

Neutral Citation No. - 2024:AHC-LKO:14722**Court No. 8**

Case :- WRIT - B No. - 158 of 2024

Petitioner :- Ram Awadhesh

Respondent :- Member Board Of Revenue U.P. Lko. And 6 Others

Counsel for Petitioner :- Mohammad Aslam Khan

Counsel for Respondent :- C.S.C.,Prabhakar Vardhan Chaudhary,Pritish Kumar,Umesh Singh

Hon'ble Jaspreet Singh,J.

1. Heard Shri Mohd. Arif Khan, learned Senior Counsel alongwith Mohd. Aslam Khan, learned counsel for the petitioner and Shri Pritish Kumar, learned counsel alongwith Shri Vidya Dhar Upadhyay for private respondent no.3 and Shri Dev Prakash Mishra, learned Standing Counsel for the State-respondents no.1 and 2. Shri Umesh Singh has accepted notice on behalf of the private respondent no.6, however, he is not present at the time of hearing.

2. Under challenge is the order dated 23.01.2024 whereby the revision of the petitioner was dismissed and the order dated 05.01.2024 passed by the respondent no. 2 admitting the appeal for hearing of the private respondent no. 3 has been affirmed.

3. In order to appreciate the controversy involved in the instant petition, certain brief facts are being noticed hereinafter:-

4. The dispute in question relates to plot no. 56/10 measuring 0.7590 hectares situate in Village Godwa Gadiyana, Pargana, Tehsil and District Raebareli which was recorded in the name of Smt. Sharda Rani.

5. The genesis of the dispute was triggered when an application under

Section 33/39 of the U.P. Land Revenue Act, 1901 was filed by the father of the petitioner and the private respondents no. 4 and 5 and the grand-father of respondent no. 6 seeking corrections in the revenue record entries and Ram Awatar had sought his name to be recorded. The same came to be dismissed by means of order dated 17.07.1979.

6. Thereafter Ram Awatar, the father of the petitioner and private respondent nos. 4 and 5 and grand-father of the respondent no. 6 instituted a suit before the Sub Divisional Officer, Raebareli under Section 229-B of the U.P.Z.A.&L.R. Act seeking declaration of his rights over the dispute property in question on the basis of adverse possession.

7. During pendency of the said suit, which was filed in the year 2000, Smt. Sharda Rani had filed her written statement and was contesting the proceedings. Later, Smt. Sharda Rani sold the property in question to the private respondent no. 3 by means of a registered sale deed dated 28.09.2013. While the said suit was pending, the respondent no. 3 on the basis of the said sale deed got his name mutated in the revenue records.

8. It is at this stage that the father of the petitioner and private respondent nos. 4 and 5 and grand-father of the respondent no. 6 made an application in the suit under Section 229-B of the U.P.Z.A.& L.R. Act, 1950 seeking impleadment of the private respondent no. 3 as he had purchased the property in question. This application was filed by Ram Awatar on 13.04.2015 and the same was allowed by the court concerned on 11.08.2015, as a result, the private respondent became a party to the suit and he too filed his written statement on 21.05.2018.

9. While, the matter was being contested before the Sub Divisional Officer in the suit for declaration, in the meantime, Ram Awatar also challenged the mutation order in favour of the private respondent no. 3.

10. Since, the application/objections filed by Ram Awatar against the mutation of the private respondent no. 3 was allowed and the mutation order was set aside, consequently, Ram Awatar also moved another application in the suit under Section 229-B of the U.P.Z.A.&L.R. Act seeking deletion of the name of the petitioner. His application came to be allowed by the Sub Divisional Officer-I, Raebareli by means of order dated 21.06.2023 and the respondent no. 3 was deleted from the array of parties in the suit under Section 229-B of the Act of 1950.

11. Though, the said order of deletion was passed by the court on 21.06.2023, the same was challenged by filing a review which was dismissed on 06.10.2023, thereafter, the private respondent no. 3 preferred a revision, however, before the said revision could be entertained and considered on merits, in the meantime, the suit under Section 229-B of the Act of 1950 came to be decreed ex-parte on 30.10.2023.

12. It is in the aforesaid backdrop that the private respondent no. 3 filed an appeal before the Lower Appellate Court i.e. the respondent no. 2 and by means of order dated 10.11.2023, the appeal of the private respondent no. 3 was entertained. This order of admission of the appeal dated 10.11.2023 came to be challenged by filing a writ petition before a coordinate Bench of this Court on the premise that the petitioner who was the caveator-respondent before the Lower Appellate Court had raised preliminary objections regarding the maintainability of the said appeal and had also

advanced his submissions including by citing certain decisions which was not considered but in a cursory manner, the order of admission was passed.

13. The coordinate Bench of this Court by means of order dated 16.12.2023 (2023:AHC-LKO:83029) allowed the writ petition and the order of admission dated 10.11.2023 passed in Case No. 3120 of 2023 (Ramakant Singh Vs. Ram Prasad and others) was set aside and the Appellate Authority was directed to pass fresh orders regarding admission of the appeal by considering the arguments and judgments cited from the side of the petitioner who was the caveator before the Lower Appellate Court within a period of three weeks. The coordinate Bench also for a period of three weeks directed the parties to maintain status-quo and it was further provided that no third party rights would be created.

14. Once again, the matter was before the Lower Appellate Court who after hearing the parties at length by means of order dated 05.01.2024 admitted the appeal and further passed an interim order restraining the parties from selling the property, however, while passing the order dated 05.01.2024, it noticed that summons had already been sent to the respondents which were duly served and fixed the matter for hearing.

15. The petitioner being aggrieved preferred a revision against the order dated 05.01.2024 which was dismissed by the Revisional Court holding that only an admission order had been passed by the Lower Appellate Court and the petitioner had all the opportunity of raising objections and placing his submissions on merit before the Lower Appellate Court, hence, in the aforesaid backdrop, the revision came to be dismissed and the said order of admission dated 05.01.2024 and the order dismissing the revision dated

23.01.2024 have been assailed before this Court.

16. Sri Mohd. Arif Khan, learned Senior Counsel while attacking the two orders have made a submission that the order of admission was bad in the eyes of law since the Lower Appellate Court was bound by the order of remand passed by a coordinate Bench of this Court dated 16.12.2023.

17. He submits that the Lower Appellate Court was required to consider the submissions of the respective parties in context with the submissions and the objections raised by the respective parties and he did not have a right to expand or permit the private respondent no. 3 to patch up the lacunae in his appeal.

18. Elaborating his submissions, the learned Senior Counsel submits that admittedly the private respondent no. 3 was not a party to the suit as by the order dated 21.06.2023, the private respondent no. 3 had been deleted in the suit under Section 229-B of the Act of 1950 and the order of deletion was passed after hearing the parties and this fact was very well in the knowledge of the private respondent no. 3, hence, when he chose to file the appeal before the Lower Appellate Court, it was incumbent upon him to have moved an application seeking leave of the court to file the appeal. In absence of any such application, the appeal itself was not maintainable and this was the precise objection which had been raised by the petitioner who was the caveator before the Lower Appellate Court, yet, this objection was neither considered nor met appropriately.

19. It is for the said reason that the petitioner had approached this Court on the earlier occasion where the order of remand was passed dated

16.12.2023 and in light of the said order, the Lower Appellate Court was bound by the directions given by the High Court and it could not permit the private respondent no. 3 to move the application seeking leave as that amounted to violation of the orders of the High Court while remitting the matter.

20. It is further urged that since Smt. Sharda Rani who was the original defendant and a party to the suit had expired during pendency of the proceedings and in terms of Order 22 Rule 4 (4) C.P.C. the petitioner was exempted from bringing the heirs of Smt. Sharda Rani on record as after filing her written statement, she had stopped appearing before the Trial Court. In this view of the matter, the contention raised by the private respondent no. 3 before the Lower Appellate Court for the purposes of admission was patently erroneous to the effect that the judgment dated 30th October, 2023 was against a dead person and a nullity.

21. It is further urged that the manner in which the Lower Appellate Court had proceeded with the matter raises concern and despite the order passed by this Court dated 16.12.2023, it had violated the order of remand and as such the order impugned is patently erroneous and deserves to be set aside. The Revisional Court also misdirected itself in treating the order of admission as interlocutory in nature and that since the petitioner had ample opportunity to address the court on merits and while dismissing the revision, it did not consider the contentions raised by the petitioner, hence, the order dismissing the revision is also bad and deserves to be set aside.

22. The learned Senior Counsel for the petitioner has relied upon the decisions of the Apex Court in ***Smt. Jatan Kanwar Golcha Vs. M/s Golcha***

Properties Private Ltd. AIR 1971 SC 347; State of Punjab and Others Vs. Amar Singh and Another 1974 2 SCC 70 and Jasraj Inder Singh vs. Hemraj Multachand 1977 (2) SCC 155.

23. Sri Prithish Kumar, learned counsel appearing for the private respondent no. 3 has refuted the aforesaid submissions and has stated that it is not disputed between the parties that Smt. Sharda Rani was the recorded owner of the property in question. It is also not disputed between the parties that Smt. Sharda Rani sold the property in question to the private respondent no. 3 on 28.09.2013. Since the name of the private respondent no. 3 had been duly mutated, hence, the petitioner himself had moved an application in the suit to implead the private respondent no. 3 as a party.

24. In furtherance thereof, the private respondent no. 3 contested the suit by filing his written statement which was on record, however, later the petitioner made another application seeking deletion of the private respondent no. 3 from the proceedings and the said application came to be allowed on 21.06.2023. It is submitted that since the private respondent no. 3 had purchased the property, hence, he was a necessary and a proper party also in terms of Order 22 Rule 10 C.P.C., hence, the suit could have continued against the private respondent no. 3.

25. Admittedly, the petitioner did not bring on record the heirs of Late Smt. Sharda Rani who had expired during pendency of the proceedings and by deleting the assignee of Smt. Sharda Rani from the parties, the petitioner had committed an error and even the order permitting the deletion of the private respondent no. 3 was assailed by filing an application for recall at the first instance but later the matter was also carried in revision, however,

before any effective orders could be passed, the suit itself was decreed on 30th October, 2023.

26. It is further submitted that since the private respondent no. 3 had already purchased the property from Smt. Sharda Rani, a fact which was known to the petitioner and the private respondent no. 3 being an aggrieved person filed the appeal before the Additional Commissioner. Even though, on the first occasion, when the appeal was admitted, the petitioner had assailed the said order by filing a writ petition which was allowed by the coordinate Bench of this Court by means of order dated 16.12.2023.

27. It is pointed out that in so far as the order passed by the coordinate Bench of this Court is concerned, the same was ex-parte as shall be evident from the order itself where the Court while dealing with the issue in paragraph 2 noticed that notice to the private respondent nos. 2 to 5 was dispensed with, however, the Court had only permitted a fresh hearing on admission and in any manner, it did not curtail the right of either party or the court concerned.

28. It is submitted that the entire premise upon which the learned Senior Counsel has made his submissions that the earlier order dated 16.12.2023 curtailed the right of the private respondent no. 3 to move an application for seeking leave to appeal and its consideration by the Lower Appellate Court is per se not borne out from the record nor there is any such embargo contained in the order dated 16.12.2023.

29. It is further urged that the reliance placed by the learned Senior Counsel on the provisions of Order 22 Rule 4 (4) C.P.C. and the

submission, it was not appropriately considered by the Lower Appellate Court while passing the order of admission on 05.01.2024 is also misconceived, inasmuch as, for the provisions of Order 22 Rule 4 (4) C.P.C. to apply its necessary conditions had to apply but it is not present in the instant case, thus, the suit had been decreed against Smt. Sharda Rani who was the sole contesting party and admittedly she had died during the pendency of the proceedings, accordingly, the order was against a dead person and a nullity in the eyes of law. Since all these issues were involved in the appeal for adjudication, therefore, the Lower Appellate Court was justified in admitting the appeal and in any case the appeal is yet to be heard on merits and no prejudice has been caused, accordingly, this Court will not exercise jurisdiction in terms of Article 226/227 of the Constitution of India to interfere with interlocutory orders which do not decide the rights of the parties and consequently, the petition deserves to be dismissed.

30. The learned counsel for the private respondent no. 3 has relied upon a decision of the Apex Court in ***T. Gnanavel Vs. T.S. Kanagaraj AIR 2009 SC 2637***.

31. The Court has heard the learned counsel for the parties and perused the material on records.

32. In so far as the facts of the case are concerned, the same are not in dispute between the parties.

33. The only question that draws the attention of the Court is as to whether the order passed by the coordinate Bench of this Court dated 16.12.2023 could prevent the private respondent no. 3 to subsequently

move an application seeking leave to appeal when the said application was not accompanied at the time of filing of the appeal. Moreover, whether the order of remand dated 16.12.2023 created an embargo in entertaining such application.

34. In view of the admitted facts as noticed hereinabove, the factual position that obtains is that Smt. Sharda Rani was the owner of the property in question who was contesting the suit as a defendant, under Section 229-B of the U.P.Z.A. & L.R. Act, 1950 filed by the father of the petitioner Ram Awatar.

35. In the year 2013 Smt. Sharda Rani had sold the property to the respondent no. 3 and this fact was known to the petitioner as he himself had moved an application seeking to implead the private respondent no. 3 which was allowed by the Trial Court on 11.08.2015. It is also not in dispute that later on the application of the petitioner, the Trial Court passed another order on 21.06.2023 deleting the respondent no. 3 from the array of parties.

36. Apparently, Order 22 Rule 4 applies where the defendant to the suit had died during pendency. It is also to be noticed that Smt. Sharda Rani who was the defendant originally, during her lifetime, had executed a sale deed in favour of the respondent no. 3. It is not only the legal heir of a deceased party who are to be brought on record rather it is the legal representative who is required to be brought on record so that the estate of the deceased is duly represented and the matter can be decided on merits.

37. Whether the judgment was a nullity or it was saved by Order 22 Rule

4 (4) C.P.C. is a question which is to be decided in appeal. This Court has no difficulty in dealing and deciding the issue but this Court refrains from dealing with the issue as that would affect the rights of the parties. If any finding is given by this Court then the outcome of the appeal would be materially affected as it is one of the most important issue in appeal and it may affect the case, especially when the issue has been noticed by the Lower Appellate Court for the purposes of admission and the appeal is to be decided on merits.

38. Coming to the other submissions regarding the order of remand which was binding on the Trial Court and the Appellate Court could not have accepted the application for leave to appeal, if examined, would indicate that the coordinate Bench of this Court in its order dated 16.12.2023 in paragraphs 11 to 18 has held as under which is being reproduced for ready reference:-

“11. I find that there are pleadings in the writ petition that arguments were advanced by the learned counsel appearing for the caveator in the appeal before the Additional Commissioner (Judicial) First, Lucknow Division, Lucknow regarding maintainability of appeal and it was argued that once appellant was not party in the suit, then order passed in the suit cannot be challenged by the appellant unless he seeks leave of appellate court and leave is granted. Learned counsel appearing for the caveator has also cited judgments rendered by the Hon'ble Supreme Court reported in (1974) 2 SCC 70 State of Punjab (now Haryana) and others vs. Amar Singh and another and AIR 1971 SC 374, Smt. Jatan Kanwar Golcha vs. M/s. Golcha Properties Private Ltd.

12. This court finds that not even a single reason has been assigned for admitting appeal. It has been vaguely mentioned that appellate court has seen the facts mentioned in the memo of appeal and judgments which find mention in the appeal cited by the appellant. In the order dated 10.11.2023, none of the arguments raised by the learned counsel appearing for the caveator have been considered.

13. This court is surprised to note that once arguments were raised on behalf of the caveator regarding maintainability of appeal without leave of appellate court and further, in that regard certain judgments rendered by the Hon'ble Supreme Court were cited, then how appeal could have been admitted without considering those arguments and judgments. Appellate court while passing order dated 10.11.2023 has not recorded any finding regarding arguments advanced on behalf of the caveator.

14. So far as preliminary objection raised by Mr. Hemant Pandey, learned counsel appearing for the Respondent No.1 is concerned, this court finds that definitely against any order passed in appeal, revision lies before the Board of Revenue under Section 210 of U.P. Revenue Code, 2006, but petitioner in this writ petition has challenged the order passed by the Appellate Court on the ground that arguments advanced by the learned counsel appearing for the caveator relating to maintainability of the appeal have not been considered and without referring the judgments cited from the side of caveator; appeal has been admitted which amounts to the abuse of process of the court. Once the abuse of the process of the court is apparent on the face of order and judicial impropriety has been done by the appellate court by not considering the arguments advanced and judgments cited from the side of the caveator then against the said order; writ petition filed under Section 226 of the Constitution of India is maintainable.

15. It is well settled proposition of law that once arguments are advanced and judgments are cited by any party regarding maintainability of the case then while passing the order for admission of the case, the said arguments and judgments must be considered.

16. In view of the aforesaid reasons, this court finds that the order dated 10.11.2023 passed by the Additional Commissioner (Judicial) First, Lucknow Division, Lucknow in Case No. 3120/2023, Computerized Case No. C202310000003120, Rama Kant Singh vs. Ram Prasad and others is not sustainable in the eyes of law.

17. Accordingly, this writ petition is allowed. Order dated 10.11.2023 passed in Case No. 3120/2023, Computerized Case No. C202310000003120, Rama Kant Singh vs. Ram Prasad and others is quashed. Appellate Authority i.e. Respondent No. 1 is directed to pass fresh order regarding admission of the appeal by considering the arguments and judgements cited from the side of the petitioner/ caveator within three weeks from today.

18. To avoid any further complication in the matter, this court directs that for three weeks, parties shall maintain status-quo regarding land in question and will not create any third party rights."

39. From the above, it would be clear that the basic premise upon which this Court had entertained and allowed the petition was that the arguments and the decision cited by the petitioner had not been taken note of by the Lower Appellate Court and for the said reason, the initial order of admission dated 10.11.2023 was set aside and the Appellate Authority was directed to pass fresh order regarding admission of the appeal by considering the arguments and judgments cited from the side of the petitioner/caveator within a period of three weeks.

40. From the bare perusal of the aforesaid decision and the relevant paras

as noticed hereinabove, it would reveal that neither any embargo has been placed on the exercise of powers by the Lower Appellate Court while passing the order dated 16.12.2023. The only direction was that the Lower Appellate Court would pass a fresh order on admission within three weeks after considering the arguments and judgments cited from the side of the petitioner.

41. It is also indicated in the order that the notice to the private respondent nos. 2 to 6 was dispensed with and in this fashion, the present respondent no. 3 was apparently not heard. The private respondent no. 3 after the order dated 10.11.2023 was set aside in light of the orders passed by this Court dated 16.12.2023 had moved an application seeking leave of the Court to appeal. This application dated 21.12.2023 was considered and thereafter taking note of the objections and the decisions cited by the petitioner, the order dated 05.01.2024 was passed.

42. The contention of learned Senior Counsel for the petitioner is that the order passed by this Court created any sort of restrictions on the right of the private respondent no. 3 or the Lower Appellate Court is not quite correct. It is not disputed that the private respondent no. 3 had purchased the property and though he had a right of contest while he was impleaded as a party yet on the own showing of the petitioner, the private respondent no. 3 had been deleted and any order passed against the private respondent no. 3 who was the assignee of Smt. Sharda Devi prima facie had a right to contest, thus, the question regarding the right of the private respondent no. 3 to file an appeal cannot be disputed.

43. Now, the only contention as to the fact that the private respondent no.

3 while filing the appeal did not move an application seeking leave of the court which came to be filed later only after the order dated 16.12.2023 whether it can create any fetter on the private respondent no. 3 or the court concerned, if examined, would reveal that it is not so.

44. It is now well settled to be disputed that any person aggrieved by a judgment of a court, subject to the forum of appeal is entitled to invoke the said powers assailing the judgment. In case if a person is not a party to the proceeding and yet he is aggrieved, he has a right of filing the appeal after seeking leave of the court. Mere presentation of the appeal is a ministerial act and even if at all at a later stage, the application is moved to seek the leave that can always be treated as substantial compliance for the reason that it is only the procedural aspect and it cannot be said that such act for non-filing of the application along with the appeal itself renders it defective to the extent that it cannot be cured at all at a later stage.

45. It is merely a procedural lapse which can also be cured at a later stage. In the instant case, it would reveal that once the order of admission had been set aside by the High Court on 16.12.2023 and the matter was directed to be considered afresh by the Lower Appellate Authority, at this stage, the application seeking leave had been moved. It cannot be said that the petitioner has suffered any prejudice as he has all the rights to raise objections on the maintainability, the same has been duly considered and prima facie view has been expressed by the Lower Appellate Court admitting the appeal and fixing the matter for final hearing. This in itself cannot create any prejudice as the appeal is yet to be heard on merits. To the aforesaid extent, the submission of learned Senior Counsel on this

count also fails.

46. In so far as the submissions made by learned Senior Counsel for the petitioner is that at one place, the Lower Appellate Court had noticed that the service is complete and at a later stage, it passed an order for serving the private respondents in the appeal through publication also has no merit for the reason that the brothers of petitioner who were not put in appearance and therefore the Lower Appellate Court has permitted service of summons through publication that also does not create any prejudice as the petitioner and his brothers are always entitled to contest the appeal and this cannot indicate any bias or any irregularity committed by the Lower Appellate Court.

47. In so far as the decisions cited by learned Senior Counsel, if seen, it would indicate that in *Jatan Kanwar Golcha (supra)*, it has been held by the Apex Court that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment. This decision of the Apex Court merely reiterates the proposition that an appeal can be filed by a person who is not a party to the suit if he is prejudicially affected by the judgment but it is not an Authority that an application for leave must only be accompanied along with the memo of appeal and if not done so, the application for leave to appeal cannot be moved at a later stage or subsequently and to that extent, the said decision does not come to the aid of the petitioner.

48. Similarly, in *Amar Singh (Supra)*, the Apex Court has merely reiterated the aforesaid proposition regarding that any person prejudicially

affected has a right to appeal after seeking leave of the court but again as noticed above, it is not an Authority on the proposition that the application for leave to appeal can only be filed along with the memo of appeal and cannot be taken note of at a later stage, hence, the said decision also does not come to the rescue of the petitioner.

49. Lastly, considering the decision of the Apex Court in ***Jasraj Inder Singh (supra)*** wherein it has been held that the remand order was undoubtedly binding on the Lower Court and the same cannot be ignored as a proposition is quite correct, however, in the facts of the instant case, there is nothing on record which prevents the Lower Appellate Court to have not accepted the application for leave to appeal.

50. The remand order as stated by learned Senior Counsel is not an order passed in terms of Order 41 Rule 23 and 23-A C.P.C. rather the Court while dealing with the contentions of the petitioner noticed that the Lower Appellate Court had not consider the submissions nor dealt with the citations cited by the petitioner while passing the initial order of admission, hence, it set aside the same requiring the court of first appeal to decide the same afresh. In such circumstances, the decision of the ***Jasraj Inder Singh (Supra)*** has no applicability.

51. Accordingly, this Court does not find that there is any merit in the instant petition which deserves to be dismissed leaving it open for the parties to contest the appeal on merits.

52. It is made clear that any observations made by this Court while passing the instant order may not be taken as an opinion on merits of the

matter which shall be considered by the Lower Appellate Court.

53. For all the aforesaid reasons, the petition is *dismissed*. Costs are made easy.

Order Date :- 19th February, 2024

Asheesh

(Jaspreet Singh, J.)