

Court No. - 8

Case :- WRIT - B No. - 643 of 2023

Petitioner :- Smt. Ghasita

Respondent :- Board Of Revenue Lko. Thru. Secy. And 3 Others

Counsel for Petitioner :- Pramod Kumar Yadav

Counsel for Respondent :- C.S.C., Dilip Kumar Pandey

Hon'ble Jaspreet Singh, J.

1. Heard learned counsel for the petitioner, Shri Hemant Pandey, learned standing counsel for the State-respondents and Shri Dilip Kumar Pandey, learned counsel appearing for Gaon Sabha.

2. Under challenge is the order dated 23.06.2023 passed by the Board of Revenue whereby the revision preferred by the petitioner was dismissed upholding the order dated 04.12.2021 passed by the respondent no.3, as a consequence, in recall proceedings at the behest of State the principal order dated 31.07.2021 passed in favour of the petitioner has been stayed.

3. Submission of the learned counsel for the petitioner is that the proceedings were initiated by the petitioner under Section 54 of the U.P. Land Revenue Act 1901. The said proceedings were contested by the State who had also filed their written objections and a copy thereof has been brought on record as annexure no.3. It is also submitted that the respondents were delaying the proceedings and as such the respondent no.3 by means of order dated 31.07.2021 allowed the application of the petitioner.

4. The State Authorities being aggrieved preferred an application for recall on 04.12.2021 which was also accompanied by an application under Section 5 of the Limitation Act, 1963. On the said application, the respondent no.3 on the very same date i.e. 04.12.2021 entertained the application for recall and also as an interim measure passed an order dated 04.12.2021 staying the operation of the order dated 31.07.2021. The petitioner being aggrieved filed a revision before the Board of Revenue which has been dismissed noticing the fact that since the recall application is already seized by the respondent no.3, the petitioner would have ample opportunity to raise objection and contest the proceedings, hence it declined to interfere.

5. Submission of the learned counsel for the petitioner is two fold:- **(i)** It is urged that once the respondents had already filed their written objections and later it did not participate to contest the proceedings, in such a situation, the orders have been passed on merits and therefore neither an application for recall or review would be maintainable and consequently the Authority had no jurisdiction to pass the order dated 04.12.2021. **(ii)** It is further urged that even otherwise if at all it may be considered that the application for recall could have been entertained but the fact remains that it was accompanied by an application under Section 5 of the Limitation Act and before condoning the delay, the Authority did not possess the jurisdiction to pass any order staying the operation of the principal orders dated 31.07.2021 which in affect amounts to entering

into merits of the matter and allowing the petition by an interim order and thus for both the reasons aforesaid, the impugned order was bad.

6. Shri Hemant Pandey, learned counsel for the State has submitted that even though the State may have filed his objection but the fact remains that on the date of passing of the order dated 31.07.2021, the State was not heard and to that extent the order is *ex parte* which permits the State to move an application for recall.

7. He has further referred to Regulation 489 as contained in the U.P. Revenue Court Manual and has drawn the attention of the Court that the power to grant ad interim *ex parte* order vests with the authority and in such a case where the property of the State was at stake hence it was justified for the authority to have passed an order and the same cannot be faulted for want of jurisdiction.

8. It has also been urged that the matter is already pending before the authority concerned and it will be open for the petitioner to contest the case on merits and in any case since the petitioner has approached this Court against the order dated 04.12.2021, in exercise of jurisdiction under Article 226 of the Constitution of India, such discretionary orders which do not impact the final rights of the parties may not be interfered with. Hence for the aforesaid reasons the petition is liable to fail.

9. The Court has heard the learned counsel for the parties and also perused the material on record.

10. In pursuance of the order dated 25.07.2023, the State was required to seek instructions as to whether they have participated in any proceedings and filed their objections especially as in the application for recall, the stand of the State appears to be that they were not properly served and the orders have been passed on merits behind the back of the State. This was contested by the petitioner as he had brought on record the copy of the objections filed by State in the proceedings as annexure no.3.

11. In this regard, as per written instructions, it could not be disputed that the objections were filed by the respondent State and this fact has also been taken note of by the respondent no.3 while passing the order dated 31.07.2021.

12. Taking note of the aforesaid, this Court finds that even though if the objections were on record but the fact which could not be disputed by the counsel for the petitioner is that on the given date when the principal order dated 31.07.2021 was passed, the State was not heard and to that extent the order naturally, having been passed in absence of the State Authorities, would be *ex parte*.

13. In so far as the application for recall is concerned, it cannot be said that the same was not maintainable; inasmuch as it is not an

application for review since the law for entertaining an application for review is quite different and unless and until such powers of review are conferred on the authority by the statute itself, the said powers cannot be exercised by the authority.

14. However, in case of recall the authority does not enter into the merits and merely recalls the order, plainly, for the reason that the aggrieved party was not heard as it is against the principles of natural justice. The distinction between review and recall has been considered by the Apex Court in the case of **Asit Kumar Kar Vs. State of West Bengal** (2009) 2 SCC 703 and the relevant portion reads as under:-

"6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees' Assn. V. Raghendra Singh cancelling certain licences was passed without giving an opportunity of hearing to the persons who had been granted licences. In these circumstances, we recall the directions in para 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate court. The writ petitions are disposed of with these directions."

15. This has been followed subsequently by the Apex Court in ***Vishnu Agarwal Vs. State of U.P. (2011) 14 SCC 813.***

16. In light of the aforesaid, it is clear that in so far as the order dated 31.07.2021 is concerned, the same was ex parte and an application for recall was apparently maintainable, hence the first submission of the learned counsel for the petitioner does not find favour with this Court.

17. Now the question arises as to whether the authority could have passed an order staying the operation of the order dated 31.07.2021. If the provisions of Regulation 489 of the U.P. Revenue Court Manual is seen, it does not bar the exercise of power for grant of interim order but at the same time what is noticeable is that it only relates to proceedings which are in order i.e. does not suffer from any disability such as being beyond limitation. Regulation 489 of the U.P. Revenue Court Manual reads as under:-

489. Ad interim ex parte order-(1) The court may, on the application of any party to a suit, appeal, revision, review or other proceeding and on such terms as it thinks fit, make an order for preservation of any land which is the subject matter of the suit, appeal, revision, review or other proceeding.

(2) The court shall in all cases, except where it appears that the object of making the order for preservation would be defeated by the delay, before making the order, direct notice of the application for the same to be given to the opposite party:

Provided that where it is proposed to make an order without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of making the order would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party or to send to him by registered post/speed post immediately after the order has been made, a copy of the application for the order together with-

- (i) a copy of the affidavit filed In support of the application;*
- (ii) a copy of the plaint, memo of appeal, memo of revision or other application on which the proceeding has been initiated; and*
- (iii) copies of documents on which the applicant relies; and*
- (b) to file, on the date on which the order is made or on the working day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.*
- (3) If the condition mentioned in clause (b) of sub-para (2) of this para is complied with, the interlocutory order shall be vacated automatically. not*
- (4) Where an order has been made under this para without giving notice to the opposite party, the court shall make an endeavour to finally dispose of application within thirty days from the date on which the order was made and where it is unable so to do it shall record its reasons for such inability.*

18. Now if any proceedings are time barred and are accompanied by an application under Section 5 of the Limitation Act in such a case the said Regulation cannot be pressed into service to suggest that even without issuing notice to the other party in whose favour certain rights have been crystallized because of an order which has not been assailed in time as prescribed by law and without condoning the delay the interim order could be passed.

19. It can be gainfully stated that if any suit, appeal, revision, review or other proceedings are filed beyond the prescribed period of limitation, legally speaking, the said proceedings are still born. Only once the delay is condoned only then the proceedings are resurrected to be considered on merits.

20. In this regard, a Division Bench decision of this Court where the issue of limitation vis a vis the right to enter into the merits of a proceeding before condoning the delay was considered in **Ram**

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SCC OnLine All 107. The relevant paragraph 20 reads as under:-

"20 If any statute provides certain period for filing of appeal, an appeal filed beyond the time limit will certainly be not entertained. If the provisions of 1963 Act are applicable and party is entitled to seek condonation of delay in filing appeal, an application has to be filed specifying the grounds on which delay in filing the appeal is sought to be condoned. It is only after that the application is allowed, the appeal can be entertained and heard on merits. Before that the appeal cannot be taken up and considered on merits."

21. In the instant case, even before the notice on Section 5 of the Limitation Act was issued, the interim order has been passed by the Court. Even though it has been urged by the counsel for the State that merely the land of the State is protected but from the perusal of the order dated 04.12.2021 which is on record as annexure no.9 it would indicate that neither the authority has recorded any reasons for passing the order and moreover no finding has been recorded that in case the order of interim protection if not granted *ex parte* it would defeat the ends of justice and it was necessary in the given reasons for passing an *ex parte* order and without recording such reasons yet the operation of the order dated 31.07.2021 had been stayed.

22. At this stage it will be worthwhile to recall that even Regulation 489 of the U.P. Revenue Court Manual also envisages the recording of reasons before passing an interim order *ex parte* which has not been followed hence the argument of the State based on

Regulation 489 of the U.P. Revenue Court Manual cannot be sustained. Thus the order dated 04.12.2021 was bad as it was passed while the application of Section 5 of the Limitation Act was pending and no notice was issued thereon prior to passing of the order dated 04.12.2021 and even otherwise the order was bad for want of reasons.

23. The said order dated 04.12.2021 is also bad for another reason as by an interim order the final relief of recall has been indirectly granted. It is also now well settled that by an interim measure, no such order can be passed which has the effect of allowing the main relief (*see Bank of Maharashtra Vs. Race Shipping & Transport Co. Pvt. Ltd. and another, (1995) 3 SCC 257*). The relevant paragraphs reads as under:-

"9. Since the writ petition is still pending in the High Court and the question of maintainability of the writ petition has yet to be considered we do not propose to go into the said question. All that we wish to say at this stage is that the objections that have been raised by the appellant-Bank against the maintainability of the writ petition are not such that they may be disregarded as lacking in substance. This is a factor which has a bearing on the exercise of discretion by the court while passing the interim order in the writ petition.

10. By the interim order the High Court has directed the appellant-Bank to credit a sum of Rs.95,000 in the Current Account No.318 of Respondent 1. The High Court has recorded that respondent through their counsel had given an undertaking to bring back the amount if the Court so desires. The said interim order, in substance, grants the relief which the respondent would have been given at the final stage in the event of their writ petition being allowed by the High Court.

11. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petitioner for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations."

24. There is another way to look at the issue since by means of order dated 04.12.2021, the operation of the principal order has been stayed at best if the intention was to protect the property it could have been protected but it was not appropriate to stay the operation of the order itself. This has not been considered by the Board of Revenue while passing the order even though the petitioner would have ample opportunity to contest the matter before the respondent no.3 but ignoring the aspect as discussed above relating to the fact that the application for recall was time barred and the interim order could not have been granted before condoning the delay as it affects the rights of the parties contesting the proceeding hence, the Board of Revenue has not exercised its jurisdiction as per law.

25. In the aforesaid facts and circumstances where the matter is already seized before the respondent no.3 and the application for condonation of delay alongwith the recall application is pending, this Court taking a holistic view and protecting the rights of the respective parties sets aside the order passed by the Board of Revenue and direct the petitioner to contest the proceedings before the respondent no.3 where he shall be permitted to file his objections to the recall application as well as to the application under Section 5 of the Limitation Act, 1963. The order dated 04.12.2021 whereby the operation of the order has been stayed is set aside. However, the

parties shall maintain status quo and none of the parties shall change the nature or create any third party rights till the decision on the application under Section 5 of the Limitation Act. The petitioner shall co-operate in early hearing of the proceedings and so will the State and the court shall endeavour not only decide the application under Section 5 of the Limitation Act, 1963 first thereafter take up the application for recall. In case if it finds favour in condoning the delay and the recall and if the proceedings are restored thereafter the proceedings itself may be decided after affording full opportunity of hearing to the parties but without granting any unnecessary adjournments on merits so that the proceedings can be culminated in a final order within a period of six months from the date, a copy of this order is placed before the authority concerned.

26. It is made clear that the Court has only touched the decision making process upon which the proceedings have been challenged, however, no expression of opinion on merits have been given by the Court on the respective rights and claims of the parties which shall be considered by the court concerned.

27. With the aforesaid, the petition is allowed in the aforesaid terms. Costs are made easy.

Order Date :- 07.08.2024

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