

Court No. - 6

Case :- WRIT - C No. - 3000050 of 2005

Petitioner :- Jagvender Singh And Anr.

Respondent :- Additional Commissioner Admin. Lucknow
And 2 Ors.

Counsel for Petitioner :- Jagdish Prasad Maurya, Vijay
Dixit, Vikas Singh

Counsel for Respondent :- C.S.C.

Hon'ble Alok Mathur, J.

1. Heard Sri Sandeep Dixit, learned Senior Advocate assisted by Sri Vijay Dixit, learned counsel for the petitioner as well as learned Standing Counsel for respondents.

2. Petitioners have preferred the present writ petition being aggrieved by the order dated 13.01.2004, passed by the Prescribed Authority under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (*hereinafter referred to as "the Act, 1960"*) as well as order dated 06.04.2005, passed by the Appellate Authority dismissing the appeal preferred by the petitioners.

3. It has been submitted by learned counsel for the petitioners that present dispute pertains to Gata No. 489/4-654 hectares, situated in Village - Jagdeopur, Mazra - Bheera, Tehsil - Palia, District - Kheri on which the petitioners claim to be Bhoomidhars. The petitioners are recorded tenure holders of the land since Fasli Year 1388 pertaining to year 1991, but notice under Section 10(2) of the Act, 1960 was issued by the Prescribed Authority in the name of one Jageer Singh on 09.03.1992. The petitioners being recorded tenure holders were not given any notice and their land was wrongly clubbed with the land of Jager Singh. In absence of any notice under Section 10(2) of the Act, 1960 proceedings were finalized by order of Prescribed Authority dated 30.09.2002 and the land of the petitioners was declared surplus considering it to be the land of the recorded tenure holder namely Jageer Singh. The petitioners being aggrieved by the order of Prescribed Authority dated 30.09.2002, preferred an appeal before the Additional Commissioner, under Section 13 of the Act, 1960 but the said appeal was dismissed on the ground of maintainability by judgment dated 31.03.2003. Against the order of dismissal of appeal dated 31.03.2003, the petitioners approached this Court and filed Writ Petition (Ceiling) No. 101 of 2003, which was

also dismissed by order dated 04.05.2003, directing the petitioner to avail remedy under the law.

4. It has been submitted that till this stage the petitioners had not appeared before the Prescribed Authority nor had they filed objections under Section 11(2) of the Act, 1960 and it is only in pursuance to the directions of this Court dated 04.05.2003 that the petitioners for the first time filed their objections under Section 11(2) of the Act, 1960 before the Prescribed Authority on 12.05.2003.

5. The Prescribed Authority rejected the claim of the petitioners on the ground of limitation as well as on merits. On merits he stated that the proceedings were decided by him where the petitioners did not object to their land being clubbed with the land of Jageer Singh and consequently their land was declared surplus and petitioners had filed objections under Section 11(2) of the Act, 1960 after long lapse of time and on both these counts rejected the objections filed by the petitioners.

6. It has been submitted that even before the Appellate Authority the proceedings were concluded ex-parte against the petitioners who were appellants and order of the Prescribed Authority dated 13.01.2004 was upheld. Against both the aforesaid orders the petitioners had preferred the present writ petition.

7. The petitioners assailing both the aforesaid orders have claimed that they have not been afforded any opportunity of hearing by both the authorities concerned. The Prescribed Authority should not have dwelled into the merits of the case, in case he found that the objections were filed belatedly.

8. It is submitted by learned counsel for the petitioners that perusal of Section 11(2) of the Act, 1960 would clearly indicate that the application has to be made within a period of 30 days from the date of passing of order under Sub-section (1) of the Act, 1960 by the tenure holder sufficient cause being shown for his absence. The Prescribed Authority has power to set aside the orders under Section 11(1) of the Act, 1960 and consequently even if the application was filed belatedly, same could have been adequately considered by the Prescribed Authority and delay could have been condoned.

9. In the present case it has been noticed that the petitioner being aggrieved by the order of Prescribed Authority filed an appeal and subsequently had approached this Court by filing Writ Petition No. 101(C) of 2003. This Court had clearly indicated that in case the petitioners had any objections they

have liberty to raise before the Prescribed Authority and objections were filed by them within two weeks from the date of passing of order by this Court. The Prescribed Authority should have examined the order of this Court and there was no occasion for him to rejected the application on the ground of delay.

10. The order passed by the Appellate Authority also is arbitrary and illegal inasmuch as the Appellate Authority could not have decided the appeal in absence of petitioners (appellants) as per provisions of Order 41 Rule 17 CPC read with Section 38 of the Act, 1960, where provisions of CPC squarely apply to the appellate proceedings. In absence of the appellants the appeal could have been dismissed in default but the Appellate Authority could not have proceeded to decide the appeal ex-parte in absence of appellants.

11. The law in this regard is very clear. The Hon'ble Supreme Court in the case of **Ghanshyam Dass Gupta Vs. Makhan Lal, (2012) 8 SCC 745**, has observed as under :-

"6. We are, in this case, called upon to consider whether the High Court was justified in deciding the appeal on merits in the absence of any representation on behalf of the appellant, in view of the Explanation to Order 41 Rule 17(1) CPC. The said provision is given below for easy reference:

"17. Dismissal of appeal for appellant's default.- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may take an order that the appeal be dismissed.

Explanation.- Nothing in this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits."

7. Rule 17(1) of Order 41 deals with the dismissal of appeal for the appellant's default. The abovementioned provision, even without Explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if nobody has appeared for the appellant.

8. Prior to 1976, conflicting views were expressed by the different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some

High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for the appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, the Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.

9. We may, in this connection, refer to a judgment of this Court in *Abdur Rahman v. Athifa Begum*, (1996) 6 SCC 62, wherein the scope of Explanation to Rule 17(1) of Order 41 CPC came up for consideration. While interpreting the said provision, this Court took the view that the High Court could not go into the merits of the case if there was no appearance on behalf of the appellant. We also endorse that view."

12. The Apex Court in the case of **Prabodh Choudhury Das and Another Vs. Mahamaya Das and Others**, (2020) 18 SCC 701, the Court has held that if appellant does not appear, court may, if it deems fit, dismiss appeal for default of appearance but it does not have power to dismiss the appeal on merits. The Court in paras 8 and 9 has held as under :-

"8. The Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976. Prior to 1976, conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Therefore, the Explanation was introduced w.e.f. 1-2-1977, to clarify the law by making an express provision that where the appellant does not appear, the court has no power to dismiss the appeal on merits. This, Order 41 Rule 17(1) read with its Explanation makes it explicit that the court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the

appellant does not appear, the court may, if it deems fit, dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.

9. This position has been clarified by this Court in Abdur Rahman v. Athifa Begum (1996) 6 SCC 62, wherein, it was held that that High Court cannot go into the merits of the case when there was non-appearance of the appellant. In Ghanshyam Dass Gupta v. Makkan Lal this Court has reiterated the legal position as under :

"8. Prior to 1976, conflicting views were expressed by the different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for the appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, the Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant."

13. From the aforesaid case law it is clear that the Appellate Authority has to exercise its powers in accordance with the CPC and in absence of appellants the appeal cannot be decided on merits.

14. In the light of above, order 13.01.2004, passed by the Prescribed Authority as well as order dated 06.04.2005, passed by the Appellate Authority are set aside.

15. The matter is remitted to the Prescribed Authority to decide the same in accordance with law on merits after giving adequate opportunity of hearing to the parties concerned. Considering the

fact that long time has lapsed during pendency of this matter before this Court, the Prescribed Authority is directed to decide the matter expeditiously, say within four months from the date of production of certified copy of this order in accordance with law.

16. The writ petition stands **allowed**.

Order Date :- 11.3.2024

A. Verma

(Alok Mathur, J.)