

Court No. - 13**Case :-** CIVIL MISC REVIEW APPLICATION DEFECTIVE No. - 77 of 2024**Applicant :-** Smt. Kamla Yadav And Others**Opposite Party :-** State Of U.P. Thru. Prin. Secy., Deptt. Of Revenue, Lucknow And Others**Counsel for Applicant :-** Girish Chandra Sinha**Hon'ble Saurabh Lavania,J.****(C.M.Application No. 1 of 2024)**

Heard learned Counsel for the applicant.

Considering the averments made in the affidavit filed in support of application under consideration, the same is *allowed*.

Accordingly, the delay in filing the present review application is hereby condoned.

Order of Review Application

1. Heard.
2. Present review application under Chapter V Rule 12 of the Allahabad High Court Rules, 1952 has been preferred by the applicants (legal heir of Mahesh Prasad) to review the judgment dated 21.02.2024 passed in Writ-B No. 26363 of 2019 (Bhagwati Prasad Yadav and Others Versus D.D.C. Gonda and Others).
3. It would be apt to indicate that Mahesh Prasad (predecessor-in-interest of applicants) sold the land in dispute i.e. land indicated in Khata No. 98 to Ram Vinod and Rishikesh Pathak, and these persons namely Ram Vinod and Rishikesh Pathak, to whom the land in issue was sold by Mahesh Prasad (predecessor-in-interest of the applicants), were heard and thereafter the judgment dated 21.02.2024 was passed.
4. The present review application has been filed broadly on the ground that before passing the judgment dated 21.02.2024, the applicants were not heard, as appears from the grounds taken in the instant review application based upon which the submissions were made.

5. The issue before this Court is as to whether an opportunity of hearing to the applicants, in the facts of the case, was/is required or it was/would be futile exercise.

6. It would be apt to indicate, on the issue aforesaid, that this Court while passing the judgment dated 21.02.2024 considered the following facts:-

- (a) Revenue entry i.e. Ziman-4 (जिमान-4), which means an occupier without any title.
- (b) The basis of claim of Ram Prasad (father of Mahesh Prasad and grandfather of applicants) i.e. the order dated 30.08.1954 passed by Naib Tehsildar, who provides the rights over the land in dispute to Ram Prasad vide order dated 30.08.1954.
- (c) The Naib Tehsildar under the relevant provisions was not empowered to pass an order in a case for correction of records and/or to provide rights over the property on the basis of possession that too of four years.
- (d) The 'Will' dated 13.09.1944 (which was not proved) executed by Smt. Jhurra widow of Prathivi Pal in favour of petitioner of Writ-B No. 26174 of 2019 namely Mewa Lal.
- (e) The Mahesh Prasad, predecessor-in-interest of the applicants, sold the land in issue to Ram Vinod and Rishikesh Pathak on 20.06.2019 and to these persons, represented by Sri G.C.Sinha, learned Advocate, right of hearing was given.

7. This Court after considering the aforesaid undisputed facts, did not issue notices to legal heirs of Mahesh Prasad, the present applicants, and passed the judgment dated 21.02.2024. The relevant paragraphs on this aspect are paragraph(s) 4(xiii) and 4(xiv) of the judgment dated 21.02.2024.

8. Vide judgment dated 21.02.2024, the claim of the parties before the Writ Court was rejected and the order dated 29.09.2011 passed by Settlement Officer of Consolidation (in short 'S.O.C.') was restored and the revenue official were

directed to record the land of Khata No. 98 in name of Gaon Sabha.

9. Taking note of aforesaid, this Court put following question(s) to Sri G.C. Sinha, learned Counsel for the applicants, who before this Writ Court appeared for Caveator/Mahesh Prasad (father of applicants) and also for the Ram Vinod and Rishikesh Pathak, to whom the land in issue was sold by Mahesh Prasad on 20.06.2019 and right of hearing was provided by this Court prior to passing the judgment dated 21.02.2024.

(i) Whether the claims of the applicants over land in Khata No. 98 is based upon order dated 30.08.1954 passed by Naib Tehsildar and this order dated 30.08.1954 was the basis of claim of Ram Prasad father of Mahesh Prasad (predecessor-in-interest of applicants), who became the owner of land in issue through sale deed dated 25.11.2003 executed by Ram Prasad, and also the basis of claim of Ram Vinod and Rishikesh Pathak to whom the land was sold by Mahesh Prasad on 20.06.2019.

(ii) Whether on 30.08.1954 the Naib Tehsildar was empowered to pass an order in case for correction of records and/or was empowered to provide Rights over the property on the basis of possession that too of only four years.

10. In response Sri G.C.Sinha, learned Counsel for the applicants, could not dispute the fact that the claim of the applicants is based upon the order dated 30.08.1954. However, he could not place any provision of law or authority to establish that on 30.08.1954 the Naib Tehsildar was empowered to pass an order in case for correction of records and/or was empowered to provide rights over the property on the basis of possession that too of only four years.

11. In view of aforesaid this Court considered relevant paragraph(s) i.e. paragraph no(s). 4(i) to 4(xiv) and 5 to 9 of the judgment dated 21.02.2024, which are as under:-

"4. Brief facts, which are relevant for the disposal of petition(s), under consideration, are as under:-

(i) The claim of parties to the petition(s) relates to land indicated in Khata No. 98 of the Basic year Khatauni of Village-Badgaon, Pargana, Tehsil and District-Gonda, which, at the time of filing of the objections under Section 9A(2) of the Act of 1953, was recorded in the name of Ram Prasad (father of Bhagwati Prasad, Devi Prasad and Mahesh Prasad).

(ii) In Writ - B No. 26363 of 2019, Bhagwati Prasad is the petitioner No.1 and petitioner Nos. 2-Smt. Sitapati and 3-Kanhaiya Lal are descendants of Devi Prasad and petitioner No.4-Smt. Aneeta Yadava widow of Harish Chandra Yadava, as appears from the record, is also the descendant of Devi Prasad.

(iii) Mahesh Prasad S/o Ram Prasad was impleaded as private respondent No.4 in both the petitions, under consideration and during pendency of the petitions, legal heirs of Mahesh Prasad have been substituted.

(iv) Before the C.O., Mewa Lal, petitioner in Writ - B No. 26174 of 2019, claimed his rights over the land in issue by preferring an application/objection under Section 9-A(2) of the Act of 1953, registered as Case No. 1423.

(v) The objection of Mewa Lal was based upon the 'Will' executed on 13.09.1944 by Smt. Jhurri widow of Prithi Pal.

(vi) Before the C.O., predecessor-in-interest of petitioners in Writ - B No. 26363 of 2019 and private respondent No.4-Mahesh Prasad and the applicants of application for impleadment No. 175465 of 2021 namely Ram Vinod and Rishikesh Pathak namely Ram Prasad also preferred an application/objection claiming his rights over the land in issue indicated in Khata No. 98.

(vii) The claim of Ram Prasad was based upon the order dated 30.08.1954 passed by the Naib Tehsildar concerned, which reads as under:-

"हुक्म श्रीमान ए०पी० पान्डे नायब तहसीलदार महोदय गोण्डा मूल मिसिल नम्बरी 1423 मौजा बड़गौव फौ० 30-8-54 ई० मुकदमा दुरुस्ती कागजात मौजा बड़गौव।

राम प्रसाद पुत्र लौटन अहिर सा० बड़गौव, परगना व जि० गोण्डा

.....वादी

प्रति

अयोध्या प्रसाद पुत्र बहोरी कुर्मी सा० बरदिहा परगना तहसील व जिला गोण्डा

.....प्रतिवादी

प्रार्थी की दरखास्त है कि भूमि नं० 66/40, 86/20, 250/31, 275/13, 293/28, 294/27, तथा 297/27 बाकाम मौजा बड़गौव पर उस का कब्जा गत 4 साल से है परंतु कागजात में प्रतिवादी का नाम दर्ज है। अतः दुरुस्ती की जावे तलवी फरीकेन की गई। वावजूद तामील काफी प्रतिवादी हाजिर नहीं आया यह भूमि जमींदारी उन्मूलन क्षेत्र के बाहर है और प्रधान को पार्टी बनाने का प्रश्न नहीं उठता। जमींदार रियासत बलरामपुर है जिस की रसीद लगान बावत सन् 1360फ० व 1361फ० बकाय वादी दाखिल मिसिल है।

सबूत में वादी ने लेखपाल व गवाहान पेश किए। इस के अतिरिक्त इस साल 1361 फसली भी पेश किया इस से प्रगट होता है कि वादी का कब्जा गत कई वर्षों से है।

अतः आदेश हुआ कि विवादित भूमि के खाते से अयोध्या प्रसाद का नाम खारिज होकर राम प्रसाद वल्द लौटन अहिर का नाम बहैसियत काश्तकार जिमन 4 मौरूसी लगान इन्द्राज खेतौनी दर्ज कागजात हो।

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30-8-1954"

(viii) Before the C.O. Mahesh Prasad was contesting the claim pertaining to land indicated in Khata No. 98 on behalf of Ram Prasad.

(ix) Ram Prasad executed a sale deed dated 25.11.2003 in favour of his own son namely Mahesh Prasad, during pendency of the proceedings before the C.O., which is apparent from the assertions made in Writ - B No. 26363 of 2019, according to which, Ram Prasad died on 26.07.2009 and also from the order(s) impugned.

(x) Mahesh Prasad S/o Ram Prasad on 20.06.2019 sold the land in issue to applicants of application for impleadment No. 175465 of 2021 namely Ram Vinod S/o Hanuman Prasad and Rishikesh Pathak S/o Late Krishna Kumar Pathak, as indicated in the application.

(xi) The applicants namely Ram Vinod and Rishikesh Pathak, to whom the land in issue was sold on 20.06.2019 by Mahesh Prasad (died on 04.04.2020 after putting in appearance before this Court as caveator), are the persons to whom hearing should be provided and in view of above, right to hearing has been provided to these applicants, who are represented by Sri G.C.Sinha, Advocate, before this Court.

(xii) In view of facts, which would be considered for disposal of the petition(s), under consideration, this Court is of the view that only right of hearing would suffice to Ram Vinod and Rishikesh Pathak, who have entered into the shoes of Mahesh Prasad by virtue of sale deed dated 20.06.2019, and are represented by Sri G.C.Sinha, Advocate, and there is no need to provide time to file counter affidavit as the facts referred in the impugned order(s) cannot be improved by means of an affidavit.

(xiii) This Court is not inclined to issue notice to legal heirs of Mahesh Prasad and other private respondents in both the petition(s). It is for the reasons aforesaid particularly the fact that the land in issue was transferred/sold on 20.06.2019 by Mahesh Prasad and to whom the land in issue was transferred/sold namely Ram Vinod and Rishikesh Pathak are present before this Court through Sri G.C.Sinha, Advocate, and contesting for their rights over the land in issue.

(xiv) Further, the issuance of notice to the legal heirs of Mahesh Prasad and other private respondents, who in fact are formal respondents, would be futile exercise as after appearance they would not be in a position to dispute the facts of the case and this process would delay the disposal of present petition(s).

(xv)

(xvi)

(xvii).....

(xviii).....

(xix).....

(xx).....

5. In the aforesaid background of the case, two following questions/issues are to be answered by this Court:-

"(a) Whether the claim of Mewa Lal, based upon the 'Will' dated 13.09.1944, is justified and is liable to be allowed?

(b) Whether in allowing the claim of Mahesh Prasad, the C.O. as also the D.D.C. committed error in law and fact both?"

6. So far as the Question No.(a) i.e. "Whether the claim of Mewa Lal, based upon the 'Will' dated 13.09.1944, is justified and is liable to be allowed", is concerned, this Court is of the view that the claim of Mewa Lal based upon the 'Will' dated 13.09.1944 is not liable to be allowed. It is for the following reasons:-

(i) Undisputedly, in the khatauni of Fasli Year 1356 the name of Smt. Jhurri widow of Prithvi Pal, who executed the 'Will' dated 13.09.1944 in favour of Mewa Lal, was recorded in Ziman-4 (जिम्न-4), which means an occupier without any title, and a person of such nature, as per law, is not empowered to execute a 'Will' or to transfer the property of such nature.

(ii) To controvert the aforesaid, learned counsel for the petitioner(s) has not placed any provision of law or any authority.

(iii) The 'Will', as per settled proposition of law including the judgment passed by this Court in Writ - B No. 23043 of 2020 (Ghuru And Ors. vs. Addl.District Magistrate Finance/Revenue Kheri And Ors.), has to be proved strictly in terms of Section 63 of the Indian Succession Act, 1925 and Sections 68, 69, 90 & 90-A of the Evidence Act, 1872 and in the instant case, the 'Will' was not proved as per law including by producing the attesting witnesses, the author of the 'Will' and as such, the basis of claim itself was not proved by Mewa Lal and being so the claim of Mewa Lal based upon the 'Will' dated 13.09.1944 cannot be acceded, even if, it is presumed that under the law Smt. Jhurri widow of Prithvi Pal was empowered to transfer the property.

(iv) Taking note of concurrent findings recorded in the impugned order(s) that Mewa Lal failed to prove the 'Will' dated 13.09.1944 by adducing appropriate evidence, this Court put a query to Sri Pande, learned Senior Advocate as to by which document it can be deduced that 'Will' dated 13.09.1944 was proved before the C.O. as per law.

(v) To the above query, Sri Pande, learned Senior Advocate, could not place any document before this Court from which it can be deduced that 'Will' was proved by producing attesting witness or if the attesting witnesses were not available, then in that event, by adducing appropriate evidence as per law.

(vi) The propounder is under obligation to prove the 'Will'. In this case, Mewa Lal failed to prove the 'Will' dated 13.09.1944 and in this regard, specific findings have been recorded by the C.O., S.O.C. and D.D.C. and before this Court, no document has been placed from which it can be deduced that Mewa Lal proved the 'Will' dated 13.09.1944 as per law and accordingly this Court finds that claim of Mewa Lal based upon 'Will' dated 13.09.1944 was rightly rejected vide order dated 29.06.2010, affirmed vide order dated 29.09.2011 and 03.09.2019 by

the authorities under the Act of 1953 namely C.O., S.O.C., and D.D.C., respectively.

7. In regard to Question No.(b) i.e."Whether in allowing the claim of Mahesh Prasad, the C.O. as also the D.D.C. committed error in law and fact both", this Court is of the view that respondent No.3/C.O. and respondent No.1/D.D.C. while allowing the claim of Mahesh Prasad S/o Ram Prasad vide order dated 29.06.2010 and 03.09.2019, respectively, erred in law and fact both. It is for the following reasons:-

- (i) Smt. Jhurri widow of Prithvi Pal, undisputedly, died issueless.
- (ii) Ram Prasad, father of Mahesh Prasad, was not the legal heir of Smt. Jhurri widow of Prithvi Pal and this fact is not in dispute.
- (iii) Ram Prasad instituted a case for correction of records and in this case, he impleaded one Ayodhya Prasad. The case was instituted on the basis of alleged possession of four years over the property in issue and this case was finally decided in favour of Ram Prasad vide order dated 30.08.1954 by the Naib Tehsildar.
- (iv) The Naib Tehsildar on 30.08.1954 was not empowered, as per statutory provisions indicated in U.P. Land Revenue Act, 1901 (in short "Act of 1901"), to pass an order in the case for correction of records and this aspect can be deduced from the relevant provisions, which are extracted hereinunder:-

"Edition (1957)

33. The Annual Register.- (1) The Collector shall maintain the record-of-rights, and for that purpose shall annually, or at such longer intervals as the State Government may prescribe, cause to be prepared an amended [register mentioned in section 32.] he [register] so prepared shall be called the annual register.

(2) The Collector shall cause to be recorded in the annual [register] all changes that may take place and any transaction that may affect any of the rights or interests recorded and shall therein correct any errors proved to have been made in the record-of-right or any annual register previously prepared.

(3) No such change or transaction shall be recorded without the order of the Collector or as hereinafter provided, of the Tahsildar or the Panchayati Adalat as constituted under section 42 of the United Provinces Panchayat Raj Act, 1947.

Amendment.- In sub-section (1) for the words "set of the registers enumerated in section 32" the words "register mentioned in section 32" and for the word "registers" occurring in paragraph 2 of sub-section (1) and in line 2 of sub-section (2) the word "register" and the present sub-section (3) have been substituted by Act I of 1951. Sch."

39. Correction of mistakes in the annual registers.-Notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947, the Collector may, on his own motion and shall, on the application of any person, correct any error or omission in the annual register."

(v) Thus, the order i.e. order dated 30.08.1954, the basis of claim of Mahesh Prasad and other legal heirs of Ram Prasad [petitioner(s) in Writ - B No. 26363 of 2019)], is nullity in the eyes of law being passed by the incompetent authority and being so ought not to have been relied upon for the purposes of providing the benefits to Mahesh Prasad.

(vi) Further, Naib Tehsildar was also not empowered to provide the rights over the property in issue on the basis of possession that too of only four years.

(vii) It is not clear from the record that how the name of Ayodhya Prasad came into light at relevant point of time.

(viii) The basis i.e. order dated 30.08.1954 itself is nullity and as such, the sale deed dated 25.11.2003 executed by Ram Prasad in favour of his son Mahesh Prasad is/was not having any force in law and being so the sale deed executed on 20.06.2019 by Mahesh Prasad in favour Ram Vinod and Rishikesh Pathak is also not having any force in law.

(ix) On the aforesaid aspect of the case, reference can be made to the maxim(s) i.e. "Sublato Fundamento, Cadit Opus" means "basis goes, superstructure goes" and "Nemo Dat Quod Non Habet" means "no one can give what they do not have".

(x) In view of aforesaid observations related to rights of Ram Prasad, the claim of petitioners namely Bhagwati Prasad Yadav, Smt. Seetapati, Kanhaiya Lal Yadav and Smt. Aneeta Yadav in Writ - B No. 26363 of 2019 is not sustainable. Neither the claim of Mahesh Prasad and others including the applicants namely Ram Vinod and Rishikesh Pathak, who preferred the application for impleadment and are represented by Sri G.C. Sinha, Advocate, is also sustainable.

8. For the reasons aforesaid and after taking note of Section 11-C of the Act of 1953 and the principles embodied under Order 41 Rule 33 of C.P.C. this Court, in exercise of power under Article 226 of the Constitution of India, is of the view that interest of the Gaon Sabha is to be protected.

9. Accordingly, the claim of the petitioner(s) in the aforesaid petition(s) claiming the rights over the property in issue i.e. land recorded in Khata No. 98, as also the rights of Mahesh Prasad-predecessor-in-interest of the applicants, who preferred the application for impleadment, and are represented by Sri G.C. Sinha, Advocate, is hereby rejected and order of respondent No.2/S.O.C. dated 29.09.2011 is hereby restored. The revenue officials are directed to record the land of Khata No. 98 in the name of Gaon Sabha."

12. Upon due consideration of aforesaid, this Court is of the view that providing an opportunity of hearing to the applicants would be only futile exercise and the case of the applicants is squarely covered by "Useless formality theory". In this view of the matter this Court is not inclined to review/recall the judgment dated 21.02.2024. Accordingly, the present review application is ***dismissed***.

13. No order as to costs.

Order Date :- 07.05.2024

Jyoti/-