

(2006) 02 AHC CK 0192

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6595 of 2006

Anar Devi and Smt. Phoola Devi

APPELLANT

Vs

Deputy Director of Consolidation and Others

RESPONDENT

Date of Decision : 02-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 11, 4, 48, 5(2), 9

Citation : (2006) 2 AWC 1847 : (2006) 100 RD 650 : (2006) 1 RD 650

Hon'ble Judges : S.N. Srivastava, J

Bench : Single Bench

Advocate : R.N. Sharma and A.K. Sharma, for the Appellant; V.K. Singh, S.C., V.D. Ojha and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

S.N. Srivastava, J.—This writ petition is directed against the order dated 13.1.2006, passed by the Deputy Director of Consolidation, Agra by which he has permitted contesting Opp. party No. 2 herein to get examined thumb impression from expert as prayed by Jeetpal-revisionist.

2. The facts giving rise to the present petition are that the dispute relates to one third share of Jamuna Prasad Son of Shiv Singh. After the death of Jamun Prasad, his property devolved upon his two sons Ram Dayal and Ram Chandra, who were issueless. Ram Dayal predeceased Ram Chandra. According to petitioners, Ram Chandra executed a registered will in their favour on 16.4.1971 in respect of his moveable and Immovable properties. Ram Claandra died on 13.8.1978. On the basis of the registered will, petitioners filed an application for mutation before Tehsildar, Bah, District Agra, which was allowed on 22.7.1978. Contesting Opp. parties-Kali Charan, Sripal and Devi Ram also filed an application for mutation on the basis of some unregistered will and got some ex parte orders on 12.2.1978 for mutation. But, on the basis of notification u/s 4 of the U.P. Consolidation of Holdings Act, consolidation proceedings commenced on

7.10.1978. One Jeet Lal challenged the order dated 22.7.1978 in Appeal and obtained an ex parte order dated 13.11.1978. Subsequently, appeal abated. The order dated 13.11.1978 was challenged in Revision by the petitioners. Revision preferred was abated u/s 5(2) of the U.P.C.H. Act. In the Basic year Munijar Son of Jyoti Prasad, Karan Singh, Rajpat and Mahipati Sons of Mahendra, Data Ram Son of Gopi Chand, Devi Ram, Kali Charan and Sripal Sons of Gambhir, Ram Chand Son of Jamuna Prasad, Vishambar Dayal, Satya Narayan and Spta Prasad Sons of Har Govind were recorded in Khata No. 39 and 40. Khata No. 51 was exclusively recorded in the name of Ram Chand Son of Jamuna Prasad in the Basic year. In respect of Khata No. 57, names of Ram Chand Son of Jamuna Prasad, Devi Ram, Kali Charan and Sripal sons of Gambhir, Vishambar Dayal, Satya Narain and Sapta Prasad Sons of Har Govind were recorded. In respect of Khata No. 144, names of Munijar Son of Jyoti Prasad, Mahipati, Karan Singh and Rajpal Sons of Mahindra, Ram Chand Son of Jamuna Prasad, Devi Ram, Kali Charan and Sripal son of Gambhir, Satya Narayan and Sapta Prasad Son of Har Govind were recorded.

3. Petitioners filed an objection u/s 9 of the U.P.C.H. Act on the basis of registered will dated 16.4.1971. Jeet Pal Son of Dwarika Prasad also filed an objection u/s 9 of the U.P.C.H. Act in respect of same Khatas and claimed his rights on the basis of an unregistered will allegedly executed on 21.10.1977. Other objections were also filed by Jeetpal in respect of Khata Nos. 39, 51, 57 and 144. Gaon Sabha also filed objection on the ground that Ram Chandra was issueless and the land vested in Gaon Sabha after his death. Kali Charan, Sri Pal and Devi Ram Sons of Gambhir Singh also filed objection claiming themselves to be successors of Ram Chand. Oral and documentary evidence were led by the parties in support of their respective cases. Jeetpal produced himself as a witness and also produced Baburam Son of Narayan and Dataram Son of Nagpal as attesting witnesses of the unregistered will dated 21.10.1977. The scribe of the will was not produced. Consolidation Officer by an order 12th October, 1979 rejected objection dated 10th July, 1979 of Kali Charan and others and also rejected all other objections in default by an order dated 15th October, 1979, but subsequently on the restoration application of petitioners and Jeetpal, by an order dated 28.11.1979, Consolidation Officer allowed restoration applications and the matter was restored to its original number to be heard on merits. Consolidation Officer after hearing the parties allowed objection of petitioners and rejected objection of Jeetpal by an order dated 15th March, 1982. An appeal preferred by Jeetpal was dismissed on merits on 11.5.1985 against which a revision was preferred on 17.6.1985 by Jeetpal which is still pending. During pendency of the revision, after about 20 years an affidavit was filed by Opp. party No. 2 for sending thumb impression of Ram Chandra to be examined by expert, to which a counter affidavit was filed by petitioners. No rejoinder affidavit was filed to counter affidavit of petitioners. By the impugned order dated 13th January, 2006, the Deputy Director of Consolidation passed an order permitting to examine thumb impression of Ram Chandra by expert.

4. Heard learned Counsel for the petitioners and learned Counsel for Caveator-Opp. Party No. 2 as well as learned Counsel for Gaon Sabha and learned Counsel for Gaon Sabha.

5. Learned Counsel for the petitioners urged that impugned order passed by the Deputy Director of Consolidation does not contain any reason. Impugned order does not give details of thumb impression of which document required to be sent for examination by expert. He further urged that no such order could be passed at the stage of revision when revisionist did not file any application before the Consolidation Officer. No application was moved by the Opp. party No. 2 alongwith his affidavit to Deputy Director of Consolidation making such prayer. Permitting to get examined thumb impression by expert amounts creation of additional evidence in order to fill the gap or remove lacuna which is not permissible in the facts and circumstances of the case at appellate or revisional stage.

6. In reply to the same, learned Counsel for caveator relying upon an affidavit (Annexure-10 to the writ petition) filed by petitioner No. 1 urged that in view of the averments made in the affidavit, impugned order was rightly passed by the Deputy Director of Consolidation in accordance with law permitting revisionist to get examined thumb impression by the expert.

7. Considered arguments of learned Counsel for the petitioners as well as learned Counsel for Caveator and also carefully considered the materials on record.

8. As registered will relied upon by the petitioners was found by the Consolidation Officer and Settlement Officer, Consolidation to be a genuine document on the basis of the reasons recorded in their respective orders, without expressing any opinion on merits in the facts of the case where the revision is still pending, the only question arises to be considered is whether at the revisional stage Deputy Director of Consolidation was competent to admit additional evidence in the form of expert's opinion. Though the provisions of CPC are not applicable to consolidation proceedings, but the settled principles of CPC will be applicable in trial, appeal and revision in the title proceedings under the U.P. Consolidation of Holdings Act. This question was considered earlier by this Court in a judgment reported in 1993 ALL.L.J. 769. Sheo Pujan v. Deputy Director of Consolidation, relevant paragraphs of which are being reproduced below:

6...The only question, therefore, which remains for consideration is as to whether the Deputy Director of Consolidation, respondent No. 1 was justified in holding that in the proceedings under the provisions of the U.P. Consolidation of Holdings Act there could be no justification for permitting expert evidence to be brought on record....

7...The question about the jurisdiction of the consolidation authority to admit additional evidence had come up for consideration before the court in the case of Bihari v. State, decided by the Division Bench reported in 1973 Rev. Dec. 342

wherein the principles enunciated in the decision of the Apex Court in the case of Arbind Kumar Singh v. Nand Kishore Prasad reported in 1968 SC 1227 were held applicable to the proceedings u/s 48 of the U.P. Consolidation of Holdings Act. There can be no justification for not applying the said principles to the proceedings u/s 11 of the U.P. Consolidation of Holdings Act which contemplates vesting of a jurisdiction on the appellate authority which cannot be held to be lesser than the jurisdiction envisaged u/s 48 of the U.P. Consolidation of Holdings Act. I may, however, add in this connection that the salutary principles contained in Order XLI Rule 27 of the CPC should be kept in mind while exercising the discretion to entertain the additional evidence at the appellate or revisional stage.

8...The power to admit additional evidence, however, at appellate or revisory stage, has to be exercised with care and caution. The rule indicated above does not authorise the admission of additional evidence for the purpose of removing lacuna and filling in gaps in evidence. Additional evidence can be admitted, if the appellate court finds it needful and necessary for enabling it to pronounce judgment. The principles contained in order XLI Rule 27 of the CPC are general principles of universal application, aimed at securing justice which should be kept in mind while exercising the judicial discretion to admit additional evidence at appellate or revisional stage....

9. Above judgment and other case laws on the point referred that in case of production or creation of additional evidence, the principles of Order 41, Rule 27 of the CPC would be applicable in consolidation proceeding also, the same are being reproduced below for ready reference:

27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence; be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

10. Additional evidence could be taken at the Appellate/revisional stage if an

application was filed to adduce additional evidence before the Trial court and same was refused to be admitted as additional evidence which ought to have been admitted. As Opp. party No. 2 did not move any application before Consolidation Officer to admit additional evidence by way of expert's opinion at revisional stage and as such first condition under Order 41 Rule 27 of the CPC is not available in the present case.

11. There is no averment in affidavit that thumb impression on which document was not within knowledge of Opp. party No. 2 and after exercise of due diligence same could not be produced by him at the time when the order was passed by Consolidation Officer. Affidavit filed by Opp. party No. 2 did not make out any of ground as contemplated under Order 41, Rule 27 of Civil Procedure Code. There is also no material on record to show that the document was not within the knowledge of Opp. party No. 2 or could not be produced even after exercise of due diligence before Consolidation Officer or Settlement Officer, Consolidation. In case the document was already on record and no such application was moved by Opp. party No. 2 to get examined the thumb impression contained on the registered will executed in favour of petitioners by expert, no such application could be entertained at Appellate/revisional stage and as such the second ground for production of additional evidence by examining thumb impression by expert is also not available to Opp. party No. 2.

12. There is also no such finding in the order that the appellate court/revisional court require any such document to be produced to enable appellate court/revisional court to pronounce the judgment and in absence of any such finding in the order of appellate court/revisional court, third ground as contemplated under Order 41 Rule 27 of the CPC be also not available to Opp. party No. 2.

13. Thus, it is clear that none of the grounds as contemplated under Order 41, Rule 27 of the CPC for admitting additional evidence at Revisional stage as expert opinion on Thumb impression of Ram Chandra is available to Opp. party No. 2. The Revisional Court wrongly and illegally passed the impugned order permitting Opp. party No. 2 to get examined thumb of impression of late Ram Chandra by expert at revisional stage. Deputy Director of Consolidation did not record any reason for permitting additional evidence in the form of expert's opinion at revisional stage. Deputy Director of Consolidation being the final court under the U.P. Consolidation of Holdings Act could permit additional evidence if any Of the grounds as contained under Order 41, Rule 27 of the CPC was attracted and reasons were recorded in this regard permitting additional evidence as an expert's opinion at revisional stage. As the order passed by the Deputy Director of Consolidation does not contain any reason, this is an additional ground for setting aside the impugned order.

14. In view of the discussions made above, writ petition succeeds and is allowed. The impugned order dated 13.1.2006, passed by the Deputy Director of Consolidation, Agra is quashed. As revision is pending for the last about 20 years, Revisional authority is directed to decide the revision in accordance with

law on the basis of the materials already on record within three months from the date of presentation of a certified copy of this order.

15. No order as to cost.