

Smt. Kanti Devi and anr. Vs. Additional Commissioner (Judicial/Second) and ors.

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SooperKanoon Citation : sooperkanoon.com/478316

Court : Allahabad

Decided On : Apr-22-2009

Reported in : 2009(3)AWC2525

Judge : S.P. Mehrotra, J.

Appellant : Smt. Kanti Devi and anr.

Respondent : Additional Commissioner (Judicial/Second) and ors.

Advocate for Def. : Shri. M.C. Tiwari

Advocate for Pet/Ap. : Shri. A.K. Malviya, Sri. A. K. Malviya

Disposition : Petition dismissed

Judgement :

S.P. Mehrotra, J.

1. The present writ petition has been filed on behalf of the petitioners, inter alia, praying for quashing the order dated 9.1.2006 (Annexure-10 to the writ petition) passed by the Additional Commissioner (Judicial/Second), Varanasi Division, Varanasi (respondent No. 1) in Appeal No. 42 of 2000.

2. It appears that the respondent Nos. 2 to 10 filed a suit under Section 229B of the U.P.Z.A. and L.R. Act, 1950 (in short 'the Z.A. Act'), inter alia, praying for a decree declaring them to be bhumtdhar of the land/pokhri in question. The said suit was numbered as Suit No. 91 under Section 229B of the Z.A. Act.

3. Copy of the plaint of the said suit has been filed as Annexure-5 to the writ petition.

4. A written statement dated 20.1.1998 was filed on behalf of the State of Uttar Pradesh, copy whereof has been filed as Annexure-6 to the writ petition.

5. The Sub-Divisional Officer, Mohammadabad, district Ghazipur by the order dated 5.6.2000 (Annexure-8 to the writ petition) dismissed the said suit as not maintainable. Thereupon, the respondent Nos. 2 to 10 filed an appeal under Section 331(3) of the Z.A. Act before the Additional Commissioner, Varanasi Division, Varanasi. The said appeal was numbered as Appeal No. 42 of 2000.

6. By the order dated 9.1.2006 (Annexure-10 to the writ petition), the respondent No. 1 allowed the said appeal and decreed the said suit filed by the respondent Nos. 2 to 10.

7. Thereafter, the petitioners (petitioner No. 1 being Gram Pradhan and petitioner No. 2 being Gaon Sabha) filed the present writ petition seeking the reliefs as mentioned above.

8. A counter-affidavit, sworn on 25.7.2006, was filed on behalf of the respondent Nos. 2, 3 and 4. In paragraph 14 of the said counter-affidavit, it is, inter alia, stated that against the decree passed by the respondent No. 1, second appeal is maintainable before the Board of Revenue, Uttar Pradesh at Allahabad under Section 331(4) of the Z.A. Act.

9. I have heard Shri A.K. Malviya, learned Counsel for the petitioners and Shri M.C. Tiwari, learned Counsel for the respondent Nos. 2 to 4, and perused the record.

10. Sri A. K. Malviya, learned Counsel for the petitioner does not dispute that second appeal lies under Section 331(4) of the Z.A. Act before the Board of Revenue, U.P. at Allahabad against the judgment and decree dated 9.1.2006, passed by the respondent No. 1. However, he submits that as the counter-affidavit and rejoinder-affidavit have been exchanged, the writ petition may not be dismissed on the ground of availability of alternative remedy. He submits that alternative remedy is not absolute bar as held by the Supreme Court in Harbanslal Sahnia and Anr. v. Indian Oil Corporation Ltd. and Ors. : (2003) 2 SCC 107.

11. It is further submitted by Shri Malviya that as the land in question being pokhri belongs to Gaon Sabha, the case of the petitioner is covered by the decision of the Supreme Court in Hinch Lal Tiwari v. Kamala Devi and Ors. 2001 (92) RD 689 : 2001 (3) AWC 2398 (SC).

12. In reply, Shri M.C. Tiwari, learned Counsel for the respondent Nos. 2 to 4 submits that the objection regarding the maintainability of the writ petition was taken in paragraph 14 of the counter-affidavit filed in the year 2006. It is further submitted that in view of the nature of controversy involved in the present case, it will be appropriate that the petitioners be relegated to the alternative remedy of filing second appeal before the Board of Revenue.

13. As regards the land in question being pokhri, it is submitted by Shri Tiwari that in view of the averments made on behalf of the respondent Nos. 2 to 10 in the suit, the same vested in the said respondents. It is further submitted that the decision in Hinch Lal Tiwari case (supra), is not applicable to the facts and circumstances of the present case. The controversy in Hinch Lal Tiwari case (supra), the submission proceeds, stained to the allotment of land under Section 122C of the Z.A. Act, and the cancellation of such allotment. The present case pertains to suit under Section 229B of the Z.A. Act.

14. I have considered the submissions made by the learned Counsel for the parties.

15. It is not in dispute that against the Judgment and decree dated 9.1.2006, passed by the respondent No. . 1, the petitioners have an alternative remedy of

filing second appeal before the Board of Revenue, U.P. at Allahabad under Section 331(4) of the Z.A. Act. Section 331 of the Z.A. Act is reproduced below:

331. Cognizance of suits, etc., under this Act-(1) Except as provided by or under this Act, no Court other than a Court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application or proceedings mentioned in Column 3 thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:]

[Provided that where a declaration has been made under Section 143 in respect of any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII, shall not apply to such holding or part thereof.]

[Explanation.-If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court could have granted.)

[(1A) Notwithstanding anything in sub-section (1), an objection that a Court mentioned in Column 4 of Schedule II, or as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised Jurisdiction with respect thereto shall not be entertained by any appellate or revisional court unless the objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.]

(2) Except as hereinafter provided no appeal shall lie from an order [or decree] passed under any of the proceedings mentioned in Column 3 of the Schedule aforesaid.

[(3) An appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 or in Order XLIII, Rule 1 of the First Schedule to that Code, passed by a Court mentioned in Column 4 of Schedule II to this Act in proceedings mentioned

in Column 3 thereof to the Court or authority mentioned in Column 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 from the final order or decree, passed in an appeal under sub-section (3), to the authority, if any, mentioned against it in Column 6 of the schedule aforesaid.]

16. It is true that the availability of alternative remedy is not an absolute bar to the entertainment of a writ petition under Article 226 of the Constitution of India. As held by their Lordships of the Supreme Court in Harbanslal Sahnia case (supra), in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is failure of principles of natural justice;

(iii) where the orders or proceedings are wholly without Jurisdiction or the vires of an Act is challenged.

17. In the present case, no enforcement of any of the fundamental rights is being sought. No failure of principles of natural justice has been shown. Nothing has been shown as to how the judgment and decree passed by the respondent No. 1 is without jurisdiction. There is no challenge to the vires of any Act. In the circumstances, none of the aforesaid contingencies arise in the present case.

18. Even otherwise, having regard to the nature of the controversy involved in the present case, I am of the opinion that it will be appropriate and in the interest of justice that the petitioners be relegated to the alternative remedy available to them of filing second appeal under Section 331(4) of the Z.A. Act.

19. In view of the above, the writ petition is liable to be dismissed on the ground of availability of alternative remedy to the petitioners.

20. The writ petition is accordingly dismissed on the ground of availability of alternative remedy to the petitioners.

