

(2007) 11 AHC CK 0161

Allahabad High Court

Case No: None

Smt. Pratibha Devi

APPELLANT

Vs

Additional Commissioner
(Administration), Varanasi
Division and Others

RESPONDENT

Date of Decision: Nov. 15, 2007

Acts Referred:

- Constitution of India, 1950 - Article 226
- Uttar Pradesh Land Revenue Act, 1901 - Section 34

Citation: (2008) 104 RD 170

Hon'ble Judges: Ashok Bhushan, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Ashok Bhushan, J.

Heard Sri Sankatha Rai, learned Counsel for the petitioner and Sri B.B. Paul, learned Counsel appearing for the contesting respondents.

2. By this petition, the petitioner has prayed for quashing the order dated 25.5.2007, passed by the Additional commissioner, Administration Varanasi Division, Varanasi dismissing the revision No. 84 of 2005 filed by the petitioner u/s 219 of the Land Revenue Act. The petitioner has also prayed for quashing the order dated 28.3.2005 passed by the Deputy Collector Revenue, Varanasi deciding the appeal filed by the contesting respondent against the order dated 22.7.2002, passed by the Naib Tahsildar allowing the restoration application of the petitioner, setting aside the mutation order dated 4.11.2000, passed by the Naib Tahsildar in proceedings u/s 34 of the Land Revenue Act, 1901 (hereinafter referred to as "Act").

3. Brief facts necessary to be noticed for deciding the writ petition are that Smt. Shanti Devi was recorded tenure holder. An unregistered Will deed dated 1.1.2000 is

claimed to have been executed by Smt. Shanti Devi in favour of the petitioner. Another unregistered Will dated 8.3.2000 is said to have been executed by Smt. Shanti Devi in favour of contesting respondents. Smt. Shanti Devi died on 9.3.2000 at Bombay. A mutation application u/s 34 of the Act was filed by the contesting respondents on the basis of Will dated 8.3.2000. The Naib. Tahsildar vide order dated 30.5.2000 allowed the mutation application of the respondents mutating their names. An application dated 4.11.2000 was filed by the petitioner, seeking recall of the order dated 30.5.2000 of Naib Tahsildar, mutating the name of the contesting respondents. The Naib Tahsildar vide his order dated 22.7.2000 set aside the order dated 30.5.2000 and restored the mutation application. An appeal was filed by the contesting respondents against the order dated 22.7.2000 before the Sub Divisional Officer. The Sub Divisional Officer passed an order on 2.8.2000, treating the appeal to be maintainable and directed that the case be decided by the appellate authority and both the parties may led their evidence. Both the parties led their evidence and after hearing the parties and considering the evidence, the Deputy Collector vide his order dated 28.3.2005 allowed the claim of the contesting respondents and directed mutation of their names in place of Smt. Shanti Devi on the basis of the Will dated 8.3.2000. The revision was filed by the petitioner u/s 219 of the Act against the order dated 28.3.2005, which having been dismissed by the revisional Court, this writ petition has been filed challenging the aforesaid orders.

4. Sri B.B. Paul, learned Counsel for the contesting respondents raised preliminary objection regarding maintainability of the writ petition on the ground that the orders impugned in the writ petition have been passed in the proceedings u/s 34 of the Act, which are summary in nature hence, the writ petition under Article 226 of the Constitution of India is not maintainable. Learned Counsel for the contesting respondents relied on various decisions of this Court which would be referred, while considering the respective submissions of learned Counsel for the parties. Sri Sankatha Rai, learned Counsel for the petitioner refuting the preliminary objection of the learned Counsel for the contesting respondents, contended that the writ petition is fully maintainable under Article 226 of the Constitution of India. He submits that the order passed by the Deputy Collector dated 28.3.2000 in appeal filed by the contesting respondents, was an order passed without jurisdiction since no appeal lay under the U.P. Land Revenue Act against the order dated 22.7.2002, passed by the Naib Tahsildar allowing the restoration application. Sri Sankatha Rai referred to Sections 201, 210 and 211 of the U.P. Land Revenue Act and contended that appeal against the order dated 22.7.2002, passed by the Naib Tahsildar was not maintainable hence, error has been committed by the Sub Divisional Officer in allowing the appeal. He furtherer contended that the Sub Divisional Officer did not consider the evidence of the parties properly and has arrived at erroneous conclusion that unregistered Will dated 8.3.2000 is proved. Learned Counsel for the petitioner has also placed reliance on various judgments of this Court which would be referred to hereinafter, while considering the submissions in details.

5. I have considered the submissions of the learned Counsel for the parties and have perused the record. This writ petition arises out of the proceedings u/s 34 of the Land Revenue Act. This Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, normally does not entertain a writ petition against the orders passed in summary proceedings u/s 34 of the Land Revenue Act. The question regarding maintainability of the writ petition against the orders passed in mutation proceedings and the cases in which the Court can entertain the writ petition, came up for consideration before this Court in several cases. I had an occasion to consider the issue in *Lal Bachan v. Board of Revenue U.P. Lucknow and Ors.* reported in AIR 2002 (46) 564. After considering the judgments of this Court and Apex Court following was laid down in paragraphs 11, 12, 13 and 16.

11. This Court has consistently taken the view as is apparent from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind apart from there being remedy of getting the title adjudicated in regular suit there is one more reason for not entertaining such writ petition. The orders passed u/s 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decide the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties.

12. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable but this Court do not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature.

13. The second question which needs to be considered is as to in what circumstances the writ petition can be entertained arising out of the mutation proceedings. The Division Bench of this Court in *Jaipal's case (supra)* has referred to "" exception" to the general rule in the following words:

The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act. This petition does not fall in that class and we think therefore this Court should not entertain it. It is accordingly dismissed with costs.

6. The writ petition against the orders passed in mutation proceedings can be entertained in case the orders passed is held to be an order passed without jurisdiction. The submission of Sri Sankatha Rai, learned Counsel for the petitioner to bring the present case in one of the exceptions as recognized for entertaining the writ petition against the mutation proceedings is; that the appeal before the Sub Divisional Officer against the order dated 22.7.2002, was not maintainable hence, the order passed by the appellate authority dated 28.3.2005 was without jurisdiction

which can very well be interfered with in the present writ petition. Thus the question, which has to be first considered is, as to whether the appeal filed by the contesting respondents against the order dated 22.7.2002 of the Naib Tahsildar before the Sub Divisional Officer was maintainable or not? As noticed above, the Naib Tahsildar passed the order dated 30.5.2000, allowing the mutation application filed by the contesting respondents. A restoration application was filed by the petitioner for recall of the said order on 4.11.2000, which application was allowed on 22.7.2002 by setting aside the order dated 30.5.2000. The appeal before the Sub Divisional Officer was filed against the order dated 22.7.2002. Section 200 and 201 of the U.P. Land Revenue Act in this context is relevant to note.

200. Hearing in absence of party. Whenever any party to such proceeding neglects to attend on the day specified in the summons or on any day to which the case may have been postponed, the court may dismiss the case for default or may hear and determine it ex parte.

201. No appeal from orders passed ex parte or by default No appeal shall lie from an order passed u/s 200 ex parte or by default.

Re-hearing on proof of good cause for nonappearance But in all such cases, if the party against whom judgment has been given appears either in person or by agent (if a plaintiff within fifteen days from the date of such order, and if a defendant, within fifteen days after such order has been communicated to him, or after any process for enforcing the judgment has been executed or at any earlier period), and shows good cause for his nonappearance, and satisfies the officer making the order that there has been a failure of justice, such officer may, upon such terms as to costs or otherwise as he thinks proper, revive the case and alter or rescind the order according to the justice of the case:

Order not to be altered without summons to adverse party.- Provided that no such order shall be reversed or altered without previously summoning the party in whose favour judgment has been given to appear and be heard in support of it.

7. Section 201 of U.P. Land Revenue Act provides that no appeal shall lie from an order passed u/s 200 ex-parte or by default. The order dated 30.5.2000 of the Naib Tahsildar allowing the mutation of the respondents, was an order allowing the mutation ex-parte. Against the order dated 30.5.2000, thus, appeal was not maintainable by virtue of Section 201. In the present case, appeal was not filed against the order dated 30.5.2000, rather the appeal was filed against an order by which the application of the petitioner for setting aside the ex-parte order was allowed. Section 201 itself provides that if, party against whom judgment has been given ex-parte satisfy that there was good cause for his non-appearance, the order can be set aside. Present is a case where the application u/s 201 was made by the petitioner for recall of the order and the order dated 22.7.2002 was an order passed u/s 201 allowing the restoration application. Sections 210 and 211 provides for

appeal. Section 210 and 211 is quoted herein below.

210. Courts to which appeals lie.- (1) Appeal shall lie under this Act as follows:

(a) to the Record Officer from orders passed by any Assistant Record Officer;

(b)(i) to the Commissioner from orders passed by a Collector or an Assistant Collector first class or Assistant Collector in charge of sub-division,

(ii) to the Collector from orders passed by an Assistant Collector second class or Tahsildar.

(6) No appeal shall lie against an order passed under Sections 28, 33, 39 or 40.

211. First Appeal.- Unless an order is expressly made final by this Act, an appeal shall lie to the court authorised u/s 210 to hear the same from every original order u/s 210 to hear the same from every original order passed in any proceedings held under the provisions of this Act.

According to Section 210(1)(b)(ii) an appeal shall lie to the Collector from an order passed by the Tahsildar. Section 211 provides that unless an order is specifically made final by the Act, the appeal shall lie to the Court authorized u/s 210 to hear from every original order passed in any proceedings held under the provisions of this Act. The proceeding for recall of an ex-parte order u/s 201 is a proceeding contemplated u/s 211. The order passed u/s 201 allowing an application setting aside ex-parte order has not been made final by any provisions of the Act hence, the said order is appealable u/s 211 of the Act.

8. Learned Counsel for the petitioner in support of his submission has placed reliance on judgment of this Court in the case of Kundan v. Board of Revenue reported in 1972 R.D. 361, Laxman v. State of U.P. and Ors. Civil Misc. writ petition No. 43450 of 2003, decided on 11.5.2004, Nawab Singh and Ors. v. Deputy Director of Consolidation and Ors. reported in 1993 R.D. 337 Mst. Isharaji v. Commissioner 1968 R.D. 123 Jokhu v. Deputy Director of Consolidation and Ors. reported in 2001 RJ 522.

9. In the case of Kundan (supra), the Court was considering the provisions of Section 144(2) C.P.C. The court held that where an ex-parte decree is set aside, it cannot be said that the decree has been varied or reversed. The question in that case was as to whether Section 144(2) C.P.C. will be applicable or not. The issue which has arisen in the present case was neither considered nor any such proposition has been laid down that against an order setting aside an ex-parte order, passed u/s 200 U.P. Land Revenue Act an appeal shall not lie. The next judgment relied upon by learned Counsel for the petitioner is the judgment of this Court in the case of Laxman (supra). In the case of Laxman, the Naib Tahsildar has rejected the application for recall of the mutation order. The writ petition was entertained only on the ground; as to whether Naib Tahsildar committed error in rejecting the application when

sufficient grounds were made out for recall of the order. Following was observed by this Court:

There is no dispute that writ petition arises out of summary proceeding. The consistent view of this Court has been that writ petition arising out of mutation proceedings cannot be entertained because the findings and orders passed by mutation courts are always subject to decision by a competent Court. In the present case, this is not examining the merits of the order passed by Naib Tahsildar dated 23rd August, 1985. The petitioners' counsel has confined his submission only on the aspect that the said order was ex-parte and Naib Tahsildar erroneously rejected the application to recall the order on the ground that summons were served. In view of the aforesaid, the writ petition has been entertained only for a limited purpose to examine as to whether the order passed by Naib Tahsildar dated 23rd August, 1985 deserved to be recalled or not. For other issues which were sought to be raised in the writ petition, it is not necessary to express any opinion or to enter into the said issues.

In the above case the issue was not involved as to whether against an order allowing the restoration application u/s 201 of the Act appeal was barred or not. The said case does not help the petitioner in any manner. Another case relied upon by learned Counsel for the petitioner is Nawab Singh (supra). In the said case the Court was examining as to whether by virtue of Section 41 of the U.P. Consolidation of Holdings Act, the provisions of Section 210 of the U.P. Land Revenue Act were applicable in consolidation proceedings. Learned Single Judge held that remedy for setting aside ex-parte order is available to an aggrieved party u/s 201 of the U.P. Land Revenue Act which has been made applicable to the proceedings under the U.P. Consolidation of Holdings Act by virtue of Section 41. The issue which has arisen in the present case, was not considered in that case hence, the said case will not help the petitioner. The next case relied upon by learned Counsel for the petitioner is Mst. Isharaji (supra). The question in the said case was as to whether a decision on objection passed ex-parte or in default, is appealable u/s 11 of the U.P. Consolidation of Holdings Act. This Court considered the provisions of U.P. Consolidation of Holdings Act including Section 41 as well as Section 201 of U.P. Land Revenue Act and came to the conclusion that all kinds of the orders passed by the Consolidation Officer are appealable u/s 11 of the U.P. Consolidation of Holdings Act and Section 201 excluding an appeal against an order passed ex-parte is not attracted. Following was laid down in paragraph 5 of the said judgment:

5. Section 41 of the Consolidation of Holdings Act opens with the phrase "Unless otherwise expressly provided by or under this Act." So far as the applicability of Section 210 is concerned if any other provision of the Consolidation of Holdings Act provides for an appeal against an order passed ex-parte or by default then Section 202 will not apply. Its applicability would be excluded by the opening part of Section 41. Section 11 of the Consolidation of Holdings Act is general. It provides an appeal

against all kinds of orders of the Consolidation Officer passed u/s 10 of the Act....

The last case relied on by learned Counsel for the petitioner is *Jokhu (supra)*. The issue raised in that case was as to whether the Deputy Director of Consolidation had power to hear the case against ex-parte order and had also power to recall the ex-parte order. This Court came to the conclusion that power to set aside ex-parte order is provided u/s 201 of the U.P. Land Revenue Act, is available to the Deputy Director of Consolidation by virtue of Section 41 of the U.P. Consolidation of Holdings Act. Following was laid down in paragraph 9.

9. The power to set aside ex parte order has been conferred in Section 201 of the U.P. Land Revenue Act on all the authorities and, therefore, in my opinion the Deputy Director of Consolidation under the U.P. Consolidation of Holdings Act, Section 41 read with Section 201 of the U.P. Land Revenue Act, 1901 has the power to proceed ex-parte and for recalling of the ex-parte orders on good cause being shown for non-appearance....

10. In view of the foregoing discussions, it is clear that none of the cases relied on by learned Counsel for the petitioner in support of his submission that against an order passed by the Naib Tahsildar u/s 201 of the U.P. Land Revenue Act, recalling a mutation order appeal to the Deputy Collector is barred. Thus, submission of the learned Counsel for the petitioner that the order of the appellate authority dated 28.3.2005 was without jurisdiction, cannot be accepted.

11. Learned Counsel for the respondents have placed reliance on judgments of this Court in the case of *Jaipal Minor v. Board of Revenue* reported in 1956 ALJ 807, *Kunj Bihari v. Board of Revenue* reported in 2001 R.D. 166 *Ishu v. State of U.P.* reported in 2003 R.D. 217 for the proposition that against mutation proceedings which are summary in nature, the writ petition under Article 226 of the Constitution of India is not maintainable. As noted above in *Lal Bachan Singh (supra)* this Court had laid down that normally the writ petition challenging the mutation proceedings is not entertained since they are summary proceedings which do not decide any question of title and they are always subject to adjudication by competent Court. The present case is not covered by any of the exceptions, in which this Court exercises its jurisdiction under Article 226 of the Constitution of India against an order arising out of mutation proceedings. The mutation courts have decided in summary proceedings as to whose name be recorded in the revenue record on the basis of Will. The decisions of the mutation court impugned in the writ petition are subject to adjudication of rights of the parties by a competent Court. It is well settled that findings recorded in the mutation proceedings are neither conclusive nor binding when the rights are adjudicated in a competent Court.

12. In view of the foregoing discussions, no ground has been made to entertain this writ petition arising out of mutation proceedings in writ jurisdiction of this Court. Subject to observation as made above, the writ petition is dismissed.