

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Order Reserved on: November 02, 2011
Order Pronounced on: November 08, 2011

+ **W.P.(C) No.7837/2008**

KIRAN DIWANIA Petitioner
Through: Mr.Raj Singh Mathur and
Mr.Vijender Singh, Advocates

versus

FINANCIAL COMMISSIONER & ORS. Respondents
Through: Mr.Sunil Chauhan, Advocate for
Respondent No. 5.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported in the Digest?
- No.

SUNIL GAUR, J.

1. The three questions of law raised in this petition challenging the validity of order of 17th October 2008 of Financial Commissioner, Delhi, restoring mutation sanctioned on 1.10.1982 in favour of respondent No.5 – Suraj Bhan, are as under:-

- (a) *Is it not the duty of a revenue court to go into the genuineness of an un-registered and un-probated Will in the proceedings for mutation of title in the 'Records of Rights'.*

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even if the 'Testator' and the 'Beneficiary' are complete stranger to each other?

- (b) Whether Tehsildar/Naib Tehsildar is vested with the powers of make recommendations for 'Review' of the orders passed by the court of Revenue Assistant during discharge of quasi-judicial function?
- (c) Whether the revenue court can deny the mutation of title of agricultural land acquired by a person on the basis of 'Will' executed by a blood relation and probated by civil court of competent jurisdiction and attained finality after dismissal of revocation proceedings?"

2. The factual context, in which the above raised questions of law are to be considered are noted in paragraphs No.4 and 5 of the impugned order, which reads as under:-

"4. Brief facts of the case is that Smt.Manbhari, widow of Late Shri Ami Lal was a recorded owner of the land measuring 50 bigha and 16 biswa in the revenue estate of village Galibpur. She died during consolidation proceedings in the village which took place in 1967-70. Shri Suraj Bhan (petitioner herein) has claimed that Smt.Sunder D/o Smt.Manbhari inherited the estate of her deceased mother and was allotted the present land on basis of natural succession made in khatouni 1969-70, so Sunder "Dukhtar Manbari Bewa Ami Lal. Smt. Manbhari had died in 1967 during consolidation proceedings. However, as per the khatouni for the year 1977-78 it has been revealed in the

column Bhumidhar as Smt.Sunder (Daughter) and Smt. Manbhari (Widow of Ami Lal) in equal share. Smt.Sunder also died on 27.6.1980. Then Shri Suraj Bhan petitioner herein, applied for mutation of inheritance of Smt.Sunder on the basis of a Will reportedly executed by Smt.Sunder in favour of him. The Naib Tehsildar vide his order dated 1.10.1982 sanctioned the mutation in favour of Shri Suraj Bhan who remained in cultivatory possession till 1990. The mutation order of the other $\frac{1}{2}$ share of Smt.Manbhari was sanction by the RA, Punjabi Bagh, vide his order dated 18.6.1990 in favour of Smt.Kiran Diwania (respondent herein) on the basis of a Will reportedly executed by Smt.Manbhari in favour of respondent Smt.Kiran Diwania. Appellant says he came to know for the first time of the wrong entry of only $\frac{1}{2}$ share mutation in his name on the basis of a khatouni of 1977-78.

5. Smt. Kiran Diwania preferred appeal before the Addl. Collector against the order dated 18.6.1990 passed by the SDM/RA (Punjabi Bagh) which was decided in her favour vide order dated 20.12.1995. Aggrieved by the said order, Shri Suraj Bhan, petitioner herein, filed appeal against the said order before this court. This court vide its order dated 26.7.1996 remanded the case to SDM/RA-Punjabi Bagh to decide the three matters together on facts and merits after

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hearing the parties. The RA-Najafgarh decided the cases vide his order dated 29.9.2000. Both the parties filed cross appeals before the Addl. Collector who after hearing the parties ordered for sanction of mutation of inheritance of Smt. Manbhari (deceased) in respect of entire suit land i.e. 50 bighas and 16 biswas in favour of Smt. Kiran Diwania. Hence both these appeals."

3. The finding returned in the impugned order is that the question of allotment of land to Smt. Sunder after death of Smt. Manbhari could not be looked into in these proceedings, as it is an undisputed fact that mutation in favour of Smt. Sunder, after the death of Smt. Manbhari has not been challenged in any proceedings and so, the mutation and allotment of the land to Smt. Sunder is final and by virtue of Will dt. 19.6.1967 of Smt. Manbhari, no right could have been conferred upon the respondent on the basis of the said Will.

4. Much emphasis has been put by the petitioner's counsel upon the fact that the Will dt. 19.6.1967 in favour of the petitioner by Smt. Manbhari was probated and the application to set aside the probate stands rejected and had extensively referred to the order of 15.3.2003 vide which the application for revocation of the Will in favour of the petitioner, was dismissed. The endeavour made by the petitioner's counsel was to highlight that respondent - Suraj Bhan in his application for mutation had asserted that Smt. Sunder had no children, which is factually incorrect as the petitioner is the real child of Smt. Sunder.

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5. The sweep of writ of certiorari or the contours within which supervisory jurisdiction is to be exercised stands reiterated by the Apex Court in its recent decision in **Shalini Shyam Shetty and Anr. Vs. Rajendra Shankar Patil**, (2010)8SCC329, in these words:-

"Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby."

6. Upon having heard learned counsel for the parties and on perusal of the impugned order and the material placed on record, it transpires that perhaps it had escaped the attention of petitioner's counsel that in this very order of 15.3.2003 the *legal position regarding the genuineness of the Will is not to be gone into in the probate proceedings*, is noticed and so, any observation made in the said order would not clinch the issue of the genuineness of the Will dt. 12.9.1979 by Smt.Sunder in favour of the Respondent-Suraj Bhan.

7. It is settled position of law that the Probate Court is only concerned with the question as to whether the Will put forward as the last Will was duly executed and attested in accordance with law and at the time of its execution, whether the testator was having a sound mind. The probate Court is not at all concerned with the genuineness of the Will. Question of title are neither to be decided by the Probate Court, nor by the Revenue Fora. It is exclusively in

the domain of the Civil Court to adjudicate upon the validity of the Will. 21

8. Undisputedly, the mutation in favour of Respondent-Suraj Bhan stands sanctioned way back in the year 1982 on the basis of a Will dt. 12.9.1979 and its validity has not been questioned till date before any Civil Court. To upset it, upon an application filed by the petitioner in the year 1990 on the strength of Letter of Administration in favour of the petitioner in respect of Will dt. 19.6.1967 upon an application under Section 26 of the Delhi Land Revenue Act, 1954 would be contrary to law as correction of mistake or error in the Annual Register can be made under Section 26 of Delhi Land Revenue Act, 1954 only after obtaining a report from the Tehsildar concerned in terms of Section 23 of Delhi Land Revenue Act, 1954 which deserves notice. It reads as under:-

***"23. Procedure on report-* The Tehsildar, on receiving such report or upon the facts otherwise coming to his knowledge, shall make such inquiry as appears necessary and in undisputed cases, if the succession or transfer appears to have taken place, shall direct the Patwari of the halka to record the same in the Annual Register, if the succession or transfer is disputed or the Tehsildar finds that it is in contravention of the provisions of the Delhi Land Reforms Act, 1954, he shall refer the case to the Revenue Assistant, who shall decide it after such inquiry as may be prescribed and where necessary, direct the Annual Register to be amended accordingly."**

9. Since mutation in favour of Respondent-Suraj Bhan upon the basis of a Will dt. 12.9.1979 was sought to be set aside on the basis of the Will dt. 19.6.1967 set up by the

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petitioner in the year 1990, therefore, the Revenue Assistant, upon this matter being remanded, ought to have proceeded under sub-Section (1) of Section 186 of Delhi Land Reforms Act, 1954, which reads as under:-

"186. Procedure when question of title is raised. - (1) Notwithstanding anything contained in section 185, if in any suit or proceeding mentioned in column 3 of Schedule I, question is raised regarding the title of any party to the land which is the subject matter of the suit or proceeding and such question is directly and substantially in issue the Court shall, unless the question has already been decided by a competent civil court for the decision of that issue only.

10. Instead thereof, upon remand, the Revenue Assistant in its order of 29.9.2000 while noticing that the genuineness or otherwise of the Will purported to have been made by Smt.Sunder (in favour of Respondent-Suraj Bhan) is to be decided by a Competent Authority, as various doubts have arisen during the course of proceedings, still erroneously proceeded to rely upon the Will of Smt.Manbhari, in favour of the petitioner. The Additional Collector before whom the order of 29.9.2000 of the Revenue Assistant was challenged, had heavily relied upon the order of 15.3.2003 vide which the application for revocation of the probate/letter of administration was dismissed to hold that the legality of the Will executed by Smt.Manbhari in favour of the petitioner is established and so, the petitioner is entitled to administer the land legally.

11. The order of 11.6.2004 of the Additional Collector sanctioning the mutation in favour of the petitioner was set

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aside vide impugned order while relying upon the Will of Smt.Sunder in favour of the Respondent-Suraj Bhan.

12. The error apparent on the face of record is that the Revenue Authority despite noticing the legal position of being incumbent upon them, to have referred the matter to Civil Court to obtain a finding regarding the genuineness of the Will, have not resorted to Section 186 of Delhi Land Reforms Act, 1954 despite Will and counter Will being set up by the parties herein.

13. It is quite unfortunate that elementary provisions of Revenue Law as clearly spelt out in Section 23 of Delhi Land Revenue Act, 1954 and Section 186 of Delhi Land Reforms Act, 1954 have not been adhered to by the Revenue Authorities in this matter. This has resulted in gross failure of justice as the findings returned by the Revenue Authorities in this matter are in clear ignorance or utter disregard of the provision of law as referred to above.

14. In the light of the view taken as aforesaid, the impugned order of 17.10.2008 as well as the order of Additional Collector dt. 11.6.2004 and even that of the Revenue Assistant dt. 29.9.2000 are required to be set at naught and they are accordingly set aside with a direction to the Revenue Assistant/SDM, Najafgarh or the concerned Revenue Assistant to take up the petitioner's application under Section 26 of Delhi Land Revenue Act, 1954 afresh and if a report thereon under Section 23 of Delhi Land Revenue Act, 1954 has been obtained or to obtain it now, and then to act upon it and to invoke Section 186 of Delhi Land Reforms Act, 1954 and to refer the question of title raised by the petitioner on the basis of the Will dt.

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19.6.1967 by Smt.Manbhari to the competent Civil Court to adjudicate upon its genuineness and to obtain a finding and thereafter to proceed expeditiously in accordance with the law, i.e., to promptly pass an order on the petitioner's application under Section 26 of Delhi Land Revenue Act, 1954 afresh.

15. Since this matter pertains to the year 1990, therefore in the interregnum, the position obtaining prior thereto shall prevail, that is to say, that the existing mutation in favour of the Respondent-Suraj Bhan shall hold the field, i.e., the order of 10.1.1982. The first and the third question of law raised in this petition stands answered in the aforesaid terms.

16. So far as the second question of law raised is concerned, the same is not required to be answered for the reason that the fate of the rectification allowed on application of Respondent-Suraj Bhan would depend upon the decision of petitioner's application under Section 26 of Delhi Land Revenue Act, 1954 which has been directed to be decided afresh upon remand of this entire matter.

17. With directions as aforesaid, this petition is disposed of while leaving the parties to bear their own costs.


(SUNIL GAUR)
JUDGE

November 08, 2011

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