

HIGH COURT OF UTTARAKHAND
AT NAINITAL

Writ Petition (M/ S) No. 1387 of 2008

Hem Chandra Balutia		... Petitioner
	Vs.	
Sri Madhwanand and Others		... Respondents
	With	

Writ Petition (M/ S) No. 1384 of 2008

Hem Chandra Balutia		... Petitioner
	Vs.	
Madhwanand and Others		... Respondents

Advocate: Mr. Rajesh Kumar Joshi, Advocate, for the petitioner
 Mr. Rajesh Pande, Standing Counsel, for the State.
 Mr. Pradeep Hairiya, Advocate, through video conferencing, for
 the respondent.
 Ms. Harshi Gupta, Advocate, holding brief of Mrs. Anjali
 Bhargava, Advocate, for the Gaon Sabha.

Hon'ble Sharad Kumar Sharma, J.

Before putting the facts of the case as per the framework of law, this Court feels it apt, to deal with the law first. As far as the provisions of U.P.Z.A. & L.R. are concerned, as per the constitutional mandate, as envisaged by Schedule IX, it has been given a special status by including it in Entry 11 of Schedule IX, which has been within the ambit of Article 31B of the Constitution of India. Article 31B of the Constitution of India in itself, prescribes that certain statutes, which are included under Schedule IX, will have a validation of act and the actions taken therein and all other arguments as extended contrary to it, will not invalidate an action or a right flowing from the provisions of a special act, covered by Schedule IX, because it provides that any Act, Regulation or Provision which are inconsistent with or takes away or abridges any of the rights conferred by the provisions of the special statute covered under

Schedule IX, that would be notwithstanding to any judgment, decree and order of any Court or such act or regulation.

2. Under the provisions of U.P.Z.A. & L.R. Act, a declaration of a right over a holding in possession of a person normally called as 'tenure holder', under revenue term, is envisaged under Section 229B of the said Act. In an eventuality, if a person is holding possession over the land without title, which is an admitted case herein, the principal recorded owner has had to resort to the proceedings, which are substantive in nature as contained under Section 209 of the U.P.Z.A. & L.R. Act, which reads as under:-

“209. Ejectment of persons occupying land without title. –
 [(1)] A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force; and-

- (a) where the land forms part of the holding of a bhumidhar, [* * *] or asami without the consent of such bhumidhar, [* * *] or asami;
- (b) where the land does not form part of the holding of a bhumidhar, [* * *] or asami without consent of the [Gaon Sabha],

shall be liable to ejectment on the suit in cases referred to in Clause (a) above of the bhumidhar, [* * *] or asami concerned and in cases referred to in Clause (b) above of the [Gaon Sabha] [* * *] and shall also be liable to pay damages.

[(2) To every suit relating to a land referred to in Clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party.]”

3. If the principal provisions, as extracted above are taken into consideration, it gives a Forum which is available to the principal owner, to evict a person in possession, it has been substantively provided under Section 209. That means, it is a substantial remedial measure prescribed to the recorded tenure holder to seek an ejectment of any

person occupying the land without title. Admittedly, and also even as per the evidence on record, there is nothing to show, that the petitioner who claims himself to be the *bhumidhar* and executants of the agreement for sale dated 25.03.1984 in favour of the respondent, had ever resorted to any proceedings as contemplated under Section 209 of U.P.Z.A. & L.R., for seeking an eviction of the respondent from disputed land by making an assertion to the effect that they are holding possession of the land without title.

4. Though this argument too, would be clouded in the instant case for the reason being, that the petitioner the tenure holder of the property, which was described at the foot of the plaint included the property which was lying in khet No. 100 having an area of 11 bigha, 14 biswa and 0 biswancies, which was agreed to be sold by an unregistered agreement for sale dated 25.03.1984.

5. The petitioner landlord does not dispute the fact of execution of an unregistered agreement for sale and he further doesn't dispute the fact, that based upon the unregistered agreement for sale, the possession was already transferred to the respondent of the disputed property.

6. When there was a rival contention raised by the present petitioner, the plaintiff respondent had instituted a Suit under Section 229B for seeking a declaration of the right as to be a *bhumidhar* of the aforesaid land to bring themselves within the definition of a 'tenure holder' under Section 129 to be read with Section 130 of the U.P.Z.A. & L.R. Act.

7. In the Suit thus filed by the respondent, the proposed purchaser, he had sought for the following decree:-

“14. अतएव श्रीमान से प्रार्थना है कि निम्नलिखित अनुतोष वहक वादी खिलाफ प्रतिवादीगण सादर प्रदान करने की कृपा की जाय।

अ- कि बाद पत्र के पद नं०-1 में वर्णित भूमि खसरा नं० 100 रकबई 11 बीघा 14 बिस्वा भूमि में वादी को संक्रमणीय भूमिधर घोषित कर दिया जाये

ब- कि अगर बाद की अपील नायब तहसीलदार महोदय के आदेश दिनांक 30.7.94 के विरुद्ध किसी कारण स्वीकार न हो तो नायब तहसीलदार हल्द्वानी दिनांक- 30.7.94 मिसल नं०-30/476 सन 92-93 किया गया है, निरस्त किया जाये।

स- कि वादी की दा०खा० अपील बावत उक्त मिसल 30 / 473 सन 92-93 स्वीकार श्रीमान द्वारा किये जाने के उपरान्त प्रतिवादीगण 1 लगायत 9 का नाम दर्ज करके उसके स्थान पर वादी का नाम संक्रमणीय भूमिधरी में कागजाद माल में अंकित किया जाये।

द- अन्य अनुतोष, जो कि श्रीमान उचित समझें वहक वादी खिलाफ प्रतिवादीगण सादर प्रदान किया जाये।”

8. When the notices were issued in the Suit, the petitioner filed a written statement on 21.03.1997, denying the plaint averments. But what would be more surprising and which would be having a direct bearing on the case at hand is that in what manner the relief was modulated by the defendant in the written statement, which is extracted hereunder, wherein he has prayed for setting aside the order passed by the Tehsildar in 1994.

“29. यह कि प्रार्थी निम्न अनुतोष पाने का अधिकारी है :-

(अ) यह कि डिक्री बहक जबाबदेहिन्दा खिलाफ वादी इस अमर की सादिर फरमा दी जाय कि प्रार्थी जबाबदेहिन्दा विवादित भूमि पर भूमिधर है, और नायब तहसीलदार हल्द्वानी द्वारा पारित आदेश दिनांक 30-4-94 वादी की बदनियती एवं वेजा मंशा से पारित हो जाने से प्रार्थी के भूमिधरी अधिकारों पर कोई प्रभाव न पड़ने से काबिले खारिजी के है।

(ब) यह कि डिक्री बहक प्रार्थी प्रतिवादी इस अमर की सादिर फरमा दी जाय कि प्रार्थी जबाबदेहिन्दा की शेष रकम अदा न कर पाने के कारण विवादित भूमि पर नाजायज एवं अनाधिकृत कब्जेदार चले आने से वेदखली किया जाकर कब्जा आराजी प्रार्थी जबाबदेहिन्दा को दिलाया जाने के साथ साथ वादी द्वारा अदा की गयी रकम बयाना 2,30,000 रुपये वादी को अदा कर दिया जाय।

(बस) यह कि खर्चा मुकदमा एवं अनधिकृत बब्जे की अवधि का हर्जाना जो भी माननीय न्यायालय बवक्त आदेश बहक प्रार्थी जबाबदेहिन्दा उचित समझें वह भी सादिर फरमा दिया जाय।

(द) यह कि अन्य अनुतोष जो भी न्यायालय श्रीमान बवक्त फैसला बहक प्रार्थी प्रतिवादी उचित समझें वही भी सादिर फरमा दिया जाय।

Secondly, he has prayed for to refund the money i.e. the partial sale consideration, which was paid to him on the basis of an unregistered agreement for sale dated 25.03.1984 and to revert back the possession of the land in question, which was a relief incorporated by way of an amendment.

9. Let us deal with these reliefs and the counterclaim at this stage itself. The subject permissible under Order 8 Rule 6A in the pending suit, as made applicable by the provisions contained under Section 341 of the U.P.Z.A. & L.R. Act, would be, qua the principal relief sought in the plaint. The issue pertaining to the order as it was passed by the Tehsildar on 30.04.1994, would be absolutely an alien subject which couldn't have been prayed for, in the counterclaim to be quashed.

10. What is more important to remark here is that the petitioner in the counterclaim, despite of being conscious of the agreement for sale dated 25.03.1984, has not prayed for quashing or cancellation of the alleged unregistered agreement for sale, rather he has prayed for refund of the money. The refund of money without questioning the validity of a document admittedly executed by the predecessor of the petitioner allegedly handing over of the possession, would be an alternative relief without disturbing the principal document by virtue of which the partial sale consideration had exchanged hands.

11. The question would be, as to whether he could at all have modulated relief 2 for refund of money without challenging the validity of the agreement of sale dated

25.03.1984 at first. The answer would clearly be 'no'. The reason is that when acceptance of partial sale consideration is in a consequence of execution of an agreement deed, there cannot be a refund of money, until and unless the principal document is subjected to challenge.

12. Another question, which may be having a vital bearing over the entire dispute, is that as to whether the relief B of returning back of possession at all, could have been claimed in the counterclaim by the petitioner of handing over the possession? The handing over of possession in the instant case would be barred by the provisions contained under Section 210 of U.P.Z.A & L.R. Act, which is extracted as hereunder:-

“[210. Consequence of failure to the suit under Section 209. - If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall-

- (a) where the land forms part of the holding of a bhumidhar with transferable rights, become a bhumidhar with a transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;
- (b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights and the right, title and interest of an asami, if any, in such land shall be extinguished;
- (c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year.]

[Provided that the consequences mentioned in Clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe.]”

13. The embargo of Section 210 will come into play for the reason being, that the time period prescribed for initiation of the proceedings for eviction under the Limitation Act, has admittedly expired, because the factum of handing over of possession on 25.03.1984, is an admitted case of the

petitioner and it is yet again an admitted case, that the petitioner had filed the counterclaim only on 21.03.1997 i.e. much beyond the period of limitation which has been prescribed for filing a Suit for handing over of possession and as such, the bar of Section 210 would always exist against the present petitioner, qua relief B, as it has been sought for in the counterclaim.

14. Another question, which has been argued by the learned counsel for the petitioner is, as to whether the possession of the respondent on the basis of agreement for sale dated 25.03.1984, would at all be treated as to be permissive possession or an adverse possession? These two terminologies have to be distinctly dealt with. The possession would have been a permissive possession, as soon as the agreement for sale was executed by the predecessor of the petitioner on 25.03.1984, but it would acquire a status of being an adverse possession when the petitioner has waived of his right to institute a Suit under Section 209, wherein after that the possession of the respondent/ plaintiff would be adverse to the claim of the petitioner.

15. The aspect of adverse possession would mean, that it should be was a hostile possession in the knowledge of the petitioner and if the hostility of possession continues, the status of possession of the respondent would be of an adverse possession and not a permissive possession, as it has been argued.

16. Even otherwise also, with a gradual process of time, the law has also been changed and as per the judgment of

the Hon'ble Apex Court, wherein the Hon'ble Apex Court has reckoned a declaration of right of the occupant of a land based upon an adverse possession, which would be a principle directly applicable in the instant case, as envisaged by the Hon'ble Apex Court in the judgment as reported in 2019 (8) SCC 729, Ravindra Kumar Grewal and others Vs. Manjit Kaur and others, the relevant paras of which are extracted hereunder:

“50. In *Gurdwara Sahib v. Gram Panchayat Village Sirthala* [*Gurdwara Sahib v. Gram Panchayat Village Sirthala*, (2014) 1 SCC 669 : (2014) 1 SCC (Civ) 630] proposition was not disputed. A decision based upon concession cannot be treated as precedent as has been held by this Court in *State of Rajasthan v. Mahaveer Oil Industries* [*State of Rajasthan v. Mahaveer Oil Industries*, (1999) 4 SCC 357], *Director of Settlements, A.P. v. M.R. Apparao* [*Director of Settlements, A.P. v. M.R. Apparao*, (2002) 4 SCC 638] and *Uptron (India) Ltd. v. Shammi Bhan* [*Uptron (India) Ltd. v. Shammi Bhan*, (1998) 6 SCC 538 : 1998 SCC (L&S) 1601]. Though, it appears that there was some expression of opinion since the Court observed that there cannot be any quarrel that plea of adverse possession cannot be taken by a plaintiff. The fact remains that the proposition was not disputed and no argument to the contrary had been raised, as such there was no decision on the aforesaid aspect, only an observation was made as to proposition of law, which is palpably incorrect.

63. When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.”

17. The Suit proceeded being Suit No. 22/137 of 1995-96 and the Court of Assistant Collector, had formulated the issues on the basis of the claim and the counterclaim and had proceeded to decide the matter by the judgment and decree dated 29.06.1999, whereby the Suit as well as the counterclaim was dismissed and simultaneously a direction was issued to refund the money, which had exchanged hands based upon the agreement for sale dated 25.03.1984.

18. The decree thus rendered, is extracted hereunder:-

“उपरोक्त विवेचना एवं निष्कर्षों के आधार पर दावा वादी एवं प्रतिवादी सं 5 का काउंटर क्लेम दोनों ही खारिज किये जाते हैं तथा वादी को निर्देशित किया जाता है कि वह प्रतिवादी सं 5 को शेष रकम अदाकर नियमानुसार बयनामा कराये। पत्रावली बाद आवश्यक कार्यवाही दा0द0 हो।”

19. Aggrieved against the said judgment and decree, as it has been passed by the Court of Assistant Collector on 29.06.1999, the respondent had preferred an Appeal being Appeal No. 173/42 of 1998-99, Madhvanand Vs. Netraballabh and others, by invoking the provisions contained under Section 331 of U.P.Z.A. & L.R. Act and simultaneously an independent Appeal was preferred by the petitioner too, as against the rejection of the counterclaim, which was numbered as Appeal No. 169/46 of 1998-99 Hemchandra Vs. Madhvanand. The Appeals preferred by the parties were dismissed by the judgment dated 23.09.2003.

20. The matter was carried to the Second Appeal by the parties to the writ petition and accordingly, a Second Appeal, being Second Appeal No. 189/2003 was preferred by respondent No. 1, Madhvanand Vs. Ballabh Balutia (since deceased and others) and the petitioner's Second Appeal, was numbered as Appeal No. 188 of 2003-04, Hemchand Vs. Madhvanand and Another. The Second Appeal after being consolidated was decided by the Board of Revenue vide its judgment dated 25.07.2008 and as a consequence thereto, the Court after considering the implications of Section 209, as referred to hereinabove has observed, that the possession of the respondent No. 1 herein, would be in adverse to the possession as contended by the petitioner to be permissive possession, and the said

inference was drawn on the basis of the judgment of the Allahabad High Court, wherein it was held, that when under Section 209 there is a transfer of occupancy of a tenancy and the sale deed or a deed of conveyance being invalid, the transfer of possession from the date of transfer would be adverse and not in a permissive possession of the transferee. Accordingly, the inference was drawn by the Court of Additional Chief Revenue Commissioner by the impugned judgment dated 25.08.2008, whereby the Second Appeal preferred by the respondent No. 1 was allowed and the Second Appeal preferred by the petitioner was dismissed.

21. The consequential effect of the same would be, that the claim of the petitioner based upon the counterclaim raised under Order 8 Rule 6A has been concurrently decided against him by the Court and particularly as per the opinion of this Court, he will not have any right as such, to object to the declaration of title of the respondent on the basis of an adverse possession, where he admits the fact of handing over possession by the agreement for sale in 1984 and more particularly, when it is fortified by the non drawing of the proceedings under Section 209, which provides an immunity of initiation of the proceedings and declaration of right against the respondent in the light of the implications of the provisions contained under Section 210 of the U.P.Z.A. & L.R. Act.

22. In order to summarise the entire issue though it may be having a wide factual history, but if these facts are considered;

- (i) That execution of agreement for sale dated 25.03.1984 and handing over of possession is admitted by the parties
- (ii) The factum of possession of the respondent is admitted.
- (iii) The possession of the respondent become adverse against the petitioner as per the provisions contained under Section 209 and, if not, at least, it would be adverse and hostile possession since the period of limitation has already expired as per the provisions contained under Section 210, which will rather provide an immunity to the respondent from being evicted from the land in question, which was handed over in possession by the petitioner and thus, the hostility of possession with the knowledge of the petitioner being adverse to his interest and being in his knowledge, the respondent would be entitled to be declared as to be an owner and a *bhumidhar* lying in shreni 1 (ka) as per the classification of bhumidhari rights and as per Section 129 to be read with Section 130 of the U.P.Z.A. & L.R. Act. More importantly, if the relief as claimed by the petitioner in the counterclaim is concerned, that in itself demolishes his case for claiming any right of possession or alternatively for the refund of money for the reasons already assigned above.

23. Thus, the writ petitions fail and they are accordingly dismissed.

24. Let a copy of this judgment be placed in the connected matter.

(Sharad Kumar Sharma, J.)
06.09.2023