(1982) 04 AHC CK 0010

In the Allahabad High Court

Case No : Writ Petition No. 831 of 1978

Smt. Jagwanta APPELLANT

Vs

Smt. Nirmala and Others RESPONDENT

Date of Decision : 07-04-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 34 Rule 5
Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Section 14, 14(1), 14(2), 5
Penal Code, 1860 (IPC) — Section 147, 427, 447, 504
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 209, 210

Citation : (1982) AWC 591

Hon'ble Judges : K.N. Goyal, J

Bench : Single Bench

Advocate : S.L. Verma, for the Appellant; Pradeep Kant, R.K. Srivastava, C.B. Misra and M.C. Chittravanshi, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Goyal, J.—In the basic year Khatauni the Respondent Smt. Nirmala Devi was recorded as Sirdar of plot No. 271 measuring 1 Bigha, 19 Biswas and 18 Biswansis. The Petitioner filed an objection contending that her husband Ram Asrey and after his death she herself had been in possession for more than 30 years and had as a consequence thereof acquired rights under the U.P. Tenancy Act and also under the U.P. Zamindari Abolition and Lard Reforms Act. This objection has been rejected by all the three Consolidation Authorities who have concurrently held the entry in favour of the Respondent to be correct. Aggrieved thereby the Petitioner has filed this writ petition. The following facts are not in dispute. Smt. Nirmala Devi the Respondent had filed a suit against the Petitioner which was decreed by the revenue courts. The final order passed by the Board of Revenue is annexure 20 to the writ petition. It is dated 25-3-1964. Actually there were two suits, one about plot No. 271, which is in controversy in the instant case and the other about plot No. 272, filed by the Respondent against different persons. In para 13 of the judgment of the Board of Revenue which was common to the two appeals, it was recited that second appeal No. 611 (in which the Petitioner was the Appellant) failed and was dismissed with costs. Thereafter in paras 14 to 18 the other second appeal of the present Respondent against the other Defendant (who is not a party herein) was dealt with, and in para 18 it was mentioned that the said second appeal was allowed and the orders of both the courts below were set aside and the case was ''remanded to the trial court for fresh decision after impleading the State. Thereafter in the concluding paragraph No. 19 it was added as follows:

19. This order would govern second appeal No. 611 of 1962-63 and 124 of 1963-64/Distt. Pratapgarh." When the records of the two cases were received the trial court issued notices to the parties, and some dates were fixed. Ultimately it was discovered that so far as plot No. 271 was concerned there was no remand at all inasmuch as second appeal No. 611 of 1962-63 having been dismissed as recited in para 13 of the judgment of the Board, that suit had stood finally decreed and it was only the other suit which was the subject of second appeal No. 124 that had been remanded. Accordingly, on 10-11-1965 the Assistant Collector terminated the misconceived proceedings that he had initiated after what he as well as the parties had erroneously thought to be an order of remand in respect of this suit as well. Thereafter on 24-3-66 Smt. Nirmala Devi made an execution application, a copy of which is annexure 21 to the writ petition. By this application relief was sought under Order 21 Rule 35, CPC by way of delivery of actual possession over plot No. 271. In this application the date of final decree was shown in columns 4 and 7 both as "25-3-64--10-11-65." As noted earlier 25-3-64 was the date of disposal of the second appeal while 10-11-1965 was the date of the subsequent order of the Assistant Collector terminating the subsequent misconceived proceedings. The period of limitation prescribed for an execution application under the Rules framed under the U.P. Zamindari Abolition and Land Reforms Act, vide entry 53 of the appendix, is one year from the date of the final decree. This period of one year had already expired even before 10-11-65 the date of the subsequent order of the Assistant Collector mentioned above, if the period of limitation was to be counted from 25-3-64. Accordingly an application for relief under Sections 5 and 14 of the Limitation Act, 1963 was also given along with the execution application. It was contended by the decree holder Smt. Nirmala that she had been punctually prosecuting the case in the Collector''s court after the decision of the second appeal by the Board of Revenue in the circumstances already narrated, and that the time spent there should be excluded. This application was contested by the Petitioner and the matter was ultimately fought out between the parties upto the Board of Revenue which finally decided the controversy on-1-4-68 in favour of the decree holder Smt. Nirmala Devi the Respondent before me, vide annexure C1 to the counter affidavit dated 3-9-80 filed by the Respondent''s son as her Pairokar. The Additional Commissioner had earlier on 25-10-67 upheld the

contention of the Respondent, and the Assistant Collector bad also upheld it and had ordered execution to proceed. The Respondent has also filed a copy of a so called "Dakhalnama" dated 6-10-66 which is annexure C1 to the counter affidavit dated 6-9-78 filed by the Respondent. This Dakhalnama recited that the Respondent had obtained possession over plot No. 271 in execution of decree passed in suit No. 23 of 1966. The Dakhalnama is also signed by the Amin and purports to bear the signatures of two other witnesses including the Pradhan of the village. It appears that the Respondent subsequently gave some mutation application which was dismissed in default on 12-12-68, vide annexure 22 to the writ petition. On 11-7-79 the Respondent moved for proceedings u/s 145, Code of Criminal Procedure. The Magistrate ordered attachment of the plot in question. The question of possession was referred to the Civil Court under the old Code of Criminal Procedure. The Civil Court pave finding to the effect that it was the Respondent and not the Petitioner who was in possession during the period of two months prior to the commencement of proceedings u/s 145. When the matter came up before this Court in criminal revision No. 299/70 this Court ordered on 7-1-72 that the case be remanded to the Magistrate with the direction that he should decide the question whether breach of peace still continued and that if he came to the conclusion that it continued he should pass his final order in conformity with the finding of the Civil Court and if he came to the conclusion that there was no longer an apprehension of breach of peace he should drop the proceedings. This order is annexure 23. After this remand order the Magistrate held that there was no longer an apprehension of breach of peace between the parties as the Respondent resided at Allahabad while the Petitioner resided in her village although the litigation between them in regard to the land continued. He accordingly ordered the dropping of the proceedings on 21-7-72, vide annexure 24. Thereafter the Respondent made an application pointing out that no specific order had been passed for restoration of the attached property in her favour although the proceedings had been terminated. The Magistrate by his order dated 10-1-74 annexure 25, however, despite the earlier finding of the civil court referred to above, held that the question of possession of the Respondent on the date of attachment was not free from doubt and as such no orders for restoration of possession in her favour could be passed. However, he ordered lifting of the attachment and of intimation of the order being given to the Supurdar. This order was confirmed on revision by the learned Sessions Judge on 17-1-75 vide annexure 26. The Respondent''s son had earlier filed a criminal complaint on 9-10-68 against the Petitioner and certain other persons under Sections 147, 427, 447 and 504 IPC alleging that on 4-8-68 the accused persons had destroyed the Bajra crop which had been sown by the Respondent. A copy of this complaint is annexure 27. The consolidation proceedings started in the village in March, 1972. By that time, as noted earlier, the name of the Respondent had come to be recorded in the khatauni over this plot. We have already seen that the Petitioner has lost in all the three consolidation courts which have held that the Petitioner already stood evicted on 6-10-66 and that thereafter his continuous possession was not proved and in any case it would be insufficient for accrual of any rights in his favour.

2. It may be noted here that the period of limitation prescribed for a suit for ejectment of a trespasser u/s 209 of the UP ZA & LR Act was six years during the period between 27-3-69 and 13-10-71. This was increased to 12 years by Notification dated 14-10-71 amending the relevant entry No. 30 of appendix 3 to the rules and serial No. 24 of Schedule 2 to the Act. If, therefore, the Petitioner actually stood evicted on 6-10-66 then he could not claim to have been in adverse possession for the requisite period before the commencement of consolidation proceedings. Even the period of six years had not expired when consolidation proceedings started in March 1972. He could only succeed if the execution proceedings be held to be a nullity and the period of his possession prior to 6-10-66 were also to be counted in continuation in his favour.

3. The learned Counsel for the Petitioner is no doubt right in contending that Section 5 of the Limitation Act does not apply to execution application. This is evident from the very terms of Section 5. The other question however is whether Section 14(2) was available to the decree holder. But before we consider this question it is relevant to point out that the question whether the execution application was time barred or was within time, and whether the decree holder could be given the benefit of Section 14(2) of the Limitation Act or not, was a matter within the competence of the execution court. The execution court has decided the question in favour of the decree holder. That decision, even if it be incorrect, being a decision inter parties would be res-judicata and cannot be re-agitated, in a subsequent litigation. Learned Counsel for the Petitioner has contended that the decision being wholly erroneous and illegal must be held to be a nullity. I am unable to accept this contention. A decision cannot be treated as a nullity merely on the ground that it is erroneous. The principle of res-judicata is a principle of finality of litigation. The application of this principle cannot be avoided by contending that the earlier decision was wrong in law or on facts. In this view of the matter it is, strictly speaking not necessary to consider in the instant case whether Section 14(2) was available or not in the circumstances.

4. We may assume, however, that the question is still open. Now so far as Section 14(1) is concerned, it has been held the time spent in prosecuting execution proceedings can be excluded for a suit in view of Section 14(1), vide Raghunath Das Vs. Gokal Chand and Another, (para 10) which was followed in Roshanlal v. R.B. Mohan Singh Oberai AIR 1975 824 in which their Lordships observed as follows:

Certainly, Section 14 is wide enough to cover periods covered by execution proceedings (see Raghunath Das Vs. Gokal Chand and Another, . After all Section 47 itself contemplates transmigration of souls as it was of execution petitions and suits. The substantial identity of the subject matter of the lis is a pragmatic test. Moreover the defects that will attract the provision are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstances, legal or factual, which inhibits entertainment or consideration "by the Court of the dispute on the merits, comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right See India Electric Works Ltd. Vs. James Mantosh and Another, .

5. The learned Counsel for the Petitioner has, however, contended that the position in respect of Section 14(2) is different because of the use of the words "same relief" in that sub-section. He has in this section relied on Maqbul Ahmad and Others Vs. Pateshri Partab Narain Singh and Others which was affirmed on appeal in AIR 1935 Privy Council 85. In this case it was held that an application for the preparation of a final decree under Order 34 Rule 5 CPC could not be treated as an application for execution of the decree. This decision was, however, distinguished in Sridhar Upadhya Vs. Lakshmi Prasad, on the ground that the relief in those two applications were clearly quite different. The Privy Council decision is thus not an authority for a general proposition that Section 14(2) has to be construed very technically or strictly on the other hand the observations of the Hon''ble Supreme Court quoted above indicate the approach that the provisions of Section 14 as a whole should be liberally construed. In the instant case what we find is that the Respondent decree-holder was entitled to the assistance of yet another principle of equity that no party shall be allowed to suffer because of a mistake of a court. This principle is wider in its scope than the provisions of Section 14(2) which contemplate a mistake on the part of the litigant himself. In the instant case, as is obvious from the foregoing narration of facts, the mistake was that of the Court. In the first instance the Board of Revenue''s order was itself not very happily worded. What was mentioned, in para 13 got lost sight of because that paragraph was followed by six more paragraphs, the concluding one being to the effect, "This order would govern second appeals Nos. 611 and 124." The penultimate para No. 18 spoke of a remand. A reading of paras 18 and 19 could mislead any one into thinking both the cases had been remanded. Of course, a close perusal of paras 13 and 18 separately could have dispelled any one of the wrong impression. But in the instant case both the parties as well as the Assistant Collector were genuinely mislead. It was not the Respondent who initiated any fresh proceedings before the Assistant Collector. It was the Assistant Collector who sent notice to her implying that the matter was still open. If the Court sent notice the Respondent was bound to appear in response thereto and to satisfy the court that the suit already stood finally decreed in her favour. Thus more than a year, which was the prescribed period of limitation for filing an execution application, was lost because of the mistake of the Court. It cannot be contemplated that she should irrevocably lose the fruits of her long drawn one litigation because of such a mistake on the part of the court. There was thus nothing malafide about the recital in the execution application of the two dates viz. 25-3-64/10-11-65 as the date of the final decree. There was no hide and seek or an attempt to mislead the Court as the execution application was accompanied by a formal application

under sections 5 and 14 of the Limitation Act. Thus I do not see how the Revenue Court in holding the application to be within time can be said to have acted without jurisdiction or how its order of execution could be treated as a nullity.

6. Learned Counsel for the Petitioner Sri S. L. Verma has further argued that the Petitioner having already acquired rights u/s 210 of UP ZA and LR Act upon the failure of the Respondent to have filed an execution application within a period of one year from 25-3-64 could not be deprived of that vested right by a subsequent order of the Revenue Court. This argument begs the question as to whether the application for execution was within time. As discussed above, it was for the execution court to have decided whether the application was within or beyond time and that order being binding on the parties as res-judicata the question of the Petitioner having acquired any rights u/s 210 on 25-3-1965 does not arise.

7. Learned Counsel for the Petitioner has further contended that the alleged proceedings for Dakhal were fictitious and in support of this contention he has relied on the observations of the Magistrate and the Sessions Judge after the termination of proceedings u/s 145 implying that the finding of the Civil Court on the question of possession was not final and conclusive. The mere failure of the Magistrate to pass a proper order for restoration of actual possession thereafter is of no cousequence, and in any case, the subsequent orders of the Magistrate and the Sessions Judge were passed after the commencement of the Consolidation proceedings and as such they are irrelevant so far as limitation herein is concerned. The complaint filed by the Respondent''s son does not say that the Respondent had been dispossessed. The complaint asserts the Respondent''s possession and speaks of certain criminal acts of the Petitioner and her supporters calculated to undo the Respondent''s possession and to damage the crop sown by her. The failure of the Respondent to prosecute the mutation application has also no bearing on the question of possession.

8. Learned Counsel for the Petitioner further argued that there was no evidence of delivery of possession in accordance with the provisions contained in the Revenue Court Manual para 39, and Rule 159. Rule 159 states that possession should be delivered in the presence of the judgment debtor and two other villagers after notice to the judgment debtor and if the judgment debtor is absent or refuses to sign the proceedings the Amin should record his absence or his refusal to acknowledge presence as the case may be. Para 39 requires that the Court should direct entries in the revenue papers to be made in accordance with the delivery of possession. The Amin is also required to submit a report to the Court about delivery of possession. The ''Dakhalnama'' annexure C 1 relied on by the Respondent is not a substitute, it is contended, for the Amins'' report. These arguments are untenable. Firstly, it was for the Petitioner to have proved that all the formalities had not been completed by the Amin or by the Lekhpal or by the Court. The ''Dakhalnama'' has been filed by the Respondent, but it does not

imply that apart from execution, by Respondent, of the ''Dakhalnama'' acknowledging delivery of possession nothing else was done. Moreover, a Division Bench of (his Court has held in Chandra Bhan and Others Vs. State, that the relevant provisions of the Revenue Court Manual were directory and not mandatory. The observations are no doubt, obiter because of the finding given that possession had actually been delivered in the case. But I find no good ground to disagree even with this obiter dictum of the Division Bench. In the instant case, it was for the Petitioner to show that the findings recorded by the three consolidation authorities are without any evidence or are perverse. The normal presumption u/s 114 Evidence Act is that official acts are regularly performed. The three consolidation courts have, after considering the rival contentions of the parties and the evidence on the record, taken the view that possession was actually delivered to the Respondent. Indeed there was no reason for not delivering possession actually when the matter was being throughout contested before and after the alleged delivery. It may be that the Petitioner was in an stronger position vis a vis the Respondent, who, as appears from Magistrate''s order mentioned above, was residing at Allahabad while the Petitioner was residing in the village itself, and for that reason the Respondent may not have been able to retain her possession for long. That, however, does not imply that possession was never delivered to her. We have already seen above that the period of Petitioner''s subsequent possession was less than the requisite period.

9. I thus find no force in this writ petition which is hereby dismissed with costs.

