father had forcibly taken possession of a part of plot in question but he had been dispossessed in a suit filed by him u/s 180 of the U.P. Tenancy Act by a decree passed on 16-7-1941, that later these Appellants somehow manipulated their names in the Patwari papers, that on knowing about the same he moved an

application for correction but the same was dismissed and so he had to file the suit. He prayed for an injunction to restrain the Appellants from interfering with his possession or in the alternative for possession if the court found that he was not in possession.

3. The Defendant-Appellants and the Respondent No. 2 contested the suit. They alleged that their father was a subtenant of the plots in question and after his death they inherited the same and remained in possession, that they acquired Adhivasi rights under the ZA & LR Act and later they became Sirdars. It was also alleged by one of the Defendant-Appellants that compensation proceedings were finalised before the Assistant Collector u/s 240-A of the ZA & LR Act and so also the Plaintiff Respondent no longer had any right left in the property in question. As regards the decree u/s 180 of the U.P. Tenancy Act it was alleged that it was not acted upon and the Appellants continued to remain in possession.

4. The learned Munsif held that the father of the Appellants and Respondent No. 2 was not a sub-tenant and so they had not acquired any Adhivasi rights or Sirdari rights and that the Plaintiff-Respondent was the Sirdar of the land in question and in possession as such. He also held that the Plaintiff-Respondent had not lost any of the rights by the proceedings u/s 240-A of the UP ZA & LR Act because they had been proceeded with in spite of the stay order passed on his application to that effect. Accordingly he decreed the suit with costs.

5. On appeal the learned lower appellate Court affirmed the findings of the learned Munsif on all the points and so dismissed the same. Thereafter, the Defendants filed this second appeal in this Court. They challenged the findings of the courts below and contended that they have taken an erroneous view of the facts and law.

6. During the pendency of the appeal, one of the Appellants, then Appellant No. 1, Shyam Narain Ahir died in 1970. In 1974, when the matter was brought to the notice of this Court, on this appeal having come up for hearing, a statement was made by the Plaintiff-Respondent's counsel that Shyam Narain, who was then Appellant No. 1 had died in 1970. The counsel for the Respondent then took time and later moved an application admitting this fact that Shyam Narain had died on 13-3-1970 but it was alleged that even after his death the right to sue survived to the remaining Defendant-Appellants who were his legal representatives.

7. The Plaintiff-Respondent filed a counter-affidavit alleging that the remaining Appellants were not the legal representatives of Shyam Narain, that Shyam Narain had left 10 sons as heirs and none of them had been impleaded. The remaining Appellants admitted this fact and they prayed that they had no objection if the sons of the deceased Shyam Narain are brought on record. At this, this Court passed an order on 25-8-1977 that the name of Shyam Narain, Appellant No. 1 be deleted and this fact be brought to the notice of the Bench hearing the appeal.

8. The learned Counsel for the Plaintiff-Respondent now contends that the effect

of this order is that the appeal of Shyam Narain abated and that as the decree of the Plaintiff-Respondent against the Respondent was joint and several the appeal of the remaining Appellants would also abate or, in any case, would not be competent. It is also pointed out that if it is not done, then there is possibility of two inconsistent decrees coming in existence, one against the deceased Shyam Narain and the other against the remaining Appellants.

9. The learned Counsel for the Appellants has made two submissions. In the first instance he contends that if the Court allows one of the legal representatives to continue with the appeal after the death of one of the Appellants and without bringing on the record the representative of the deceased, that heir represents the entire inheritance and so the appeal remains competent. It is pointed out that the fact that this Court had allowed the name of Shyam Narain Appellant to be deleted implied that the court had allowed the remaining Appellants to continue with the appeal. This contention is not acceptable at all. The court had not permitted any of the Appellants to continue with the appeal on behalf of the deceased. Actually none of the remaining Appellants is the legal representatives or heirs of the deceased. This is admitted that the deceased left 11 sons. The learned Counsel for the Appellants contends that as members of the joint Hindu family they would represent the entire estate. But this contention has not been upheld by this Court in *Ram Awalamb v. Jata Shanker* 1968 AWR 731. It was held in that case that the notions of Hindu law about the joint Hindu family are not applicable to the tenure holders under the Zarmindari Abolition Act and here the heirs inherited the property as tenants in common. So the other brothers of Shyam Narain deceased are not the heirs of Shyara Narain. They represent their own shares and only the sons of Shyam Narain would be heirs or his legal representatives.

10. It was next contended that, in any case, under Order 41 Rule 4 CPC this Court will have power to decide the appeal of the remaining Appellants and could pass an order setting aside the entire decree. The learned Counsel for the Plaintiff-Respondent, however, relied upon the case of *Sri Chand v. Jagdish Prasad Kishan Chand* AIR 1966 SC 1427 in which it was held that an appellate court had no power to proceed with an appeal and to reverse and vary the decree in favour of all the Plaintiffs or Defendants under Order 41 Rule 4 when the decree proceeds on a ground common to all the Plaintiffs or Defendants, if all the Plaintiffs or the Defendants appeal from the decree and any one of them dies and the appeal abates so far as he is concerned.

11. Learned Counsel for the Appellants then relied upon *Mahabir Prasad Vs. Jage Ram and Others*, for the proposition that the appellate court had power to proceed under Order 41 Rule 4 CPC in such cases. It is contended that this case being later than the case of *Sri Chand v. Jagdish Prasad* (Supra) should be given preference. This contention is also not correct. Their Lordships in *Mahabir Prasad*'s case (Supra) had not overruled the decision of *Sri Chand*'s case (Supra). They had rather distinguished the case of *Rameshwar Prasad* and

Others Vs. Shyam Beharilal Jagannath and Others, . This case was also relied upon in the case of Sri Chand v. Jagdish Prasad (Supra). Distinguishing that case, their Lordships held that Order 41 Rule 4 CPC would apply only when all the persons, affected by the decree either do not appeal or are not impleaded as Respondents. Obviously, therefore, it would apply to those cases where all the Defendants or the Plaintiffs, as the case may be, had filed an appeal. Here the facts are the same as reported in 1966 SC 1427. All the persons effected by the decree had filed an appeal and it is only one of them who had died later. So the provisions of Order 41 Rule 4 would not be applicable.

12. The next question is whether on account of the abatement of the appeal of Shyam Narain, the appeal by the remaining Appellants becomes incompetent and so has to be dismissed. The learned Counsel for the Appellants contends that the Plaintiff-Respondent claimed only injunction against the Appellants treating them to be trespassers and so it would make no difference if the decree remains confirmed against one of the trespassers and the remaining alleged trespassers can continue the appeal, the learned Counsel for the Plaintiff-Respondents, however, points out that the matter is not so simple as that. The present Appellants and the deceased had claimed rights from a common source. They had alleged that their father was the sub-tenant and they had inherited the tenancy rights from him and so they had become first Adhivasi and then Sirdars. The court below had given a finding against these Appellants and Shyam Narain on these points. So on the decree against Shyam Narain being finalised it would mean that the father of the Appellants had not acquired any rights in the land and so thus too could not inherit anything, in case the appeal of the present Appellants is allowed, it would be only by a reversal of those findings of facts and of law. Thus there would clearly be two inconsistent decrees in existence simultaneously. As held in Shri Chand v. Jagdish Prasad (Supra), in such a case where there is possibility of two inconsistent decrees coming into existence, then the appeal of the remaining Appellants becomes incompetent. Thus the contention of the Plaintiff-Respondent has a force that this appeal by the remaining Appellants becomes incompetent and so has to be dismissed.

13. Even otherwise the appeal has no force on merits at all. The Appellants had claimed Sirdari rights on the following three grounds:

(1) They were recorded as occupant in 1356 Fasli and so u/s 20(b) of the ZA & LR Act they had become Adhivasi of the land and were entitled to remain in possession thereof.

(2) They were in cultivatory possession in 1359 Fasli and also under the U.P. Land Reforms (Supplementaries) Act 1952 they were entitled to remain in possession.

(3) The compensation proceedings u/s 240-A of the ZA & LR Act having become final, the rights of the Plaintiff-Respondent No. 1 became extinct and so also he had no right to sue.

14. On behalf of the Plaintiff-Respondent it is contended that it was a question of fact whether the Appellants were occupants in 1356 Fasli or 1359 Fasli and that finding of fact is not open to challenge in Second appeal.

15. Learned Counsel for the Appellants, however, contends that once an entry is made in 1356 F. it was not open to the court to disregard it by giving a finding of fact otherwise. Reliance was placed on Amba Prasad v. Mahboob Ali Shah 1964 AWR 541, Mosim Ali v. Ganga Prasad 1966 AWR 457, Hari Nath v. Ram Pratap Singh 1968 AWR 65, Smt. Sonawati v. Srt Ram 1968 AWR 1 and Sri Nath Singh v. Board of Revenue, U.P. 1968 AWR 722. On the other hand, the learned Counsel for the Plaintiff-Respondent contends that in view of the ruling of the Hon"ble Supreme Court in Bachhan v. Kankar 1972 AWR 786 it is open to a court to give a finding that the entry was not a genuine one. We need not, however, go into the merits of this case law. Obviously the case of the Appellants is not covered by any of the ruling cited above. No name of the Appellants or their father was recorded either in 1356 F. or 1359 F. Only oral evidence was led, which was not believed. So, no question pf law was involved on the points Nos. 1 and 2.

16. As regards point No. 3 also the finding was that these proceedings were finalised inspite of a stay order given by the Assistant Collector himself and, therefore, the order, if any was void and illegal. This fact is also not disputed before us. Therefore, no question of law is involved even on this third point. Hence there is no force on the merit also.

17. Thus in either view of the case the appeal has no force and is accordingly dismissed with costs to Respondent No. 1.