Ram Harakh (dead) by Lrs.

Vs

Hamid Ahmed Khan (dead) by Lrs. and Others

Civil Appeals Nos. 2041-42 of 1981 with No. 1523 of 1982

(S.B. Majmudar, B.N. Kirpal JJ)

28.08.1997

ORDER

1. These three appeals arise out of a common judgment of the High Court of Allahabad whereby the learned Single Judge of the High Court disposed of two writ petitions and confirmed the order passed in revision by the Deputy Director of Consolidation functioning under the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act"). The dispute between the parties centres round the right to remain in possession of 109 disputed plots of lands situated in Gonda District in the State of U.P. The respondents herein were the Zamindars of these lands and were admittedly recorded as Khud Kasht (in personal cultivation) of these lands in the relevant records of rights till 1947 by Entry No. 1354 Fasli. The said entry related to the year beginning from 1-7-1946 and ending on 30-6-1947. All authorities functioning under the Act concurrently held that such was the factual position till 30-6-1947. Therefore, the respondents were found to be in actual possession and being Zamindars intermediaries were personally holding these lands in their possession at least till that date. It appears that these respondents during the relevant time, immediately after partition of the country in 1947 were apprehending dispossession by the present appellants and their predecessors-in-interest. They, therefore, are said to have filed two suits under Sections 63 and 189 of the U.P. Tenancy Act, 1939 in two different courts on the same day, i.e., 14-10-1947. In the said suits it was alleged by the respondents that they were in possession and the defendants, who are the present appellants, were trying to disturb their possession. It was prayed in the alternative that during the pendency of the suits if their possession was disturbed they should be restored back the possession of these lands. It is the case of the appellants that one of the two suits which was filed in Tarabganj Court got partly decreed on 10-9-1953 whereunder the respondents' suit for 7 plots mentioned in the decree was allowed and the respondents were treated to be entitled to continue in personal cultivation thereof. However, the said suit for the remaining plots of lands was dismissed presumably on the basis of subsequent entry being 1356 Fasli in favour of the appellants in the Khasra and Khatauni in the relevant records of rights concerning these lands. It is the further case of the appellants that the said decree became final. However, so far as the second suit filed before Balrampur Court is concerned, it lingered on the file of the learned trial Judge for a couple of years and ultimately it also resulted in an identical decree on 15-2-1960 whereunder a decree came to be passed partly allowing the respondents' suit for the very same 7 plots and dismissing the suit for the rest. The second suit resulted in appeal on the part of the dissatisfied plaintiff-respondents in the District Court so far and the suit was dismissed for the remaining plots by the trial court. That appeal came to be dismissed. The respondents carried the matter in second appeal and at that stage, a declaration came to be issued under Section 4 of the Act and consequently, the second appeal before the High Court stood abated as laid down by Section 5(2) thereof. There is no dispute on this aspect. In view of the aforesaid abatement of the second appeal the plaintiffs' grievance remained

unredressed in the civil proceedings arising out of the second suit. Under these circumstances, the dispute concerning these lands had to be decided de novo under the Act. The Consolidation Officer in the first instance decided in favour of the appellants by taking the view that the appellants became entitled to remain in possession as per Section 20(b) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter to be referred to as "the Zamindari Abolition Act") as they were recorded as occupants of these lands pursuant to the entry in the Khasra and/or Khatauni of 1356 Fasli. The aforesaid decision of the Consolidation Officer resulted in appeals by the respondents before the appellate authority under the Act. The said appeals came to be dismissed by the appellate authority on 23-8-1974. The appellate authority observed that copy of Entry 1354 Fasli, which was available to the respondents did not mention about any endorsement in the remarks column said to have been made by the Naib Tahsildar showing the appellants to be in cultivation. According to the appellate authority, therefore, it was not possible to express any opinion about this entry. But the appellate authority curiously thereafter observed that it was necessary for the respondents who were appellants before him to file a copy of Khasra regarding Entry 1354 Fasli in which the endorsement of the authority was recorded. In the absence of any other evidence before him the appellate authority came to the conclusion that the name of the opposite parties (the appellants herein) continued over the disputed land after 1356 Fasli till date and, therefore, the appeal of the respondents was dismissed. That resulted in revision applications before the Deputy Director of Consolidation under Section 48 of the Act. The Deputy Director by his order dated 17-4-1976 observed that Entry 1356 Fasli was made during the pendency of the proceedings before the civil court wherein the respondents were claiming that the appellants were trying to disturb their possession and had no interest in the land. The revisional authority, therefore, held that Entry 1356 Fasli was of no evidentiary value and could not be relied upon, meaning thereby, the entry was not a legally valid one. Consequently, it was held by the revisional authority that the names of the appellants (the opposite parties before him) were wrongly recorded as "sirdar" in the basic years' records and, therefore, the names of the appellants were liable to be expunged. The revisional authority also took the view that it was a settled position of law that the pendente lite entries have no value. Consequently, the orders passed by the authorities below were set aside and the claim of the appellants for being treated as Adhivasi was rejected. The revision petitions of the respondents were accordingly allowed.

2. The appellants carried the matter before the High Court by filing two writ petitions arising from the very same judgment of the revisional authority. The High Court agreeing with the revisional authority dismissed the writ petitions and that is how the appellants are before us in these appeals on the grant of special leave.

3. Learned counsel for the appellants raised two contentions for the appellants. Firstly, it was contended that for the applicability of Section 20(b) of the Zamindari Abolition Act all that is necessary is to see whether in the Khasra or Khatauni or both, there was an entry in favour of any occupant for the year 1356 Fasli. If such an entry was there, whether it was supported by actual possession or not or whether the possession was legal or not would be totally irrelevant. Only the existence of such entry in favour of the person concerned would be sufficient to clothe him with the right to be treated as Adhivasi and would make him entitled to continue in possession of the lands covered by this entry. He submitted that rightly or wrongly, Entry 1356 Fasli was in the names of the appellants and, therefore, that entry gave them sufficient right to get the benefit of the statutory protection of Section 20(b) of the Zamindari Abolition Act and hence according to the learned counsel for the appellants the decisions rendered by the Settlement Officer and the appellate authority were correct and required no interference in revision by the Deputy Director of Consolidation. The second contention raised by him for our consideration was to the effect that

years back in 1953 in the first suit filed by the respondents excepting 7 plots for which the respondents succeeded and for which the appellants have no grievance for the rest of the plots the respondents suffered a decree of dismissal. The said decree had become final. Thus for the remaining plots the decision rendered by the competent civil court years back in 1953 remained final, binding and operative between the parties. Hence on the principle of res judicata the said decision had to be given effect to in the consolidation proceedings and even on that ground the decision rendered by the Settlement Officer cannot be found fault with.

4. So far as the first contention of the learned counsel for the appellants is concerned, it is true that Section 20(b) of the Zamindari Abolition Act provides that every person who ... was recorded as occupant of any land other than grove land or land to which Section 16 applies or land referred to in the proviso to sub-section (3) of Section 27 of the U.P. Tenancy (Amendment) Act, 1947 in the Khasra or Khatauni of 1356 Fasli, prepared under Sections 28 and 33 respectively of the U.P. Land Revenue Act, 1901, or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947), or of any land to which Section 16 applies, in the Khasra or Khatauni of 1356 Fasli prepared under Sections 28 and 33 respectively of the United Provinces Land Revenue Act, 1901 (U.P. Act III of 1901), but who was not in possession in the year 1356 Fasli, shall, unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under clause (b) of Section 21, be called Adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof. It is not in dispute between the parties that in Khasra or Khatauni of 1356 Fasli the appellants' names were mentioned. However, the moot question is whether this entry was effected under Sections 28 and 33 respectively of the U.P. Land Revenue Act, 1901 after following the due procedure. There is nothing on the record of these appeals to show whether this entry was effected after following the said procedure. It is to be kept in view that this entry saw the light of day in favour of the appellants during the time when there were already litigations pending between the parties before the competent civil courts at the instance of the respondents who were already having an earlier entry of personal cultivation in their favour being Entry 1354 Fasli. It was their contention that they were actually in possession and the defendants, namely, the appellants had no interest in the lands and they were trying to interfere with the plaintiffs' possession during the pendency of the proceedings concerning the right, title and interest of the plaintiffs over the very same properties, namely, the suit plots. Despite the pendency of these litigations 1356 Fasli Entry is said to have been effected by the Naib Tahsildar in favour of the appellants. This entry, therefore, on the fact of it, would be clearly incompetent and is hit by the principles of lis pendens under Section 52 of the Transfer of Property Act. The revisional authority has, therefore, rightly come to the conclusion that this entry is meaningless and has no legal effect. Learned counsel for the appellants vehemently contended that there is no legal prohibition for the Revenue authority functioning under the U.P. Land Revenue Act, 1901 against effecting such an entry pending any dispute between parties before a civil court. They could act under the Land Revenue Act and the Land Record Manual. They were not bound to stay their hands only because some litigation was pending between the parties if they were not injuncted by the Court from doing so. This contention does not advance the case of the appellants. Maybe, there may not be any statutory prohibition for these authorities. Still the nature of the entry effected by them will have to be decided on the touchstone of common sense and on the broad probabilities of the case. The plaintiffs had already filed suits as earlier as on 14-10-1947 against the appellants and when the said suits were pending it would be doing violence to common sense to presume that they would not contest such entry being made in favour of the appellants pending litigation concerning their right to the very same land. Therefore, the said Entry 1356 Fasli made in

favour of the appellants during the pending litigation must necessarily be treated to have been surreptitiously made behind the back of the respondents. If it was made after hearing them then they would have certainly resisted by challenging the same before higher authorities when they had already filed civil litigation which was already pending and which went ultimately up to the High Court. For all these reasons, the finding of the revisional authority that the entry is illegal and incompetent implies that the same was effected surreptitiously and fraudulently. Once that conclusion is reached the entry would cease to have any legal efficacy for buttressing the case of the appellants.

5. Learned counsel for the appellants was, however, right when he contended that this Court has consistently taken the view that once Entry 1356 Fasli was on the record and the person concerned was recorded as occupant thereunder no further enquiry was required to be done whether he was in actual possession or he was in fact holder of any such occupancy right. That even a trespasser could get benefit of such an entry in his favour. In this connection, he cited two decisions of this Court in the case of Patiraji v. Mamta ((1973) 1 SCC 665) and in the case of Sonawati v. Sri Ram (AIR 1968 SC 466 : (1968) 1 SCR 617). Relying on these decisions it was submitted on behalf of the appellants that the scheme of the U.P. Zamindari Abolition and Land Reforms Act, 1950 wherein Entry 1356 Fasli was treated to be effective on its own was different from the latter scheme of the U.P. Land Reforms (Supplementary) Act, 1952 which dealt with Entry 1359 Fasli and which required lawful cultivation of the person covered by such an entry. The scheme of the earlier Act was entirely different and that under the earlier Act being Zamindari Abolition Act, 1950 all that is required to be seen is whether there was actually such Entry 1356 Fasli to enable the appellants to get the benefit of Section 20(b)(ii) of the said Zamindari Abolition Act. In this connection reliance was also placed on the Constitution Bench decision of this Court in the case of Upper Ganges Sugar Mills Ltd. v. Khalil-ul-Rahman (AIR 1961 SC 143 : (1961) 1 SCR 564) and the decision of a later Bench of two learned Judges in the case of Amba Prasad v. Mohaboob Ali Shah (AIR 1965 SC 54 : (1964) 7 SCR 800).

6. As we will presently see, these decisions do not advance the case of the appellants in view of the well-established facts on the record of these cases. Once we find that the revisional authority had rightly come to the conclusion on facts that Entry 1356 Fasli relied upon by the appellants was not a genuine entry at all and had no legal efficacy, the submission of the learned counsel for the appellants that the physical existence of such entry by itself would be sufficient to clothe the appellants with a statutory right flowing in under Section 20(b), would not survive at all. Entry 1356 Fasli in favour of the appellants has to be treated as stillborn. It has, therefore, no existence in the eye of law. In this connection the learned counsel for the appellants fairly submitted that if there was an express finding that Entry 1356 Fasli in favour of the appellants was fictitious or fraudulent then the appellants would have no case but such a finding was not recorded by the Deputy Director. It is not possible to agree. The finding that the entry was fictitious and not genuine is implicit in the finding recorded by the Deputy Director that the said entry was effected pending civil litigation between the parties and hence was hit by the principles of lis pendens. The first contention, therefore, fails.

7. So far as the second contention on the plea of res judicata is concerned, it is true that a certified copy of the judgment dated 10-9-1953 of the first civil court was produced before the consolidation authorities. However, nothing was argued on that basis for getting an order from the consolidation authority in the first instance nor was that judgment pointed out before the appellate authority or the revisional authority nor even before the High Court. Such a contention was also not taken in the memo of the special leave petitions. Under these circumstances, therefore, the questions whether the

earlier decree was by a competent court or not or whether it was ever taken in appeal or not will raise highly disputed factual controversies. It is also interesting to note that if two suits were filed on the same day for the same lands against the same defendants in two courts and if the first suit had already got disposed of on 10-9-1953 and was in favour of the respondents in respect of 7 plots and for the rest of the plots it was in favour of the appellants, then when the second suit reached for hearing before the trial court after seven long years in 1960, it could have been easily pointed out by the appellants before the second court that the proceedings before the second court were barred on the principle of res judicata in view of the fact that the decision in the first court had been rendered seven years back by another competent civil court. But they failed to do so. Therefore, the moot question arises for consideration whether there was really a decree of a competent court in the first suit rendered by the civil court and whether it had become final. All these aspects would be required to be considered before the plea of res judicata could be entertained. Such a contention of res judicata based on mixed questions of law and facts, therefore, cannot be entertained by us for the first time at this stage. Reliance was placed by the learned counsel for the appellants in this connection on the decision of the Privy Council in the case of Ramlal Hargopal v. Kisanchandra (AIR 1924 PC 95 : 51 IA 72). This decision is also of no assistance for the simple reason that in that decision it was held that the question about the jurisdiction of the Court could be raised at any time. We fail to appreciate as to how that decision can be of any help to the appellants as it is not the contention of the appellants that the decision of the civil court had any nexus with jurisdiction of the court which rendered it. On the facts of the present cases it has to be held that the contention of res judicata was waived by the appellants before all the authorities below. It was also not a pure question of law. Hence it is too late in the day for the appellants to raise this contention for the first time at the stage of arguments in these appeals. Consequently, the second contention is also rejected as not maintainable.

8. In the result, the appeals fail and are dismissed. There will be no order as to costs in the facts and circumstances of the case.