

(1982) 09 AHC CK 0025

In the Allahabad High Court

Case No : Writ Petition Nos 1899, 1901, 1902, 1903, 1904 and 1905 of 1982

State of U.P.

APPELLANT

Vs

Smt. Vimla Sambharwal and Others

RESPONDENT

Date of Decision : 23-09-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Forest Act, 1927 — Section 18(4), 20, 27A, 4, 9
Limitation Act, 1963 — Section 5
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 11C, 3, 48, 9(2)

Citation : (1982) AWC 878

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

Bench : Single Bench

Advocate : Umesh Chandra, Krishna Chandra and C.P. Johri, for the Appellant;

Final Decision : Allowed

Judgement

K.N. Goyal, J.—These Writ Petitions have been filed by the State of U.P. through Forest Department. They are directed against the order of the consolidation authorities contained in Annexures 1, 2 and 9 to each of the writ petitions.

2. Certain land was entered in the basic year Khatauni, at the start of the Consolidation operations, in the names of Respondent No. 1 in each of these petitions. The Forest Department filed objections u/s 9(2) of the U.P. Consolidation of Holdings Act. These objections were to the effect that the land in question had already been notified as reserve forest u/s 20 of the Indian Forest Act, 1927 as amended in its application to this State and, as such, the opposite parties had no subsisting right in that land. These objections were dismissed in default of parties on 28-11-1975 and the basic year entries were accordingly left undisturbed by the Consolidation Officer. It is said on behalf of the State that the Forest Department officials were subsequently told by the officials of the Consolidation Department that the original objections filed by Forest Department were not available on record. As such, they filed fresh objections on 8-5-1976 in

ignorance of the fact that the earlier objections had actually been dismissed in default on 28-11-1975. The new objections were rejected on 20-7-1977 on the ground that they were not maintainable because the original objections, filed by the Forest Department, had already been dismissed on 28-11-1975. Thereafter, restoration applications were filed on 18-8-1977. These were dismissed by the Consolidation Officer on 26-12-1977. Against this dismissal time-barred appeals were filed on 17-2-1978. The limitation for these appeals had expired 18 days earlier. Applications u/s 5 Limitation Act were also made for condonation of delay in the filing of the appeals. The Settlement Officer (Consolidation) held that the appeals were not maintainable and that the orders of the Consolidation Officer, rejecting the restoration applications on 18-8-1977, could only be challenged in revision before the Deputy Director of Consolidation. Thereafter, the State took the matter in revision to the Deputy Director of Consolidation who agreed with the Settlement Officer (Consolidation)'s view that no appeals were maintainable against the order dated 18-8-1977.

3. Aggrieved by these orders of the Consolidation authorities the State has filed these writ petitions.

4. Only Writ Petition No. 1904 of 1982 has been contested on behalf of the opposite party No. 1 while in the other writ petitions the opposite parties have not put in appearance inspite of sufficient service and the writ petitions have been heard ex-parte against them. 5. Sri Umesh Chandra, learned Counsel for opposite party No. 1 in writ petition No. 1904 of 1982, has urged several preliminary objections to the maintainability of this writ petition. The first objection is on the ground of laches. The writ petition has been filed about four weeks later than the usual period of 90 days. As no period of limitation has been prescribed for writ petitions and the period of 90 days is adhered to only as a matter of court practice, without any rigidity, learned Counsel for opposite party has not pressed this objection.

6. Another preliminary objection is that while before the consolidation officer and the Settlement Officer (Consolidation), apart from opposite party No. 1 Smt. Vimla Sambharwal, some other co-sharers had also been impleaded those co-sharers had not been impleaded by the State in its revision before the Deputy Director of Consolidation or in the writ petition before this Court. As such, it has been contended that the decision has become final against the other co-sharers. Accordingly, the argument runs, the entertainment of this writ petition against Smt. Vimla Sambharwal alone may result in inconsistent decisions in a matter in which the interest of Smt. Vimla Sambharwal and her co-sharers is joint. Learned Standing Counsel, Sri H. N. Telhari, has, on the other hand, contended that so far as the writ petition is concerned, the other co-sharers have been rightly not impleaded because they were not parties before the Deputy Director of Consolidation, and that when the matter goes back to the Deputy Director of Consolidation, it would be open to him to give notice to the other co-sharers in case any adverse order is proposed to be passed by him against them. He has

further contended that Section 11C of U.P. Consolidation of Holdings Act provides that in the course of hearing of an objection, appeal or revision, the authorities may direct that any land which vests in the State Government or the Gaon Sabha or any other local body or authority may be recorded in its name even though no objection, appeal or revision has been filed by such Government, Gaon Sabha, body or authority. Moreover, u/s 48 of the Act it is open to the Deputy Director of Consolidation to exercise suo motu powers of revision and, as such, even though no revision may have been filed against the order dated 28-11-75 at all or in respect of the order of SOC against other co-sharers, the Deputy Director of Consolidation could act on his own, of course after allowing those other parties who had not been impleaded an opportunity of being heard. As regards Section 11C, Sri Umesh Chandra has contended that this section is not applicable in a case where the State Government or the Gaon Sabha or other local body or authority has preferred an objection, but is applicable only to a case where they have not preferred an objection, appeal or revision. This, in my opinion, is an unduly restrictive interpretation of Section 11C. The words of Section 11C are that the authorities may make the direction as mentioned in that section "even though no objection etc. had been filed by such government etc." The words "even though" cannot be interpreted to mean "only if" or "only in case". The words imply that irrespective of whether or not any objection, appeal or revision has been filed by the Government etc., it is open to the consolidation authorities to make a direction in favour of the Government or other authority. A Full Bench of this Court has held in *Amir Hmain v. The Deputy Director of Consolidation, Moradabad* 1977 AWC 1 that "the various provisions of the Act would show that a duty has been cast on the Consolidation authorities to maintain correct record of persons entitled to the land". (Vide para 12 of the Report). Accordingly, even though it is open to the Government or other Authority to file objections u/s 9(2) of the Act, the Consolidation authorities ought to make an order in favour of Government etc. where it is so warranted even though no objection has been filed u/s 9(2) of the Act. It was also observed in para 14 of the Report that "it is the duty of a court of law to adopt an interpretation of a provision of an Act which is just and reasonable and should avoid making a mechanical interpretation of the words as far as the context permits."

7. The provisions of Section 11C are legislative recognition of the notorious fact that in our country the officials of Government or other authorities are not always prompt or vigilant enough to safe-guard the property rights vesting in the Government and other public bodies. It is for this reason that unlike the Civil Courts, the Consolidation Authorities have been required to watch the interest of the Government and such other bodies as are mentioned in that section even in the absence of any objection etc. filed by the latter. It follows that even where no objection, appeal or revision has been filed by the Government etc, then also the Consolidation Authorities should ensure that a correct record is made in accordance with facts brought before them. I am, therefore, not inclined to uphold this preliminary objection as well.

8. A third preliminary objection, raised by learned Counsel for the opposite party is that the State Government has in atleast five writ petitions claimed the same area of 7.520 Acres of plot No. 18 Minjumla. This is not a preliminary objection, but a matter pertaining to merits of the claim made by the State.

9. The first question that arises is whether the view taken by the Settlement Officer (Consolidation) and the Deputy Director of Consolidation to the effect that no appeal was maintainable against the Consolidation Officer's order dated 18-8-1977, was correct or not ? It is the consistent view of this Court, as noted in *Pheku v. Joint Director of Consolidation* 1981 A.L.J. 1233 by Hon''ble K. N. Misra, J., that an appeal does lie against an order dismissing a restoration application though not against an order allowing such application. Sri Umesh Chandra has brought to my notice a recent decision of the Supreme Court reported in *Ashok Kumar Vs. State of Jammu & Kashmir*, . It is to the effect that an order allowing a restoration application is not appealable, but their Lordships have not dealt with a case of an order refusing restoration. Thus the decisions of this Court are not inconsistent with this Supreme Court decision. It must, therefore, be held that the view taken by the Settlement Officer (Consolidation) and the Deputy Director of Consolidation in regard to the maintainability of the appeal was clearly erroneous and it cannot be sustained. The proper course for the Deputy Director of Consolidation was to send the appeals back to the Settlement Officer (Consolidation) for decision and for Settlement Officer (Consolidation) to decide those appeals on merits.

10. Learned Counsel for the opposite party has pointed out that the Deputy Director of Consolidation has not dismissed the revisions merely on the ground of aforesaid erroneous view of law in regard to the maintainability of appeals. The DDC has further added that there was no sufficient cause for the restoration application. The Deputy Director of Consolidation does, no doubt, have a jurisdiction u/s 48 of the Act to revise an order of the Consolidation Officer as also of the Settlement Officer (Consolidation), but if the Settlement Officer (Consolidation) had taken the view that an appeal did lie and if the Settlement Officer (Consolidation) could be persuaded to hold that the restoration ought to have been allowed, then the likelihood of interference by the Deputy Director of Consolidation with such an appellate order would have been much less than if the matter was considered by the latter originally.

11. Learned Counsel for the opposite party has tried to show that there was in fact no sufficient cause for the restoration application. The pairakar of the Forest Department was present on 24-11-1975 and again on 27-11-1975 and had secured an adjournment for 28-11-1975. As such, the assertion in the application for restoration that the Forest Department had no knowledge of the date of hearing could not be correct. He has also cited some authorities for the view that Section 5 of the Limitation Act can be applied only where sufficient cause is established and that the State is not a favoured litigant in that regard. As against those authorities, the learned standing counsel has cited other

decisions in which it has been held that a litigant should not suffer for any inaction, deliberate omission, or misdemeanor of his agent. (Vide Rafiq and Another Vs. Munshilal and Another, . A Division Bench of this Court in State of U.P. v. Sant Bux Singh Special Appeal No. 27 of 1973 decided on 21-3-1980 was called upon to consider the question of delay in connection with writ petition which was filed about 7 years after the order impugned in that case. In that connection their Lordships made the following observations:-

In considering the question of delay we cannot lose sight of the fact that the Petitioners in the writ petition are the State of U.P. and the Forest Department. The property in dispute is worth several lacs of rupees. In paragraph 37 of the writ petition the value of the property involved has been stated to be Rs. ten lacs. In the counter affidavit Respondent No. 1 has merely denied this figure but has not set up a counter figure. We can, therefore, safely assume that the property in dispute is worth Rs. ten lacs. In case the writ petition is dismissed on the technical ground of laches the loss will fall on the public, that is, on the community in general and a private individual will derive huge monetary benefit. All this would be on account of what may, at the most be said to be the negligence of the officers of the State. For the faults or negligence of a few officers of the State the community in general should not suffer. In taking this view we are fortified by the decision of their Lordships of the Supreme Court in Nav Rattanmal and Others Vs. The State of Rajasthan, wherein it has been observed that the maxim "nullum tampus occurit regi" applies to the Crown. The maxim applicable to the subject is "vigilantibus et non dormientibus jura subveniunt.

Learned counsel for opposite party then pointed out that these observations were made in the context of delay in the filing of a writ petition for which no period of limitation is prescribed. That distinction is no doubt there, but I do not think it proper or expedient to do well on the merits of the restoration application as this is a matter which should be decided by the Consolidation authorities in the first instance.

12. Learned Counsel for the opposite party has further contended that the averments in paras 1 to 31 of the counter affidavit filed by this opposite party on 28-4-1982, had not been controverted in para 3 of the rejoinder affidavit dated 5-5-1982 and as such, they should be deemed to have been admitted. Para 3 of the rejoinder affidavit, which has been sworn on the basis of legal advice, is as follows :-

That the contents of para 1 to para 31 of the counter affidavit give only the history of the case and the origin of tenancy in favour of the opposite party No. 1. That the deponent has been advised to state and believing the advice to be correct deponent does state that the narration of facts as given in the above paras is redundant to the point in issue involved in the writ petition. The only point involved in the writ petition is that the orders of C. O. 13 Mihinpurwa dated 16-12-77, the order of SOC dated 16-5-79, the order of the Deputy Director of

Consolidation (at camp Bahraich) dated 26-9-81 have been passed in utter disregard of the law and both the courts of DDC and SOC have failed to exercise their jurisdiction in holding that no appeal lies against the order passed by the Consolidation Officer rejecting the application of the Forest Deptt. for setting aside the ex parte order passed on 28-11-75.

Although this para is not happily worded, inasmuch as it does not clearly express that the averments in paras 1 to 31 of the counter affidavit were denied or not admitted, it is nonetheless clear that the same cannot be treated as implied admission of the aforesaid paras of the counter affidavit on the analogy of Order 8 Rule 5 Code of Civil Procedure. It is significant that the para has not been sworn on the basis of perusal of records, but merely on the basis of legal advice. Thus it is only a plea to the effect that the merits in respect to the alleged title need not be gone into in the writ petition. It is thus only a refusal to plead and not a pleading in respect of averments in paras 1 to 31 of the counter affidavit. The rejoinder affidavit and the writ petition have to be read in their entirety and by no stretch of imagination could it be said that the State has admitted the title of the opposite party.

13. The opposite party has no doubt referred in the counter affidavit to an alleged allotment of land in favour of her vendors under the U.P. Land Utilization Act and to Pattas granted by the Collector. No details of the order of allotment or of pattas have been given in para 15 of the counter affidavit. As against this, the State has filed the notifications under sections 4 and 20 of the Indian Forest Act. Reliance has also been placed on behalf of the State on Sections 9, 18(4) and 27A of the Indian Forest Act. There is thus on one hand a Bhumidhari Sanad, coupled with entries in the basic year Khatauni in favour of the opposite party and her predecessor, and, on the other hand, notifications under the Indian Forest Act, 1927 in favour of the State Government. Learned Standing Counsel has in this connection relied on Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, and Om Singh v. State of U.P. 1980 ALJ 77 in support of his contention that a notification u/s 3 of the Act could be issued even in respect of Bhumidhari land provided it is forest or waste land.

14. Sri Umesh Chandra, learned Counsel for opposite party, on the other hand, relied on Divisional Forest Officer Kheri v. D.D.C. Shahjahanpur 1980 ALJ 466 and The State of U.P. Vs. Mahant Avidh Nath, for the view that the rights of tenure-holders are not extinguished u/s 9 of the Indian Forest Act merely because of notifications issued u/s 4 or 20 of the Act if the land in question was not forest or waste land. It is not necessary to enter into this controversy, as the merits of the case are still to be investigated and I am not even expressing any final view on the merits of the restoration application. Suffice it to say that the material placed before me is not such as to warrant the throwing out of the writ petitions on the ground that no useful purpose will be served by remanding the case to the Deputy Director of Consolidation even though the view taken by him on the maintainability of the appeals be wrong.

15. In the result, the writ petitions are allowed and the order of the Dy. Director of Consolidation, Annexure No. 1 in each petition, is hereby quashed. The Deputy Director of Consolidation shall readmit the revisions at their original numbers and decide them afresh in accordance with law.

16. In the circumstances of the case, I make no order as to costs.

17. Before this order dictated in open court was signed, Sri Umesh Chandra, learned Counsel for opposite party, suggested that having regard to the heavy stakes involved, both for the Government and the opposite parties and also with a view to expediting the final decision of the cases on merits, it would be desirable if the Deputy Director, when these cases go back to him, decides them finally at his own level after taking such evidence as may be produced by the parties. For the most part only documentary evidence would be needed and any oral evidence that may be adduced would be merely of a formal nature. Learned Standing Counsel, Sri Tilhari, stated that he had no objection to the cases being decided in this manner by the Deputy Director, which he can undoubtedly do in view of the provisions of Section 11C and the suo motu powers conferred on him u/s 48 to reopen the decision dated 28-11-75. As the parties represented before me are agreed to this course of action and as the opposite parties in the six other writ petitions have not chosen to contest the writ petitions, there seems no objection to the Deputy Director proceeding to act in the manner suggested above. Before doing so, however, he would have to give notice to the co vendees of Vimla Sambharwal who were not parties to the revision before him, and also to the opposite parties in the other six writ petitions the co-vendees of Vimla Sambharwal are not parties before this Court either, I do not think it proper to issue any direction to the Deputy Director in this regard. It shall be open to him to take a proper decision after notice to the said co-vendees.