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(2010) 2 All LJ 26 : (2010) 2 All WC 1949 : **(2010) 28 LCD 1761** : (2010) 110 RD 781

ALLAHABAD HIGH COURT (LUCKNOW BENCH)

SINGLE BENCH

SMT. SHIVA SINGH AND OTHERS — Appellant

Vs.

ADDITIONAL COLLECTOR (ADMIN.) AND OTHERS — Respondent

(Before : Narayan Shukla, J)

Decided on : 19-01-2010

- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 170

A. Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Sections 170, 169, 130, 131 — Bequest by Sirdar/Bhumidhar — Will — Validity — A Sirdar declared as Bhumidhar with transferable rights effective from 28.1.1977, subsequently acquired the right to bequeath land by Will — Wills executed on 15.4.1977 and 21.4.1977 by such a person are valid, as the transferable rights were acquired before the execution of the Wills. (Paras 2, 4, 6, 7, 11)

B. Will — Nature of — Not a transfer — Devolution of property — A Will is generally not considered a transfer of property but rather a devolution of property that becomes effective after the death of the executor — Therefore, even if rights were acquired after the Will's execution but before the executor's death, the Will may be considered valid. (Para 8)

C. Consolidation of Holdings Proceedings — Dismissal for want of prosecution — Subsequent Fresh Case — Jurisdictional error — Where a case (Case No. 95) was initially dismissed for want of prosecution, the institution of a fresh case (Case No. 513) on the same cause of action before a lower authority (Assistant Consolidation Officer) is without jurisdiction — The order passed in such a fresh case and subsequent orders/entries based on it are non est — The

original dismissed case (Case No. 95) should be restored for adjudication on merits. (Para 12)

Cases Referred

- [Gaon Sabha, Village Don Pargana Vs. Dy. Director of Consolidation and Others](#), (1982) AWC 25 : (1982) RD 115
- [Ghurhu Vs. Board of Revenue and Others](#), (1982) AWC 37

Final Result : Dismissed

JUDGMENT

Narayan Shukla, J.—Heard Mr. Mohd. Arif Khan, learned senior advocate assisted by S/ Shri Mohiuddin Khan, D.C. Jain, Mohd. Adil Khan, Mohd. Aslam Khan, Mohd. Shadab Khan and Shailendra Sachan, learned Counsels for the petitioners and Mr. G.S. Mishra, learned standing counsel for the State as well as Mr. S.H. Menhdi and Mr. Tilak Raj Singh, learned Counsels for the opposite parties Nos. 2 to 6.

2. The petitioners have challenged the order dated 30.9.2006, passed by the Additional Collector (Administration), Lucknow, whereby he has negated two Wills executed in favour of petitioners as well as opposite parties, on the ground that those were executed by 'sirdar', who was not having right of transfer as the 'sirdar' was declared 'bhumidhar' with transferable rights by means of Government Gazette dated 24.7.1977, whereas the Will deeds were executed on 21.4.1977 in favour of the opposite parties and on 15.4.1977 in favour of the petitioners.

3. Briefly, the facts of the case are that the land in dispute was recorded in the name of Smt. Guljara, daughter of Gajodhar in Form No. C.H. 23. She died in 1982. After her death the revisionist Yashwant Singh, father of the opposite parties 2 and 3 and husband of opposite party No. 4 submitted an application to declare him as tenure holder on the basis of adverse possession and secondly on the basis of a Will deed dated 21.4.1977, whereas the opposite parties Shiva Singh and Ors., who are the petitioners in the present writ petition, filed an application for mutation of their names on the basis of Will deed dated 15.4.1977, executed in their favour by Smt. Guljara. The Pradhan of the concerned Gram Sabha also moved an application to vest the property with the State, on the ground that Smt. Guljara died issueless. Keeping in view the dispute raised by the parties, the Assistant Consolidation Officer referred the matter to the Consolidation Officer, which was registered as Case No. 95, but it was dismissed by the Consolidation Officer on 17.8.1994 for want of prosecution. But one another case was instituted before the Assistant Consolidation Officer on behalf of Shiva Singh on the basis of Will deed, which was registered as Case No. 513. The Assistant Consolidation Officer passed the order on 5.3.1987 in favour of Shri Shiva Singh, which was challenged on the ground that the same was without jurisdiction as once earlier

the same dispute was referred before the Consolidation Officer, there was no question for institution of another case for the same subject-matter by Shri Shiva Singh. The revisional court by means of order impugned held that since the Wills were executed in contrary to the provisions of Section 170 of the U.P.Z.A. and L.R. Act, 1950 they are void. Smt. Guljara daughter of Gajodhar died leaving behind no heir, therefore, the land in dispute vests with the Gaon Sabha and he ordered accordingly.

4. Section 170 of the U.P.Z.A. and L.R. Act, 1950 (hereinafter referred to as the 'Act') as it was before amendment reads as under:

170. Bequest by a sirdar or asami.--No sirdar or asami shall have the right to bequeath by Will his holding or part thereof.

In place of aforesaid provisions by means of U.P. Act No. 8 of 1977, which came into force with effect from 28.1.1977, Sections 169 and 170 have been amended as under:

169. Bequest by a bhumidhar.--(1) A bhumidhar with transferable rights may by Will bequeath his holding or any part thereof except as provided in sub-section. (2A). In relation to a bhumidhar with transferable rights belonging to a Scheduled Tribe the provisions of Sections 157A and 157B shall apply to the making of bequests as they apply to transfer during lifetime. (3) Every Will made under provisions of Sub-section (1) shall, notwithstanding anything contained in any law, custom or usage, be in writing and attested by two persons.

170. Bequest by a sirdar or asami.--No bhumidhar with nontransferable rights or asami shall have the right to bequeath by Will his holding or part thereof.

5. The learned Counsel for the petitioners invited the attention of this Court towards the provisions of Sections 130 and 131 of the Act also. Section 130 as amended with effect from 28.1.1977, which reads as under:

130. Bhumidhar with transferable rights.--Every person belonging to any of the following classes, not being a person referred to in Section 131, shall be called a bhumidhar with transferable rights, and shall have all the rights and be subject to all the liabilities conferred or imposed upon such bhumidhars by or under this Act, namely, (a) every person who was a bhumidhar immediately before the date of commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1977 ; (b) every person who, immediately before the said date, was a sirdar preferred to in clause (a) or clause (c) of Section 131, as it stood immediately before the said date ; (c) every person who in any other manner acquires on or after the said date the rights of such a bhumidhar under or in accordance with the provisions of this Act.

6. Accordingly he submits that since on 28.1.1977 she was declared as bhumidhar with transferable rights and she was having jurisdiction to bequeath, the property through Will, therefore, the Will executed by her on 15.4.1977 is in accordance with law.

7. The learned Counsel for the petitioners submits that since Smt. Guljara being a sirdar was declared as bhumidhar with transferable rights and she executed Will deed in favour of the petitioners on 15.4.1977 by that time she had acquired transferable rights, the Will deed executed by her in favour of the petitioners cannot be said to be without jurisdiction or contrary to the provisions of the Act.

8. He further submits that this Court in the several cases has held that the Will deed is not a transfer, rather it is a devolution of property upon the persons, in favour of whom the Will has been executed, as it becomes effective after the death of executor and by the time of her death in 1982, she acquired the transferable rights, the Will in question cannot be said as without jurisdiction or contrary to law.

9. In support of his submissions he cited the following decisions:

(1) Gaon Sabha village Don Pargana, Tehsil and district Jalaun, through Secy, of its Land Management Committee [Gaon Sabha, Village Don Pargana Vs. Dy. Director of Consolidation and Others,](#) .

(2) Jasran son of Nain Singh, resident of village Ghumraoli, P.O. Khas, Pargana Ahar, district Bulandshahr v. Board of Revenue, U.P. at Allahabad and Ors. 1970 RD 313.

(3) [Ghurhu Vs. Board of Revenue and Others,](#) .

10. The proposition of law laid down by this Court as well as the provisions of the Act are not disputed.

11. Thus keeping in view the amendments made in the U.P.Z.A. and L.R. Act, 1950, I am of the view that Smt. Guljara was declared as bhumidhar with transferable rights with effect from 28.1.1977. On the date of execution of both the Wills which are dated 21.4.1977 executed in favour of Shri Yashwant Singh and will dated 15.4.1977 executed to Shri Shiva Singh and Ors. (petitioners), she was having right to execute the Will deed, therefore, the findings of the Additional Collector (Administration), Lucknow that the Will deed was executed in contrary to the provisions of Section 170 of the U.P.Z.A. and L.R. Act is unfounded and unsustainable, therefore, I hereby quash the order impugned to the extent it ordered to vest the property with the Gaon Sabha.

12. There are two Will deeds ; one executed in favour of the petitioners as well as another executed in favour of Shri Yashwant Singh, who was predecessor of the opposite parties 2 and 3 and husband of opposite party No. 4 and the opposite parties are also claiming their right on the basis of the Will deed executed on 21.4.1977 in favour of Shri Yashwant Singh, I am of the view that both the Wills require adjudication of their validity with the evidence, which can be adduced by the parties concerned, but since Case No. 95 was dismissed for want of prosecution, the validity of Wills could not be adjudicated. It is not a case of any of the parties that anybody moved the application for restoration of the said case, rather the petitioners moved a fresh application before the Assistant Consolidation

Officer, upon which a new case was registered as Case No. 513 and the Assistant Consolidation Officer proceeded with the case. I am of the view that once for the same cause of action the case was registered as Case No. 95, there was no reason to register another Case No. 513 by the Assistant Consolidation Officer instituted by the petitioners, therefore, I hereby declare that the order passed by the Assistant Consolidation Officer on 5.3.1987 in Case No. 513 and other orders passed by different authorities in the matter as well as the entries made in the revenue record on the basis of the said orders, shall be treated as non est. Therefore, I hereby restore the Case No. 95, which was dismissed for want of prosecution by means of order dated 17.8.1994, passed by the Consolidation Officer with the direction to the Consolidation Officer to proceed with the case referred to him by the Assistant Consolidation Officer and decide the same after providing opportunity of hearing to the parties concerned.

13. With the aforesaid observations and directions the writ petition is disposed of finally.