HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 1782 of 2016

Ratiram and others …Petitioners

Vs.

Board of Revenue and others …Respondents

Advocate: Mr. M.C. Pant, Advocate for the petitioners.
Mr. M.S. Bisht, Brief Holder for the State of Uttarakhand
Mr. Arvind Kumar Sharma, Advocate for the respondents

Hon'ble Sharad Kumar Sharma, J.
(Via Video Conferencing)

The challenge by the petitioner, in the present writ petition is to the judgement and order dated 01.06.2016, as rendered by the Board of Revenue, while exercising its revisional powers under Section 333 of the U.P.Z.A. & L.R. Act. While deciding Revision No. 151 of 2014-15, *Sau Singh and others Vs. Rati Ram,* by virtue of the impugned decision dated 01.06.2016, which has been rendered by the Board of Revenue, which is impugned in the present writ petition, the consequential effect of the Revisional Court's order was that the impugned order dated 30.06.2015, which was challenged before it by virtue of which the execution proceedings was rejected, had been set aside and as a consequence thereto it has resulted into the revival of the execution proceedings which was initiated before the Court of Assistant Collector, 1st class.

2. The brief facts of the case is that the parties to the writ petition, they interse claim their right in relation to their respective proportionate share of the property, which is being covered under the definition of land as defined under Section 3(14) of the U.P.Z.A & L.R. Act; contending thereof that they would be having a certain proportionate share over the property, on the death of their respective predecessors, namely late Mr. Khushi Ram, in case of petitioner and late Mr. Nihal Singh, in case of respondents. As a result thereto, the Suit No. 5 of 2004-05, *Sau Singh and others Vs. Khushi Ram,* was instituted in the year 2004-05, which was later on re-numbered as

Case No. 18 of 1999-2000, Sau Singh Vs. Khushi Ram, seeking partition of the holdings by invoking the provisions contained under Section 176 to be read with Section 178 of the U.P.Z.A. & L.R. Act.

3. The Suit proceeded and ultimately as per the records, which are available before this Court, the same was decided ex-parte by the judgement dated 24.07.2006. Agitating its grievance as against the decree dated 24.07.2006 of the Suit, the predecessor of the present petitioners had filed an application for recall and for setting aside the ex-parte decree on 14.08.2006. In the affidavit, filed in support of the recall application, as filed by the predecessor of the petitioner was on the ground that in pursuance to the ex-parte decree, as rendered on 24.07.2006, the *halka lekhpal* had prepared the preliminary decree and had settled the *kuras*, which was fixed by the halka lekhpal, was not agreed by the defendant to the suit on the ground as referred in para 9 and 10 of the affidavit filed in support of recall filed by the predecessor of the petitioner, relevant grounds are quoted as under:-

> ''9. यह कि पत्रावली पर दिनांक 17.01.2006 से दिनांक 4.7.2006 तक सही नजरी नक्शा पेश करने हेतु तारीखें लगाई गई लेकिन कोई सही नजरी नक्शा पत्रावली पर उपलब्ध नहीं है इसलिये आदेश दिनांक 24.7.2006 गलत आदेश है जो निरस्त किये जाने योग्य है।
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> 10. यह कि न्यायालय की डायरी में दिनांक 4.7.2006 को दिनांक 25.7.2006 दी गई बाद में काटकर 24.7.2006 के डपर 24 के स्थान पर 25 ओवर राईटिंग की गई। इसी प्रकार से पत्रावली पर आर्डर शीट में 4.7.2006 को अगली तारीख 25.7.2006 के स्थान पर ओवर राईटिंग करके 24.7.2006 लिखा गया जो कि गलत है तथा न्यायालय ने किसी आधार पर किसी एक व्यक्ति को लाभ पहुंचाने के लिए ऐसे गलत आदेश पारित किये।''

4. The predecessor of the petitioner submitted that when he reached the Court of Assistant Collector and had inspected the records then only he could gather the knowledge about the ex-parte decree dated 24.07.2006, and also became aware of the fact about the date fixed by the Court on 27.01.2006, fixing 04.07.2006, directing the halka lekhpal to prepare the correct map for the purposes of fixation of the *kuras*. Raising a doubt on the decree as well as the

mode adopted for preparation of the *kura* were the grounds for the defendant to file a recall on 14.08.2006.

5. The parties to the proceedings in the suit itself had contended that the petitioner and the respondents are the co-owners of the property in dispute having half of shares each in the property in question, but on account of non demarcation of the property or fixation of appropriate *kuras,* often dispute arises amongst them creating difficulties for them in cultivating their respective shares. They contended that in order to overcome the aforesaid persisting problem, and to eradicate the problem forever they have divided their shares and in support thereto they have arrived to the settlement on the basis of *khatauni* of 1399 to 1404 *fasli.*

6. There had been certain facts and controversies pertaining to the sale being made by the parties to the proceedings under Section 176 of the U.P.Z.A. & L.R. Act; but, at this stage, this Court is not concerned with regards to the respective sale made by the parties to the proceedings under Section 176 of U.P.Z.A & L.R. Act. The another application which was preferred by the respondents on 14.08.2006, it was on the ground that since despite the fact that it is alleged that the halka lekhpal as prepared the *kuras*, but no *parwana amal daramad* had been issued as such on the same. Though there are rival contentions that *parwana amal daramad* was already issued on 24.07.2006, i.e. much prior to the filing of application for recall by the predecessor of the petitioner. The petitioner's predecessors, apart from the aforesaid reasons given in the recall application has also contended that the map prepared by the halka lekhpal was not depicting the accurate map of the land in question and the same was not supplied on record even despite of various dates fixed by the Court below.

7. The respondent No. 2, on 24.06.2015, had filed an application in Case No. 5 of 2004-05, to set aside the order dated 22.12.2009, contending thereof that since the said order dated 22.12.2009, since being *ex-parte* and was passed without providing an effective opportunity of hearing, the same may be set aside and the matter may be decided on merits. The application for recall thus filed by respondent No. 2 on 24.06.2015, was considered by the Court of Assistant Collector, First Class and had rejected the application on 30.06.2015, on the ground that the application seeking for recall of the judgement dated 22.12.2009, dismissing the suit being Suit No. 5 of 2004-05 for want of prosecution, was filed at a highly belated stage. Though the fact remains that the said restoration application, as filed by respondent No. 2 on 24.06.2015, was supported with delay condonation application, giving the reasons therein for seeking the condonation of delay and recall of the judgement dated 22.12.2009. But, the Court of Assistant Collector, First Class rejected the same on the ground of delay itself, the relevant part is quoted hereunder:

> ''प्रार्थी के आवेदन का तथा पत्रावली अवलोकन किया गया।
> पाया गया कि प्रकरण दिनांक 22.12.09 को अदम पैरवी में खारिज किया जा चुका है। 51/2 वर्षों बाद रेस्टोरेशन आवेदन प्रस्तुत किये जाने से आवेदक को प्रकरण में अरगचे परिलक्षित होती है।
> धारा –5
> द्वितीय मियाद अधिनियम द्वारा
> Prescribed ..... के समय – बाधित है। इस लंबे विलंब का कोई युक्ति युक्त कारण भी प्रस्तुत नहीं किया गया। अतः आवेदन अस्वीकार किया जाता है।''

8. As against the order of rejection of the recall application dated 24.06.2015, by the order dated 30.06.2015, preferred by respondent No. 2. A Revision was preferred, which was registered as Revision No. 151 of 2014-15, *Sau Singh and others Vs. Rati Ram and others,* before the Board of Revenue. There were various contentions, which were raised by respondent No. 2; in support of the restoration application dated 24.06.2015, including the question of defective service of notice, including the ground taken therein that the order of rejection of condonation of delay, filed alongwith the restoration

application preferred by respondent No. 2, had been rendered by the Court of Assistant Collector, First Class by barging beyond the jurisdiction, which was not even vested with it and besides the other procedural irregularity, which was committed while deciding the suit vide judgement dated 22.12.2009.

9. When the Revision was preferred, the Board of Revenue vide its interim order dated 07.09.2015, had directed the parties to maintain status quo. The said Revision, as preferred by respondent No. 2, was opposed by the present petitioners by filing an objection from the view point that the *kuras* thus settled in pursuance to the decree, it had already stood mutated and separate entries has already been recorded in the revenue records and the co-sharers are in possession of the respective part of the property thus settled by the decree and *kuras* settled thereafter.

10. Another objection, which was taken by the petitioner was that there was no necessity to recall the judgement dated 22.12.2009, because subsequent thereto, the tenure holder whose rights have been settled by way of decree of partition, after preparation of respective *kuras,* have executed number of sale deeds in favour of third person and the purchasers of the respective shares of the property have been placed in possession. Apart from that it was denied by the petitioner herein that the judgement dated 22.12.2009, sought to be recalled, was not *ex-parte* and hence the recall dated 24.06.2015 at the behest of the respondents was not tenable and same deserves to be rejected.

11. The learned Board of Revenue, after considering the rival contentions in the Revision by the impugned order under challenge in the present writ petition had allowed the Revision and set aside the order dated 30.06.2015, thereby which has resulted into rejecting the recall application of respondent No. 2, and as a consequence thereto, the restoration application filed on 24.06.2015 by respondent No. 2,

has been allowed and as a result thereto, the execution proceedings had been restored to its original number and the direction was issued that in accordance with admitted *kuras* of the parties to the proceedings under Section 176 of the U.P.Z.A. & L.R. Act, the execution proceedings may be decided at the earliest.

12. Though there are various findings, which have been recorded by the Revisional Court while passing the impugned judgement dated 01.06.2016, pertaining to the consensus given by the parties at the time, for the preparation of preliminary decree and the final decree, the consensus pertaining to the preparation of *kuras*, based on the admitted *kuras* which was settled between them, and regards the process of handing over of possession thus the Court held after the filing of the execution application within time the process of an actual handing over of possession was consuming sufficient time and thus the Court derived a conclusion that the pendency of the execution and keeping the decree to be made actually effective may have an effect of rendering the proceedings of the execution itself infructuous, as parties to the partition suit under Section 176 of the U.P.Z.A & L.R. Act, may not be able to reap the fruits of decree for partition.

13. The Revisional Court from the wider perspective that since it happens to be interse between the co-sharer in relation to the property, which they had contended that they would be inheriting in accordance with the proportionate share, it could have been apt that the adjudication of the execution proceedings should have been made only after consideration of the merits of the case and those proceedings were to be brought to a judicious and logical end, hence the Court has observed that and also otherwise settled by the various pronouncements rendered by the Hon’ble Apex Court; that whenever an aspect of limitation is to be considered, the Court has to liberally construe the concept of delay and it has to be applied in a manner so

that the dispute between the parties itself is decided on merits and hyper technical view should not be accepted to defeat the interest of parties under litigation, where a denial to condone the delay may affect to resulting into the miscarriage of justice, particularly in the circumstances of the present case, which is a suit for partition, where each of the parties are plaintiffs themselves, because its their right of share which is also to be decided.

14. The Revisional Court has recorded that though the consented partition, which was entered into between the parties which was claimed by the parties to the suit, in fact, even if it might have been entered in the revenue records; but still since the actual possession has not been taken place after settlement of *kuras*, still the matter deserves to be adjudicated on merits, consequently, the order dated 30.06.2015, rejecting the recall application preferred by respondent No. 2, was set aside and the execution proceedings was directed to be revived back to its original number for settlement of *kuras* to be decided on its own merits.

15. After having heard learned counsel for the parties at length, even this Court is in agreement with the reasoning assigning by the Revisional Court; that the order of rejection of the restoration in the light of rejection of the delay condonation application by an order dated 30.06.2015, by the Court of Assistant Collector was without any plausible reasons for denying to condone the delay and the said error has been rectified by the Revisional Court vide its impugned judgement dated 01.06.2016, as a result thereto the execution proceedings have been directed to be revived back, to be decided on merits for the purposes of settlement of *kuras* and handing over of possession on the basis of partition decree.

16. This Court is of the view that no interference is required to be called for, while scrutinising the judicious propriety of the

Revisional Court's order dated 01.06.2016, because, as a matter of fact, the effect of the order would be that only the execution proceedings have been revived which has to be decided on its own merits, hence the adjudication made by the Revisional Court is not a determination of any right of a party, which could necessitate interference under Article 226/227 of the Constitution of India, because the *lis*, in fact, is yet to be decided by the Executing Court on its merits.

17. In that view of the matter, without expressing any opinion on the merits, because the execution has yet to be decided, independent to any finding recorded herein, the writ petition fails and the same is accordingly dismissed.

(Sharad Kumar Sharma, J.)
30.07.2020

Mahinder/