

Bhola Singh and Others Vs. Indra Narain and Others

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Court : Allahabad

Decided On : Sep-02-1998

Reported in : 1999(1)AWC62

Judge : Sudhir Narain, J.

Acts : Uttar Pradesh Zamindar Abolition and Land Reforms Act, 1950 - Sections 229B; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 103, 107 and 107 (2); [Constitution of India](#) - Article 226

Appeal No. : C.M.W.P. No. 15655 of 1986

Appellant : Bhola Singh and Others

Respondent : indra Narain and Others

Advocate for Def. : S.C., ;G.L. Tripathi, ;A.N. Shukla, ;R.N. Singh and ;V.K. Chandel, Advs.

Advocate for Pet/Ap. : R.C. Mishra, ;Radhey Shyam and ;L.M. Tewari, Advs.

Judgement :

Sudhir Narain, J.

1. This writ petition is directed against the order dated 27.6.1984 passed by the Additional Commissioner whereby he allowed the appeal and decreed the suit filed

by plaintiff respondent No. 1, and the order dated 4.7.1986 passed by the Board of Revenue affirming aforesaid order in second appeal.

2. The facts of the case in brief are that one Anant Ram was co-tenant to the extent of 1/3rd share in the land in dispute. He executed registered sale deed on 9.7.1965 in favour of Indra Narain, respondent No. 1. The petitioners are co-tenants to the extent of 2/3rd share in the land in dispute. They filed suit for cancellation of sale deed dated 9.7.1965. The civil court dismissed the suit on 13.5.1970. They preferred appeal against said decree. The Additional District Judge dismissed the appeal on 9.11.1970. The crops were standing over the land in dispute. Respondent No. 1 filed suit for damages as the petitioners had taken away the crops. The suit for damages was decreed by the trial court. The petitioners filed appeal and the appeal was dismissed. respondent No. 1 filed Suit No. 112/296/123/267 of 1981-82 under Section 229B of U. P. Zamindari Abolition and Land Reforms Act (in short referred to as the Act) in the Court of Sub-Divisional Officer. Allahabad. on 27.1.1971 for declaration that he is co-tenant in the land in dispute to the extent of 1/3rd share on the allegation that Anant Ram was co-tenant to the extent of 1/3rd share, and he having executed sale deed in his favour, was entitled for declaration of his right over the land in question.

3. The petitioners filed written statement and denied that sale deed was executed by Anant Ram. The plea was that Anant Ram was their grandfather. He left the village in the year 1961 and when he came back in the year 1962. he wanted to take possession from the defendant petitioners, but they did not permit him to take possession. There was dispute and Anant Ram had taken some money and surrendered his right.

The parties led evidence before the trial court on all the issues. The trial court dismissed the suit on the ground that the suit was not maintainable for declaration of cotenancy right. Plaintiff respondent filed appeal before the Additional Commissioner. The Additional Commissioner allowed the appeal on 27.6.1984, holding that the suit for declaration of co-tenancy right was maintainable. As the evidence was on record, he found that Anant Ram had executed sale deed and the petitioners failed to prove ouster of Anant Ram. The petitioners filed second

appeal before the Board of Revenue which was dismissed on 4.7.1986. These orders have been challenged in the instant case.

4. I have heard Shri Radhey Shyam. learned counsel for the petitioners and Shri R. N. Singh. learned counsel for contesting respondent.

5. The learned counsel for the petitioners submitted that the trial court having dismissed the suit on preliminary issue, viz., the suit was not maintainable for declaration of tenancy right and other issues having not been decided, the Additional Commissioner, in appeal, should have remanded the matter to the trial court to decide all other Issues. He has placed reliance upon the decision Dwarka Nath Prasad Atal v. Ram Rati Devi. AIR 1980 SC 192, wherein it was held that if the decision of the trial court is reversed on one issue, the appellate court should have remanded the matter to give opportunity to the parties to adduce evidence on other issues. In Maharaja Dharmendra Prosad Singh and another v. State of U. P. and others. AIR 1973 Ail 174. It was held that if the appellate court sets aside the order of the trial court in the interest of justice, it can remand the suit to the trial court. In the instant case, the parties had already led oral as well as documentary evidence before the trial court on all issues. The trial court dismissed the suit only on the ground that the suit was not maintainable for declaration of co-tenancy right. The view taken by the trial court was manifestly illegal.

6. The plaintiff was entitled to seek declaration as regards cotenancy right. In case, when the parties had led evidence on all the issues, the trial court should have decided all the issues while deciding issue No. 4 relating to the question of Jurisdiction of the Court to decide the suit.

7. Section 103 of the Code of Civil Procedure, 1908, 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 which has not been determined by the lower appellate court or both by the Court of first instance and the lower appellate court. The powers of lower appellate court is much wider under Section 107 of the Code of Civil Procedure. Sub-section (2) of Section 107, thereof, provides that the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on

Courts of original jurisdiction in respect of suits instituted therein. The lower appellate court was, thus, fully empowered to determine any issue of fact and law which was not determined by the trial court. The evidence was already on record in respect of all the issues which were framed by the trial court.

8. There were basically two questions ; firstly, as to whether the sale deed was executed by Anant Ram in favour of respondent NO. 1 and secondly, as to whether Anant Ram was ousted by the co-tenure-holders. The petitioners had filed suit for cancellation of sale deed executed by Anant Ram. The suit was dismissed by the civil court on 13.5.1970 and this Judgment was affirmed by the lower appellate court. The findings recorded by the appellate court became final. There was hardly any thing further to be decided by the revenue court regarding the execution of the sale deed.

9. The second question was as to whether the petitioners had perfected their rights by adverse possession. The Additional Commissioner recorded finding that the petitioners failed to prove that they were in adverse possession. This finding has been affirmed by the Board of Revenue. The learned counsel for the petitioners assailed this finding. He urged that the petitioners had led oral evidence to prove their adverse possession. They had produced Ram Singh D. W. 1, Ram Kishun D.W. 2, Ram Samujh D.W. 3. Indra Pal D.W. 4 and Ram Saran D.W, 5. Their statements have been annexed as annexures in the instant writ petition. It was admitted by the petitioners that Anant Ram was co-tenant to the extent of 1/3rd share in the land in dispute and there was no partition amongst co-sharers. It was for the petitioners to establish that they had ousted Anant Ram. In the written statement filed by the petitioners, they had taken plea that Anant Ram had left the village in the year 1961 and he came back in the year 1962. The petitioners did not permit him to take possession over the land in dispute. There was dispute in this respect and thereafter Anant Ram after taking the amount surrendered his right from the land in dispute. This plea in the written statement is belied by the fact that Anant Ram executed sale deed on 9.7.1965 in favour of respondent No. 1 after accepting the sale consideration from him. In case he had surrendered his right in favour of the petitioners, then he could not have executed the sale deed. On the other hand, he claimed himself as Bhwmidhar of the land in dispute and

executed sale deed in favour of respondent No. 1. The petitioners filed suit for cancellation of the sale deed and it was held that Anant Ram was Bhumidhar of the land in dispute and was entitled to execute the sale deed. Further, respondent No. 1 filed suit for damages in the civil court in respect of crops which was standing over the land in dispute on the allegation that the petitioners illegally removed the crops. The suit was decreed by the trial court and judgment to this effect was affirmed in appeal on the finding that respondent No. 1 was entitled to have share in the crops. If the version of the petitioners is accepted that they had ousted Anant Ram and he had no right of possession, the suit for damages, could not have been decreed. The finding recorded in the suit is binding upon the petitioners. The oral evidence, in these circumstances, was not of much importance. In *Thakur Prasad Pandey v. Deputy Director of Consolidation, Azamgarh and another*, 1981 AWC 359, it has been held that if the Dy. Director of Consolidation attaches greater importance to documentary evidence in preference to oral evidence and there was no express discussion of oral evidence in the order passed by the Dy. Director of Consolidation, the Court in writ jurisdiction normally should not interfere.

10. Considering the facts and circumstances of the present case, it is not a fit case for Interference under Article 226 of the [Constitution of India](#). The writ petition is accordingly dismissed with costs.