

Shyam Dhar Vs. Xith Additional District Judge and ors.

Shyam Dhar Vs. Xith Additional District Judge and ors.

SooperKanoon Citation : sooperkanoon.com/465401

Court : Allahabad

Decided On : May-04-2004

Reported in : 2004(3)AWC1889

Judge : Arun Tandon, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9; [Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950](#) - Sections 331; [Constitution of India](#) - Articles 226 and 227

Appeal No. : C.M.W.P. No. 900 of 1991

Appellant : Shyam Dhar

Respondent : Xith Additional District Judge and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : B.D. Ojha and ;B.B. Paul, Advs.

Disposition : Writ petition allowed

Judgement :

Arun Tandon, J.

1. Heard Sri B.B. Paul on behalf' of the petitioner. Nobody is present on behalf of the respondent Nos. 3 to 6. Standing Counsel is present on behalf of the

respondent Nos. 1 and 2.

2. Petitioner filed Original Suit No. 140 of 1985 in the court of Civil Judge, Allahabad claiming relief in the nature of permanent injunction restraining the defendant from interfering in the possession of the petitioner over the plot No. 345, for restraining the defendant from demolishing the Dalan as well as for restraining the defendant from removing the Nand, Charni Khunta of the petitioner.

3. From the plaint, which has been enclosed alongwith the writ petition, it is clear that relief No. A-1 to A-3 have subsequently been added. By means of the said relief the plaintiff has sought the relief for demolition of the wall constructed during the pendency of the suit proceedings as well as for possession of the land after demolition of the said construction.

4. In the said suit written statement was filed. An objection was taken that since the suit is regarding Bhoomidhari land and relief prayed for is for possession, the suit was barred by the provisions of Section 331 of the U.P.Z.A. and L.R. Act. On the said objection issue was framed, being issue No. 8, by the trial court.

5. The trial court by means of the order dated 25th April, 1986 decided the said issue against the plaintiff and held that the suit filed was not maintainable. However, granted time to plaintiff to inform the Court to which Court he wants to file the suit after it is returned for presentation and matter was directed to put up on 9th May, 1986 for further orders.

6. The plaintiff in turn moved an application, being paper No. 56-D for time being granted to file an appeal against the said order of the trial court deciding issue No. 8 dated 25.4,1986. The application filed by the plaintiff was rejected by means of the order, dated 22nd May, 1986 and the plaint was returned to the plaintiff for being presented wherever he so likes.

7. From the record it is further clear that the plaintiff preferred an appeal against the order dated 22.5.1986 only. The said appeal was numbered as Misc. Appeal No. 20 of 1990. The appeal has been rejected by the First Additional District Judge by means of the order dated 8.8,1990 while dismissing the said appeal findings

have been recorded by the Additional District Judge to the effect that the order of the trial court dated 25.4.1986 holding that the suit was barred by the provision of Section 331 of the U.P.Z.A. and L.R. Act was just and legal.

8. Feeling aggrieved by the order of the Additional District Judge dated 8.8.1990 as also against the order of the trial court dated 25.4.1986, deciding issue No. 8, the petitioner has filed the present writ petition.

9. It has been fairly stated before this Court by the counsel for the petitioner that no appeal against the order dated 25.4.1986 was filed by the plaintiff. However, it has been contended that the said order has been challenged by means of the present writ petition. It is contended that although the petitioner had an alternative remedy by way of appeal against the said order dated 25.4.1986 but under some misconceived advice no appeal against the said order was filed. The Additional District Judge under the order dated 8.8.1990 has also decided the legality or otherwise of the order passed by the trial court deciding issue No. 8.

10. In such circumstances, it is being contended that this Court may look into the legality of the order passed by the trial court dated 25.4.1986 and also of the order passed by the Additional District Judge dated 8.8.1990.

11. On behalf of the State it is contended that since the petitioner has not filed any appeal against the order of the trial court dated 25.4.1986 deciding issue No. 8, the said order has become final between the parties and this Court for the first time may not adjudicate upon the merit of the said order passed by the trial court. In any case the petitioner has efficacious alternative remedy against the order of the trial court dated 25.4.1986, which he did not avail and as such the writ petition is legally not maintainable so far as the order dated 25.4.1986 is concerned.

12. I have heard counsel for the parties and have gone through the record of the writ petition.

13. It is not in dispute that the petitioner has alternative remedy available to him against the order dated 25.4.1986 and the writ petition filed by him against the said order dated 25.4.1986 should have normally been dismissed on the ground of

availability of the alternative remedy. However, this Court cannot lose sight of the fact that the remedy lay before the District Judge and since the Additional District Judge while passing the order dated 8.8.1990 had already adjudicated upon the merits of the order holding that the suit as filed by the plaintiff was barred by Section 331 of the U.P.Z.A. and L.R. Act, it would not be fair to insist that the petitioner should avail the alternative remedy and writ petition filed by him is liable to be dismissed.

14. In such circumstances even if petitioner has alternative remedy and he did not avail the same, this Court, in the proceedings under Article 226 of the [Constitution of India](#), is satisfied that the facts and circumstances of the case justify the exercise of power under Articles 226 and 227 of the [Constitution of India](#) despite availability of the alternative remedy to petitioner.

15. This Court now proceeds to consider the merit of the order passed by the trial court dated 25.4.1986, whereby it has been held that the suit filed by the plaintiff was barred by Section 331 of the U.P.Z.A. and L.R. Act.

16. From the relief prayed by the petitioner it is apparently clear that one of the reliefs prayed for, by the petitioner was for demolition of the construction raised by the defendant during the pendency of the suit and for possession being handed over of the land after demolition of the construction raised.

17. This Court in the judgment in 1987 RD 111, has held that the relief for demolition can only be granted by the civil court. In view of the law laid down by this Court, the relief with regard to demolition and possession over which the construction has been raised by the defendant can be subject matter of adjudication only in the civil proceedings and the provisions of Section 331 will not be attracted. In view of the aforesaid, the order passed by the trial court holding that the suit as filed by the plaintiff was barred by Section 331 of the U.P.Z.A. and L.R. Act is legally not sustainable in the eyes of law.

18. The trial court has failed to take into consideration that one of the reliefs prayed by the plaintiff could be granted by the civil court only,

19. In view of the aforesaid, the order passed by the Additional District Judge dated 25.4.1986 holding that the suit as filed by the plaintiff is not maintainable and is barred by Section 331 of the U.P.Z.A. and L.R. Act is hereby set aside.

20. Since the order passed by the trial court dated 25.4.1986 has been set aside by this Court, the order passed on the application seeking time as well as the order passed by the Additional District Judge in appeal against the said order are rendered infructuous.

21. In view of the aforesaid the writ petition is allowed. The order passed by the trial court is hereby set aside. The Suit No. 140 of 1985 is restored to its original number.

22. Since the suit as filed is pending since 1985, it is expected that the trial court should decide the said suit at the earliest possible, preferably within a period of six months from the date a certified copy of this order is produced before the Court.

23. It is needless to point out that no unnecessary adjournment shall be granted to any of the parties.