

Court No. - 13**Case :-** WRIT - B No. - 1129 of 2023**Petitioner :-** Kanhaiyya Lal And Others**Respondent :-** Deputy Director Of Consolidation / Addl. District.

Magistrate (Finance / Revenue), And Others

Counsel for Petitioner :- Vijay Kumar, Akshat Srivastava, Arvind Kumar Verma, Bajhul Quamar Siddiqui, Harish Kumar, Sanjay Kumar Srivastava**Counsel for Respondent :-** C.S.C., Kapil Kumar Srivastava**Hon'ble Saurabh Lavania, J.**

1. Heard Sri Sanjay Kumar Srivastava, counsel for the petitioner assisted by Sri Akshat Srivastava, Advocate and learned Standing Counsel who has appeared on behalf of respondents No. 1 to 3 and Sri Kapil Kumar Srivastava, Advocate who has appeared on behalf of respondents No.4 & 5.

2. The present petition has been filed for the following main relief:-

- "i. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned judgment and order dated 13.07.2023, passed by the opposite party no. 1 in Revision No. 482/202354104300000552 under Section 48 of U.P. Consolidation of Holdings Act parties (Kanhaiyya Lal & others -Vs- Dinesh Kumar & others) thereby rejecting the revision of the petitioners in a most illegal and arbitrary manner without considering the grounds taken by the petitioners in the memo of revision as well as challenging the judgment and order dated 13.07.2023, passed by the opposite party no. 1 in Revision No. 481/202354104300000551 Parties Vineet Kumar & others -Vs- Shiv Rani & other thereby rejecting the revision preferred by the opposite party no. 6 to 10 so far as it relates to the petitioners contained in Annexure No.1 to the writ petition it relates to the petitioners, and*
- ii. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned judgment and order dated 10.04.2023, passed by the opposite party no. 2 in Appeal No. 726/2017541043000030 under section 11 (1) of U.P. Consolidation of Holdings Act parties (Ram Bharosey & others -vs- Vineet Kumar & others) thereby rejecting the*

appeal preferred by the petitioners in a most illegal and arbitrary manner without considering the grounds taken by the petitioners in the memo of appeal as well as judgment and order dated 10.04.2023, passed by the opposite party no. 2 in Appeal No. 525/2021541043000714 parties Dinesh Kumar Vs- Vineet Kumar and others thereby allowing the appeal preferred by the opposite party no. 4 and 5 so far as it relates to the petitioners contained in Annexure No.2 to the writ petition it relates to the petitioners.

iii. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned judgment and order dated 15.12.2017, passed by the opposite party no. 3 in Case No. 26/2017-18 under section 9 A(2) of U.P. Consolidation of Holdings Act parties Vineet Kumar -Vs- State of U.P. by which the opposite party no. 3 allowing the objection of the opposite party no.6 to 10 on the basis of Varasat and further directed to the revenue authorities to cancelled the name of the petitioners from the revenue records without given any decision on the objection filed by the petitioners so far as it relates to the petitioners contained in Annexure No.3 to the writ petition it relates to the petitioners; and

iv. Issue a writ, order or direction in the nature of Mandamus thereby directing the opp. parties no. 4 and 5 not to make any hindrance in peaceful possession of the petitioners over the land in dispute."

3. The notice to respondent(s) No. 6 to 10 is dispensed with. It is for the reason that their petition i.e. **WRIT - B No. - 682 of 2023 (Vinit Kumar and Others Vs. D.D.C. and Others)** challenging the order(s) dated 13.07.2023 and 10.04.2023, has already been dismissed vide judgment and order dated 09.08.2023.

4. The respondent(s) No. 11 and 12 are formal respondents and as such notice to these respondents is also dispensed with.

5. In view of the aforesaid as also in the view of the facts of the case and material available on record including the supplementary affidavit dated 16.05.2024 filed today, which is taken on record, with the consent of learned counsel for the contesting parties present today, this Court proceeded to decide the present petition at admission stage.

6. It would be apt to indicate that the claim of the petitioners of Vinit Kumar (supra) before the authorities under the Consolidation of

Holdings Act, 1953 (in short "Act of 1953") was based succession/ inheritance and the claim of these petitioners was accepted by the Consolidation Officer (in short 'C.O.') and the claim of the present petitioners based upon the unregistered Will dated 03.01.1987, alleged to be executed by Shiv Dayal(Sheo Dayal), was rejected and the claim of the private respondents no. 3 and 4 based upon registered Will dated 18.03.1980 of Shiv Dayal was also rejected vide order dated 15.12.2017. The operative portion of order dated 15.12.2017 reads as under:

आदेश

"अतः आदेश हुआकि ग्राम धनपुर पर० कस्बा तहसील मितौली के खाता सं० 119 व 120 के मृतक खातेदार शिवदयाल पुत्र रघुवर का नाम निरस्त करके वरासत के आधार पर विनीत कुमार, अरविन्द कुमार पुत्रगण रामस्वरूप व ब्रजेश कुमार रजनीश कुमार, मनोज कुमार पुत्रगण मेवालाल निवासी धनपुर का नाम बतौर वारिस दर्ज हो खाते में अंकित नाम कन्हैयालाल, पन्नालाल, रामभरोसे पुत्रगण मूलराम निवासी ग्राम धनपुर का नाम साक्ष्य से प्रमाणित न होने के कारण निरस्त हो तथा खाता सं० 161 का आ० वर्ष का इन्द्राज बदस्तूर दर्ज रहे। खाते के विभाजन का प्रस्ताव निरस्त हो। तथा गोमती देवी आदि की आपत्ति भी सक्ष्यभाव में निरस्त हो।

पत्रावली बाद अमल दरामद दाखिल दफतर हो।"

7. In view of the aforesaid two appeals were filed i.e. in Appeal No. 726/2017541043000030 (Ram Bharosey & others -vs- Vineet Kumar & others) and Appeal No. 525/2021541043000714 (Dinesh Kumar Vs. Vineet Kumar and Others) under section 11 (1) of the Act of 1953. Both the appeals were decided by a common order dated 10.04.2023 by the appellate authority/Settlement Officer Consolidation (in short 'S.O.C.'). In this order, the S.O.C. observed that the unregistered Will dated 03.01.1987 is not genuine and the registered Will dated 18.03.1980 has been proved and accordingly directed the revenue official to record the names in the revenue records in the light of the registered Will dated 18.03.1980. The operative portion of the order dated 10.04.2023 reads as under:

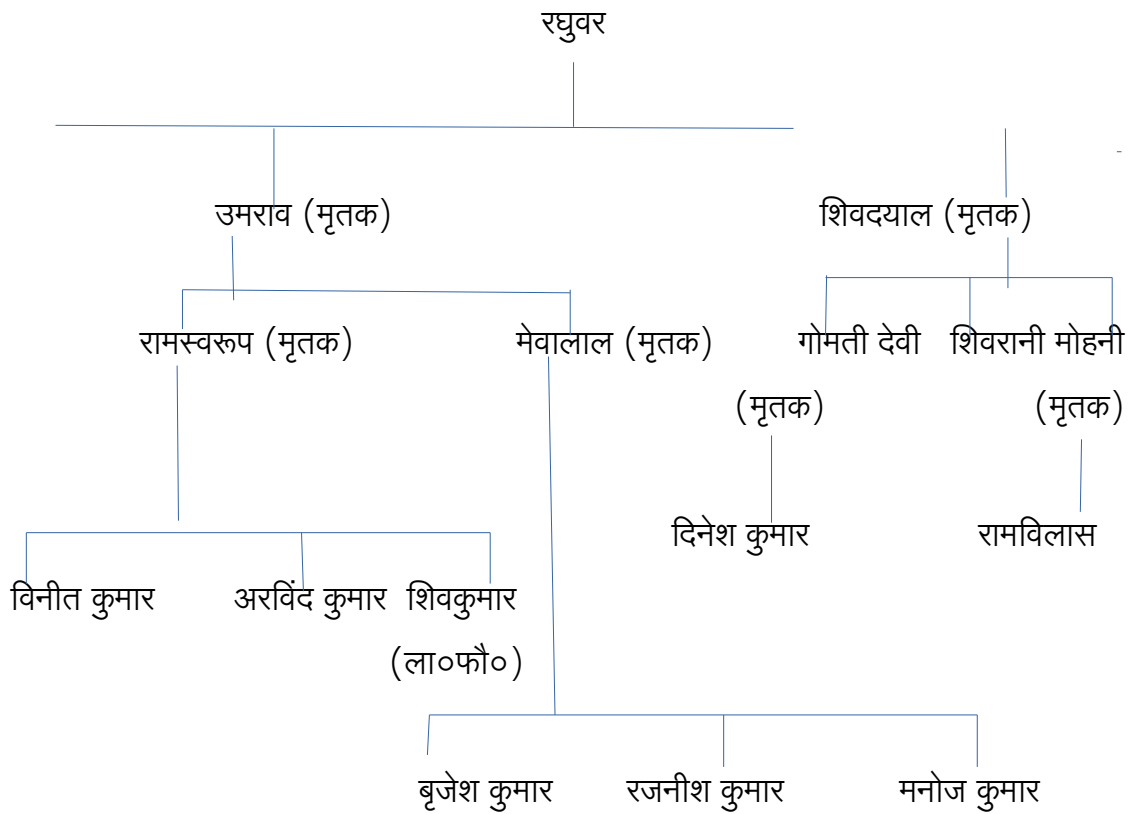
आदेश

"उपरोक्त विवेचना के आधार पर राम भरोसे आदि पुत्रगण मुल्लू द्वारा प्रस्तुत अपील संख्या 726/17 निरस्त की जाती है तथा दिनेश कुमार पुत्र जगन्नाथ आदि द्वारा प्रस्तुत अपील संख्या 525/21 मियाद का लाभ देते हुए स्वीकार की जाती है। चकबन्दी अधिकारी के वाद संख्या वाद संख्या 26 अन्तर्गत धारा 9 क(2) जोत चकबन्दी अधिनियम में पारित आदेश दिनांक 15.12.2017 निरस्त किया जाता है। आधार वर्ष खतौनी खाता संख्या 119 व 120 से विधि विरुद्ध दर्ज राम भरोसे, पन्ना लाल, कन्हैया लाल पुत्रगण मुल्लू राम एवं खाता संख्या 161 से राधेश्याम पुत्र जैराखन का नाम खारिज हो। खाता संख्या 119 के 1/2 अंश, खाता संख्या 120 के 1/4 अंश तथा खाता संख्या 161 के सम्पूर्ण अंश से शिवदयाल मृतक पुत्र रघुवर का नाम खारिज होकर वसीयत रजिस्ट्री संख्या 47 दिनांक 18.3.1980 के आधार पर शिवरानी पत्नी रूपराम निवासी जलालपुर तहसील मिश्रिख जिला सीतापुर व गोमती देवी पत्नी जगन्नाथ प्रसाद निवासी लौकी परगना जड़रा तहसील मिश्रिख जिला सीतापुर का नाम दर्ज हो। बादहू गोमती देवी मृतक पत्नी जगन्नाथ के स्थान पर दिनेश कुमार पुत्र जगन्नाथ का नाम बतौर वारिस दर्ज हो। यही आदेश अपील संख्या 525/21 पर भी लागू होगा। पत्रावली बाद कार्यवाही दाखिल दफ्तर की जाय।"

8. Being aggrieved, the revisions were filed before the Deputy Director Consolidation (in short 'D.D.C.') i.e. Revision No. 481/20235410430000055 (Vineet Kumar & others Vs Shiv Rani & other) and Revision No. 482/202354104300000552 (Kanhaiyya Lal & others -Vs- Dinesh Kumar & others) under Section 48 of the Act of 1954.

9. The D.D.C. vide order dated 13.07.2023 affirmed the order of the S.O.C. dated 10.04.2023. The relevant portion of the order reads as under:

"उभयपक्षों द्वारा प्रस्तुत तर्कों तथा अवर न्यायालय की वाद पत्रावलियों पर उपलब्ध साक्ष्यों के अवलोकन से स्पष्ट है कि प्रश्नगत विवाद मृतक शिवदयाल पुत्र रघुवर के स्थान पर विधिक उत्तराधिकार निर्धारण के सम्बन्ध में है। वाद के सम्बन्ध में निम्नलिखित वंशावली, जो उभयपक्षों को स्वीकार है, इस प्रकार है—



इस वंशावली से स्पष्ट है कि शिवदयाल की तीन पुत्रियां गोमती देवी, शिवरानी व मोहिनी देवी हैं। शिवदयाल द्वारा अपनी पुत्रियों गोमती देवी, शिवरानी व मोहिनी के पुत्र रामविलास के पक्ष में एक पंजीकृत वसीयत दिनांक 18.03.1980 को निष्पादित की गयी, जिसके सम्बन्ध में कोई विवाद नहीं है, परन्तु इस वसीयत के आधार पर विपक्षीगणों द्वारा अत्यधिक विलम्ब से प्रस्तुत अपील के सम्बन्ध में निगरानीकर्तागणों द्वारा मुख्य रूप से यह कथन प्रस्तुत किया गया है कि विपक्षीगणों द्वारा प्रस्तुत अपील के विलम्ब मर्षण के सम्बन्ध में साधारण रूप से आदेश पारित करते हुए विलम्ब मर्षित किया गया है तथा उनके पक्ष में निष्पादित पंजीकृत वसीयत को सिद्ध किये जाने की प्रक्रिया में प्रस्तुत वसीयत के लेखक को स्वतंत्र साक्षी नहीं माना जा सकता, अपीलिय न्यायालय द्वारा विलम्ब मर्षण एवं वसीयत दिनांकित 18.03.1980 पर विपक्षीगण के पक्ष में पारित आदेश त्रुटिपूर्ण है एवं निरस्त होने योग्य है। इस सम्बन्ध में ध्यातव्य है कि विपक्षीगण मृतक शिवदयाल की सगी पुत्रियां हैं तथा

उनके पक्ष में निष्पादित किये गये वसीयतनामा के आधार पर स्वत्व की अधिकारिणी हैं एवं विधिक रूप से हितबद्ध पक्षकार हैं, जिन्हें विलम्ब मर्षण के बिन्दु पर सार्वभौमिक एवं प्राकृतिक न्याय से वंचित नहीं किया जा सकता। इस सम्बन्ध में विलम्ब के बिन्दु पर विपक्षीगणों द्वारा प्रस्तुत अपील को धारणीय मानकर अपीलीय न्यायालय द्वारा कोई त्रुटि नहीं की गयी है। जहां तक वसीयत के लेखक के स्वतंत्र साक्षी होने का प्रश्न है, इस सम्बन्ध में सुस्थापित व्यवस्था है कि पंजीकृत वसीयत के प्रथमतः दोनों साक्षियों द्वारा वसीयत को प्रमाणित किया जाना चाहिए। यदि दोनों साक्षी में से एक साक्षी न हो तो लेखक को भी साक्षी के रूप में परीक्षित कराया जा सकता है। प्रस्तुत प्रकरण में वसीयत के दूसरे गवाह आबिद अली के मृतक होने के कारण उपलब्ध नहीं हो सकते थे, इसलिए वसीयत के लेखक द्वारा प्रश्रुत वसीयत को सिद्ध किये जाने में कोई विधिक अनियमितता नहीं है। इसके अतिरिक्त विपक्षीगणों के पक्ष में निष्पादित वसीयत पंजीकृत विलेख है, जिसे लिखे जाने के बाद उचित प्रक्रिया के अन्तर्गत निबन्धक / प्राधिकारी के समक्ष विलेख प्रस्तुत किया जाता है, जिससे सम्बन्धित सभी पक्षों एवं विलेख में अंकित विषय का सत्यापन हो जाने के उपरान्त विलेख का पंजीकरण किया जाता है। इस प्रकार विपक्षीगणों के पक्ष में निष्पादित वसीयतनामा पंजीकृत है एवं उचित प्रकार से अधीनस्थ न्यायालय में परीक्षित कराया गया है, जिसके आधार पर अपीलीय न्यायालय द्वारा पारित आदेश दिनांक 10.04.2023 न्यायोचित है। चूंकि मृतक शिवदयाल द्वारा निष्पादित पंजीकृत वसीयतनामा के आधार पर उनकी पुत्रियां व नाती विधिक उत्तराधिकारी के रूप में सिद्ध हैं, इसलिए उनके सिद्ध हो जाने के उपरान्त निगरानीकर्तागण विनीत कुमार आदि, ज०वि०अधि० की उत्तराधिकार की धारा-171 के अन्तर्गत कोई अनुतोष पाने के अधिकारी नहीं रह जाते हैं। दूसरे निगरानीकर्तागण कन्हैयालाल आदि के पक्ष में निष्पादित अपंजीकृत वसीयतनामा किसी भी प्रकार से न तो परीक्षित है एवं निष्पादन भी शिवदयाल द्वारा किया गया है, यह भी सिद्ध नहीं है। ऐसी स्थिति में अधीनस्थ न्यायालयों द्वारा कन्हैयालाल आदि द्वारा प्रस्तुत वाद/अपील निरस्त करके कोई त्रुटि नहीं की गयी है। कन्हैयालाल आदि द्वारा प्रस्तुत निगरानी निरस्त

किये जाने योग्य है। इस प्रकार उपरोक्त विवेचना के आधार पर बन्दोबस्त अधिकारी चकबन्दी द्वारा पारित आदेश दिनांक 10.04.2023 युक्तियुक्त है, जिसमें किसी हस्तक्षेप की आवश्यकता नहीं है। दोनों निगरानियां बलहीन हैं एवं निरस्त किये जाने योग्य हैं। उपरोक्त विवेचनानुसार आदेश हुआ कि:-

आदेश

निगरानी विनीत कुमार आदि एवं निगरानी कन्हैयालाल आदि बलहीन होने के कारण निरस्त की जाती हैं। दोनों निगरानी पत्रावलियां बाद आवश्यक कार्यवाही संचित अभिलेखगार हों।"

10. The order dated 13.07.2023 passed by the D.D.C. and the order dated 10.04.2023 passed by the S.O.C. were challenged by the respondent nos. 6 to 10 by means of **WRIT - B No. - 682 of 2023 (Vinit Kumar and Others Vs. D.D.C. and Others)** and the petition was dismissed vide judgment and order dated 09.08.2023 which reads as under:

"1. Heard learned counsel for the petitioners, Shri Hemant Kumar Pandey, learned Standing Counsel for respondent nos. 1 & 2 and Shri Kapil Kumar Srivastava, learned counsel for respondent nos. 3 & 4.

2. Supplementary affidavit filed by learned counsel for the petitioners in Court today is taken on record.

3. In view of order proposed to be passed, notice to respondent nos. 5 to 7 is dispensed with.

4. By means of this petition, the petitioners have assailed the order dated 13.7.2023 passed by respondent no. 1 -Deputy Director of Consolidation/Additional District Officer (F/R), District - Lakhimpur Kheri in Revision(s) No. 481/202354104300000551 (Vineet Kumar and Ors. Vs. Shivrani and Ors.) and 482/202354104300000552 (Kanhaiyalal and Ors. Vs. Dinesh and Ors.) which were filed by assailing the order dated 10.4.2023 passed in the Appeal(s) No. 726/2017541043000030 (Ram Bharosa and Ors. Vs. Vineet Kumar and Ors.) and 525/2021541043000714 (Dinesh Kumar Vs. Vineet Kumar and Ors.) by respondent no. 2- Settlement Officer of Consolidation District-Lakhimpur Kheri.

5. As per the submissions advanced by learned counsel for the petitioners and the averments made in the present petition, the orders impugned have been challenged broadly on two grounds. First ground is based upon Section 65 of the Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872) and second ground is to the effect that the 'Will' dated 18.03.1980, the basis of claim, was not proved as required under the law.

6. On the first ground, learned counsel for the petitioner placed reliance on the judgement of Hon'ble Apex Court passed in the case of Jagmail Singh & Anr. Vs. Karamji Singh & Ors. passed in Civil Appeal No. 1889 of 2020 on 13.03.2020, reported in MANU/SC/0444/2020. Referred paragraphs are extracted herein-below:

"10. For proper appraisal of the matter in controversy, it would be appropriate to reproduce Sections 65 and 66 of the Act which read as under :-

" 65. Cases in which secondary evidence relating to documents may be given.— Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

- In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.
- In case (b), the written admission is admissible.
- In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.
- In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

66. Rules as to notice to produce - Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:— (1) when the document to be proved is itself a notice; (2) when, from the nature of the case, the adverse party must know that he will be required to produce it; (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force; (4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

12. The issue arising out of somewhat similar facts and circumstances has been considered by this Court in *Ashok Dulichand Vs. Madahavlal Dube and Anr.*¹, and it was held as under :-

"According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given."

13. In the matter of *Rakesh Mohindra vs. Anita Beri and Ors.*² this Court has observed as under:-

"15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted." [1976] 1 SCR 246 (2016) 16 SCC 483

14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of *H. Siddiqui (dead) by LRs Vs. A. Ramalingam*³, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.

15. In the case at hand, it is imperative to appreciate the evidence of the witnesses as it is only after scrutinizing the same opinion can be found as to the existence, loss or destruction of the original Will. While both the revenue officials failed to produce the original Will, upon perusal of the cross-examination it is clear that neither of the officials has unequivocally denied the existence of the Will. PW- 3 Rakesh Kumar stated during his cross-examination that there was another patwari in that area and he was unaware if such Will was presented before the other patwari. He went on to state that this matter was 25 years old and

he was no longer posted in that area and, therefore, could not trace the Will. Moreover, PW- 4 went on to admit that, "there was registered Will which was entered. There was a Katchi (unregistered) Will of Babu Singh was handed over to Rakesh Kumar [2011 (4) SCC 240] Patwari for entering the mutation...". Furthermore, the prima facie evidence of existence of the Will is established from the examination of PW-1, Darshan Singh, who is the scribe of the Will in question and deposed as under :-

"I have seen the Will dated 24.01.1989 which bears my signature as scribe and as well as witness."

16. In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the pre-requisite condition i.e., existence of Will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence."

7. On the second ground, reference has been made to judgment rendered by this Court in the case of Writ-B No. 23043 of 2020 (Ghuru And Ors. Vs Addl.District Magistrate Finance/Revenue Kheri And Ors.) passed on 1.02.2023.

8. The brief facts of the case are to the effect that respondent no. 3 -Smt. Shivrani w/o Rupram, Gomati w/o Jagannath and Ram Bilas based upon the registered 'Will' dated 18.3.1980 preferred an objection under Section 9-A(2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953").

9. The objection aforesaid relates to 141, 142/1 and 161, Gata No. 181/0.16 acres, 179/0.78 acres, 200/0.78 acres, 7/1.80 acres, 182/2.71 acres and 54/1.37 acres situated at Village - Dhanpur, Pargana- Kasta, Tehsil - Mitauli (Mawli), District - Lakhimpur Kheri.

10. The registered 'Will' dated 18.03.1980 which was the basis of objection under Section 9-A(2) of Act, 1953 was executed by Shiv Dayal s/o Raghuvar (father of the objectors, namely, Shivrani and Gomati).

11. The objection was filed before Consolidation Officer concerned. Before the Consolidation Officer, the certified copy of the 'Will' was produced. For producing the certified copy of the 'Will' (secondary evidence), the objectors, named above, stated that the 'Will' was burn.

12. To prove the case, based upon the 'Will' dated 18.3.1980, which was executed by Shiv Dayal at the age of 60 years, as mentioned in the registered 'Will', three witnesses were produced namely Om Prakash (author of the 'Will'), Bhikhari (one of the attesting witnesses of the registered 'Will') and Gomati (one of the objectors) and their statement(s) were recorded before the Consolidation Officer. Abid Ali, another attesting witness, could not be produced because he had expired prior to the proceedings, in issue.

13. To prove the fact that original 'Will' has been destroyed, which is required as per Section 65 of the Act, 1872, one of the objectors namely Gomati, before the Consolidation Officer, specifically stated that my original 'Will' was burnt in the fire. The relevant portion of her statement is as under:

"मेरी मूल वसीयत आग में जल गयी थी मैंने प्रदर्श क-1 देखकर कहा यह वसीयत की नकल है जो मैंने दाखिल की है विवादित भूमि से अन्य किसी व्यक्ति का मतलब सरोकार नहीं है।"

14. On the aforesaid aspect in the cross examination, this witness namely, Gomati, reiterated the aforesaid. This witness in cross examination stated "असल वसीयत मेरे पास थी जो आग में जल गयी थी".

15. On perusal of the statement of Gomati, which is on record, it is apparent that on the aforesaid aspect, which relates to Section 65 of Act, 1872, this witness has not been impeached. Thus, to the view of this Court, the first ground taken by the petitioners assailing the impugned orders has no force.

16. Now, coming to second ground based upon which the impugned orders have been challenged. As per the statement of attesting witness Bhikhari, Shiv Dayal put his signature in Urdu on the 'Will' in the presence of the witnesses and thereafter Abid Ali (attesting witness) put his signature in Urdu and thereafter, this witness i.e. Bhikhari put his thumb impression. This witness also stated that the 'Will' was written in the month of Chaitra 1980 and accordingly it can be said that 'Will' was written in the month of March or April 1980 and the date of the 'Will' is 18.03.1980. A perusal of the examination-in-chief and cross-examination of this witness further reflects that the 'Will' was written on being asked by Shiv Dayal (testator) and as per his wishes and no pressure was created upon him and prior to putting of signature, the 'Will' was read out to Shiv Dayal, who thereafter put his signature in Urdu and Abid Ali (second attesting witness) also put his signature in Urdu and the 'Will' was written in the presence of all these persons in Tehsil- Mitauli. This witness to prove the genuineness of 'Will', also stated that about 01:30 p.m, the 'Will' was presented for registry before the Registrar and the

certified copy of the 'Will' indicates that the same was presented between 02:00 p.m. to 03:00 p.m and to the view of this Court, this minor error related to the time of presenting the 'Will' before the Registrar would not be fatal in light of the fact that the statement of a rustic person was recorded after about twenty years and on the other hand, this Court is of the view that witness i.e. Bhikhari proved the fact that the 'Will' was presented before the Registrar for its registration. Further, the statement of the witness that 'Will' was hand-written is also not in dispute.

17. Witness namely, Om Prakash (author of the 'Will') before the Consolidation Officer concerned. As per his statement, the 'Will' was written on 18.3.1980 by him on being asked by Shiv Dayal (testator), thereafter, the 'Will' was read out and, thereafter, Shiv Dayal put his signature in the presence of attesting witnesses, namely, Abid Ali and Bhikhari, who thereafter attested the 'Will', and 'Will' was in favour of Shiv Rani & Gomati and one Ram Bilas s/o Mohini (another daughter of Shiv Dayal). This witness also stated that at the time of execution of 'Will', the testator - Shiv Dayal was of sound mind. Nothing could be elicited in cross-examination by the concerned parties.

18. How the 'Will' is to be proved has been settled in various pronouncements rendered by this Court as also by the Hon'ble Apex Court including the judgment passed rendered by this Court in the case of Ghuru And Ors. (supra).

19. Considered the observation made by this Court in judgment, referred above, as also the statement(s) of the witnesses, who were produced by the objectors before the Consolidation Officer to prove the 'Will'.

20. It is crystal clear from the statements of witnesses, named above, recorded before Consolidation Officer that the testator - Shiv Dayal was of sound mind at relevant time and after understanding the nature and effect of dispositions in the 'Will', which was executed in favour of his two daughters namely Shivrani and Gomati and one grand son namely Ram Bilas (son of another daughter of Shiv Dayal namely Mohini) and whereby excluded the two nephews namely Ram Swroop and Mewalal (predecessors in interest of petitioners), he put his signature on the 'Will' knowing what it contained. Accordingly, this Court is of the view that 'Will' was duly proved.

21. For the reasons aforesaid, this Court finds that concurrent findings of the fact regarding the genuineness of the 'Will' and the claim of the respondent nos. 3 & 4 is not liable to be interfered with in exercise of power under Articles 226 & 227 of Constitution of India.

22. Accordingly, the petition has no force and is dismissed. No order as to costs."

11. After dismissal of above mentioned petition vide order dated 09.08.2023, the present petition was filed before the Registry of this Court on 12.12.2023.

12. Challenging the impugned order, counsel for the petitioner has stated that before the C.O., the unregistered Will dated 03.01.1987, favorable to the petitioners, executed by Shiv Dayal, upon which the attestator put his thumb impressions, was proved by the attesting witnesses Ram Saran S/o Hazari Lal, Chandamau, and Sharfuddin S/o Nei waji, as is evident from the order dated 15.12.2017 passed by the C.O. in Case No.26/2017-18 (Vinod Kumar Vs. State of U.P.) instituted under Section 9-A(2) of the Act of 1953 and despite the same, the C.O. failed to record any finding thereupon and rejected the claim of the petitioners and allowed the claim of the respondent nos. 6 to 10, whose claim was based upon succession/inheritance and entry PA-11 in the revenue record, and thereafter the appellate authority/S.O.C. as also the D.D.C. failed to consider this aspect of the case and passed the impugned orders. As such, impugned orders are liable to be interfered by this Court.

13. It is also stated that the S.O.C. and the D.D.C. ignored the Will dated 03.01.1987, favorable to the petitioners, after stating that this Will dated 03.01.1987 is not genuine as (i) the registered Will dated 18.03.1980 bears signature of the testator namely Shiv Dayal which was in 'Urdu' and the Will favourable to the petitioners of the Will dated 03.01.1987 bears thumb impression of Shiv Dayal and (ii) as per parivar register, Shiv Dayal died on 10.10.1986 and in doing so committed error of law and fact both as Will dated 03.01.1987 was proved and Shiv Dayal was expired on 27.10.1987 and to prove the date of death, the written statement filed by Shiv Dayal, which also bears thumb impression, filed in the regular suit no. 657/1986 as also medical certificate issued on 27.10.1987 indicating date of death as 27.10.1987 were on record. Thus, the orders impugned

are liable to be interfered with and the matter is liable to be remanded back for proper adjudication of the claims between the parties.

14. On the other side, learned Standing Counsel for the State and Shri Kapil Kumar Srivastava, learned counsel for the respondent nos. 4 and 5 stated that Shiv Dayal, testator of the registered Will dated 18.03.1980 put his signature in 'Urdu' and as per this Will, the property was provided to real daughters namely Shivrani and Gomti Devi and one Ram Bilas son of Mohini Devi D/o Shiv Dayal. Thus the property was given to the blood relations and by means of the unregistered Will dated 03.01.1987, the basis claims of the petitioners, the rights over the property of Shiv Dayal would go to Ram Bharose, alleged husband of Mohini Devi (daughter of Shiv Dayal) and Kanhaiya Lal and Panna Lal, who are real brothers of Ram Bharose. From these facts it can be inferred that the Will dated 03.01.1987 was not genuine as no prudent or normal person will execute a Will in favour of the brothers of the alleged husband excluding the reasonable legal heirs without justifiable reasons and in the present unregistered Will dated 03.01.1987 reasons for exclusion given are vague as in this will only it has been indicated that Gomti, Shivrani and Mohini Devi are married and two daughters namely Gomti and Shivrani and to their husbands, heavy amount and articles have already been provided. Thus, unregistered Will dated 03.01.1987 is not genuine and the petition is liable to be dismissed.

15. It is also stated that in the facts of the present case providing an opportunity of proper hearing before the authorities under the Act of 1953 would be futile in nature as if it is taken to be true that attesting witnesses have proved the Will dated 03.01.1987 even then the petitioners would not be in a position to improve the statements of the witness and remove all the legitimate suspicious based upon the statements of witnesses already recorded before the C.O.

16. In so far as the death is concerned, it is stated that to establish the case of the death, no authentic document which can be provided in terms of the Registration of Birth and Death Act, 1969 read with rules made therein was placed on record and in so far as the medical certificate indicating the date of death is concerned, it appears not be genuine because a perusal of Annexure No. 13 to the petition would show that the same is not proper form.

17. Based on aforesaid, it is also stated that a perusal of the medical certificate indicates that the same is completely fake as a prudent doctor would not verify the thumb impression of a dead person and to support that Shiv Dayal was under treatment as outdoor patient since 12.10.1982, no document was placed on record nor has been placed before this Court. This fact also proves that the medical certificate indicating the date of death is completely bogus document.

18. It is also stated that in view of the aforesaid, the filing of the written statement with thumb impression of Shiv Dayal to prove the date of death should also be treated as a bogus document because the person who knows the 'Urdu' and signed the earlier registered Will in 'Urdu' and would never put thumb impressions.

19. It is also stated that the document parivar register is a statutory document prepared in terms of rules made in the U.P. Panchayat Raj Act 1947 namely the rules U.P. Panchayat Raj (Maintenance of Family Planning Registers) Rules, 1970 and therefore, placing reliance on the same, no error was committed by the SOC and the DDC, and thereafter, passing the order dated 10.04.2023 and 13.07.2023, respectively, which are under challenge in the present petition.

20. It is further stated that in the aforesaid background of the case, there is no requirement to interfere in the orders impugned as the

petitioner would not be in a position to prove the valid reasons for exclusion of all the legal heirs.

21. It is also stated that Ram Bilas, one of beneficiary/propounder of the registered Will dated 18.03.1980 was the son of Mohini Devi (daughter of Shiv Dayal), alleged wife of one of the propounder of the Will dated 03.01.1987 namely Ram Bharose and as such, Shiv Dayal distributed the property to all the legal heirs namely Gomti, Shivrani and Ram Bilas and excluded Mohini Devi. Thus, no interference in the impugned orders is required by this Court and the petition is liable to be dismissed.

22. Considered the aforesaid and perused the records.

23. The issue, in view of the aforesaid, before this Court is as to whether the unregistered Will dated 03.01.1987, the basis of the claim of the petitioners is suspicious.

24. On due consideration of the facts which are on record, this Court is of the firm view that the unregistered Will dated 03.01.1987, the basis of the claim of the petitioners, is not genuine and in fact it is suspicious, which can be inferred/deduced from the following reasons:

(A) From the documents annexed with the supplementary affidavit dated 16.05.2024 filed by the petitioners i.e. (a) the copy of application under Guardian and Wards Act, 1890 registered as Misc. Case No. 30 of 1986 (Shiv Dayal Vs. Property of Ram Bilas minor), (b) the order dated 03.02.1987 passed by District Judge, Kheri in Misc. Case No. 30 of 1986 (Shiv Dayal Vs. Property of Ram Bilas minor) and (c) written statement filed by Shiv Dayal in Case No. 657 of 1986 (Ram Bilas Vs. Shiv Dayal), the following facts emerge:

(i) Mohini Devi D/o Shiv Dayal was legally wedded wife of Sant Ram.

(ii) Sant Ram was murdered.

(iii) Out of wedlock of Sant Ram and Mohini Devi, Ram Bilas was born.

(iv) Mohini Devi went somewhere.

(v) Shiv Dayal was intended to part his properties in favour of Ram Bilas.

(vi) Vision of Shiv Dayal was not proper in the year 1987.

(B) Para (e) of the application registered as Misc. Case No. 30 of 1986 reads as under:

"(e) What near relations the minor, has and where they reside.

There is no near relation of the minor as his father was murdered and after giving birth of the said minor his mother went somewhere."

(C) The order dated 07.02.1987 passed in Misc. Case No. 30 of 1986 (Shiv Dayal Vs. Property of Ram Bilas minor) reads as under:

"Order

This is an application under Section 10 of the Guardian & Wards Act by one Sheo Dayal.

2. It is alleged by him that Ram Bilas has become an orphan, whose father was murdered and the mother left the roof of his father immediately shortly thereafter. The minor was born on 17.10.1971 and is being brought up by the applicant, being his 'Nana'.

3. The applicant is issueless and he wants to part with personal properties also in favour of this minor.

4. The applicant has no adverse interest against the minor and being maternal-grand-father, he can properly look after the minor as also the property.

5. I, accordingly, allow the application and appoint Sheo Dayal as guardian of the person and property of the minor Ram Bilas whose date of birth is 17.10.1971 and this order shall remain in force unless set aside or till the minor attains majority, according to law, (21), which ever be the earlier event of the two. He shall submit accounts every six-monthly with all necessary details and particulars depicting the true picture of the income and

expenditure both, to serve as balance-sheet and shall properly look after the education and upbringing of the minor, to which he is entitled."

(D) The paras 13 and 16 of written statement are extracted herein-under:

"धारा 13- यह कि प्रतिवादी उत्तरदाता की बुढ़ापे में सेवा भी वादी ही करता क्योंकि प्रतिवादी उत्तरदाता के कोई लड़का नहीं है। प्रतिवादी उत्तरदाता ही वादी को अपना लड़का समझता है और प्रतिवादी उत्तरदाता ने अपनी भूमि नं० 146 रक्बा 5-51 एकड़ का बयनामा दिनांक 5.04.1985 को वादी के नाम वादी के पिता की मृत्यु से पूर्व प्राप्त धन के आधार पर कर दिया था।

धारा 16- यह कि प्रतिवादी उत्तरदाता वृद्ध एवं आँखों से कमजोर व्यक्ति है और बुढ़ापे का एकमात्र सहारा वादी रामविलास नाबालिग ही है।"

(E) Shiv Dayal executed a registered Will dated 18.03.1980 and by this Will he bequeathed his properties in favour of his two daughters namely Shiv Rani and Gomti and his grand son Ram Bilas S/o Mohini Devi D/o Shiv Dayal.

(F) The registered Will dated 18.03.1980 was executed in terms of declaration before the District Judge, as indicated in above quoted order dated 07.12.1987.

(G) The witnesses who proved the Will dated 03.01.1987 are not truthful witnesses as according to them Shiv Dayal was well to know to them but during examination, they failed to indicate the fact of marriage of Mohini Devi with Sant Ram.

(H) To prove the factum of marriage of Ram Bharose with Mohini Devi, no document was placed on record viz. ration card, parivar register, etc.

(I) In view of aforesaid, this Court is of the firm view that a normal person, in this case Shiv Dayal, would not bequeath his property to a person, Ram Bharose, who was keeping his daughter Mohini Devi without marrying her and also to the brothers of such person and a father

(Shiv Dayal) would not bequeath his property to a daughter who had demean his reputation/image in the society.

(J) Taking note of the fact that in the year 1987 the eyes of Shiv Dayal were very weak i.e. his vision was not proper, this Court is of the view that taking benefit of this ailment of Shiv Dayal on the Will dated 03.01.1987 the thumb impressions of Shiv Dayal were obtained.

(K) No reason has been indicated in the Will dated 03.01.1987 in regard to exclusion of Ram Bilas, right to whom through Will dated 19.03.1980 were provided and in regard to whom Shiv Dayal stated in the written statement filed in the Case No. 657 of 1986 that Ram Bilas is like his son and he is dependent upon Ram Bilas.

25. For the aforesaid reasons, though are different from the reasons recorded by the S.O.C. and the D.D.C., despite treating the date of death as 27.10.1987 and that witnesses proved the Will dated 03.01.1987, this Court is not inclined to entertain the claim of the petitioners based upon the Will dated 03.01.1987.

26. Accordingly, the writ petition is **dismissed**. Cost made easy.

Order Date :- 23.5.2024

Mohit Singh/-