

Court No. - 51

Case :- WRIT - C No. - 35685 of 2023

Petitioner :- Sarvajit Yadav And 3 Others

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- R. K. Singh Kaosik

Counsel for Respondent :- C.S.C.,Hira Lal

Hon'ble Chandra Kumar Rai,J.

1. Heard Sri R.K. Singh Kaushik, learned counsel for the petitioner, Sri Ayyub Khan, Advocate holding brief of Sri Hari Lal, learned counsel for the respondent no. 3 and Sri Sridhar Tripathi, learned counsel for the respondent nos. 1 and 2.

2. The instant petition has been filed against the order dated 30.8.2023 passed by respondent no. 2 rejecting the restoration application filed by the petitioner against the order passed in the partition suit as well as for Mandamus directing the respondent no. 2 to decide the proceeding on merit. It is also prayed that respondent no. 2 may not interfere in the possession of the petitioner with respect to Arazi No. 225.

3. Counsel for the petitioner submitted that partition suit filed by the contesting respondent no. 3 under Section 176 of U.P.Z.A. & L.R. Act was not maintainable in view of the judgment passed in the civil proceeding. He further submitted that the order passed in partition suit was ex-parte, as such, restoration application was filed on behalf of the petitioner after four years from the date of the order explaining the ground of delay in filing the application. He submitted that due to fault of the counsel for the petitioner, the prayer for condonation of delay under Section 5 of the Limitation Act could not be made. He submitted that restoration application has been illegally rejected by the trial court on the ground of limitation, as such, the impugned order be set aside and matter be sent back to decide the partition suit afresh taking into consideration objection of the petitioner with regard to the maintainability of the partition suit in accordance with law. Counsel for the petitioner further places reliance upon the judgment of a Division Bench of this Court passed in Special Appeal Defective No. 417 of 2021 in order to demonstrate that matter is to be decided on merit rather on the technical ground.

4. Sri Ayyub Khan, Advocate appearing for respondent no. 3 submitted that against the order impugned passed by Sub-Divisional Officer remedy will lie before appropriate forum, as such, the writ petition is liable to be dismissed on the ground of alternative remedy. He further submitted that partition suit was decided after following due procedure of law. He further submitted that restoration application was filed after four years but there was no prayer for condonation of delay, as such, the restoration application has been rightly rejected on the ground of limitation. He further submitted that suit for partition in respect to holdings is very much maintainable, as such, no interference is required against the impugned order even on merit also.

5. I have considered the arguments advanced by counsel for the parties.

6. There is no dispute about the fact that impugned order dated 12.6.2015 for preliminary decree has been passed in partition suit filed by the contesting respondents. There is also no dispute about the fact that restoration application dated 6.2.2019 filed by petitioner has been dismissed on the ground of limitation.

7. In view of the impugned order passed by Sub-Divisional Officer rejecting the restoration application on the ground of limitation remedy will lie before Appellate Court/Revisional Court rather writ petition before this Court.

8. So far as the ratio of law laid down by Division Bench of this Court passed in **Special Appeal Defective No. 417 of 2021, Shiv Kumar Pandey Vs. State of U.P. Thru. Secy. Agriculture & Ors.** is concerned, the petitioner can cite the ratio of law before the appropriate forum where the remedy will lie against the order rejecting the restoration application.

9. No interference is required against the impugned order.

10. The writ petition is dismissed with liberty to petitioner to approach the proper forum. It is provided that if petitioners file appeal/revision within period of three weeks before appropriate forum along with the prayer for condonation of delay, if any, the same shall be considered and disposed of in accordance with law expeditiously.

Order Date :- 4.12.2023

S.A.