

(2009) 11 AHC CK 0284

Allahabad High Court

Case No: None

Seedheswari Promoters and
Builders (P.) Ltd.

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision: Nov. 7, 2009

Acts Referred:

- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 143(1)

Citation: (2010) 1 AWC 793

Hon'ble Judges: Shishir Kumar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Shishir Kumar, J.

The present writ petition has been filed quashing the order dated 20.8.2008 passed by Sub-Divisional Officer, Dadri, District Gautam Budh Nagar and to allow the application and declare Khasra Nos. 307/2, 308/1, 309/2, 329/1, 330, 334 to 336/1, 337/1, 338/1, 339/3, 340 to 385, 412, 414 to 416, 418 and 419 in village Ilhabas, Pargana and Tehsil Dadri, District Gautam Budh Nagar as non-agricultural, abadi land within the meaning of Section 143(1) of Zamindari Abolition and Land Reforms Act.

2. The facts arising out of the present writ petition are that petitioner is engaged in developing residential colony over Khasra mentioned above in the village Ilhabas, Pargana and District Dadri, district Gautam Budh Nagar (earlier known as district Ghaziabad) in the name of M/s Seedheshwari Promoters & Builders Pvt. Ltd.

3. Petitioner purchased the land for converting it into residential colony through various registered sale deeds after obtaining due clearance from the concerned authorities, including Collector, Ghaziabad as early as in 1988-89. Copies of the certificates have been filed as Annexure-1 to writ petition. The Tehsildar, Dadri has

given a certificate to that effect that land in question was out of consolidation operation. Petitioner moved an application before the Deputy Collector, Gautam Budh Nagar which was registered as Case No. 45/1989 u/s 143 of U.P. Zamindari Abolition and Land Reforms Act to declare the use of the said land purchased by petitioner to be residential and not connected with agriculture, horticulture, etc. Report was called for from Tehsildar Dadri who submitted a report stating therein regarding development of residential colony "Vikrant Vihar" is being done over the plots in question and, therefore, they may be declared as non-agricultural abadi land u/s 143 of the Act. In spite of aforesaid reports submitted by Tehsildar, Sub-Divisional Officer Dadri dismissed the said application vide its order dated 20.6.1989. Petitioner preferred an appeal before the Collector Ghaziabad. During this period, petitioner has also submitted residential lay out plan in view of the order passed in Writ Petition No. 5618 of 1990 permitting petitioner to carry out developmental work from the land in question for its proposed colony i.e., "Vikrant Vihar". Petitioner was again directed to submit lay out plan of his residential colony to Noida Authority for its consideration and approval in accordance with by-laws and the master plan which was in force on 4.6.1990. In pursuance of the aforesaid, plan was submitted but no order has yet been passed and petitioner has agitated the matter before the Court by filing a writ petition for adjudication.

4. The aforesaid land stood changed from agricultural to non-agricultural since 1988-89 which was also permitted by this Court as early as 4.6.1990. For the past 20 years, there has been no agriculture or horticulture or any related activities on the land in question and the same is being used as residential abadi land. It has been developed as residential colony and hundreds of residential plots have already been transferred to various plot holders with the permission of this Hon"ble Court. Petitioner moved a revision along with the said application before the Board of Revenue, Lucknow which was dismissed then petitioner preferred a Writ Petition No. 3766 of 2007 which was finally heard by this Court and after hearing both the parties, writ petition was allowed quashing the order dated 20.6.1989 passed by Sub-Divisional Officer, Dadri District Gautam Budh Nagar u/s 143 of the U.P. Zamindari Abolition and Land Reforms Act and has directed the Sub-Divisional Officer concerned to pass appropriate orders in accordance with law u/s 143 of the Act within a period of six weeks. In compliance with the order passed by this Court, petitioner moved an application before the opposite party No. 2 and on an application report was called for from Tehsildar Dadri, who in turn has submitted a detailed report under Rule 135 of Zamindari Abolition and Land Reforms Rules on 2.11.2007 which clearly indicates that total land of petitioner on spot is being identified and was found in possession of petitioner. Further it was found that same has not been used for any agricultural purposes for last so many years. It has also been pointed out in the report that it is being used for non-agricultural purpose consisting of roads and building etc. Despite the aforesaid report submitted by Tehsildar, the matter was not disposed of by respondent No. 1 then a contempt

petition was filed and notices were issued to show cause and immediately after receipt of notice, respondent No. 1 has passed an impugned ante-dated order on 28.8.2008 and dismissed the application filed by petitioner u/s 143 clearly in violation of the order of this Court and ignoring the report submitted by the Tehsildar.

5. Learned Counsel for petitioner submits that while considering the claim of petitioner in earlier writ petition, this Court has passed the following orders:

According to the learned Counsel for the petitioner, the colony has been developed under the order of this Court in accordance with law. The application filed u/s 143 of U.P.Z.A. and L.R. Act, was rejected solely on the ground that the petitioner's name was not mutated. However, there is no dispute revolving round the title. From the certificate on record issued by the Tehsildar, it is clear that the village where the land is situated is under consolidation operation. It is further clear that the land has nothing to do with the Gaon Sabha property. For ready reference, Section 143 of the U.P.Z.A. and L.R. Act is being quoted as follows:

143. Use of holding for industrial or residential purpose.--(1) Where a bhumidhar with transferable rights uses his holding or part thereof for the purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector Incharge of the Sub-Division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(1A) Where a declaration under Sub-section (1) has to be made in respect of a part of the holding the Assistant Collector Incharge of the Sub-Divisions may in the manner prescribed demarcate such part for the purpose of such declaration.

(2) Upon the grant of the declaration mentioned in Sub-section (1) the provisions of this Chapter (other than this section) shall cease to apply to the bhumidhar with transfer with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

(3) Where a bhumidhar with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such bhumidhar, the provisions of this Chapter (other than this Section) shall cease to apply to such bhumidhar with respect to such , land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject).

From perusal of the aforesaid provision, it is clear that once it is brought to the notice of the Assistant Collector, Incharge of the Division that holding or part thereof is being used for the purposes not connected with agriculture, horticulture

or animal husbandry which includes pisciculture and poultry farming, he may suo motu or on an application, after making an enquiry, make declaration to that effect. Once the land is found not being used for agricultural purposes, a duty is cast on the Asstt. Collector, Incharge of the Division whenever the matter is brought to his notice, to pass the order suo motu for making declaration to that effect. It further clearly transpires from the record that the Asstt. Collector, Incharge of the Sub-Division has not recorded any findings on any of the relevant facts required to be considered by him before passing an order u/s 143 of the U.P.Z.A. and L.R. Act. The only ground is that the petitioner was not recorded as bhumidhar though from the materials on record, it transpires that the sale deed was already on record and declaration order was made but it appears that due to some technicalities coming in the way, no final order could be passed.

In the facts and circumstances, it is further clear that the matter has been pending since, 1989 and on one ground or the other. The matter continued to linger on before the different authorities under the U.P.Z.A. and L.R. Act without any valid justification.

In the facts and circumstances of the case and after hearing the learned Counsel for the parties, this Court is of the view that once it comes to the notice of the S.D.O. That the land in dispute is not used for agricultural purposes it was his duty to make suitable enquiry on relevant point envisaged under the law and pass appropriate order for declaration that the land is not used for the purposes connected with agriculture etc. The effect of the declaration is only to the effect that U.P.Z.A. and L.R. Act will not apply and it shall be governed by the personal law. In such a situation the opposite parties have failed to exercise jurisdiction vested in them in not passing the order in accordance with law after applying its mind to the relevant factor to be considered. On the ultimate analysis, this Court is of the view that the impugned orders are liable to be quashed as the matter is pending for the last 18 years just for the declaration as envisaged u/s 143 of U.P.Z.A. and L.R. Act.

6. In spite of aforesaid order passed by this Court, same has been rejected by respondents, whereby he given an opinion that land in question falls under the notified areas and without their permission no declaration u/s 143 of the Act can be passed and further no declaration can be made with regard to part holding without there being partition amongst the co-tenure holder and has maintained the order of 1989. Hence the present writ petition.

7. As counter and rejoinder-affidavits have already been exchanged, therefore, the matter is being heard finally after hearing both the parties.

8. Learned standing counsel has raised preliminary objection regarding maintainability of the writ petition and relating to alternative remedy by way of filing an appeal before the Collector. Further submission has been made that Noida Development Authority has not been impleaded as party, therefore, the writ petition

is not maintainable. No other point has been raised on behalf of learned standing counsel at the time of argument.

9. In reply to the preliminary objection raised on behalf of learned standing counsel, learned Counsel for petitioner has placed reliance upon a judgment of the Apex Court in [Dhampur Sugar Mills Ltd. Vs. State of U.P. and Others](#), and has submitted that the Apex Court in so many cases as well as this case has held that alternative remedy available to writ petitioner, as the decision was taken by Government, therefore, remedy of appeal cannot be termed as "alternative remedy" or "equally efficacious" and petitioner has placed reliance upon para 23 of the said judgment. The same is being quoted below:

23. As to alternative remedy available to the writ petitioner, a finding has been recorded by the High Court in favour of the writ petitioner and the same has not been challenged by the State before us. Even otherwise, from the record, it is clear that the decision has been taken by the Government. Obviously in such cases, remedy of appeal cannot be termed as "alternative", or "equally efficacious". Once a policy decision has been taken by the Government, filing of appeal is virtually from "Caesar to Caesar's wife", an "empty formality" or "futile attempt". The High Court was, therefore, right in overruling the preliminary objection raised by the respondents.

10. It has been submitted that alternative remedy is no bar as this Court had directed the Sub-Divisional Magistrate concerned to pass appropriate orders taking into consideration the report of Tehsildar, therefore, S.D.M. concerned was obliged to pass appropriate orders declaring the said land u/s 143 of the Act. The Division Bench of this Court on 4.6.1990 in a writ petition has permitted petitioner for development work on the land in question. The order passed in Writ Petition No. 3766 of 2007 will operate as res judicata inasmuch as the respondents could not agitate or act put forward such claim as ground of defence which could not have been taken in the earlier writ petition. The principle of construction of res judicata is fully applicable in the present; case in view of judgment in [Ramadhar Shrivastava Vs. Bhagwandas](#). Once the policy decision has already been taken by Collector of the district, filing an appeal would be an empty formality or will be a futile effort. As regards the objection raised by S.D.O. concerned in the order regarding applicability of notified area under U.P. Industrial Area Development Act, 1976 is concerned, the same has no application so far as the power exercised by S.D.O. under U.P. Z.A. and L.R. Act. This question has already been settled by this Court in Merino Exports Pvt. Ltd. and Anr. v. Additional Commissioner, Meerut Division Meerut and Ors. 2005 (98) RD 707, holding therein that two Acts are independent of each other and field of operation of both the Acts are also different. Placing reliance upon the aforesaid judgment, learned Counsel for petitioner submits that as far as it appeared that land is being used for the purposes not connected with agriculture or horticulture, then the Collector concerned Incharge of Sub-Divisional Magistrate may suo motu or on

an application after making such enquiry as may be prescribed make a declaration to that effect. The relevant para 8 which is being quoted below:

8. From the perusal of the aforesaid provisions of law it is clear that where a bhumidhar with transferable rights uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector Incharge of the Sub-Division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect. Sub-sections (2) and (3) of Section 143 of the Act deals with the consequences of such declaration, which provides that unless the grant of the declaration mentioned in Sub-section (1) the provisions of this Chapter (other than this section) shall cease to apply to the bhumidhar with transferable rights with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject. Thus, it is clear that on account of declaration made u/s 143 of the Act, the consequences which would flow therefrom, are in Sub-sections (2) and (3) of Section 143 of the Act and nothing more. Since the proceedings u/s 143 of the U.P.Z.A. and L.R. Act are initiated either suo motu or on an application moved by a bhumidhar with transferable rights before the Assistant Collector Incharge of the Sub-Division therefore in order to make declaration under the aforesaid Act an enquiry is required to be conducted by the Assistant Collector Incharge of the Sub-Division as prescribed under the Rules, 1952. Rule 135 of the U.P.Z.A. and L.R. Rules, 1952 provides the procedure for holding such enquiry, wherein the Assistant Collector Incharge of the Sub-Division is empowered to make enquiry through the Tehsildar or any other officer not below the rank of Supervisor Kanoongo for the purpose of satisfying himself that the bhumidhar's holding or a part thereof is really being used for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming. The enquiry shall be made on the spot and the enquiry officer shall, along with his report also furnish information in the proforma given in the rules itself. Clause (2) of the aforesaid Rules postulates that where the proceedings have been started by the Assistant Collector Incharge of the Sub-Division in his own motion he shall issue notice to the bhumidhar concerned. Otherwise also he shall give him an opportunity of being heard before coming to the decision in the matter. Clause (3) of the aforesaid rules provides that where the entire holding of the bhumidhar has been put to use for the purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector Incharge of the Sub-Division may make a declaration to that effect. Clause (4) of the aforesaid rules deals with the matter relating to the part of the holding and demarcation of the area of the land of the bhumidhar on the basis of existing survey map and actual user of the land. Clause (5) of the aforesaid Rules provides further procedure and apportionment the land revenue payable for each part of the land. Clause (6) of the aforesaid Rules deals with the costs for demarcation which is to be released from

the bhumidhar as arrears of land revenue unless it has been deposited during the course of the proceedings. Thus from the joint reading of the provisions of Section 143 of the Act inasmuch as Rule 135 of the Rules particularly Clause (1) and Clause (3) of Rule 135 of the Rules, it is clear that where on the basis of the enquiry made under the aforesaid Rules, it is found that where the entire holding of the bhumidhar has been put to use for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector Incharge of the Sub-Division may make a declaration to that effect.

11. Petitioner has purchased the said land in dispute after obtaining all the clearance from concerned authorities namely Land Acquisition Officer, Noida, Revenue Officer, Noida, District Magistrate, Ghaziabad in the name of Buildings and Promoters Company for a specific purposes of construction and development of residential colony. It was also proved from the record by documentary evidence and various report of revenue authorities that the land in dispute was never used for agricultural purposes after the purchase by petitioner from 1988-89. The use of the land was changed from agricultural to residential as it is evident from the record. In the writ petition filed by petitioner in the year 1990, the Division Bench of this Court having been satisfied that this land is being used for development of residential colony permitted the petitioner to continue the development activities and has passed orders after hearing Noida Authorities and Collector Gautam Budh Nagar and then given clearance to consider the lay out plan submitted by petitioner.

12. In view of aforesaid fact, learned Counsel for petitioner submits that as the matter of fact, declaration within the meaning of Section 143(1) of the Act should have been done by S.D.O. concerned suo motu immediately on an application made by petitioner in the year 1989 but as order has already been quashed by the Court by judgment dated 1.8.2007. The S.D.O. concerned by passing the order impugned has committed a contempt in rejecting the application filed by petitioner on the ground which were not in existence. It appears that under the pressure of district administration and Noida Authorities, the matter being kept pending for last twenty years on one pretext or other. In such circumstances, it will be appropriate that on the basis of report submitted, this Court itself passes an order declaring the said land as non-agricultural u/s 143 of the Act.

13. As stated above, learned standing counsel has not argued or placed before this Court any other two points which have already been mentioned in the earlier part of the judgment.

14. I have considered the submission made on behalf of petitioner and have perused the record. As regards, the submission made by learned standing counsel regarding the alternative remedy to petitioner, I am of opinion that petitioner from 1988-89 is running from this authority to that authority for getting declaration u/s 143 of the U.P. Zamindari Abolition and Land Reforms Act. It is not disputed from

the record that land is not being used for agricultural purposes which is apparent from the report submitted by Tehsildar immediately when earlier application was made. Subsequently, after remand by this Court, again a report was submitted on 23.1.2006 which also shows that land in question is not being used for agriculture and horticulture purposes and land in question is being used for residential colony. That is for the purposes not connected with agriculture, horticulture or animal husbandry within the meaning of Section 143 of the Act. Petitioner filed a revision. Revision too has been dismissed. This is the second innings by petitioner before this Court. There is no dispute to this effect that normally if there is an alternative and efficacious remedy this Court should not interfere but in view of the facts and circumstances of the present case and in view of Dhampur Sugar Mills (supra) there cannot be any bar of alternative remedy if this Court comes to conclusion that authorities below has committed an illegality apparent on the face of record in spite of specific direction issued by this Court. Therefore, I am of view that matter should be decided by this Court and the objection raised by learned standing counsel has got no force. As regards, the contention raised by learned standing counsel that Noida Development Authority has not been impleaded as a party, has got no force because in the earlier writ petition decided on 1.8.2007, it will operate as res judicata inasmuch as respondent could not agitate or act put forward such claim on the ground of defence which could not have been taken in earlier writ petition in view of judgment of [Ramadhar Shrivastava Vs. Bhagwandas](#), Relevant paras are 17 and 18. The same is being quoted below:

17. To us, therefore, it is clear that the ownership right of the plaintiff came to be established by a competent court of law in the earlier proceedings wherein certain specific findings of fact had been recorded that the property was not joint family property but self-acquired property of Hiralal; Hiralal had sold the said property to the plaintiff for Rs. 12,000 by a registered sale deed; the defendant Bhagwandas was paying rent of Rs. 10 per month to Hiralal; and Bhagwandas could not produce any evidence to show his proprietary rights over the property. No decree could be passed against Bhagwandas as the suit was filed by the plaintiff against the owner Hiralal, the trespasser Ganpat and the defendant Bhagwandas in a civil court. Since the defendant was not found to be trespasser or in unauthorised occupation, the suit was dismissed against him. In our opinion, therefore, it was not open to the defendant Bhagwandas to put forward the claim in the present proceedings that Hiralal was not the absolute owner of the property and the property was joint family property which Hiralal could not have sold to the appellant. It was also not open to the defendant to deny the title of the plaintiff since in the appropriate proceedings, a finding had been recorded as to ownership of property and a decree had been passed by a competent civil court holding the plaintiff to be the owner who had purchased it from its real owner Hiralal. The trial court, in our opinion, was wholly justified in passing the decree in favour of the plaintiff and against the defendant.

18. The learned Counsel for the appellant is also right in contending that the finding as to ownership of the plaintiff has attained "finality" in the earlier proceedings in the decree passed by a civil court. So far as the ownership rights of the plaintiff are concerned, they had not been challenged by the defendant Bhagwandas and hence that finding would operate as *res judicata*. In this connection our attention has been invited by the learned Counsel to the following decisions:

Pawan Kumar Gupta v. Rochiram Nagdeo

P.K. Vijayan v. Kamalakshi Amma

K. Ethirajan v. Lakshmi

Marwari Kumhar v. Bhagwanpuri Guru Ganeshpuri

Madhavkrishna v. Chandra Bhaga

Konda Lakshmana Bapuji v. Government of A.P., and

Most Rev. P.M.A. Metropolitan v. Moron Mar Marthoma

In the above decisions, various aspects of the doctrine of *res judicata* have been dealt with by this Court.

15. Further, it has to be noted that in the earlier writ petition this Court has specifically directed the authority concerned that enquiry officer under Rule 135 of the U.P.Z.A. and L.R. Act submit a report without being influenced by earlier proceeding. The Court has taken a view that alleged violation of provision of Act has nothing to do with the declaration sought u/s 143 of the Act and only essential thing is the report under Rule 135 in respect of actual use of land on spot is only essential for making such declaration. The Court has further held that there is no occasion for holding any further enquiry.

16. Since in the earlier proceeding, this Court has already held that in view of material available on record, Sub-Divisional Officer is only required to make declaration u/s 143 of the Act taking into consideration the enquiry report but from perusal of the record, it appears that S.D.O. concerned i.e., respondent No. 2 has taken into consideration various other issues, which were not relevant for the purposes of the present case.

17. As regards the finding to this effect that unless and until conversion is made u/s 176 of the U.P. Zamindari Abolition and Land Reforms Act, no order can be passed u/s 143 of the Act declaring the land outside the preview of agriculture and horticulture. In the earlier proceeding, as this was not raised in the earlier order, all these points have not been raised by respondents in the earlier proceeding, therefore, question for consideration is whether it is open for the respondent or to the relevant authority to raise this issue which was never raised in the earlier proceeding. This Court while passing the order has clearly held that once it comes to

the notice of S.D.O. concerned, that land is not being used for agriculture purposes, it was his duty to make suitable enquiry and to pass appropriate orders. The S.D.O. concerned was directed to pass appropriate orders in accordance with Section 143 of the Act within a specific period. Therefore, whether it was open to S.D.O. concerned to raise certain points in the order impugned which was never raised by the parties concerned. In view of judgment in [Ramadhar Shrivastava Vs. Bhagwandas](#), principle of res judicata will come into play. If it has attained the finality, the said finding will operate as res judicata and now the respondents cannot reject the claim of petitioner on this ground.

18. Further it has also to be seen that S.D.O. concerned has not complied the order passed by this Court in true spirit and rejected the claim of petitioner on the ground which was never in existence. Admittedly, a report on the basis of enquiry was submitted in favour of petitioner that land is not being used for agriculture purposes, therefore, the duty was cast upon the respondent-S.D.O. concerned to pass appropriate orders. A finding has been recorded that the land is not being used for the agriculture purposes. I have no hesitation to hold that on the basis of aforesaid material available on record, Sub-Divisional Officer is required to make a declaration u/s 143 of the U.P. Zamindari Abolition and Land Reforms Act. Only relevant factor is the statement of enquiry for the purposes that the land is being used not for the purposes of agriculture and horticulture. Nothing otherwise has to be considered. Admittedly, petitioner is running from pillar to post from 1989 and claim of petitioner being rejected without any reason in spite of the fact that report has been submitted in their favour. As about 22 years have already been passed and petitioner has thrice approached this Court only for the purposes of declaration of land u/s 143(1) of the Act.

19. Therefore, this Court is of the view that in the facts and circumstances of present case, again remanding the matter to the authority below will not be proper in the facts and circumstances of the present case and this Court can straightway in view of report submitted by competent authority as well as in view of relevant record, can exercise power declaring the said land u/s 143 as non-agriculture. In [Canara Bank and Others Vs. Swapan Kumar Pani and Another](#), though it was a matter relating to disciplinary enquiry of a charged official but the Apex Court was of view that remanding a matter to disciplinary authority directing them to hold fresh enquiry will not be proper in the interest of justice being a fact that misconduct of official is committed in the year 1985 and he was litigating the matter and was being harassed. In such circumstances, Apex Court has quashed the charge-sheet itself without remanding the matter. In [M.V. Bijlani Vs. Union of India \(UOI\) and Others](#), in the similar circumstances, the Apex Court has quashed the disciplinary proceeding without remanding the matter. In view of the aforesaid facts and circumstances of present case, this Court is passing an order by allowing the writ petition and quashing the order passed by Sub-Divisional Officer concerned and declaring the land of petitioner u/s 143(1) of U.P. Zamindari Abolition and Land Reforms Act as

non-agriculture.

20. From the fact stated above, the order impugned dated 20.8.2008 passed by Sub-Divisional Magistrate, Dadri, District Gautam Budh Nagar is hereby quashed. The writ petition is allowed. The plots mentioned in Annexure-4 to writ petition situated at village Illhabas, Pargana and Tehsil Dadri, District Gautam Budh Nagar is hereby declared as abadi with effect from the date of application i.e., 2.5.1989 u/s 143(1) of the U.P. Zamindari Abolition and Land Reforms Act.

No order as to costs.