

(2015) 08 AHC CK 0114
In the Allahabad High Court
Case No : Writ B. No. 47145 of 2015

Sushil Kumar and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 21-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25
Evidence Act, 1872 — Section 50
Uttar Pradesh Land Revenue Act, 1901 — Section 34

Citation : (2015) 113 ALR 524 : (2015) 129 RD 267

Hon'ble Judges : Ram Surat Ram (Maurya), J.

Bench : Single Bench

Advocate : C.S. Agnihotri and R.K. Yadav, for the Appellant; D.K. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri C.S. Agnihotri for the petitioner and Sri D.K. Mishra for the caveator. The writ petition has been filed against the order of Board of Revenue dated 20.7.2015 by which the revision filed against the order of Additional Commissioner has been allowed and the order of Sub Divisional Officer remanding the case to Tehsildar for summoning Smt. Chandrakali and recording her statement and decide the matter afresh, has been upheld.

2. The dispute related to inheritance of the properties of Manna. Manna had four sons namely Shyam Lal, Mihi Lal, Ganga Dayal and Chhedi Lal. The petitioners are heirs of Ram Devi, Smt. Surjana and Durjana who were daughters of Manna while respondent -3 is claiming herself to be daughter of Mihi Lal. It may be mentioned that name of Smt. Ram Kanti was mutated on the basis of report of PA 11 in the year 1994 as heir of Mihi Lal. After death of Ganga Dayal, the mothers of the petitioners filed an application for mutating their names under section 34 of U.P. Land Revenue Act claiming to be the nearest heirs of sons of Manna. It was stated by the mothers of the petitioners that Shyam Lal and

Chhedi Lal had died during life time of Mihi Lal and Ganga Dayal. Mihi Lal died issueless and their share was inherited by his brother Gagna Dayal. After death of Ganga Dayal they being sisters of last male tenure holder were heirs. Name of Smt. Ram Kanti was illegally recorded on the basis of report of PA 11 on 5.1.1994. The case was tried by the Additional Tehsildar who by the order dated 19.5.1994 held that the statement of the witnesses examined by Smt. Ram Kanti were not corroborated with the statement of Ram Kanti as according to her statement at the time of death of her father she had aged about two years while her age as recorded in the statement was 21 years. While according to the statement of her witnesses, Mihi Lal died about 21-22 years back. Further the statement of Ram Kanti was hearsay evidence as such it was not admissible evidence. He further relied upon the copy of the Kutumb Register produced in which her parentage was noted otherwise than Mihi Lal. Thus it was held that respondent-3 was not daughter of Mihi Lal and the names of the mothers of the petitioners were directed to be recorded over the land in dispute. Ram Kanti filed an appeal against the aforesaid order. The appeal was heard by the Assistant Collector, 1st Class who by the order dated 28.6.2014 held that Tehsildar had placed reliance upon Kutumb Register although Kutumb Register was not certified by the Pradhan. The dispute relating to parentage of Ram Kanti is being raised as such the statement of Chandrakali, her mother was necessary evidence which ought to have been recorded. Rama Devi in her statement has stated that after about two months of death of Mihi Lal re-marriage of his widow has taken place. While Surjana has stated that after death of Mihi Lal about 4-5 years his widow was living in village Chakdohri which was parental village of Mihi Lal. In such circumstances, the appeal was allowed and matter has been remanded to the Tehsildar for deciding the dispute afresh after recording statement of Chandrakali, mother of respondent-3. Revision filed against the aforesaid order has been allowed by the Additional Commissioner by order dated 20.5.2015 and the parties were directed to get their right decided by the Court of competent jurisdiction as the highly disputed question of fact was involved in the case. On this finding the revision was allowed and the order of Appellate Court was set aside giving liberty to respondent-3 to get her right decided in regular suit. Respondent-3 filed a revision before the Board of Revenue which has been allowed by the Board of Revenue by order dated 20.7.2015 and the order of Revisional Court dated 20.5.2014 was set aside on the ground that order of remand was an interlocutory order and revision against it was not maintainable. Hence this writ petition has been filed.

3. The Counsel for the petitioner submits that the Board of Revenue has allowed the revision without summoning the record of lower Court therefore the order of Board of Revenue is illegal. He further submits that findings recorded by the Board of Revenue that order of remand was an interlocutory order and revision was not maintainable, is incorrect. He submits that order of the Trial Court has been set aside and the matter has been remanded therefore the remand order cannot be treated as an interlocutory order. He further submits that the Trial

Court has recorded a categorical finding that respondent-3 born after re-marriage of Smt. Chandrakali and she was not daughter of Mihi Lal. The findings of fact of the Trial Court has been illegally set aside by the lower Appellate Court. The lower Appellate Court has remanded the matter to fill up lacunae in evidence for that he has no jurisdiction.

4. I have considered the arguments of the Counsel for the parties and examined the records.

5. Under order XLI Rule 25 of CPC provides: where the Court from whose the decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to be Appellate Court essential to the right decision of the suit upon the merit, Appellate Court may, if necessary, frame issues, and refer the same for trial of the Court from whose decree the appeal is preferred, and in such cases shall direct such Court to take the additional evidence required. Thus the Appellate Court is the competent Court to remand the matter under Order XLI, Rule 25 of CPC.

6. So far as the findings of the Trial Court is concerned, the Trial Court has disbelieved the statement of Ram Kanti only on the ground that her statement was hearsay. Although for proving the pedigree the hearsay statement is admissible according to section 50 of the Evidence Act. Thus the statement of Ram Kanti has been wrongly ignored by the Trial Court. So far as the other witnesses of Ram Kanti is concerned, they by their opinion had stated that Mihi Lal died on 21-22 years ago while the age of Ram Kanti was noted in her statement as 21 years as such their statement have been ignored. The statement of the witnesses was not a fix statement but it was proximate evidence. Thus the statement of witnesses has been wrongly ignored by the Trial Court.

7. The Additional Commissioner has allowed the revision only on the ground that the disputed question ought to have been decided in regular suit. Thus there was no ground for allowing the revision. In case in the mutation proceeding disputed question is raised then this disputed question has to be decided by the mutation Court and it cannot be shirk its responsibility and leave the question to be decided by the regular Court. If such proposition is accepted then no mutation can be done as in every case there may be chance of disputed question being raised. In such circumstances, the order of the Additional Commissioner was illegal.

8. Since the matter has been remanded to the Trial Court, the petitioners have liberty to raise their grievances before the Trial Court afresh and no prejudice has been caused to them. No interference is required by this Court. The writ petition has no merit, it is dismissed. However, since the matter is lingering for a long time the Tehsildar shall decide the matter expeditiously, preferably within a period of six months. The petitioner may file an application for interim protection before the Trial Court.