

(2009) 12 UK CK 0053
In the Uttarakhand High Court
Case No : A.O. No. 391 of 2009

Smt. Mithilesh Verma

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 43 Rule 1, Order 9 Rule 8 , Order 9 Rule 9
Land Acquisition Act, 1894 — Section 18 , 26
Limitation Act, 1963 — Section 5

Citation : (2009) 12 UK CK 0053

Hon'ble Judges : B.S. Verma, J

Bench : Single Bench

Advocate : Neeraj Garg, holding brief of Prabha Noliyal, for the Appellant; R.C. Arya, Brief Holder for Respondents, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Verma, J.—Heard Learned Counsel for the parties and perused the record.

2. This appeal has been filed for setting aside the order dated 8-9-2009 passed by the District Judge, Haridwar, in Miscellaneous Case No. 533 of 2007 and to allow the application under Order 9, Rule 9 CPC and further to set aside the judgment and order dated 26-7-2007 passed by the District Judge Haridwar in Land Acquisition Case No. 19 of 2006 Smt, Mithilesh Verma v. State of Uttarakhand and two Ors. It has also been prayed that the Land Acquisition Case Na. 19 of 2006 be heard on merits in accordance with law.

3. Relevant facts giving rise to the present appeal in brief are that the Appellant filed objection against the award dated 28-12-2005 passed by the Special Land Acquisition Officer Haridwar before the Collector. Ultimately, a reference was made to the civil court, i.e. District Judge Haridwar, u/s 18 of the Land Acquisition Act.

4. The Appellant could not appear on the date fixed. The counsel for the Respondent No. 1 - D.G.C. (Civil) was present in the court. The reference court on 19-7-2007 proceeded to decide the reference in the absence of the Appellant and vide order dated 26-7-2007, the reference was rejected.

5. Aggrieved by the order dated 26-7-2007, the Appellant herein filed restoration application for recalling the order dated 26-7-2007 along with application u/s 5 of the Limitation Act.

6. The Learned District Judge, after hearing the Appellant dismissed the restoration application on the ground that the application is not maintainable and reliance was placed on the judgment of the Apex Court in the case of Khazan Singh (dead) by L.Rs. v. Union of India 2002 (47) ALR 215 (Supreme Court) wherein it has been held that non-participation of any party would not confer jurisdiction on the civil court to dismiss the reference for default.

7. Learned Counsel appearing for the Appellant has vehemently contended that the Learned District Judge has wrongly observed in his order that the order was passed under Order XVII, Rule 3 CPC since no evidence was adduced by the Appellant before the reference court. It reveals from the order-sheet dated 9-7-2007 that no evidence was adduced by the Appellant-claimant and opportunity was closed. The reference was fixed for arguments on 16-7-2007 and final order was passed on 26-7-2007.

8. Learned Counsel for the Appellant has relied upon the provisions of Order 17, Rule 2 CPC which reads as under:

2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

Where the evidence, or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day, the Court may, in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation.- No party shall be deemed to have failed to appear if he is either present or is represented in Court by agent or pleader, though engaged only for the purpose of making an application.

9. Learned Counsel for the Appellant has placed reliance upon the Full Bench judgment of the Allahabad High Court in the case of Seth Munna Lal Vs. Seth Jai Prakash, wherein it has been held in paragraph 7 that it is permissible to

entertain an application for restoration under Order 9 CPC even when the Court purports to act under Order 17, Rule 3 CPC if the circumstances set out by the Court are such that an order under Order 9 read with Order 17, Rule 2 CPC would be legally justified and the actual order passed is one which could be legally passed under Order 9 read with Order 17, Rule 2 CPC.

10. The judgment in the case of "Seth Munna Lal v. Seth Jai Prakash" (supra) relied upon by the Learned Counsel for the Appellant is not applicable to the case at hand, because it refers to civil suit proceeding. The judgment in the case of Khazan Singh (dead) by L.Rs. v. Union of India (supra), which was relied upon by the Learned District Judge is applicable to the facts and circumstances of the case. In this case the Apex Court has an occasion to deal with the provisions of Section 18 and 26 of the Land Acquisition Act. The controversy before the Apex Court was whether the reference made by the Collector u/s 18 of the said Act could be dismissed for default. In that case, the civil court dismissed the reference for default of the claimant as he failed to be present when the matter was taken up likewise in this case. In paragraph 6 of the judgment, the Apex Court has observed as under:

6. The provisions above subsumed would thus make it clear that the civil court has to pass an award in answer to the reference made by the Collector u/s 18 of the Act. If any party to whom notice has been served by the civil court did not participate in the inquiry it would only be at his risk because an award would be passed perhaps to the detriment of the concerned party. But non-participation of any party would not confer jurisdiction on the civil court to dismiss the reference for default.

11. The argument advanced by the Learned Counsel for the Appellant cannot be accepted that the District Judge ought to have dismissed the reference for default since no evidence was adduced till relevant date and the court should have dismissed the reference under Order 9, Rule 8 CPC. The Apex Court in Khazan Singh (dead) by L.Rs. v. Union of India (supra) has set aside the order dated 29-9-1997 passed by the Additional District Judge, whereby the reference was dismissed for default.

12. For the reasons and discussion above, I am of the considered view that the Learned District Judge has not committed any error of law in deciding the reference on merit in the absence of the claimant and the application for restoration has rightly been rejected as not maintainable under Order 9, Rule 9 C.R.C.

13. This appeal has been filed by the Appellant under Order 43, Rule 1(c) CPC wherein an order passed under Order IX, Rule 9 CPC can be assailed. In the present case, the reference was decided on merits. Consequently, the present Appeal against Order preferred as such under Order 43, Rule 1(c) CPC is dismissed as not maintainable. However, the Appellant may assail the impugned order passed by the reference court before appropriate Forum, if so advise.