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AFR

Court No. - 36

Case :- SECOND APPEAL No. - 1035 of 1996

Appellant :- Mangoo Singh And Ors.
Respondent :- Ram Autar
Counsel for Appellant :- Smt. Shikha Singh,Ajay Shankar,Alrafio Basir,D.K. Dwivedi,R.C.Tiwari,Shashi Kumar Dwivedi,Triveni Shankar
Counsel for Respondent :- Ajit Kumar,Kiran Kumar Arora,Rahul Sahai

Hon'ble Kshitij Shailendra,J.

THE APPEAL

1. The instant second appeal at the instance of defendants of Original Suit No.523 of 1989 (Ram Autar Vs. Siyawati and others) has been filed challenging the concurrent judgments and decrees drawn by the trial court and the first appellate court whereby, respectively, suit for cancellation of a registered Will dated 20.03.1985 has been decreed and civil appeal arising out of the decree has been dismissed.

PLAINT CASE

2. As per the plaint case, one Harswaroop had two sons, namely, Ram Autar (plaintiff) and Mangoo (defendant no.2). One Siyawati wife of defendant no.2, was arrayed as defendant no.1. Harswaroop, aged 90 years, used to remain sick in his last days of life. His wife had already died and the plaintiff and defendant no.2 used to take care of their father. When Harswaroop fell seriously ill in March, 1985, the plaintiff and defendant no.2 took him to Modinagar and Meerut for treatment. Initially, Harswaroop got some relief but he again fell ill and, on 20.03.1985, defendant no.2 along with his brother-in-law Nand Kishore took Harswaroop for examination by a doctor at Modinagar. At that time, since the wife of plaintiff was ill, he could not accompany his father. Defendant no.2, in collusion with defendant no.1, i.e. his wife, and his brother-in-law Nand Kishore, took Harswaroop to Ghaziabad for treatment and on 20.03.1985 itself, a Will was obtained from Harswaroop in the name of defendant no.1, i.e. the wife of defendant no.2 pretending that the same was being executed in favour of both plaintiff and defendant no.2. Harswaroop died on 04.01.1989, however, plaintiff could not get any information about the Will but when the defendants, at the strength of the said Will, expressed their absolute ownership in respect of Khasra No.1007, the plaintiff got information about the Will and found it as having been fraudulently executed. A plea with regard to family settlement dated 17.01.1989 was also taken and cause of action for filing the suit was alleged as denial by the defendants to get the Will cancelled, threats extended in April, 1989 as regards possession over the property and on not accepting family settlement.

DEFENCE IN WRITTEN STATEMENT

3. The defendants filed written statement pleading due execution of the Will. It was stated that the testator even till his death remained in all good senses and the Will was executed out of his free will. It was further stated that the plaintiff had never taken care of his father and even did not participate in his last rites. Bar of Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short 'the Act of 1950') was also pleaded with a further statement that name of the beneficiary, i.e. the defendant no.1, had already been mutated in the revenue records at the strength of Will.

TRIAL COURT'S JUDGMENT

4. The trial court decreed the suit on 04.11.1993. It found the execution of Will as a result of fraud and fabrication and also recorded that the original Will was neither filed before the Court nor proved in accordance with law. It, however, discarded family settlement relied upon by the plaintiff. As regards bar of Section 331, the trial court observed that since suit was filed seeking cancellation of Will and claiming injunction restraining dispossession and alienation, the civil court had jurisdiction to entertain and decide the suit.

FIRST APPELLATE COURT'S JUDGMENT

5. Aggrieved by the decision of the trial court, the defendants preferred Civil Appeal No.10 of 1993 (Mangoo Singh and others Vs. Ram Autar) that has been dismissed on 05.11.1996.

COUNSEL HEARD

6. I have heard Sri Triveni Shankar along with Sri Narendra Mohan & Sri Ramesh Chandra Tiwari, learned counsel for the

defendant-appellants and Sri Kiran Kumar Arora, learned counsel for the plaintiff-respondent.

ADMISSION ORDER

7. The instant second appeal, though filed in the year 1996 when an order of status quo was also passed, it was admitted as late as on 05.10.2021 on the following substantial questions of law:-

> "(1) Whether in a case where the plaintiff is not recorded in the revenue records of an agricultural holding, a suit for cancellation of a Will at the instance of such an unrecorded person is maintainable before the Civil Court ?
>
> (2) Whether secondary evidence of a document (photostat copy) is admissible in a case, where the original is available and the two are at variance ?"

SUBMISSIONS ON BEHALF OF APPELLANTS

8. Sri Triveni Shankar, learned counsel for the defendant-appellants vehemently argued that the suit was barred by Section 331 of the Act, 1950, inasmuch as on the date of its institution, name of plaintiff-respondent was not recorded in the revenue records, whereas the name of beneficiary, i.e. defendant no.1 (Siyawati), stood recorded. He submits that the finding of both the courts below holding the suit as maintainable is incorrect, inasmuch bequeath by a bhumidhar is provided under Section 169 of the Act, 1950 and as per sub-section (3) of Section 169, if the Will is in writing and attested by two persons, the same is valid and any person who otherwise claims himself as bhumidhar, would have to seek a declaration under Section 229-B of the Act, 1950 and, therefore, it is the Court described in Second Schedule of the Act which would have jurisdiction to entertain such a claim rendering the suit as barred by Section 331. He, therefore, submits that first substantial question of law should be answered in favour of the appellants and the impugned judgments and

decrees should be set aside. As regards question no.2, it is contended that the plaintiff-respondent relied upon a family settlement of 1989 bringing on record its photostat copy, which was inadmissible in evidence and, therefore, the suit was otherwise not liable to be decreed and, hence, the second question may also be answered in favour of the appellants. In support of his contention, learned counsel has placed reliance upon following authorities:-

(i) **Shri Ram and another Vs. 1st Additional District Judge: AIR 2001 SC 1250**;

(ii) **Kamala Prasad Vs. Krishna Kant Pathak: 2007 (1) AWC 1 (SC)**;

(iii) **Dr. Ram Prakash Gupta Vs. District Judge: 2010 (110) RD 613**;

(iv) **Mohan Lal Vs. Sri Ram and another: 2016 (3) AWC 2696**;

(v) **Ishwaragouda and others Vs. Mallikarjun Gowda and others: 20009 (1) AWC 1 (SC)**.

9. During the course of arguments, certified copy of a document paper No.37-Ka was placed before the Court and it was contended that it is the document dated 17.01.1989 that was termed as family settlement but it did not contain mention of Gata No.1007 about which the disputed Will had been executed, rather it contains description of other gatas and, even otherwise, the document being a photostat copy, it could not be relied upon. When the Court perused the original record of proceedings, it found that in the record of the trial court, original family settlement was indexed as paper No.37-Ka, however, it was not found on record but there was a photostat copy of the same document as paper No.38-Ga. What was placed before the

Court was a certified copy of paper No.37-Ka, which was issued from Executing Court dealing with Execution Case No.11 of 2011. As per General Rules (Civil), no certified copy of a photostat copy can be issued by the office of the civil court. It, therefore, appears that paper No.37-Ka, in fact, was an original document forming part of the record of trial court but it is quite surprising as to how its certified copy was issued by the Executing Court. Though, it is true that the decree is executed by the court of first instance itself, this Court fails to understand as to how the original Paper No.37-Ka was taken out from the original record so as to form part of the record of execution proceedings which are said to be going on, whereas original record is with this Court. Probably, some skeleton file is being maintained by the Executing Court about which there is no illegality or irregularity. It is also permissible that any party to the proceedings can take back any original document from the record of the proceedings by moving application under the relevant Rules and there may also be a possibility that original Paper No.37-Ka, indexed on the file of the trial court, was taken away by the respondent. However, this Court does not want to indulge itself in the inquiry as to how original Paper No.37-Ka forms part of the record of execution proceedings and it proceeds to decide the matter in the light of questions framed by this Court.

SUBMISSIONS ON BEHALF OF RESPONDENT

10. The contention of Sri K.K. Arora is that at no point of time the bar of Section 331 was specifically pressed by the defendants, although a vague plea was taken in the written statement but the trial court's judgment itself shows that the defendants did not press the alleged bar covered by issue No.4 on which the trial court recorded

specific finding that the defendants had not produced any such evidence on the basis whereof it could be said that the civil court had no jurisdiction to try and decide the suit. He submits that in view of Section 331 (1-A), no such plea can be permitted to be raised before the second appellate court unless it was pressed before the court of first instance at the earliest possible opportunity. As regards maintainability of the suit before the civil court, it is vehemently argued that only civil court has power to cancel a Will and it is not a case where the plaintiff was claiming declaration of his bhumidhari rights in terms of Section 229-B but a case where a void document, i.e. the Will, was existing to the detriment of the right and interest of the plaintiff and since the revenue court has no jurisdiction to cancel an instrument, the suit was very much maintainable before the court. In support of his submission, Sri Arora places relied upon following judgments:-

(i) **Ram Padarath and others Vs. Second Additional District Judge, Sultanpur: 1989 RD 21 (FB)**;

(ii) **Chandrika Vs. Shivnath and others: 2016 (5) AWC 4874**.

11. Shri Arora further submits that since both the courts below have discarded the family settlement for one reason or the other, he is not pressing his claim on that basis and, therefore, for deciding the instant appeal, the document dated 17.01.1989 may be kept aside and ignored and that he would stick to his claim for cancellation of Will and injunction on the basis of findings recorded by both the courts below in his favour. In view of the said submission of Sri Arora, question no.2 as regards admissibility of copy of family settlement becomes redundant and it is answered in the manner that decision in the instant

appeal would not be dependent upon admissibility or inadmissibility of alleged family settlement dated 17.01.1989.

12. The moot question on which the instant appeal has been argued revolves around bar of Section 331 of the Act, 1950 and, therefore, the Court deals with the submissions of both the sides in the light of first question framed in the admission order.

ANALYSIS OF RIVAL CONTENTIONS

13. On perusal of original record, it is found that Will was executed on 20.03.1985 and was registered on 08.04.1985. Copy of Khatauni relating to 1393-F to 1398-F is on record as paper No.11-Ka. It contains description of various gatas, viz, 873, 874, 890, 1007, 1009, 1122 and 1204. The Khatauni reveals that pursuant to an order dated 25.03.1989 passed by Additional Tehsildar concerned, after expunging the name of testator Harswaroop, name of beneficiary Siyawati (defendant no.1) was entered on the basis of Will. Copy of this Khatauni was issued on 13.05.1989 and the suit in question was instituted on 18.05.1989, i.e. immediately after five days of issuance of copy of Khatauni. The name of beneficiary was, for the first time, recorded just two months prior to institution of suit, although the Will was executed four years prior in point of time.

14. Having heard learned counsel for the parties, this Court proceeds to elaborately deal with the question as regards maintainability of a suit for cancellation of Will with consequential/ ancillary relief of injunction in respect of an agricultural land.

15. The controversy regarding the jurisdiction of Civil Court and Revenue Court in entertaining a suit regarding agricultural land and also entertainability of the suit seeking cancellation of void

instruments and documents has engaged attention of several benches of this Court over decades. Suits for cancellation of a sale-deed or other instruments and documents are essentially suits of civil nature. As per section 9 of C.P.C., every suit of civil nature is cognizable by a civil court except its cognizance is expressly or impliedly barred. In **Abdul Waheed Khan Vs. Bhawani and others, 1968 RD 79: AIR 1966 SC 1718** settled principle was stated that it is for the party who seeks to oust the jurisdiction of civil court to establish his contention and that a statute ousting the jurisdiction of a civil court must be strictly construed.

16. Section 31 of the Specific Relief Act, 1963 makes specific provision for cancellation of void as well as voidable instruments. Suits for cancellation of such documents being of civil nature are cognizable by a civil court and even otherwise suits claiming relief provided under Specific Relief Act are entertainable only by a civil court and no revenue court or any other court can entertain such a suit including for cancellation of an instrument or document. Section 31 of the Specific Relief Act reads as under:

> Section 31. **When cancellation may be ordered-**
>
> (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have if adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument bas been registered under the Indian Registration Act 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books the facts of its cancellation."

17. Thus one, who has reasonable apprehension that any instrument, if left outstanding, may cause him serious injury, can approach a competent court of law to get it cancelled. Sub-section (2) of Section 31 casts a mandatory duty upon the court passing the decree to send a copy of the same to the registering officer, who is enjoined by law to make a note on the copy of such document regarding the order of its cancellation and, after such an endorsement is made, the document becomes legally ineffective and no benefit of the same can be derived by any one. If a certified copy of such a document is issued to anyone, it would obviously contain the note regarding its cancellation by a court of law.

18. So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without their cancellation. But a void document is not required to be cancelled necessarily. Its legal effect can be put to an end by declaring it to be void and granting some other relief instead of cancelling it. Once it is held to be void, it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority, would be a void document. In case it is in excess of authority, it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts mentioned in the same, but the said presumption is not conclusive and can be dislodged. On the finding that a particular instrument or document was void because of any reason, it will be of no legal consequence and binding on any one without even its cancellation. But existence of such a document or instrument for a

substantial period may cause injury to the person whose rights are affected by it and existence of such instrument may create complications giving rise to unnecessary litigations. But for those who are aware of any judgment holding a particular document or instrument to be void or are supposed to be aware of it, others can be misled by its existence if it does not contain any endorsement of its cancellation subsequent to a decision by any competent court of law.

19. The law relating to right, title and interest over the agricultural land is contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950, which is a complete Code by itself and the Schedule-II to it enumerates the suits etc., the cognizance of which is to be taken of by the revenue courts specified therein. The said Act being special Act, its provisions would prevail over the general law. The jurisdiction of Civil Court is ousted if the relief can be granted by the special court conferred with jurisdiction to grant such reliefs. In Section 331 of the Act which specifically ousts the jurisdiction of other courts in respect of all suits, applications etc., enumerated in Schedule II, the main emphasis is on the words cause of action and any relief. The said section reads as under:

> Section 331- **Cognizance of suits etc., under this Act**-(1) Except as provided by or under this Act no court other than a court mentioned in column 4 of Schedule II shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (V of 1908), take cognizance of any suit, application or proceedings mentioned in column 3 thereof, or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.
>
> Provided that where a declaration has been made u/s 143 in respect of any holding or part thereof; the provisions of Schedule II in so far as they relate to suits, applications, or

> proceedings under Chapter VIII shall not apply to such holding or part thereof.
>
> Explanation-If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.
>
> (1-A) Notwithstanding anything in Sub-section (1) an objection that a court mentioned in column 4 of Schedule II, or, as the case may be, a civil court, which bad no jurisdiction with respect to the suits, application or proceedings, smelted jurisdiction with respect thereto shall not be entertained by any appellate of revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all eases where issues are settled, at or before such settlement, and unless there has been consequent failure of justice.

20. Section 331 of the Act makes the phrase "cause of action" as pivotal point for determining the jurisdiction of civil or revenue court. The expression "cause of action" means every fact that would be necessary for the plaintiff to prove in order to support his right of judgment. It is the real "cause of action" which determines the jurisdiction of the court to entertain particular action notwithstanding the language used in the plaint or the relief claimed. The strength on which the plaintiff comes to the court does not depend upon the defence or relief claimed which could determine the forum for the entertainment of claim and grant of relief. It is the pith and substance which is to be seen. The expression "any relief" used in Section 331 of the Act is of too wide import and would not only mean the relief claimed but would also include any relief arising out of the cause of action which led the plaintiff to invoke the jurisdiction of a court of law. The word 'relief' is not part of cause of action nor the same is related to the defence set up in the case. The relief is a remedy which the court grants from the facts asserted and proved in an action.

21. A Full Bench of this Court, in the case of **Ram Awalamb v. Jata Shanker 1968 AWR 731**, observed that "where in a suit, from a perusal only of the relief claimed, one or more of them are ostensibly cognizable only by civil court and at least one relief is cognizable by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and if so, (a) whether the main relief asked for on the basis of the cause of action is such as can be granted only by a revenue court or (b) whether any real or substantial relief, though it may not be identical with that claimed by the plaintiff could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above, the jurisdiction shall vest in the revenue court and not in the civil court."

22. Section 331 of the Act, 1950, if read without Explanation, does not create any difficulty. Difficulty regarding jurisdiction arises when Explanation, which is an integral part of the section, is interpreted and applied to the facts of a particular case. It is well settled that the object of Explanation to any statutory provision is to understand the Act in the light of the Explanation which ordinarily does not enlarge scope of the original section which it explains, but only makes its meaning clear beyond dispute. The Explanation makes the things still more explicit and exists primarily removing doubts and dispute which may crop up in its absence. Section 331 of the Act along with Explanation cannot be read so as to oust the jurisdiction of civil court if the primary relief on the same cause of action can be granted by the civil court notwithstanding the fact that consequential relief or ancillary relief flowing out of the main relief, the grant of which also becomes necessary, can be granted by revenue court alone.

23. In the case of a void document said to have been executed by a plaintiff during his disability or by some one impersonating him or said to have been executed by his predecessor whom he succeeds, the relief of cancellation of the document is more appropriate relief for clearing the deck of title and burying deep any dispute or controversy on its basis in present or which may take place in future. The document, after its cancellation, would bear such an endorsement in Sub-Registrar's register and would be the basis for correction of any paper and revenue record. Section 31 of the Specific Relief Act itself prescribes as to who can seek relief of cancellation. A third person cannot file a suit for cancellation of a void document.

24. The controversy in issue was extensively dealt with by a Three Judges Full Bench of this Court in **Ram Padarath (supra)**. The said judgment has been approved by Supreme Court in **Smt. Bismillah Vs. Janeshwar Prasad: AIR 1990 SC 540**. This Court in **Chandrika (supra),** after placing reliance upon judgments in **Ram Padarath (supra)** and **Smt. Bismillah (supra),** held that in view of Section 31 of the Act, 1963, a suit for cancellation of sale deed, void or voidable, is a suit of civil nature and can be filed before the Civil Court that has jurisdiction to try it under Section 9 CPC. **Church of North India v. Lavajibhai Ratanjibhai, (2005) 10 SCC 760**, held that a plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed *dehors* the factual averments made in the plaint. With a view to determine the question as regards exclusion of jurisdiction of the civil court in terms of the provisions of the Act, the

court has to consider what, in substance, and not merely in form, is the nature of the claim made in the suit and the underlying object in seeking the real relief therein.

RECONSIDERATION OF SHRI RAM (SUPRA) AND KAMLA PRASAD (SUPRA) BY SUPREME COURT

25. This Court may gainfully refer to a somewhat recent decision of the Apex Court in the case of **Narendra Kumar Mittal and others Vs. M/S Nupur Housing Development Pvt. Ltd. and another: 2019 (7) Supreme 157: 2019 (144) RD 785**. The case before the Apex Court had arisen out of a suit for cancellation of sale deed dated 15.06.2006 in respect of an agricultural land filed before the civil court. A question arose before the Apex Court whether the decision of the District Court and High Court holding the civil suit as maintainable despite bar of Section 331 of the Act of 1950 was correct. The Supreme Court, after discussing the judgments of **Ram Padarath (supra)**, **Shri Ram (supra)** and **Kamla Prasad (supra)**, held that the suit before the civil court was very much maintainable. It distinguished the decisions of the Supreme Court in the case of **Shri Ram (supra)** and **Kamla Prasad (supra)** in the following manner:-

> "9. This Court in Shri Ram & Anr. v. Ist Addl. Distt. Judge & Ors., (2001) 3 SCC 24 considered the question relating to maintainability of a suit by a recorded tenure holder in possession for cancellation of the sale deed in favour of the respondents executed by some imposters. After noticing the aforesaid judgment of the Full Bench of Allahabad High Court, this Court held that where recorded tenure holder, having a prima facie title and in possession files suit in the Civil Court for cancellation of sale deed having been obtained on the ground of fraud or impersonation, it cannot be directed to file a suit for declaration in the Revenue Court, reason being that in such a case, prima facie, the title of the recorded tenure holder is not

> under cloud. He does not require declaration of his title to the land. However, if the plaintiff is required to seek a declaration of title, he has to approach the Revenue Court.
>
> 11. In Kamla Prasad & Ors. v. Kishna Kant Pathak & Ors., (2007) 4 SCC 213 relied on by the learned counsel for the appellant-second defendant, the plaintiff was the co-owner and not a recorded tenure holder. In the plaint, the plaintiff himself had stated that he was not the sole owner of the property and defendants 10 to 12 who were proforma defendants had also right, title and interest therein. He had also stated that though his name had appeared in the revenue record, defendants 10 to 12 also had a right in the property. In this factual background, this Court held that such a question can be decided by the Revenue Court in a suit instituted under Section 229-B of the Act. It was also held that the legality or otherwise of the insertion of names of purchasers in records of rights and deletion of the name of the plaintiff from such record can only be tested by Revenue Court, since names of the purchasers had already been entered into the record. This judgment has no application to the facts of the present case."

26. The Apex Court, while distinguishing the earlier decisions, was of the considered opinion that once a sale deed is challenged, the plaintiff need not be forced to seek a declaration of his title and, hence, bar of Section 331 of the Act of 1950 would not be attracted. Further, in view of the discussion made hereinabove, it can be safely understood that Schedule-II contained in U.P. Z.A. & L.R. Act, 1950 does not contemplate any suit for cancellation of a written instrument and the power vests only in a civil court.

27. As regards the judgments cited on behalf of the appellants, the Apex Court in **Shri Ram (supra)** also placed reliance upon **Ram Padarath (supra)** and its approval in **Smt. Bismillah (supra).** However, it was observed that where a recorded tenure holder having

a *prima facie* title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation, he cannot be directed to file a suit for cancellation in the revenue court as he does not require declaration of his title to the land but the position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. It was observed that in that case the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court as the sale deed being void has to be ignored for giving him relief for declaration and possession. In **Kamla Prasad (supra),** the Supreme Court placed reliance upon **Shri Ram (supra)**. The Apex Court in, **Narendra Kumar Mittal Shri Ram (supra)** has already distinguished both the said judgments holding civil suit maintainable.

28. **Dr. Ram Prakash Gupta (supra)** was a case where the suit was instituted claiming a decree for declaration that a sale deed executed in favour of the plaintiff was valid. Another relief seeking declaration of title on the basis of a Will was also claimed. In that background of facts it was held that the suit was barred by Section 331 of the Act of 1950 as declaration of title can be granted by the revenue court. **Mohan Lal (supra)** was a case where a gift deed was challenged by the plaintiff on the ground that executant had no right to execute the same. The said plaintiff was not recorded tenure holder of the disputed agricultural land and placing reliance upon judgment in **Shri Ram (supra)**, it was held that suit would lie before the revenue court. Not only the facts of that case are distinguishable, inasmuch as here the instrument, i.e. the Will, has been challenged on the ground of fraud, the said judgment is prior in point of time when the Apex Court re-considered the decisions in **Ram Padarath (supra)**, **Shri**

Ram (supra) and **Kamla Prasad (supra)** and held that suit for cancellation of an instrument shall lie before the civil court and Section 331 of the Act of 1950 would not create a bar against the suit.

29. **Ishwaragouda (supra)** was a case arising out of State of Karnataka where certain rights were claimed under the provisions of Karnataka Land Reforms Act and applications seeking declaration of cultivation title were filed before the Land Tribunal. Various proceedings were held inter-se parties, such as determination by Land Tribunal, the writ petition before the High Court, demarcation proceedings, an appeal before the Land Reforms Appellate Tribunal and, thereafter, a suit for declaration of title and possession in respect of the land before the civil court. In that background of facts, an issue had arisen as to whether the jurisdiction of the civil court was ousted in view of Section 133 of the Karnataka Land Reforms Act to decide whether an individual is a tenant or the joint family is tenant. Under such circumstances, after dealing with the provisions of Section 133, the Supreme Court found that the suit was barred as declaration of title was within the exclusive jurisdiction of the Land Tribunal. Not only the facts of the said case but also nature of the proceedings as well as provision of law under the concerned Reforms Act were entirely different from the facts of the present case and statutory provision applicable here in the State of U.P. Therefore, with due respect, the said judgment also has no application in the present case and, thus, appellants cannot get any help from it.

30. In order to test the appellants' argument based upon non-recorded tenure holder, in the instant case, status of defendant no.1 being a recorded tenure holder on the basis of the disputed Will has to be analyzed. As noted above, the disputed Will was executed in the

year 1985 and the defendant no.1, i.e. the beneficiary of the Will, just immediately prior to institution of the suit in the year 1989, got her name mutated in the revenue records. The challenge came on the 5th day of obtaining certified coy of the Khatauni Paper No.11-C. It was not a case where since long prior to institution of the suit, the beneficiary was enjoying actual and physical possession as a recorded tenure holder in its true sense but was a case where the cause of action for institution of suit arose in very close proximity of entry in the revenue records on the basis of Will which was not in the knowledge of the plaintiff-respondent prior to obtaining certified copy of the Khatauni that contained reference of a mutation order of the Assistant Tehsildar passed on the basis of Will. Whatelse, except seeking cancellation of Will, could be done by the plaintiff under such circumstance. In the opinion of the Court, the suit for declaration of bhumidhari rights along with his real brother as a joint successor from their late father was not the necessity, inasmuch as it was the Will and consequential entry in the revenue records which was standing against the plaintiff in enjoyment of uninterrupted possession as a co-bhumidhar over the agricultural land. The plaintiff, therefore, was well within his rights to seek cancellation of the Will on available grounds, such as fraud, coercion or undue influence, etc.

31. As discussed above, unless the Will is cancelled by the civil court and, in terms of sub-section (2) of Section 31 of the Specific Relief Act, 1963, unless its intimation is sent to the Sub-Registrar concerned, the Will would remain alive for all theoretical and practical purposes causing injury to the person who would have succeeded rights on the basis of natural succession from his predecessor, here, late Harswaroop. Thus cancellation of the registered Will is, beyond doubt, the main relief as cause of action for

the suit was the existence of Will itself. Mutation order, on its basis, directing recording of the name of the defendant therein is found to be a consequential action based on Will. So long as a registered instrument is not cancelled by civil court, revenue court will be bound to respect it and will not able to ignore it, as held by Full Bench of this Court in **Ram Nath Vs. Munna, 1976 RD 220 (FB)**.

32. It is also emphasized here that there is no provision under the Act of 1950 empowering a revenue court to cancel an instrument. Even Section 229-B does not contemplate any such provision whereunder an instrument of transfer or conferring testamentary succession can be expressly or impliedly cancelled or that its intimation can be sent to the Sub-Registrar concerned for making an entry in the concerned records so that certified copy of such instrument, as and when issued, may contain remark of its cancellation. The Court is of the considered opinion that even if, while deciding a suit for declaration under Section 229-B in a given case, the revenue court comes to a conclusion that any instrument relied upon by the defendants is void or voidable and records a finding to that effect, the operative portion of the judgment of the revenue court would simply confer a declaration of ownership upon the concerned plaintiff, either exclusively or along with any other person but finding to that effect would not be sufficient to statutorily compel the Sub-Registrar concerned to make an entry of cancellation of the instrument in the concerned records.

33. In so far as the findings of courts below in the instant case that the Will was a result of fraud and undue influence etc, no argument was advanced by the appellants. Even otherwise, the Court finds that the analysis of oral and documentary evidence testing the Will of 1985

on the touchstone as to whether it was a result of fraud and whether it was surrounded by suspicious circumstances, as done by both the courts below, is covered by pure findings of fact based upon evidence and, hence, the same cannot be upset in second appellate jurisdiction under Section 100 CPC. In so far as the argument of appellant based upon sub-section (3) of Section 169 of Act of 1950, the Court finds that the said provision speaks of execution of Will and has no concern with the proceedings seeking cancellation thereof. Hence, the argument advanced on that line is of no significance.

34. As regards contention of Sri Arora that the plea under Section 331 having not been substantially raised before the courts below and, hence, it cannot be allowed to be raised here, the same is not acceptable in view of clear statement contained in the written statement regarding bar of the said provision and its discussion by both the courts below. However, in view of the above discussion, the said bar is not attracted in the facts and circumstances of the present case and it is held that both the courts below have rightly found civil suit to be maintainable.

35. Before concluding this judgment, it is apt to mention that learned counsel for the appellants filed a very brief written synopsis alongwith which the case laws cited by him were annexed and in the third point of the synopsis, it is mentioned that the courts below have wrongly accepted the case of the plaintiff as full owner of Khasra No.1007, because in case natural succession follows, the plaintiff and defendant being two sons of late Harswaroop, would become co-owners. Here what I notice from the record is that the trial court decreed the suit cancelling the Will dated 20.03.1985 (registered on 08.04.1985) and granting a decree for permanent prohibitory

injunction restraining the defendants from causing interference in plaintiff's possession over the land covered by Khasra No.1007. Issue No.2 framed as to whether the plaintiff-respondent is co-owner on the basis of succession, was decided in favour of the plaintiff-respondent holding him as co-bhumidhar in joint possession along with defendants as a consequence of cancellation of the aforesaid Will. Though, in the operative portion, it is mentioned that the defendants were restrained from interfering in the plaintiff's possession, in view of the finding on issue No.2, the possession of the plaintiff-respondent is certainly in the capacity of a co-bhumidhar based upon natural succession from his late father Harswaroop and not as the sole bhumidhar. Therefore, contrary contention raised by the appellants in this regard too is not acceptable.

36. For all the aforesaid reasons, the first question of law is answered in favour of the plaintiff-respondent and against the defendant-appellants and it is held that the suit for cancellation of the Will was very much maintainable before the civil court. Second question has already been held to be redundant in view of the discussion made above.

37. Consequently, the instant second appeal fails and is, accordingly, **dismissed**.

Order Date :- 21.8.2024
AKShukla/-