
(1995) 11 AHC CK 0108

In the Allahabad High Court

Case No : C.M.W.P. No's. 3936 of 1982 and 6834 of 1983

Smt. Shanti Devi and Another

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 21-11-1995

Acts Referred:

Civil Procedure Code Amendment Act, 1950 — Order 41 Rule 11, 100, 103
Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956 — Section 4
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B

Citation : (1996) AWC 531 Supp

Hon'ble Judges : Sudhir Narain, J

Bench : Single Bench

Advocate : H.R. Misra, for the Appellant;

Judgement

Sudhir Narain, J.—Both these writ petitions are against the order of Board of Revenue arising out of the proceedings in Suit No. 322 of 1969 filed before the Collector 1st Class Gorakhpur u/s 229B, U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act).

2. The dispute relates to Plot No. 78/1/2 situate in village Daudpur, Pargana Haveli, Tahsil Sadar, District Gorakhpur, area 1.7 acres. The Zamindari in this village was abolished on 1.7.1966 under the provisions of U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956. Balli and Baij Nath, sons of Jagannath, were recorded as hereditary tenants of the disputed property. After the death of Baij Nath his two daughters, namely, Smt. Chandra Devi and Smt. Shanti, claimed their rights by way of succession.

3. Balli filed Suit No. 465 of 1966 in the Court of Munsif. Gorakhpur against Nauratam Tewari, Respondent No. 3 and others for declaration of his right in the disputed plot. In the said suit a preliminary issue was framed as to whether the Civil Court had Jurisdiction and the issue was decided against the Plaintiff. It is alleged that the suit was dismissed in the year 1969 holding that the Civil Court

had no Jurisdiction to try the suit.

4. On 22.10.1969 Balli and Smt. Santi Devi (Petitioners) and Smt. Chandra Devi filed suit No. 322 of 1969 against Respondent Nos. 3 to 6 in the court of Assistant Collector I Sadar. Gorakhpur u/s 229B of the Act for declaration that they are Sirdars of the disputed land and in the alternative for possession if it was found that Plaintiffs were not in possession.

5. The Plaintiff filed suit on the allegation that Balli and Baij Nath sons of Jagannath, were recorded as hereditary tenants of the disputed plot. Defendants have no right and title over the disputed land. In para 4 of the plaint it was stated that Nauratam Tewari, Defendant No. 1, in collusion with the Lekhpal illegally got his name entered as tenant in chief over the plot in dispute in the revenue records and started threatening to take possession. Nauratam Tewari, Defendant-Respondent No. 3 (in reference to writ petition No. 3936 of 1982) filed written statement. He contested the suit on the ground that Plaintiffs are not Sirdars of the land in dispute. Balli and Baij Nath were co-tenants of the land in dispute. There was a private partition amongst them and the land in dispute came into exclusive share of Baij Nath. Baij Nath took money from him and after having taken money he surrendered his rights to the Zamindar and with the consent of Zamindar he delivered possession to him on 3.12.1963 and since then he is coming in possession of the land in dispute with the consent of Zamindar and Baij Nath. The suit is barred by limitation as it was not filed within the period of limitation and he has prescribed his right by adverse possession. He further obtained Bhumidhar certificate after depositing ten times of the revenue before the appropriate authority.

6. The trial court came to the conclusion that the Defendant failed to prove that there was a partition between Balli and his brother Baij Nath. He further disbelieved the version of the Defendant that Baij Nath had surrendered his tenancy right to the Zamindar and delivered possession to him. The suit of the Plaintiff was, however, dismissed on the finding that Narottam, Respondent No. 3, acquired rights in the disputed land by adverse possession.

7. The Plaintiffs filed appeal before the Additional Commissioner, Gorakhpur Division, Gorakhpur. The Additional Commissioner, during the pendency of the appeal, summoned the original record and came to the conclusion that revenue entries relied upon by the trial court were fictitious. The finding of the trial court was reversed and it was held that the Plaintiffs were in possession of the land in dispute and the Defendant failed to prove adverse possession. The suit was accordingly decreed by the Additional Commissioner by order dated 5.8.1975. Respondent No. 3 filed Second Appeal No. 1/76-77 before the Board of Revenue against the judgment of the Additional Commissioner.

8. During the pendency of second appeal, further developments took place. On 12.4.1977, the Plaintiffs, namely Balli, Smt. Chandra Devi and Smt. Shanti executed a sale-deed regarding the disputed land transferring their rights in

favour of Smt. Bhanmati, Smt. Urmila and Smt. Lalita. The second appeal filed by Respondent No. 3 was admitted on 29.7.1977 under Order XLI, Rule 11, CPC. The Appellant-Respondent No. 3 filed an application to implead the transferees of the Plaintiffs as Respondents in the second appeal on the allegation that the Plaintiffs have transferred their rights. On 10.8.1981 Smt. Bhanmati died. The Appellant filed substitution application on 25.11.1981 to implead the heirs of Bhanmati. On 4.1.1982 Smt. Chandra Devi, who was the Plaintiff in the suit and impleaded as one of the Respondents in the second appeal, died. The Appellant-Respondent No. 3 did not file any application for substitution to implead her heirs. The Board of Revenue also did not pass any order on the application filed by the Appellant-Respondent No. 3 to implead the transferees as Respondents in the second appeal and also on the substitution application filed on the death of Smt. Bhanmati.

9. The Board of Revenue proceeded to hear the second appeal and allowed the appeal and set aside the judgment of the Additional Commissioner and restored the judgment and decree of the trial Court by order dated 19.3.1982.

10. Smt. Shanti and Balli have filed Writ Petition No. 3936 of 1982 against the decision of the Board of Revenue on 7.4.1982. On 31.8.1982 a review application was filed on behalf of transferees from the Plaintiffs that they had vested rights in the property in question. The Plaintiffs had sold their rights even prior to the second appeal was admitted and an application was also filed for their impleadment by the Appellant himself and they were neither impleaded nor heard in the second appeal. It was further averred that Smt. Chandra Devi, one of the transferees, died during the pendency of second appeal but her heirs were not brought on record. They are entitled to be impleaded and heard and the judgment dated 19.3.1982 be reviewed. This review application was allowed by the Board of Revenue by order dated 5.5.1983. Nauratam Tewari, who was Appellant before the Board of Revenue, has filed writ petition No. 6834 of 1983 against the order dated 5.5.1983.

11. I have heard learned Counsel for the parties at length in both the writ petitions.

12. Learned Counsel for the Petitioner in Writ Petition No. 3936 of 1982 Smt. Shanti Devi and Ors. v. Board of Revenue, Allahabad and Ors. has assailed the judgment of the Board of Revenue on various points. It is not disputed that Balli and Baij Nath, sons of Jaganhath, were hereditary tenants of the land in dispute and they were recorded as such in the revenue records. The dispute arose in the year 1966 when Balli filed Suit No. 465 of 1966 in the Civil Court for declaration of his rights. The suit was not entertained by the Civil Court on the ground that it was only the Revenue Court which had Jurisdiction and it remained pending before the Civil Court for about three years. On 22.10.1969 the Plaintiffs filed Suit No. 322 of 1969 for declaration of their rights. They claimed that they were in possession over the land in dispute.

13. The defence of Respondent No. 3 was that there was partition between the two brothers, namely, Balli and Baij Nath and the disputed plot came to the share of Baij Nath. Baij Nath took money from him and surrendered his rights to Zamindar and with the consent of Zamindar he delivered possession to him on 3.12.1963 and since then he is in possession. The trial court disbelieved the version of Respondent No. 3 and came to the conclusion that he failed to prove that there was no partition between Balli and Baij Nath and secondly Baij Nath ever took money and surrendered his rights to Zamindar and delivered possession of the land in dispute to him. The trial court, however, came to the conclusion relying upon certain revenue entries coupled with oral evidence adduced by the parties that the Defendant No. 1, was in possession since 1373 Fasli and acquired rights over the land by adverse possession and the suit was not filed within limitation. On these findings the suit was dismissed.

14. On appeal preferred by the Plaintiffs before the Additional Commissioner, the finding of the trial court that Respondent No. 3 was in possession was reversed. The Additional Commissioner summoned the original revenue records and found that the entries of 1373 Fasli made by the Lekhpal were fictitious. The Board of Revenue in the second appeal set aside the judgment of the Additional Commissioner and restored the judgment of the trial court.

15. The main controversy is as to whether the Board of Revenue was Justified in setting aside the findings recorded by the Additional Commissioner in appeal. The Board of Revenue could set aside the findings of fact recorded by appellate court on the ground mentioned in Section 100 of Code of Civil Procedure. The Board of Revenue has taken the view that the Commissioner did not consider the oral evidence and this has vitiated his finding. The Board of Revenue further took the view that the entry of the Khasra and Khatauni of 1373 Fasli made by the Lekhpal did not require any notice to be given to the tenure-holder concerned under para 84 (d) of the Land Record Manual as then existed and he affirmed the judgment of the trial court.

16. The court in Second Appeal while setting aside a finding recorded by the first appellate court can itself record its own finding u/s 103(b) of the CPC which provides that in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal:

(a)

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100.

17. Power can be exercised when in second appeal a finding is recorded that the finding of fact recorded by the Court below is erroneous on a ground mentioned u/s 100 of CPC and secondly, the Court, on the evidence on the record, thinks it proper to record its own finding by appreciating evidence on the record.

18. Learned Counsel for Respondent No. 3 has placed reliance upon Shri

Bhagwan Sharma Vs. Smt. Bani Ghosh, , wherein it was held that High Court in second appeal can determine issues of fact which have been wrongly determined by such court on such question of law as is referred to u/s 100 of Code of Civil Procedure. In that case, the trial court had accepted the Defendant's case and dismissed the suit. On appeal by the Plaintiff-Appellant, the first appellate Court reconsidered the evidence led by the parties and recorded finding of fact in favour of Plaintiff-Appellant and on that basis decreed the suit. The Defendant preferred second appeal in the High Court. The High Court allowed the second appeal, set aside the judgment and decreed the suit by recording its own finding. Their Lordships of the Supreme Court held that the High Court could have either remanded the matter or in the alternative, decided the case finally in accordance with the provisions of Section 103(b) of CPC but their Lordships set aside the order of the High Court and remanded the matter to first appellate court with the following observation:

If in an appropriate case the High Court decides to follow the second course, it must hear the parties fully with reference to the entire evidence on the records relevant to the issue in question and this is possible if only a proper paper book is prepared for hearing of facts and notice is given to the parties. The grounds which may be available in support of a plea that the finding of fact by the Court below is vitiated in law, does not by itself lead to the further conclusion that contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment. We, therefore, allow this appeal, set aside the impugned judgment as also the judgment of the first appellate court and remit the entire matter to the first appellate court for fresh decision of the appeal filed before it, in accordance with law. The cost will abide the final result in the case.

19. In Dr. N.G. Dastane Vs. Mrs. S. Dastane, , the Supreme Court observed that if the High Court takes upon itself the duty to determine an issue of fact as contemplated u/s 103(b) of the Code of Civil Procedure, its power to appreciate the evidence would be subject to the same restraining conditions to which the power of any Court of facts is ordinarily subject. The limits of that power are not wider for the reason that evidence is being appreciated by the High Court and not by the district Court.

20. In case the court takes upon itself to decide the question of fact in the second appeal, it has to examine itself the entire evidence on the record and reappraise it in accordance with law. in case the entire evidence is not considered or appreciated in accordance with law, it will be failing to perform its duty as conferred u/s 103(b) of the Code of Civil Procedure.

21. In the present case, the trial court has disbelieved the version of the Defendant-Respondent No. 3 that any partition had taken place between Balli and Baij Nath and the land in dispute came to the share of Baij Nath. It further came to the conclusion that Baij Nath never surrendered his tenancy rights to

the Zamindar or delivered possession of the land in dispute with the consent of the Zamindar to him. It, however, proceeded to record finding of possession on the basis of revenue entries. The revenue entries related for the year 1372 Fasli, 1373 Fasli, (there was no revenue record relating to 1374 Fasli) and thereafter 1375 Fasli to 1377 Fasli. The Additional Commissioner summoned the original revenue record in question and found that in the Khasra of 1372 Fasli an entry of Plot No. 78/1 with an area of 1.02 acres in the main column Balli and Baij Nath, original tenants, were recorded in Ziman VIII but in the remarks column where Qabis entries were to be made was crossed in red Ink and during the portal the Lekhpal had entered Dhan, Bhadal as the crops shown over the entire plot. Thereafter the Lekhpal crossed the name of Balli and Baij Nath over the main column in red Ink and in the Khasra has made a fresh entry where Nauratam Tewari has been recorded as trespasser. He found that portal had already been made and the remarks column was crossed with red ink. He had no opportunity to enter the name of the trespasser.

22. In Khasra 1373 Fasli, the name of Nauratam Tewari has been entered in column VI as sub-tenant under Ziman XIX. It was further found that the entry was not in accordance with para 83 (d) of the Land Record Manual. There was no Khasra available for the year 1374 Fasli.

23. In the year 1375 Fasli. the names of Balli and Baij Nath have been removed from the chief tenants" column and the name of Respondent No. 3 has been entered therein as Sirdar. The Additional Commissioner further found that there was no evidence on the record that there was demarcation of agricultural land as provided u/s 4 of U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956. The appellate court did not rely upon these entries. As regards oral evidence, he took the view that the oral evidence adduced by the Defendant regarding other points having been disbelieved and the documentary evidence relating to the possession having found to be collusive and fictitious was not reliable. The finding recorded by the trial court on the question of possession was held illegal.

24. The Board of Revenue did not summon the Original Khasras which were relied upon by the Respondent No. 3. It came to the conclusion that the entry of Khasra of the year 1373 Fasli was in accordance with law as it was not in violation of para 84 (d) of the Land Record Manual. The provision is applicable when entry is made in column 5 but if there is an entry of Qabiz in remarks column no such notice is needed. The Board of Revenue did not consider with regard to entry of 1372 Fasli. The possession of Respondent No. 3 in Khasra 1373 Fasli was recorded in column No. VI as sub-tenant. It was never the case of Respondent No. 3 that he entered into possession as sub-tenant of the tenant-in-chief.

25. Balli had filed a suit in the Civil court in the year 1966 i.e., in 1373 Fasli. The Lekhpal has made entry in 1373 Fasli. None of the parties filed Khasra of 1374 Fasli. The suit remained pending till the year 1969 when the civil court decided

an issue that the suit is not cognizable by it. Thereafter the present Suit No. 322 of 1969 was filed on 22.10.1969 in the revenue court and in para 4 of the plaint, the Plaintiffs stated that Respondent No. 3 had got his name entered in the revenue record collusively with the Lekhpal. The Board of Revenue while deciding the matter on appreciation of the evidence was to consider the entire evidence on the record, documentary and oral. Respondent No. 3 had adduced evidence on the allegation that he obtained possession through Baij Nath with the consent of Zamindar. There was a petition between Balli and Baij Nath and the land in dispute came to the share of Baij Nath. He surrendered his rights to the Zamindar and with the consent of the Zamindar he delivered possession to him on 3rd December, 1963 (1370 Fasli). There is no entry of 1370-71 Fasli in the name of Respondent No. 3.

26. The trial Court without strictly scrutinising the nature of entries and its correctness relied upon it and accepted the oral evidence in support of it. The Additional Commissioner found the entries collusive. The Board of Revenue simply without itself appreciating the oral evidence made a remark that the view of the trial court should be accepted regarding oral evidence. The appreciation made by the trial Court was based on the revenue entries. In case the appellate court has not accepted those revenue entries and found them as fictitious or collusive but did not further examine the statement of each of the witnesses in detail, it was the duty of the Board of Revenue, if it wanted to record its own finding, to reappraise the entire oral evidence.

27. The oral evidence was further to be considered with regard to pleadings of the parties and their statement. Respondent No. 3 came with the allegation that the possession was delivered to him by Baij Nath. He never stated that he acquired any right by adverse possession. Neither the trial court nor the Board of Revenue recorded any finding as to on what date the Plaintiffs were dispossessed by Respondent No. 3 and he claimed right adversely to the Plaintiffs. The Lekhpal had made entry in Khasra 1373 Fasli in column No. VI indicating Respondent No. 3 as sub-tenant which was not the case of either of the parties. The oral evidence was to be examined in the context of documentary evidence and pleadings of parties. Balli had already filed suit in the year 1966 (1373 Fasli). Filing of suit is only relevant to show that he was asserting his rights over the land in dispute and in such circumstances whether the Respondent No. 3 had obtained possession or was in possession in that year was also to be considered.

28. In view of the above, the writ petition No. 3936 of 1982 is allowed. The order of the Board of Revenue dated 19.3.1982 is hereby quashed. The case is directed to be decided afresh by the Additional Commissioner taking into consideration the entire evidence on the record, oral and documentary, and record a fresh finding on the question as to whether Respondent No. 3 acquired rights by adverse possession and whether the suit is barred by limitation. Any observation made in this order shall not affect the merit of the case while assessing the evidence.

29. As the order of the Board of Revenue dated 19.3.1982 has been set aside, it is not necessary to decide writ petition No. 6834 of 1983 on merits. When the matter is taken up before the Commissioner, it will be open to the transferees to file application for impleadment and on such application being made the Additional Commissioner shall pass appropriate order.

30. The parties shall bear their own costs.