

(2012) 04 AHC CK 0109
In the Allahabad High Court
Case No : Writ C No. 7788 of 2008

Abdul Kadir and Others

APPELLANT

Vs

The Commissioner Basti Division, Basti and others

RESPONDENT

Date of Decision : 04-04-2012

Acts Referred:

Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 — Section 10(2)

Citation : (2012) 04 AHC CK 0109

Hon'ble Judges : Amreshwar Pratap Sahi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Amreshwar Pratap Sahi, J.—Heard Sri B.B. Jauhari, learned Standing Counsel for the Sushil Kumar for the State, and perused the supplementary affidavit that has been filed bringing on record the statement of Mohd. Yaqoob who is the attesting witness of the Will executed by Abdul Gaffar on 15th August 1972. This writ petition arises out of proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 whereby the land belonging to Abdul Gaffar has been declared as surplus in the hands of his sons and their successors who are the petitioners herein. The proceedings under the Act had been initiated by the State by issuing a notice u/s 10 (2) to the two sons of late Abdul Gaffar after his death. Notices had not been issued to Abdul Gaffar. During his life time Abdul Gaffar executed a Will on 15th August, 1972 in favour of his grand-sons. Abdul Gaffar died on 3rd September, 1972. The Ceiling proceedings were initiated against Abdul Kavi and Abdul Azeez u/s 10 (2) after the death of Abdul Gaffar as they got their names mutated in the revenue records.

2. Abdul Kavi and Abdul Azeez contested the notices issued to them on the ground that they have not inherited that part of the holding from their father which was already set apart and had devolved on the grandsons of Abdul Gaffar under the Will. It was, therefore, urged that they were not the tenure holders of that part of the land. The said land, therefore, could not have been dubbed with

the petitioners" holdings.

3. The prescribed authority vide judgment dated 30th December, 1976 declared certain area of land as surplus in the hands of the sons of Abdul Gaffar including that part of the land which was covered under the Will of Abdul Gaffar in favour of the grand-sons.

4. Two appeals were filed against the order of the prescribed authority dated 30.12.1976 which were dismissed on 30.10.1978. Writ Petition No. 1876 was filed by Abdul Qadir and Writ Petition No. 1877 was filed by Abdul Azeez in the year 1979 and both the writ petitions were allowed by the judgment of this Court dated 19.8.1981 recording a clear finding that the issue relating to succession under the Will has not been considered in accordance with law nor have the courts below examined the evidence given by the petitioners and, therefore, the appellate order was set aside and the writ petition was partly allowed with a direction to the appellate court to decide this issue as well.

5. After remand by the High Court, the appellate authority by the judgment dated 30.10.1982 recorded a finding that the said Will has not been proved in accordance with the provisions of the Indian Succession Act read with Indian Evidence Act and came to the conclusion that the Will remained a waste paper. While recording this finding the appellate court categorically held that two of the attesting witnesses were found to have signed the deed and their names appear on the Will, but none of them had been examined to prove the attestation and execution of the Will. The petitioners did not challenge the said order at that point of time by filing a writ petition before this Court and appeared before the prescribed authority as the matter had been remanded on the issue of calculation of irrigated and unirrigated land.

6. After remand the prescribed authority framed six issues and the first issue was again with regard to the Will dated 15th August, 1972. While dealing with the said issue the prescribed authority held that this aspect has already been decided by the prescribed authority on 30.12.1976 and, therefore, the same does not require any reconsideration. However, it also observed that since the order dated 30.10.1982 in appeal only preferred a partial remand, therefore, it was not necessary to delve into the said question.

7. The other issues were also decided against the petitioners and they filed an appeal which has been dismissed on 2.11.2007 against which the present writ petition has been filed. A counter affidavit has been filed on behalf of the state even though the state had not been called upon to do so, and a rejoinder affidavit has also been filed. A supplementary affidavit has also been brought on record as referred to hereinabove that includes the statement of the attesting witness of the Will, Mohd. Yaqoob.

8. Sri Jauhari submits that that it is open to the petitioners to assail the findings of the remand order dated 30.10.1982 in relation to the Will in as much as the issue was again framed before the prescribed authority and answered against the

petitioner after remand which has been affirmed in appeal giving rise to the present writ petition.

9. Sri Jauhari relies on the decision of the Apex Court in the case of Satyadhyan Ghosal Vs. Smt. Deorajin Devi reported in 1960 SC 941 (V 47 C 167) (Paragraph Nos. 7,8 and 11 to 16) to contend that the remand order dated 30.10.1982 did not denude the petitioner from raising a challenge to the same after the matter has now been finally decided in appeal. He has further relied on the judgment of the Kerala High Court in the case of Cherian Vs. Kochuvareed and Another, and the judgment of the Apex Court reported in Jasraj Inder Singh Vs. Hemraj Multanchand, . He has further invited the attention of the Court to the Judgment in the case of Chandra Devi Vs. Abdul Halim reported in 1986 (4) Luck CD 270.

10. Replying to the aforesaid submissions learned Standing Counsel contends that the petitioner is precluded from raising a challenge to the order of 1982 in relation to the Will and, therefore, that issue having been foreclosed, the petitioner will be presumed to have acquiesced to the findings recorded therein. He contends that the principle of res judicata and the finality of a remand order are attracted in as much as res judicata applies at different stages of the same proceedings and the remand order dated 30.10.1982 had finally decided the issue relating to the Will. As such it cannot be permitted to be reopened at this stage.

11. Replying to the aforesaid contention of the learned Standing Counsel Sri Jauhari submits that this could have been precluded at the appellate stage or at the stage of the prescribed authority, but not before this Court which is a higher Court than the appellate authority. The High Court had never finally disposed of the issue relating to the Will and the petitioner has not committed any delay in raising a challenge to the said issue after the matter has now been finally decided after remand in the year 2007. In such circumstances relying on the judgments aforesaid he contends that the High Court is not precluded from entertaining the issue so raised challenging the order dated 30.10.1982.

12. Having heard learned counsel for the parties, prima facie, the contention raised on behalf of the petitioner deserves to be scrutinized in as much as apart from the aforesaid submissions raised, what appears that the prescribed authority while deciding issue No.1 after remand by the appellate authority has observed that this issue has already been decided on 30.12.1976 by the prescribed authority. Prima facie, this is unsustainable in as much as the order dated 30.12.1976, which had merged into the appellate order dated 30.10.1978, had already been set aside by the High Court vide its judgment dated 19.8.1981. The said observation of the prescribed authority, therefore, is erroneous.

13. Apart from this even assuming that the order dated 30.10.1982 precluded the prescribed authority from proceeding to examine the question relating to the Will, this Court is not precluded from examining the same, the reason being that prima facie a perversity is reflected in the order dated 30.10.1982 which narrates

that none of the attesting witnesses had been examined, whereas according to the affidavit brought on record one of the attesting witnesses had been examined by the prescribed authority itself prior to the order of remand. In such circumstances, in my opinion, the petitioners should not be deprived of this opportunity of questioning the correctness of the order dated 30.2.1982.

14. Learned Standing Counsel prays that he may be granted some time to file a supplementary counter affidavit to the supplementary affidavit brought on record.

15. Three weeks" time is granted to file a supplementary counter affidavit.

16. In view of the discussion hereinabove, the petitioners are entitled to an interim relief. Until further orders of the court it is provided that the status of possession over the disputed land, as existing today, shall be maintained by the parties. In the event any third party rights have intervened, facts regarding the same shall be brought on record by the State.