

Court No. - 18

Case :- WRIT - B No. - 1001032 of 2008

Petitioner :- Vijai Pal

Respondent :- Board Of Revenue Allahabad And 6 Ors.

Counsel for Petitioner :- Satya Prakash Srivastava

Counsel for Respondent :- C.S.C., Bajhul Quamar Siddiqui, J K Sinha, Om Prakash Srivastava, Pankaj Gupta, Prem Kumar Singh, R.N. Gupta, Shravan Kumar, Vijai Bahadur Verma, Zakiya Khatoon

Hon'ble Manish Kumar, J.

1. Heard learned counsel for the petitioner, Sri Satya Prakash Srivastava, learned Standing Counsel for the State and Sri Vijai Bahadur Verma, learned counsel for the private respondents.

2. The present writ petition has been preferred for quashing of the impugned judgment and order dated 13.07.2006 passed in suit preferred by the petitioner under Section 229-B of the U.P. Z.A & L.R. Act, 1950 (hereinafter referred to as 'the Act, 1950') by respondent no. 4; the impugned first appellate order dated 28.11.2007 passed by Additional Commissioner (Judicial) and the impugned second appellate order dated 09.01.2008 passed by Board of Revenue, /respondent no. 1.

3. Learned counsel for the petitioner has submitted that Late Shaligram was the tenure holder of Khata no. 607 at village- Mahadeo Misir, P.O. Behre Kuiya, District Balrampur. It is further submitted that Late Shaligram had two sons and the petitioner and the respondents are the grandsons of Late Shaligram. It is further submitted that the respondents moved an application under Section 34 of the U.P. Land Revenue Act, 1901 before the Tehsildar for the purposes of mutation of their names over the land on the basis of an unregistered Will, alleged to be executed by Late Shaligram in favour of Bijleshwari, respondent no. 5 and Shobha Ram, the father of the petitioner. The 2/3rd share was given to Bijleshwari and 1/3rd share was given to Shobha Ram i.e. the father of the petitioner and on the basis of which without giving any opportunity of hearing to the petitioner, the mutation order was passed accordingly on 12.10.1978.

4. It is further submitted that the father of the petitioner filed a suit under Section 229-B of the Act, 1950 in which the written statement was filed on behalf of the respondents, claiming their right on the basis of unregistered Will and after hearing the parties, the suit was dismissed by judgment and order dated 13.07.2006.

5. It is further submitted that the father of the petitioner against the dismissal order dated 13.07.2006, preferred a first appeal on 19.07.2006 which was also dismissed on 28.11.2007. Against the dismissal order, the petitioner preferred a second appeal which was also dismissed by judgment and order dated 09.01.2008 and the second appellate court had not considered the submission of the petitioner that without proving the Will, the case was decided in favour of the respondents as per the unregistered Will. Feeling aggrieved by these orders, the present writ petition has been filed.

6. On the other hand, Sri Vijai Bahadur Verma, learned counsel for the respondent no. 3 has submitted that the petitioner in his writ petition had not disclosed the relevant fact for the proper adjudication of the present case i.e. on the basis of Will, after the mutation on 12.10.1978, the father of the petitioner had executed two sale deeds dated 13.03.1980 and 07.02.1983 of 1/3rd share as provided in the Will executed by late Shaligram.

7. It is further submitted that after selling the property i.e. 1/3rd share, as mentioned in the sale deed, after about 15 years from the date first sale deed, the petitioner had preferred a suit under Section 229-B of the Act, 1950, which was dismissed on 13.07.2006 after the written statement filed on behalf of the respondents mentioning about the Will on the basis of which the rights between the parties have already been determined. It is further submitted that the father of the petitioner had not amended the suit challenging the Will nor asked for framing of an issue on the point.

8. After dismissal of the suit, the first appeal was preferred on 19.07.2006 under Section 331(3) of the Act, 1950 and had not taken a ground that the Will relied by the respondents in the suit at the time of filing of written statement was neither filed nor proved before the trial Court. The ground taken was that the Will is forged.

9. It is further submitted that one day prior to the filing of first appeal, after about 28 years, petitioner moved an application for recall in the mutation case for recalling the mutation order dated 12.10.1978. The appeal was dismissed on 28.11.2007 after considering the submission made on behalf of the father of the petitioner mainly on the ground that the sale deeds executed by the father of the petitioner wherein it has been mentioned that he had executed the sale deed of 1/3rd of his share which amounts to acceptance of the Will and also dismissed on the ground that the validity of the Will has been raised as new ground in the present appeal.

10. The first appellate Court dismissed the appeal. The judgment and order passed in first appeal was challenged by the petitioner by filing a second appeal and for the first

time, the ground was taken that the Will was never ever placed before the Court below which was taken into consideration and it was never proved. The second appellate Court dismissed the appeal by giving a finding that the same cannot be looked into at this stage as no such plea was taken before the Court below.

11. After hearing learned counsel for the parties going through the record of the case, it is an admitted case of the petitioner that his father had executed the sale deeds dated 13.03.1980 and 07.02.1983 mentioning therein that it is 1/3rd share and 1/3rd share was nothing but as mentioned in the Will executed by Late Shaligram.

12. Once the father of the petitioner had acted upon in pursuance of the Will accepting his share as 1/3rd share and executed the sale deed then there was no occasion for him to file a suit after about fifteen years under Section 229-B of the Act, 1950 from the date of execution of first sale deed on 13.03.1980 and moving a recall application in the mutation case after about 28 years. The sale deeds were enclosed/filed alongwith counter affidavit which were not disputed by the petitioner. It is also not disputed by the petitioner that he had ever raised these grounds that the Will was never produced before the Court and the Will was not proved before the trial Court and first appellate Court and admitted that it was for the first time raised before the second Appellate Court.

13. It is pointed out that all these facts regarding execution of sale deed have neither been disclosed in the present writ petition nor filed the sale deeds at the time of filing of the present writ petition.

14. At this stage, learned counsel for petitioner has interrupted and submitted that it was not required to be disclosed in the writ petition as it has been mentioned in the impugned order. The non-disclosure of these facts in the writ petition is nothing but just to mislead this Court.

15. In view of the facts, circumstances and discussion made hereinabove, the present writ petition is liable to be dismissed as the father of the petitioner had acted upon as per the Will by executing the sale deeds and after 15 years of executing the sale deed, filed a suit under Section 229 B of the Act, 1950 and moved a recall application in mutation case after 28 years. The ground that the Will was never produced and it was never proved was taken for the first time at the stage of second appeal and as per the law settled in the case of **Kshitish Chandra Purkait versus Santosh Kumar Purkait and others reported in AIR 1997 SC 2517**, wherein it has been held that a new plea was treated as legal plea by the High Court and entertained the new plea in the second appeal whereas no specific plea was taken or no precise issues were framed in that behalf, so it cannot be permitted to be raised in the

present case i.e. in the second appeal before the High Court. In the present case, the petitioner had tried to raise a new factual plea in the second appeal hence it was rightly rejected by the second appellate Court.

16. In the result, the writ petition being devoid of merit is accordingly, dismissed.

Order Date :- 18.4.2024

Nitesh