
(1997) 07 AHC CK 0169
In the Allahabad High Court
Case No : C.M.W.P. No. 22831 of 1997

Smt. Imrat Jahan and others

APPELLANT

Vs

VIIIth Addl. District Judge, Bareilly and others

RESPONDENT

Date of Decision : 25-07-1997

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 169, 169(3), 171, 172, 173

Citation : (1998) 1 AWC 544 : (1997) RD 594

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Rameshwar Prasad Agarwal, for the Appellant; B.D. Mandhyan, for the Respondent

Final Decision : Allowed

Judgement

D.K. Seth, J.—The deceased plaintiff had instituted a suit being suit No. 716 of 1989 against Smt- Arais Begum defendant No. 1 and Sagir Ahmad. son-in-law of Smt. Arais Begum. On the death of the plaintiff, the petitioners, claiming to be the daughters, sought to substitute themselves in place and stead of the deceased plaintiff on the ground that a will was executed by the deceased plaintiff on 16.5.91. On the other hand, the said Smt. Arais Begum claims to be substituted in place and stead of deceased plaintiff on the ground that she is the only daughter-in-law of the deceased plaintiff and therefore she has the right to substitute u/s 171 of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter called as the Act).

2. The learned trial court by an order dated 2.9.96 allowed the application of the petitioners. Upon revision being moved by the respondents, the revisional court by an order dated 28.3.97 passed in CM! Revision No. 136 of 1996 reversed the said order and allowed the application of said Smt. Arais Begum to be substituted in place and stead of the plaintiff. It is against this order, the present writ petition has been moved.

3. Learned counsel for the petitioner Shri Rameshwar Prasad Agarwal, contends that in view of execution of will by the bhumidhar by reason of Section 169 of the Act the petitioners are the heirs of the deceased plaintiff irrespective of the order of succession provided in Section 171 of the Act, and, therefore they are entitled to be substituted in place and stead of plaintiff. He further contends that since the will has been executed, therefore, the right claimed by Smt. Arais Begum u/s 171 of the Act stands superseded, therefore, the revisional order cannot be sustained and is liable to be quashed.

4. Shri B. D. Mandhyan, learned counsel appearing for respondent Nos. 2 and 3, on the other hand, contends that no will was produced before the court. Unless something is shown before the court that there is a will, the court cannot be liable to proceed on the basis of statement made in the application for substitution. Therefore, the order of trial court being contrary to the provision of Section 171 of the Act, the learned revisional court has rightly allowed the substitution of respondents and set aside the order passed by the trial court.

5. I have heard Shri Rameshwar Prasad Agarwal, learned counsel for the petitioner and Shri B. D. Mandhyan, learned counsel for respondent Nos. 2 and 3.

6. The revisional court records a finding that the trial court had allowed the application of the petitioners on the basis of a will which fact has been disputed by respondent No. 3 and that the trial court had allowed the said application without making any enquiry as to whether any will has been executed or not. Therefore, he has reversed the order of the trial court and directed substitution of respondent No. 3 as plaintiff. The trial court, on the other hand, has pointed out that the petitioners had claimed the right on the basis of a will executed on 16.5.91 which has been denied and disputed by the defendants. Whether any will has been executed or not can be decided on the basis of evidence. The plaintiff had instituted the suit for injunction restraining respondent No. 3 herein along with respondent No. 2 from interfering in the peaceful possession of the plaintiff. Therefore, he has assumed that the relation between the plaintiff and the defendant were not good, therefore, the plaintiff may not like that his property may be passed on to the defendant (respondents 3 and 2 herein) and that there is every possibility of executing a will in favour of the petitioners. Therefore, he has come to a conclusion prima facie that there is every possibility of will being executed by the plaintiff and if such will is executed, the claim of defendant u/s 171 of the U.P.Z.A. and L.R. Act would not be applicable. Therefore, he has allowed the application for substitution.

7. Admittedly by reason of Section 171 of the U.P.Z.A. and L.R. Act, the property of a bhumidhar shall devolve as indicated in the said section. In the case of Uma Shanker and Another Vs. The Deputy Director of Consolidation and Others, , it was held that by reason of Section 4 (2) of the said Act, the property had vested to the State free from all encumbrances and that the creation of the tenancy under the said Act is to be governed by the provisions of the Act and, therefore, all rights under Hindu Succession or otherwise with regard to the devolution of

tenancy right is excluded from Sections 171 to 175 of the U.P.Z.A. and L. R. Act. Following the said decision, this Court had held similarly in the case of Abdul Rahman Khan v. Deputy Director of Consolidation and others 1980 ALJ 590 that Section 171 will exclude the personal law--either of the Hindu or of the Muslim. Similar Mew was taken in the case of Soron Pol v. Smt Kela Devi and others 1980 ALJ 1124.

8. Section 169 of the said Act recognises the right of a bhumidhar as a transferable one. It also provides that the bhumidhar can transfer it by way of will. Section 169 (3) prescribes that notwithstanding anything contained in any law, custom or usage, such will is to be in writing and attested by two persons. Therefore, if a will is executed and the same is well recognised by Section 169 of the Act, in that event, Section 171 of the Act cannot apply. Section 171 will apply only when there is no will or there is a will which contravenes Section 169 (3) and in case of devolution by succession.

9. Learned counsel for the petitioner cites the decision in the case of Gopi Singh v. Kashi Ram 1982 RD 271, rendered by the Board of Revenue wherein it was held that since Section 169 (3) precedes Section 171, therefore, it will override the preferential claim provided in Section 171.

10. In my view, it is immaterial whether Section 169 precedes or follows Section 171. If the right of bhumidhar is transferable and right to execute a will by a bhumidhar and the transferable right is recognised, in that event if it is presumed that Section 171 precedes Section 169, then also it cannot be reconciled with each other and would contradict each other. Legislature would never intend to waste words or expressions. If the right to execute a will is recognised in that event, the devolution would be subject to such right. Section 171 is always subject to recognition of the right of execution of a will u/s 169. Because of two provisions contained in the same Act conceives of two different situations, any other meaning would defeat the object of introduction of Section 169 altogether. An interpretation which reconciles each other is preferable. Such an interpretation which defeats the object cannot be accepted by the court.

11. Now at the stage of substitution, it is not necessary to determine the rights of the parties.

12. Since the substitution is claimed on the basis of will and when the facts and circumstances of the case, the trial court has come to prima facie finding subject to final decision on the basis of evidence that might be led in the suit, had rightly allowed the application for substitution. At this stage, it is not necessary to decide the right of the parties. The learned revisional court has acted and entered into deciding the right at this stage which is altogether premature.

13. Then again it is some thing preposterous to substitution, a defendant against whom the injunction was sought in the place of plaintiff. At best, the defendant could claim that in the absence of any will, the right having devolved on the defendants, no one else could be substituted and the application for substitution

is to be rejected and the right having devolved on the defendant, the suit became not maintainable. But by no stretch of imagination, the defendant could be substituted in place and stead of plaintiff in a suit for injunction particularly in the facts and circumstances of the present case.

14. In that view of the matter, the revisional order cannot be sustained and is accordingly set aside. The order passed by the learned trial court is hereby restored. However, it will be open to the parties to establish their rights either u/s 169 or u/s 171 of the Act as the case may be which will remain open for the trial court to decide at the appropriate stage.

15. The writ petition is thus allowed.

16. There will however be no order as to cost.