

Reportable.

Reserved.

Case :- WRIT - C No. - 1570 of 2017

Petitioner :- Jahan Singh

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Anil Kumar Aditya

Counsel for Respondent :- C.S.C.

Hon'ble Mrs. Sunita Agarwal, J.

Heard learned counsel for the parties.

In the present petition, the petitioner is claiming his right over agricultural plots of Khata No.518, 606, 607, 841 situated in Village Gahalau, Pargana Hasangarh, Tehsil Iglas, District Aligarh on the basis of a Will dated 6.7.2002 executed in his favour by the tenure holder namely Radhey Shyam. In the year 2007, the petitioner filed an application for correction of entries and mutation of his name in place of the recorded tenure holder Radhey Shyam on the basis of the aforesaid Will. The mutation application was rejected on 29.5.2009 on the ground the Will was an unregistered document, no right could be claimed by the petitioner on the basis on the said Will. The names of other successors already recorded in PA-11A have been retained as such. This order was challenged in revision, which was dismissed on 30.9.2016 and hence this writ petition.

The submission of learned counsel for the petitioner is that in the summary proceeding of mutation under the U.P. Land Revenue Act, 1901, correctness/validity of the Will could not have been examined by the Revenue Authorities. Moreover, the Will executed in the year 2002 could not have been disbelieved on the ground that it was an unregistered document and no valid title was passed on to the petitioner.

Reliance is placed upon the judgment of this Court in the case **Sobhnath Dube, In the matter of : Late Kashinath Dube** reported in **2015(7) ADJ 252** to submit that the question of the Will being hit by the provisions of Section 169(3) of the U.P. Z.A. & L.R. Act (hereinafter referred to as 'the Act') being unregistered Will has been decided by this Court. It has been held therein that it was not mandatory to get the Will registered prior to the amendment i.e. before 23.8.2004. Only requirement under Section 169(3) of the Act was that the bhumidhari land could be bequeathed by its holder by means of the Will in writing attested by two persons. The amended provision had been introduced by the Amendment Act namely U.P. Act No.26 of 2004 w.e.f. 23.8.2004 and are prospective in nature, no

retrospective effect can be given to it. The amended provisions of Section 169(3) of the Act cannot be applied to a Will which was executed prior to 23.8.2004 i.e. the date of its enforcement. This apart, it has been held that under the Indian Succession Act, 1925 or the Indian Registration Act, 1908, there is no requirement of registration of testamentary instrument like the Will rather Section 18 of Indian Registration Act makes registration of Will optional. By amendment of U.P. Act, registration of Will cannot be made compulsory as it would be against the provisions of the Central Act.

With reference to paragraphs 13 & 14 of the aforesaid judgment, it is submitted that the provisions of Section 169(3) of the Act cannot override the provisions of the Central Act i.e. the Indian Registration Act and, therefore, an unregistered Will of the agricultural land will not be hit by Section 169(3) of the Act.

In view of the arguments raised by learned counsel for the petitioner regarding the application of Section 169(3) of the Act which made the registration of Will to bequeath a bhumidhari land compulsory, the questions which have arisen for consideration before this Court are as to what would be the effect of amendment of the provisions of U.P. Act No.26 of 2004 w.e.f. 23.8.2004, further as to whether the amendments by the State Legislature in the Act are in conflict with the provisions of Central Act i.e. the Indian Registration Act and whether the provisions of Indian Registration Act will override the amended provisions of the U.P. Z.A & L.R. Act making the registration of Will for devolution of agricultural land compulsory.

Even after time granted by the Court, learned counsel for the petitioner did not provide much assistance to the Court on the aforesaid two questions put to him. He simply relied upon the judgment of this Court in **Sobhnath Dube** (supra) to reiterate that the case of the petitioner is covered by the said judgment.

From a perusal of the judgment in **Sobhnath Dube** (supra), it is found that the question of registration of Will for passing of title under the provisions of Section 169(3) of the Act was raised in a testamentary suit by the objectors who were contesting the Will bequeathing the property of the tenure holder to the person who had applied for grant of Letters of Administration to the estate of the deceased. The issue of registration of Will has been answered in three paragraphs namely paragraphs 12, 13 & 14 by the learned Single Judge, with the observations therein. However, with due respect, this Court finds that the nuances of law for holding that unregistered Will was not hit by the provisions of Section 169(3) of the Act, have not been examined and as such the ratio of the said judgment as

relied upon by the learned counsel for the petitioner can be said to be *per incuriam*.

In order to answer the questions framed by this Court, it would be appropriate that the Court may first go through the relevant provisions of U.P. Z. A & L.R. Act.

Section 169 is contained in Chapter VIII of the Act which deals with the classes of tenure, acquisition of bhumidhari rights, transfer and devolution of bhumidhari land. A careful perusal of the said Chapter indicates that for transfer of bhumidhari rights, certain restrictions have been imposed by the State Legislature. These restrictions are provided under Section 154, 157-A, 157-AA, 157-B, 157-BB of the Act. These provisions deal with the restrictions imposed by the Act for transfer of land by a bhumidhar with transferable rights. Section 158 requires that the lease of land for a term exceeding one year or from year to year can only be made by a registered instrument. Section 159 further says that any lease in contravention of Section 158 would be deemed to be a transfer made in contravention of the provisions of the Act. Section 165, 166 & 167 provides for the effect of transfer made in contravention of the provisions of the Act. The devolution as provided under Section 169(3) of the Act also requires that a bhumidhar with transferable rights can bequeath his holding by a registered Will made in writing attested by two persons. The amendment adding the requirement of registration of Will was introduced on 23.8.2004. Meaning thereby that after the said date, a bhumidhar with transferable rights could bequeath his property only by way of a registered Will in favour of any person. The requirement of registration as provided in Section 169(3) is a restriction on the right of the bhumidhar to bequeath his holdings except by way of a registered instrument and not upon the person who possess the Will and claim his rights in exclusion of the heirs and other legal representatives of the deceased tenure holder.

So far as the succession of bhumidhari rights are concerned, they are governed by the provisions of Sections 171 to 175 in the same Chapter.

The devolution of interest in the bhumidhari land is governed by Section 169 of the Act. Section 169(3) of the Act contains a Non-obstante clause which means that anything contrary contained in any law, custom or usage will not be applicable in case of a Will by which a bhumidhar with transferable rights bequeaths his holding.

Non-obstante Clause is sometimes added to a Section in the beginning, with the view to give enacting part of the Section, in case of conflict, an overriding effect over the provisions of Act mentioned in that

Clause. In other words, in spite of the provisions of the Act mentioned in the Non-obstante Clause, the enactment following it, will have its full operation or that the provisions enacted in the Non-obstante Clause will not be an impediment in the operation of the enactment.

It is well known rule of interpretation that on construction, the entire Act must be looked into as a whole. The Court cannot add words to a Statute or read words into it which are not there. When the purpose and object or the reason and spirit pervading through the Statute is clear, the Court must adopt a purposive approach in interpreting such a Statute. It is equally well settled that when there is a conflict between the Special Statute dealing with a special kind of property and a General Statute, the rights of the parties with regard to the special kind of property must be governed by the former i.e. the provisions of the Special Act as such must prevail on the sole recognized maxim *generalia specialibus non derogant*.

The relevant entries under which the U.P. Zamindari Abolition and Land Reforms Act has been framed by the State Legislature is Entry-18 of List II which is the "State List". The subjects as provided in the said list are within the exclusive domain of State Legislature i.e. in such matters, the State Legislature alone has a jurisdiction to make law. The relevant Entry-18 of List II-State List is as under:-

"18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

So far as the Indian Registration Act, 1908 is concerned, it has been framed under the powers given to the Federal Government under the Government of India Act, 1935. Before coming into the force of the Constitution, the field of legislation was governed by the provisions of Government of Indian Act, 1935. Relevant entry in Seventh Schedule-List III-Concurrent Legislative List is Entry-8 which reads as under:-

"8. Transfer of property other than agricultural land; registration of deeds and documents."

In the Constitution of India, the said entry has been kept as the same in Entry-6 which deals with the power of legislature to frame law for registration of deeds also deals with the power of transfer of property and excludes agricultural land from such provision which means that for transfer of property other than agricultural land, the Central and the State Legislature both will have legislative powers.

The succession of agricultural land, however, is not governed by the personal laws of the tenure holders rather by the provisions of the Special Act framed by the State Legislature.

As far as the Indian Succession Act, 1925 is concerned, it was passed by the Federal Government in order to consolidate the laws applicable to intestate and testamentary succession. It has been amended from time to time. The relevant Entry for framing the Statute would fall in Entry-7 in the Concurrent List (List-III) of Schedule-7 of the Government of India Act, 1935 which reads as under:-

“7. Wills, intestacy, and succession, save as regards agricultural land.”

Under Entry-21 of List II, the provincial legislature was empowered to make laws with regard to the transfer, alienation and devolution of agricultural land which reads as under:-

“21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.”

Thus, all matters relating to right in or over the agricultural land including transfer, alienation and devolution were exclusively within the domain of the State Legislature.

Under the U.P. Act No.1 of 1951, the U.P. Zamindari Abolition and Land Reforms Act, a restriction has been imposed by the State Legislature so as to restrict the devolution of agricultural land except by way of a written and registered deed. The restriction so imposed by the State Legislature upon the right of a bhumidhar under the Special Act is in conformity with the objects and purpose of the Act which has been framed to reform the law relating to the land tenure so as to check any unscrupulous person from claiming land of a bhumidhar to the exclusion of his heirs and legal representatives.

The provisions of the personal law are not applicable in the case of transfer/devolution of agricultural land i.e. bhumidhari holdings of a person as has been held by the Full Bench of this Court in the Case of **Prema Devi v. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp and others**¹. The whole object of the Act that the soil must go to the actual tiller has been applied in the case of devolution of interest also.

Moreover, there is no conflict in the provincial legislation namely the U.P. Zamindari Abolition and Land Reforms Act and Central legislations that

¹ AIR 1970 Allahabad 238.

is Indian Succession Act and Indian Registration Act with regard to the devolution of interest in the land of tenure holder. Under Section 17 of the Indian Registration Act, registration has been made compulsory for all non testamentary instrument. The registration of Will has not been made compulsory under the Indian Succession Act, whereas U.P. Z.A. & L.R. Act provides restriction in this field. The restriction imposed by the State Government cannot be said to be in conflict with the laws made by the Central Legislature. There is no repugnancy as such and it cannot be said that the State Legislature was not competent to legislate. It is settled law that when the question arises with regard to the legislative competence of a legislature in regard to a particular enactment with reference to the entries in various lists, it is necessary to examine the pith and substance of the Act and find out if the matter comes substantially within an item in the list. The scheme of the Act under scrutiny, its object and purpose, its true nature and character and the pith and substance of the legislature are to be focused at. It is a fundamental principle of Constitutional law that everything necessary to the exercise of a power is included for the grant of power itself (Ref. **Chaturbhai M. Patel v. Union of Indian and Others**²).

No entry should be so read so as to drop it of its entire content, a broad and liberal spirit should inspire those whose duty is to interpret the Constitution, whenever there is a question whether any Amended Act is within any of the three Lists, it is to be answered by considering the Act as a whole and deciding in pith and substance that the Act is with respect to particular categories or not. The relevant factors to examine are:-

The design and purport of the Act both as disclosed by its language and the effect which it would have in its actual operation (Ref. **United Provinces v. Mt. Atiqa Begum and Others**³).

As noted above Entry-18 of List II of State List corresponding to the Entry-21 of List-II provincial list of Government of India Act, 1935, empowers only the State Legislature to legislate on the subject i.e. transfer, alienation and devolution of interest in agricultural land. Thus, it cannot be said that the amendment of U.P. Z.A. & L.R. Act by U.P. Act No.26 of 2004 w.e.f. 23.8.2004 making registration of Will compulsory would be against the provisions of the Central Acts.

As far as the applicability of the amended Act is concerned, there is no doubt that the amendments is prospective in nature and it cannot be given retrospective effect. The restriction imposed by Section 169(3) of the U.P. Z.A. & L.R. Act upon the bhumidhar for devolution of his bhumidhari

² AIR 1960 SC 424.

³ AIR 1941 FC 16.

land would be operative w.e.f. 23.8.2004 i.e. the date of commencement of Amendment Act by which the registration of the Will has been made compulsory. The restriction so imposed by the aforesaid provision is on the right of bhumidhar to bequeath his property except by way of a registered instrument. The restriction is not upon the person who is claiming his right on the basis of Will rather it is on the testator of the Will. Thus, no bhumidhari land could be bequeathed after 23.8.2004 except by way of a registered Will, the whole idea is that the land of the village remain with the tiller of the land. A bhumidhar of agricultural land may not be a person well-versed with the legal issues, he may be a poor farmer or an illiterate person having no idea of the degrading moral values of the society. In order to protect the interest of such person and his heirs and legal representatives who may claim their interest in the bhumidhari land, the legislature in its wisdom placed the restriction on transfer of land by an unregistered Will.

The contention of the petitioner is that on the date of execution of the Will i.e. in the year 2002 as there was no prohibition, the Will cannot be rejected being unregistered document. The date of execution of Will would not be relevant for the purpose of the application of Section 169 of the Act for the reason that the Will came into life only after the death of the testator i.e. the bhumidhar who died in the year 2007, after coming into operation of the amendment Act. The genuineness of the Will, therefore, becomes doubtful.

It is settled law that the registration of a Will is an important circumstance proving its genuineness, however, registration does not dispense with the need of proving the execution and attestation of the document as required under Section 68 of the Indian Evidence Act, it only dispels any doubt as to the genuineness of the Will. However, non-registration of a document by itself would not *ipso facto* make it bad. It is always open for the person who is claiming right on the basis of an unregistered Will to prove its execution and attestation so as to dispel all doubts relating to its genuineness. In view of the aforesaid facts and circumstances, it is held that the petitioner cannot claim mutation on the basis of unregistered Will in the summary proceeding under the Land Revenue Act.

It is, however, provided that it would be open for the petitioner to prove the genuineness of the Will in an appropriate proceeding so as to get declaration of his rights with regard to the land-in-question. Even otherwise, it is settled law that mutation does not confer any right or title. The genuineness of the document cannot be seen in a summary proceeding of

mutation under the Land Revenue Act.

Any observation made by the State Authorities in mutation proceedings or by this Court made hereinabove would not come in the way of the petitioner in an appropriate proceeding initiated by him in accordance with law. The order of refusal of mutation on the basis of unregistered Will cannot be interfered with in exercise of powers under Article 226 of the Constitution of India by this Court.

In the result, the writ petition fails and is **dismissed**.

(Sunita Agarwal, J.)

Order Date :- 18.5.2017

Jyotsana