

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 2908 of 2017

Petitioner :- Janardan Giri

Respondent :- Dhanwati Devi And 5 Others

Counsel for Petitioner :- Abhishek Kumar Chaubey

Counsel for Respondent :- Arvind Kumar Tiwari

Hon'ble Jayant Banerji,J.

1. Heard learned counsel for the petitioner.

2. This petition has been filed challenging the order dated 22.2.2017, passed by the Additional District Judge/FTC-2, Ballia in Misc. Appeal No. 7 of 2017 (Janardan Giri Vs. Dhanwati and others), whereby the appeal filed by the plaintiff-petitioner challenging the order dated 24.12.2016 passed by the Civil Judge (Junior Division), Ballia in Original Suit No. 466 of 2016, rejecting the application for temporary injunction, was dismissed.

3. When this case was listed on 2.11.2023, the following order was passed:-

"Heard Shri Abhishek Kumar Chaubey, learned counsel for the petitioner.

Matter has been taken up out of turn. Learned counsel submits that he had tried to serve a notice on Shri Arvind Kumar Tiwari, Advocate regarding the matter to be taken up out of turn. However, he states Shri Tiwari, Advocate refused to accept the notice on the ground that some other counsel has been engaged in the matter.

By the order dated 9.05.2017, an interim order was granted by the court and notices were directed to be issued to respondent nos. 1 to 7. Accordingly, notices were issued by the registered post with A.D. fixing 10.07.2017.

The office report of 22.08.2023 is that on behalf of respondent nos.1 and 2 counter affidavit is on record, which is filed by Shri A.K.Tiwari, Advocate. With regard to respondent Nos.3 to 7, it is stated that neither the acknowledgment nor the undelivered cover has been returned. Accordingly, service on all the respondents is sufficient.

A rejoinder affidavit is also on record.

Since, no time is left, list this matter on 28.11.2023.

Interim order is extended till the next date of listing."

4. No one has appeared today on behalf of the respondents.

5. Notice given to Sri A.K. Tiwari, learned counsel for the respondent on 2.11.2023 was refused and an endorsement of learned counsel for the petitioner appears therein that Sri A.K. Tiwari, counsel for the respondents refused to take the notice and stated that some other counsel has been engaged. There is no vakalatnama on record of any other counsel. A counter affidavit on behalf of respondent nos. 1 and 2 alongwith stay vacation application was filed on 11.7.2017 which is on record. A rejoinder affidavit is also on record.

6. It is stated that father of petitioner late Suryadev Giri owned a house and 1/3rd share in 14 agricultural plots and after his death, the petitioner-plaintiff alongwith respondent no.2 and late Uday Narayan Giri were in possession over the aforesaid house and agricultural plots and their names were directed to be recorded in the Khatauni. It is stated that a registered will dated 29.10.2003 was executed by father of the petitioner in favour of his three sons including the petitioner, in which it was stated that after his death, his three sons will equally divide the property and enjoy equal share without creating any dispute against themselves regarding his property. It is stated that the aforesaid will deed dated 29.10.2003 was registered in the office of Sub-Registrar, Ballia at Bahi No.3, Jild No. 74 page no. 390-393 at sl. no. 250.

7. It is stated that a dispute arose between three of the sons as a result of which, Uday Narayan Giri instituted a suit against Suryadev Giri and his brother Ram Pravesh Giri before the Civil Judge bearing Suit No. 214 of 2007, in which a written statement was filed by the father of petitioner. It is alleged that in that written statement, father of petitioner questioned the character of his second son Ram Pravesh Giri. The suit apparently was dismissed for want of prosecution on 4.10.2010. The father of petitioner died on 12.4.2016. After his father's death, the respondent no.2 started harassing the petitioner and other co-sharers and stated that his father Suryadev Giri had already executed a will on 15.12.2010 in favour of wife of respondent no.2, namely, Dhanwati Devi, wife of Ram Pravesh Giri naming her to be his only successor of all his properties. It is stated that the will of 15.12.2010 is a fraudulent document as at his advanced age of 97 years, Suryadev Giri was unable to understand and was not having sound mind. Accordingly, the suit for cancellation of will deed dated 15.12.2010 and for injunction was filed.

8. Alongwith the plaint, an application 6C seeking temporary injunction was filed by the plaintiff-petitioner seeking injunction against the defendants. The trial court observed that whether the

will deed dated 15.12.2010 is fraudulent, the same could be adjudged at the time of final decision of the suit. The trial court also observed that the subsequent will deed would be said to be effective and as such found no prima facie case in favour of the plaintiff and accordingly, the application was rejected. The appellate court in Misc. Civil Appeal No. 7 of 2017 dismissed the appeal filed by the plaintiff-petitioner on the ground that ownership and possession of the disputed property is of the appellant as well as respondents, that the fate of the registered will is dependent on the evidence adduced by the parties. It was observed that all the properties do not belong to the appellant-plaintiff. There exists no prima facie and balance of convenience in favour of the appellant and accordingly, appeal was dismissed.

9. It is pertinent to mention that the application for temporary injunction has not been filed. In the counter affidavit, filed by the respondent nos. 1 and 2, the effect of registration of will of 2003 is disputed and is stated to be an unregistered will. It is stated that the suit No. 266 of 2016 has been filed with malafide intention to deprive the respondent no.1 from her legitimate right. It has further been stated that on the basis of will dated 15.12.2010, the order of Revenue Inspector dated 20.7.2016 ordering mutation of the names of petitioner and his two brothers has been stayed and the relevant Khatauni has also been filed. Under the circumstances, though it is trite that will of 2010 makes no mention of the will of 2003 and does not specifically provide for it being revoked, but it does mention that other than the will dated 15.12.2010, he has not written any other will, and if any one produces any will, the same would be considered as fraudulent and useless. The copy of the will of 2010 has been enclosed as Annexure no. 6 to this petition. In any view of the matter, the validity or otherwise of the aforesaid two wills, is a matter of evidence.

10. Under the circumstances, no interference is called for in this petition. This petition is, accordingly, **dismissed**.

11. It is made clear that the aforesaid order has been passed only for adjudication of this petition and shall not be taken as an opinion of this Court on merits of the case.

Order Date :- 28.11.2023

sfa/

(Jayant Banerji, J)