

(2017) 01 AHC CK 0135
In the Allahabad High Court
Case No : Writ B. No. 51096 of 2009

Aasey	Vs	APPELLANT
D.D.C.		RESPONDENT

Date of Decision : 03-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 9A(2)

Citation : (2017) 134 RD 542

Hon'ble Judges : Anjani Kumar Mishra, J.

Bench : Single Bench

Advocate : Gyan Prakash, Advocate, for the Petitioners; C.S.C. and Lal Chandra Sahu, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

Anjani Kumar Mishra, J.—Heard Shri Gyan Prakash, learned counsel for the petitioners and Shri Lal Chandra Sahu, learned counsel for the respondents.

2. The writ petition arises out of an objection under Section 9A(2) of the U.P. Consolidation of Holdings Act, filed by the contesting respondent, claiming half share in the disputed land.

3. The objection was dismissed by the Consolidation Officer vide order dated 18.02.2008. However, it came to be allowed in appeal by the order dated 07.03.2009 passed by the Settlement Officer Consolidation.

4. The consequential revision, filed by the petitioner, was dismissed. The petitioner thereafter, filed a review application, which has also been dismissed holding that the consolidation courts do not possess the power to review.

5. Hence this writ petition challenging the appellate order and the order passed in the revision as also on the review application.

6. The contention of learned counsel for the petitioner is that earlier in time, a

partition suit under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act was filed and decided between the parties. Even in the partition suit, initially, the respondent claimed half share.

7. The suit was decreed by the trial Court and the consequential appeal was also dismissed.

8. A second appeal was filed before the Board of Revenue, which came to be decided by means of a compromise decree dated 11.09.1979. By this compromise decree, it is submitted, that the opposite party was granted 2/3rd share.

9. This compromise decree having attained finality before the start of consolidation operations, the same was binding upon the consolidation courts and, therefore, the impugned orders, whereby the contesting respondent has been granted half share in the property in question, cannot be sustained.

10. In this connection, it would be relevant to note that this issue was never raised before the consolidation courts till the revision itself was dismissed, on merits, after hearing the parties. This issue has been raised for the first time in the review application that was filed by the petitioner, thereafter.

11. In view of the above, the submission of learned counsel for the petitioner is that the contesting respondent, the objector before the Consolidation Officer, was aware of the compromise decree passed in the year 1979, but this fact was concealed in the objection. The pairokar of the petitioner, who had been prosecuting the proceedings before the consolidation courts, was not aware of the suit under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act, nor the decree passed therein. It was only when the record of the second appeal was examined by their counsel that petitioners acquired knowledge and, thereafter, the review application was filed bringing this fact on record.

12. Elaborating further, he has submitted that it was a case of fraud upon the court. It was incumbent by the opposite party to have come to court with clean hands. This was not done and, therefore, in view of the law laid down by the Apex Court in the case of *S.P. Chengal Varaya Naidu v. Jagan Nath*, 1994, ACJ 355 and *United India Insurance Co. Ltd. v. Rajendra Singh*, 2000 (3) SCC 581, even a Court which does not have the power to review, can review its order, in case, it is established that the order was obtained by fraud. Reliance has been placed upon paragraphs 4, 5 and 6 of the judgment in the case of *S.P. Chengal Varaya Naidu* (Supra).

13. The next submission raised by counsel for the petitioner is that the objection itself had been filed after the consolidation operations had been closed by means of notification under Section 52 of the Act. The objection therefore, was not maintainable and could not have been entertained and has therefore, wrongly been allowed.

14. The next and last contention of counsel for the petitioner is that the

consolidation courts have granted ? share to the respondent in the disputed khata relying upon the judgment and decree of the Commissioner in the suit for partition under Section 176 of the Act. This order had ceased to exist in view of the compromise decree passed, on 11.09.1979, by the Board of Revenue. The impugned order, therefore, is based upon an order which was not in existence and, therefore, the same cannot be sustained.

15. Shri Lal Chandra Sahu, counsel for the respondent submits that the pedigree given in the judgment of the Settlement Officer Consolidation is not disputed between the parties. This pedigree would clearly establish that the share of the answering respondent in the disputed land is 1/2.

16. He further submits that the appeal allegedly filed before the Board of Revenue had been filed by the petitioner. The answering respondent was never aware of the appeal itself nor he ever appeared before the Board of Revenue nor entered into any compromise.

17. He also submits that this contention is fortified by the fact that it was never alleged by the petitioner, at any stage of the proceedings before the consolidation courts, either in the objection, appeal or revision that any compromise decree had been passed between the parties. Even otherwise, he submits, that once the trial court had granted him a decree as regards ? share in the disputed khata, it would be highly improbable for the answering respondent to have entered into a compromise wherein his share would be reduced to ?th only.

18. He next submits that Aasey the lone surviving original party to the suit has never come forward to allege any compromise as has been set up by the petitioners. This plea was never raised before the consolidation courts prior to the filing of the review application.

19. He has also placed reliance upon the judgment in Sobaran Singh And Other v. Deputy Director of Consolidation, Agra And Others, 1993 (11) LCD 157 and Jangi Lal And Another v. Deputy Director of Consolidation And Others, 2007 (4) AWC 3598.

20. The contention of Shri Gyan Prakash, in rejoinder, is that the compromise decree passed by the Board of Revenue granted ?th share to the petitioner in the disputed land. Had this decree been in the knowledge of his pairokar before the consolidation courts, the same would necessarily have been brought on record and it would also have been pleaded by them. The very fact that this was not brought on record earlier, nor a copy of the decree filed before consolidation courts, shows that the contention raised that the pairokar was not aware of the decree, should have been accepted.

21. I have considered the submissions made by learned counsel for the parties and have perused the record as also the case law cited.

22. From the same, the most glaring fact, which emerges and which is admitted

to counsel for the parties, is that irrespective of whether or not the compromise decree was entered into by the respondent, the existence of the compromise decree dated 11.09.1979 was never pleaded or urged before the consolidation courts, namely Consolidation Officer, Settlement Officer Consolidation as also the Deputy Director of Consolidation, till the revision was decided after hearing the parties. This compromise decree has been set up for the first time, in the review application, filed by the petitioner.

23. Under the circumstances therefore, the first point which arises for consideration is whether orders passed by the courts below can be assailed on a point, which was never urged before any of them.

24. The contention of learned counsel for the petitioner in this regard is that this point was raised before the Deputy Director of Consolidation, in the review petition.

25. This in my considered opinion is not an adequate answer. It is settled law that the power of review, is a power conferred by statute. It is not the case of the petitioner that the Deputy Director of Consolidation had dismissed his revision without hearing the parties.

26. Admittedly, the revisional order was passed, on merits, after hearing the parties. Therefore, the review application was rightly held to be not maintainable by the Deputy Director of Consolidation and I do not find any illegality in this reasoning given by him.

27. The petitioner sought a review of an order raising a plea which was well within their knowledge but was never raised by them. This, in my considered opinion, is not permissible.

28. The other contention that the objection before the consolidation courts was filed by the contesting respondent, who being aware of the compromise decree, should have disclosed the same and in failing to do so, he has committed fraud upon the court and, therefore, in the light of judgment cited, the Deputy Director of Consolidation was entitled to and should have considered the review application and passed appropriate orders on it, on merits.

29. The judgments cited, in my considered opinion, though highly attractive are not really attracted to the facts and circumstances of the instant case.

30. The contention of learned counsel for the respondent is that the respondent never put in appearance in the second appeal nor was a signatory to the alleged compromise. In view of this specific denial, till such time, a categorical finding is recorded that the compromise was actually entered into and that the answering respondent was a signatory thereto, the allegation of fraud as pleaded by counsel for the petitioner, cannot be accepted. Further, in the absence of such a categorical finding the very basis of the petitioner's claim that fraud had been played upon the court, cannot be accepted.

31. It is not open for the writ court to enter into this controversy as to whether or not a compromise was actually entered into between the parties. A disputed question of fact, is beyond the scope of proceedings under Article 226 of the Constitution of India.

32. Besides this court fails to understand as to how a compromise decree, which is alleged to have been passed, prior to the start of consolidation operations, was not within the knowledge of the pairokar of the petitioner.

33. The other circumstance, which goes against the petitioner is the fact that the admitted pedigree, found on page 38 of the paper book shows that Janki the alleged pairokar of the petitioner belongs to the branch, to which the petitioners also belong. It therefore, necessarily follows that in case a valid compromise was entered into between the parties before the Board of Revenue, in the second appeal arising out of the suit for partition, Janki must necessarily have been a signatory, thereto. There cannot be a valid compromise without the signature of all the parties in the suit. The allegation of counsel for the petitioner that Janki was not aware of the compromise decree clearly shows that no valid compromise was in fact entered into. It is impossible for a signatory to a compromise to allege that he was not aware of the compromise.

34. Therefore, either the explanation offered as to why the plea of a compromise was never raised before the consolidation courts, is totally false or else the only other conclusion that can emerge is that the compromise itself was not a valid compromise because one of necessary parties thereto, namely Janki, was not a signatory thereto.

35. It is the admitted case of the petitioner that Janki their pairokar never raised this plea before the consolidation courts, due to lack of knowledge of the same.

36. The above discussion, in my considered opinion, is also an adequate answer to the second contention of counsel for the petitioner that the Consolidation Courts have granted ? share to the petitioner, relying upon a judgment and decree passed by the Commissioner, in the partition suit, which was not in existence any more, after the passing of compromise decree on 11.09.1979. Since it is not established that a valid compromise was entered into between the parties, it cannot be said that the order of the Commissioner had ceased to be in existence.

37. Yet another circumstance, which goes against the petitioner is that even if it is accepted that the preliminary decree in a suit for partition passed on the basis of compromise whereby the petitioner was granted ?th share in the disputed khata had attained finality and the same would continue to operate even on the close of consolidation operations as is admitted to counsel for the parties and as so held in the case law cited by them, the same should have been sought to be implemented on the spot during consolidation operations at the stage of carving of chaks. However, this was not done and the only explanation for this lapse, is lack of knowledge.

38. This omission to my mind, supports the contention of counsel for the respondent that he was not a signatory to the compromise and in fact had never put in appearance in the second appeal in the Board of Revenue.

39. The last contention of learned counsel for the petitioner is that the objection itself was filed after issuance of the notification under Section 52 of the Act bringing consolidation operations to a close.

40. This court does not find any categorical averment of the writ petition that the objection had been filed after close of consolidation operations. This contention therefore, cannot be accepted, also because no such plea appears to have been raised before the Courts below.

41. In view of the above discussion and since the contentions raised by counsel for the petitioner are found to be without merit, the orders impugned, call for no interference.

42. The writ petition is accordingly dismissed.