

2007 SCC OnLine All 2230 : (2007) 103 RD 569**In the High Court of Allahabad at Lucknow**

(BEFORE NARAYAN SHUKLA, J.)

Ram Pratap Tiwari and another ... Petitioners;

Versus

Board of Revenue and others ... Respondents.

W.P. No. 777 (MS) of 2007

Decided on July 26, 2007

The Judgment of the Court was delivered by

NARAYAN SHUKLA, J.:— Heard Mr. R.N. Gupta, alongwith Mr. Ram Kumar Singh, learned Counsels for the petitioners, learned. Standing Counsel for opposite parties 1 and 2 and Mr. Ravi Nath Tilhari alongwith Mr. Manoj Sahu, learned Counsels for the opposite party No. 3.

2. The land in question numbered as Khata Nos. 30, 31, 32, 148, 197, 104 and 198, situate at Village Mawaiya, Pargana Su-ryapur, Tehsil Ram Sanehi Ghat, District Barabanki was recorded in favour of one, Shri Keshav Ram Tiwari, who died on 4.6.2001. Claiming their rights over the land in question, on the basis of Will deed, the petitioners as well as the opposite party No. 3 filed applications under section 34 of the U.P. Land Revenue Act for mutation of their names in place of Shri Keshav Ram Tiwari (deceased). The petitioners claimed their right on the basis of unregistered Will deed dated 1st June, 2001 on the ground that the deceased was their uncle and before he died he executed the Will deed in their favour, whereas the respondent No. 3 claims his right on the basis of registered Will deed dated 26.8.1992, on the ground that during his life time Mr. Tiwari (the deceased) was residing with him and he rendered all the services to the deceased during his life time to his satisfaction. Since Mr. Tiwari was fully satisfied with his services he bequeathed the property in his favour. Both the applications were heard together by the opposite party No. 2 i.e. Naib Tehsildar, Suryapur, Tehsil Ram Sanehi Ghat, district Barabanki and were decided by a common order dated 11th June, 2002. After dealing with the evidences adduced before him he allowed the application of the respondent No. 3 and rejected the application submitted by the petitioners and issued direction to record the land in the name of respondent No. 3, on the basis of registered Will deed dated 26th August, 1992, executed in his favour by Mr. Keshav Ram Tiwari. Being aggrieved with which, the petitioners filed revision before the Board



of Revenue. The Board of Revenue through its order dated 21.12.2006 rejected the petitioners' revision and upheld the order passed by the Court below. Both the orders passed by the Courts below are under challenge before this Court through the instant writ petition, mainly on the ground that the respondent No. 3 did not produce the original Will deed before the Courts below. Further, the evidence produced by the petitioners in support of unregistered Will deed has not been considered by the Courts below. Further, the photocopy of the Will deed is not admissible in evidence, as such the Will deed cannot be proved without any other secondary evidence.

3. The respondent No. 3 has contested the matter by filing counter affidavit. The learned Counsel for the respondent No. 3 has raised an oral objection against the maintainability of the writ petition and argued that the proceeding under section 34 of the Land Revenue Act, 1901 (hereinafter referred to as 'Act') is a summary in nature and against the order passed in the said proceeding the writ petition under Article 226 of the Constitution of India is not maintainable. In support of his contentions he has cited some judgments, which are referred as under:

- (1) *Ram Bharose Lal v. State of U.P.*,¹ relevant paragraphs 6 and 7 of which are reproduced hereunder:

"6. As a matter, of fact, the mutation proceedings may be under section 34 of U.P. Land Revenue Act or under some other similar Act, but the legal effect in both the events remains the same. These proceedings do not decide the right or title of the parties rather these proceedings are just fiscal in nature. They have just got legal effect of entering name of vendee in place of the vendor or the name of lessee in place of lessor or donee in place of doner. These mutation proceedings are to enable the State to receive revenue from vendee.

7. By now it is well settled that where the dispute is in mutation proceedings which do not adjudicate upon rights or title of the parties, this Court need not interfere under Article 226 of the Constitution. In such matters person aggrieved shall have rider to seek remedy in the appropriate Court."

- (2) *Smt. Queeni Banerji v. Board of Revenue. U.P., Lucknow*,² in which this Court had held that the orders passed under sections 34/40 of the Act do not bar any suit in a competent Court for declaration of title in the land in dispute and dismissed the writ

petition on the ground of availability of alternative remedy.

(3) *Narain Singh v. Addl. Commissioner, Meerut*³ The relevant portion of paragraph 8 of which is quoted below:

“8. Present petition arises out of proceedings under section 34 of the U.P. Land Revenue Act. The said proceedings are summary in nature. In these proceedings rights and titles of parties to the property in dispute are not decided. The orders passed in the said proceedings are not binding upon the parties or upon the Courts in regular suits or proceedings. The said orders are subject to the decision by the Courts on the regular side. The party aggrieved by the said order may file a regular suit before a Court of the competent jurisdiction of declaration on his title, therefore, a writ petition, under Article 226 of the Constitution of India challenging the validity of the orders passed in the said proceedings, is legally not maintainable.”

(4) *Shakil v. Nashir Khan*⁴ In this case this Court has held that the proceedings pertain to section 34 of the U.P. Land Revenue Act, which are summary in nature. It is settled law and there are catena of decisions on the point holding that no writ petition is maintainable challenging the said summary proceedings.



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4. In light of the aforesaid decisions the learned Counsel for the respondent No. 3 submits that the findings recorded in the proceedings under section 34 of the U.P. Land Revenue Act will not be binding in regular side for declaration of their right, the petitioners can approach the proper forum.

5. In reply, Mr. R.N. Gupta, learned Counsel for the petitioners submits that after completion of pleadings no preliminary objection can be permitted to be raised and also cannot be considered by this Court. The learned Counsel for the respondents has raised such an objection not through the pleadings, but only it is an oral objection, which cannot be raised at this stage. Further, the stage of such objection is now over as after exchange of affidavits the Court has to decide the case on merit. In support of his arguments he has cited several judgments, which are as under:

(1) *Lal Bachan v. Board of Revenue, U.P., Lucknow*.¹ Relevant paragraphs 11, 12 and 13 are reproduced hereunder;

“11. This Court has consistently taken the view as is apparent

from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind apart from there being remedy of getting the title adjudicated in regular suit there is one more reason for not entertaining such writ petition. The orders passed under section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decide the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties.

12. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable, but this Court do not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature.

13. The second question which needs to be considered is as to in what circumstances the writ petition can be entertained arising out of the mutation proceedings. The Division Bench of this Court in *Jaipal's case* (supra) has referred to "exception" to the general rule in following words:

"The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act. This petition does not fall in that class and we think therefore this Court should not entertain it. It is accordingly dismissed with costs."

(2) *Smt. Durgawati v. Additional Commissioner, Azamgarh Division, Azamgarh*² Relevant paragraph 7 of the judgments is quoted below:

"7. So far as the argument of the learned Counsel for the respondents that in mutation matters there should be no interference by higher Court it is to say that this principle is not of universal application. No doubt in mutation proceedings the rights of the parties are not decided. The mutation takes place only for limited purpose to fix the liability of the person to pay the land revenue. It is also true that generally higher Courts do not interfere with the mutation order. But there is no absolute bar to interfere with the mutation order in appropriate cases particularly when there is no dispute of natural heirship."

6. Mr. R.N. Gupta, learned Counsel further argued that there is an illegality in the order itself, as the Court below in passing the order

impugned, has not considered the factor of possession, which is a statutory requirement to be considered for deciding the dispute regarding entries in the revenue records, and invited the attention of this Court towards section 40 of the

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U.P. Land Revenue Act, which speaks that all disputes regarding entries in the annual registers shall be decided on the basis of possession. Section 40 is reproduced hereunder:

“40. *Settlement of disputes as to entries in annual register:* (1) All disputes regarding entries in the annual registers shall be decided on the basis of possession;

(2) If in the course of inquiry into a dispute under this section the (Collector or the Tahsildar) is unable to satisfy himself as to which party is in possession, he shall ascertain by summary inquiry who is the person best entitled to the property and shall put such person in possession.”

7. He further submits that the order impugned is without jurisdiction as the Court below has failed to appreciate the possession of the petitioner over the land in question. Under section 40 of the Act it was mandatory for the authority concerned to pass the order only after satisfying himself regarding one's possession over the land in question, accordingly.

8. In light of the provisions of section 40 of the Act he submits that since the Courts below have proceeded to decide the matter without considering the point as to who was in the actual possession over the land in question; the order passed by the Courts below are per se, illegal and are not sustainable in the eye or law.

9. In reply Mr. R.N. Tilhari, learned Counsel for the respondents submits that in deciding the dispute of entries in the review records the findings of possession are not necessary. He submits that the provisions of section 40 are relevant for the purpose of section 39, which provides for correction of mistake in the annual register. Section 39 of the Act is reproduced hereunder:

“39. *Correction of mistakes in the annual register—*(1) An application for correction of any error or omission in the annual register shall be made to the Tahsildar.

(2) On receiving an application under sub-section (1) or any error or omission in the annual register coming to his knowledge otherwise the Tahsildar shall made such inquiry as appears necessary and then refer the case to the Collector, who shall dispose it of, after deciding

the dispute in accordance with the provisions of section 40:

Provided that nothing in this sub-section shall be construed to empower the Collector to decide a dispute involving any question of title.

(3) The provisions of sub-sections (1) and (2) shall prevail, notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947.”

10. On the strength of the aforesaid provisions he submits that when there is an application for correction of any error or omission in the annual register the Tehsil-dar shall make such inquiry as appears necessary and then refer the case to the Collector to dispose of after deciding the dispute in accordance with the provisions of section 40.

11. He further submits that earlier for the purpose of section 35 also the provisions of section 40 were attracted, but now after amendment of section 35 made in 1975 the provisions of section 40 are not attracted for the purpose of sections 34 and 35 of the Act

12. The unamended provisions of section 35 are reproduced hereunder:

“Section 35: *Procedure of Report*—(1) On receiving a report of succession under section 34, or on facts otherwise coming to his knowledge, the Tahsildar shall made such inquiry as appears necessary and if, in an undisputed case succession appears to have taken place, direct the annual registers to be amended accordingly. If the succession is disputed he shall dispose it of after deciding the dispute in accordance with the provisions of section 40.

(2) On receiving a report of transfer under section 34, or on facts otherwise coming to his knowledge, the Tahsildar shall make such inquiry as appears necessary and then refer the case to the Collector who shall, after making such further inquiry as may be necessary, dispose it of.”



It is also necessary to reproduce the amended provisions of sections 34 and 35 of the Act, which are reproduced hereunder:

“34. *Report of succession or transfer of possession*— (1) Every person obtaining possession of any land by succession or transfer (other than a succession or transfer which has already been recorded under section 33-A) shall report such succession or transfer to the Tahsildar of the Tahsil in which the land is situate.

(2)

(3)

(4) If the person so succeeding, or otherwise obtaining possession, is a minor or otherwise disqualified, the guardian or other person who has charge of his property shall make the report required by this section.

(5) No revenue Court shall entertain a suit or application by the person so succeeding or otherwise obtaining possession until such person has made the report required by this section.

Explanation—For the purposes of this section, the word “transfer” includes—

- (i) a family settlement by which the holding or part of the holding recorded in the record-of-rights in the name of one or more members of that family is declared to belong to another or other members; or
- (ii) an exchange of holding or part thereof under section 161 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.”

35. *Procedure on report*—On receiving a report of succession of transfer under section 34, or upon facts otherwise coming to his knowledge, the Tahsildar shall make such inquiry as appears necessary, and if the succession or transfer appears to have taken place, he shall direct the annual registers to be amended accordingly.”

13. After perusal of unamended provisions of section 35 it is obvious that under the unamended provisions of section 35, in the matter of succession under section 34 the Tehsildar was under obligation to decide the dispute of succession in accordance with the provisions of section 40, but now under the amended provisions of section 35 obviously on the inquiry it is appears that the succession or transfer has taken place, he shall direct the annual register to be amended accordingly.

14. In light of aforesaid provisions Mr. Tilhari, learned Counsel for the respondents submits that there is no need to give findings on the point of possession as to who is under actual possession of the property in dispute, but if the authority concerned is satisfied that the succession or transfer has taken place he can direct the annual register to be amended accordingly. Here in the present matter on the application moved by the answering respondent on the basis of Will deed the Court below was satisfied with the succession of the answering respondent over the property in question and accordingly he passed the order to enter his name in the revenue records in place of the deceased. In support of his contentions he has cited several cases

decided on the identical issues on merit also, but I do not feel necessity to deal with those cases as in the case of *Jaipal Minor v. The Board of Revenue. U.P., Allahabad*,¹ the Division Bench of this Court has I held as under:

“It has however been the consistent practice of this Court not to interfere with orders made by the Board of Revenue in cases in which the only question at issue is whether the name of the petitioner should be entered in the record of rights. That record is primarily maintained for revenue purposes and an entry therein has reference only to possession. Such an entry does not ordinarily confer upon the person in whose favour it is made any title to the property in question, and his right to establish his title thereto is expressly reserved by section 40(3) of the Act. The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P.



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Zamindari Abolition and Land Reforms Act. This petition does not fall in that class and we think therefore this Court should not entertain it. It is accordingly dismissed with costs.”

15. The above case has, constantly, been followed by this Court in several judgments.

16. Mr. Gupta, learned Counsel made an attempt, though unsuccessfully, to attack the orders impugned on the ground that no enquiry was done regarding succession of either of the parties, but only on the basis of application made by the respondent No. 3 he passed the order. In reply of which Mr. Tilhari, learned Counsel submitted that only the information, regarding succession, to the officer concerned was sufficient to pass the order. In light of the decision rendered in *Jaipal's case* (supra), I am of the view that it is open for the petitioner to question the validity of the Will deed executed in favour of the respondent No. 3 before the Civil Court and thus he can get adjudicate his right of title before the Civil Court because, as has been held by the Division Bench of this Court hereinabove, the entry in the revenue records made under section 34 does not confer any title to the land in question.

17. Under the circumstances without entering into the merits of the case the writ petition is hereby dismissed. However, it will be open for the petitioner to get adjudicate his right of title over the land in question by the Civil Court.

18. *Petition Dismissed.*

1. 1991 RD 72.

2. 1997 (88) RD 415.

3. 1999 (90) RD 416.

4. 2005 (99) RD 168.

1. 2002 (93) RD 6.

2. 2006 (100) RD 403.

1. 1956 ALJ 807.

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