

(2011) 11 AHC CK 0331

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 20324 of 2005

Rakesh Sharma and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Evidence Act, 1872 — Section 68

Uttar Pradesh Land Revenue Act, 1901 — Section 219

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 171, 172

Citation : (2012) 1 ADJ 243 : (2012) 3 AWC 3062

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble A.P. Sahi, J.—Heard Sri Shesh Kumar learned counsel for the petitioners and Sri Anupam Kulshreshtra for newly impleaded respondent No. 6 who claims to have succeeded to the holding of respondent No. 5. The respondent No. 5 had died during the pendency of the writ petition.

2. The pedigree giving rise to this dispute has been set out in Paragraph 2 of the writ petition and is gainfully reproduced here under:

3. The dispute relates to the holding of late Khem Chand to whom the respondent No. 5 Smt. Prakashini was married. Khem Chand died issueless. The petitioners are the sons of the brother of Khem Chand. After the death of Khem Chand on 9th August, 2001 the petitioners filed a mutation application claiming to have succeeded to the holding of late Khem Chand to the exclusion of the respondent No. 5 on the strength of a will dated 28th July, 2001. This will was contested by the respondent No. 5 and the parties led their evidence. The Tehsildar vide order dated 2nd of May, 2003 found that the will appears to have been genuinely executed and accordingly directed the mutation of the name of the petitioners to the exclusion of the respondent No. 5.

4. An appeal was preferred against the same and the appellate authority on 19th July, 2003 reversed the order of the Tehsildar basically on two grounds. It held that the thumb impression of late Khem Chand as contained in the will relied on by the petitioners appear to be doubtful on account of the statement of the attesting witness of the will, namely, Sri Harun. The second ground taken by the appellate authority to reverse the order was that the respondent No. 5 Prakash continued to be recorded in several documents which indicated that there was no divorce between Khem Chand and the respondent No. 5, and therefore the natural course of succession had been incorrectly diverted. The appellate Court further held that in view of the circumstances and the evidence on record, the will as relied on by the petitioners was under a serious cloud and hence, the order passed by the Tehsildar was reversed.

5. The petitioners preferred a revision against the said order in appeal and the revising authority vide order dated 15.12.2003 set aside the order in appeal after recording a finding that the appellate Court could not have acted as an expert of thumb impressions, and even otherwise the fact that Khem Chand continued to reside with his brother Shyam Singh, sufficiently indicated that he had love and affection for him and his sons, and accordingly the execution of the will does not appear to be in any suspicious circumstance. Not only this, the revisional Court further held that the appellate authority committed an error by ignoring the evidence relating to the medical treatment that was extended to Khem Chand in a Nursing Home prior to his death, as also the fact of entire functions having been performed by the petitioners and their family. The revisional Court further relied on the background in which the relationship of the husband and wife were strained, and while passing the order held that there was material irregularity by not correctly appreciating the statement of the real sister of the respondent No. 5 which indicated the existence of strained relationship between Khem Chand and his wife.

6. The revising authority, namely, the Additional Commissioner, Meerut Division, accordingly reversed the order of appeal and maintained the order passed by the Tehsildar dated 2nd May, 2003.

7. Aggrieved the respondent appears to have approached the Board of Revenue in a revision u/s 219 of the U.P. Land Revenue Act, 1901 and by the impugned order dated 19th February, 2005 the learned Member, Board of Revenue reversed the order of the Additional Commissioner and upheld the order of the appellate authority dated 19th July, 2003. The Board of Revenue proceeded to reiterate the facts that were recorded by the appellate authority.

8. Sri Shesh Kumar learned counsel for the petitioners submits that the execution of the will had been proved by the attesting witnesses and a finding to that effect was categorically recorded which is also evident from the statement of Harun, who had clearly indicated the date, the place and the presence of the persons including the lawyer concerned as well as one Mr. Dharm Vir, before whom the will had been drafted, read out to the executor which was accepted,

and the thumb impression was put by Khem Chand on the said will. He submits that there was absolutely no suspicious circumstance existing, inasmuch as, the strained relationship of the husband and wife stood proved by the statement of her own sister and also the statements of the other witness. Accordingly there were sufficient reasons for edging out the natural course of succession by the executor of the will. He contends that it was not the case of the petitioner that there were different thumb impressions on the documents that were relied on by the petitioners. The difference which was sought to be compared was through a document which was not set up by the petitioners. The second will had been set up by Harbir the husband of the real sister of respondent No. 5. He therefore contends that this comparison which has been made by the appellate Court was a step beyond the jurisdiction of the appellate Court and even not a case set up by the petitioners.

9. The contention of Sri Shesh Kumar is that the will was not required to be registered, and the circumstances as well as the composite assessment of the entire statement of the attesting witness, does not create any doubt about the execution of the will.

10. Sri Anupam Kulshreshtha who has advanced his submissions on behalf of the newly impleaded respondent No. 6, contends that the trial Court did not indicate any discussion either of the evidence led on behalf of the answering respondent or even on the evidence led by the petitioners for proving the will. He submits that the witnesses have not been discussed and therefore the conclusion drawn by the trial Court was erroneous. He further submits that the proximity of the period between the date of the execution of the will and the death of the executor, coupled with the intervening circumstances of his having been hospitalized, does indicate that the executor was not in a sound state of the mind, and was not in a position to execute the will hence, the conclusion drawn by the Tehsildar as well as by the revising authority were erroneous. He further contends that the findings so recorded do not call for any interference by this Court in the exercise of jurisdiction under Article 226 of the Constitution of India as the proceedings are summary in nature and the petition itself would not be maintainable. He further submits that the witnesses who had been pressed into service on behalf of the answering respondents had testified, and which proves that there was no separation between husband and wife, and that the respondent No. 5 continued to reside with her husband and she therefore was entitled to succeed to the holding of Khem Chand by way of natural course of succession. He contends that the respondent No. 5 is the successor in view of the provisions of Section 171 read with Section 172 of the U.P. Z.A. & L.R. Act, 1950 and therefore the conclusion drawn by the appellate authority does not require any interference. The contention therefore in sum and substance is that the order of the Board of Revenue does not require any interference by this Court.

11. Learned Standing Counsel has also been heard on behalf of the respondents 1 to 4 and who has also proceeded to support the impugned order.

12. Having heard learned counsel for the parties, the case set up by the petitioners was that late Khem Chand executed the will as he was in the company of his brother and the petitioners, and it was out of love and affection that this natural course of succession was avoided by him for which several circumstances existed and are reflected in the evidence which was led before the Tehsildar and is on record. Having perused the same, in my opinion, the proving of a will has to be in accordance with the provisions of Section 68 of the Indian Evidence Act. The attesting witnesses are required to be produced in case they are alive and the duty is cast on the propounder of the will to prove the execution thereof and remove any suspicious circumstance which may be the cause for a doubt.

13. In the instant case the attesting witness Harun has deposed before the Tehsildar. The trial Court has discussed his statement and as arrived at a conclusion to the effect that the will had been executed. This finding was sought to be upturned by the appellate authority on the ground of an alleged discrepancy in the thumb impression as also the other circumstance indicated therein.

14. In my opinion, such a reversal by the appellate Court is perverse, inasmuch as, the composite assessment of the entire statement of the witness has to be made in order to infer the factum of the execution of the will. Harun, the attesting witness has categorically stepwise indicated as to how he accompanied the executor, was present when the lawyer prepared the will whereafter the executor put his thumb impression thereon. In my opinion, the said statement nowhere reflects any discrepancy or infirmity so as to gather the impression that he had stated otherwise. The appellate Court picked up just a string of the statement where Harun had recited that he does not remember the nature of the thumb impression of late Khem Chand. In my opinion, this stray statement which was picked up by the appellate Court overlooks the fact that Harun had categorically stated every fact about the date of execution of the will and of the manner in which it came to be executed. The appellate Court therefore drew an inference which can be termed to be perverse and therefore the revising authority did not commit any error in setting aside the order dated 19.7.2003.

15. The Board of Revenue instead of attending to the findings that were recorded by the revising authority in detail, has simply reiterated what was said by the appellate authority. The demeanour of the testimony of the elder sister of the respondent No. 5 was also taken note of by the revising authority to point out that the appellate authority did not for reasons based known to it advert to the same. In my opinion this was also a manifest error in the approach of the appellate authority in spite of the fact that these aspects had been taken notice of by the Tehsildar while proceeding to pass the order dated 2nd May, 2003.

16. Accordingly, in view of the aforesaid elements of perversity existing in the order of the Board of Revenue as well as the appellate order dated 19.7.2003 and in view of law laid down in the case of Sri Lal Bachan Vs. Board of Revenue,

Uttar Pradesh and Others, , the arguments advanced on behalf of the petitioners that this Court need not entertain this petition under Article 226 of the Constitution of India is devoid of substance. The findings recorded by the revising authority, in my opinion, touch each and every aspect of the matter while the order of the Board is founded on mere suspicious considerations. The Board of Revenue therefore committed an error by simply scraping through the said findings and upholding the order of the appellate authority.

17. Accordingly, the impugned order dated 19.2.2005 cannot be sustained and is hereby quashed. The order of the Tehsildar dated 2nd May, 2003 as upheld by the learned Additional Commissioner on 15.12.2003 is upheld. Needless to say that these findings have been recorded in relation to mutation proceedings which are for fiscal purposes only and are summary in nature and such findings are subject to the outcome of any litigation being pursued by the contesting parties before the appropriate forum on the regular side. In view of this, the impugned order will always be subject to the outcome of any such decision being taken by a regular Court. The writ petition is allowed.