
(1982) 02 AHC CK 0014
In the Allahabad High Court
Case No : Civil Misc. Writ No. 1690 of 1982

Bal Kishun and Another

APPELLANT

Vs

Ghamandi and Others

RESPONDENT

Date of Decision : 03-02-1982

Acts Referred:

North Western Provinces Tenancy Act, 1901 — Section 22
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 9A(2)
Uttar Pradesh Tenancy Act, 1939 — Section 28(2), 35, 36, 38, 45
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 171, 171(1)

Citation : (1982) AWC 326 : (1982) RD 181

Hon'ble Judges : K.N. Misra, J

Bench : Single Bench

Advocate : Pradeep Chandra, for the Appellant;

Final Decision : Dismissed

Judgement

K.N. Misra, J.—Heard learned Counsel for the Petitioners and perused the impugned order dated 31st December 1981 passed by the Deputy Director of Consolidation.

2. The Petitioners Bal Kishun and Dhaniram, sons of Gulley, asserted that they are the sole tenure holders having inherited the land in dispute after the death of their father, Gulley. Opposite party No. 1 Ghamandi, claiming to be son of Gulley, filed an objection u/s 9A(2) of the U.P. Consolidation of Holdings Act praying that his name be recorded as co-tenure holder along with the Petitioners, who are his real brother. The Petitioners contested the claim of opposite party No. 1 asserting that he is not their real brother. The consolidation authorities have recorded a finding to the effect that Ghamandi is son of Gulley and was born posthumously and in this view of the matter the Deputy Director of Consolidation has held to be co-tenure holder entitled to 1/3rd share in the holding in dispute.

3. Learned Counsel for the Petitioners contends that even accepting the finding recorded by the Consolidation Authorities to the effect that opposite party No. 1

was son of Gulley, but since he was born posthumously as such he was not entitled to inherit the land in dispute. In support of his contention learned Counsel placed reliance upon a single Judge decision of this Court in *Ramjas v. The Board of Revenue* 1963 AWR 354, in which the earlier decision of a learned single Judge in *Mangali Prasad v. Ram Balak* 1956 AWR 752 was relied upon. Learned Counsel for the Petitioners further cited a Full Bench decision of the Board of Revenue in *Dulli v. Imarti Devi* 1966 AWR 51 (Revenue section), and *Inderjit Singh v. Ramjit Singh* 1949 RD 257. In the aforesaid decision of *Ramjas* (supra) it has been held that:

It is true that under Hindu law and the English law, legal personality is attributed to an unborn child for certain purposes.... We should, therefore, adopt the general rule that legal personality does not take effect till the birth of the child.

4. The aforesaid decisions were considered by a Division Bench of this Court in *Ram Dayal v. Bhim Sen* 1965 AWR 755 wherein it was held:

The general rule is that an estate is not held in abeyance on the death of its owner. It vests in his heir then living. This rule would also apply to Section 35, U.P. Tenancy Act. According to all civilized systems of jurisprudence a child in embryo at the death of the holder of a proprietary interest, if born alive after his death, is deemed to be living at his death.

5. In this view of the matter it was held that the daughter's son, who was in the womb at the death of his maternal grand-father or his widow, would inherit the latter's tenancy. After considering the original texts of the Hindu Law as well as several decided cases on the point it was observed that:

We are unable to see any reason why Section 35...from the general system of law sub silentio.

In the aforesaid decision it was further held:

It is not easy to overlook the irrational hardships.... It is not necessary to give further instances of hardship.

These hardships are not inevitable on the language of Sections 35, 38 and 45...avoid unintelligible hardships--see *State of Gujarat v. Shyamlal Mohan Choksi* AIR 1965 SC 1251.

6. In earlier decisions the Board of Revenue construed the provisions of succession contained in Section 22(a) of the Agra Tenancy Act, Act II of 1901, and held that posthumous son succeeds to the occupancy holding of his father u/s 22 (a) of the Agra Tenancy Act. See *Nanhe v. Durga Narain Singh* 1922 RD 470, and *Sukhrania v. Bal Mukund* 1923 RD 515.

7. In a latter decision in *Prahhuraj Kumari v. Bijai Pal Singh* 1951 RD 67, the Board of Revenue held that:

The rule of the Hindu law entitling an unborn (though conceived) heir to inherit is

not inconsistent with the devolution of tenancy rights under Sections 35 and 36 of the U.P. Tenancy Act.

A daughter's son who was not born when the tenancy opened for succession but who had been conceived at the time is a rightful heir and successor to his mother's father's tenancy.

8. In another decision In *Dev Nandan v. Dashrath* 1971 RD 269, the Board of Revenue placing reliance upon the aforesaid Division Bench decision of this Court in *Ram Dayal's* (supra) held that a posthumous child is entitled to succeed the interest of his father as he would be deemed to be living on the date of his father's death. Having giving my anxious consideration, I am of the opinion that the view taken by the Division Bench in *Ram Dayal's* case (supra) is perfectly correct.

9. Learned Counsel for the Petitioner, however, referred to another Division Bench of this Court in *State of U.P. v. D. Singh* 1973 ALI 478, wherein it was held that the said doctrine is not of general or universal application. The question for consideration in the Division Bench in the said case was whether the son conceived before the enforcement of the U.P. Imposition of Ceiling on Land Holdings Act but born afterwards, would be deemed to be in existence on the date of the enforcement of the said Act and by distinguishing the aforesaid decision in *Ram Dayal's* case (supra) it was held that he will not be deemed to be in existence on the date of the enforcement of the Act. The correctness of the doctrine enunciated in *Ram Dayal's* case was, however, not at all doubted. Referring to the decision of the Division Bench in *Ram Dayal's* case it was observed that:

The doctrine deeming a son in embryo to be in existence on a date prior to the.... But the doctrine is not of general or universal application.

10. After considering the provisions of the U.P. Imposition of Ceiling on Land Holdings Act the Division Bench in the aforesaid decision distinguished *Ram Dayal's* case by observing that:

The non-application of the doctrine and non-recognition of the existence of the son on 3-1-1961 will not affect any right of the son. The doctrine cannot be invoked or applied merely to confer some benefit on the father. We have not been referred to any case where the doctrine has been applied to cases where rights of inheritance and succession and rights incidental to these rights are not involved. We are of the opinion that the doctrine cannot be invoiced in determining ceiling area of a tenure holder under the Act.

11. The Supreme Court in *T.S. Srinivasan Vs. Commissioner of Income Tax, Madras*, , referring to an earlier decision, observed that:

In *Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa*, , this Court had occasion, to consider the scope of the doctrine that under Hindu law a son conceived in his mother's womb is equal in many respects to a son actually

in existence in the matter of inheritance, partition, survivorship and the right to impeach an alienation made by his father. The doctrine is not of universal application and it applies mainly for the purpose of determining right to property and safeguarding such rights of the son.

12. It was, however, not applied to invalidate an adoption or to tax matters, but such is not the case at hand.

13. Thus in this view of the matter, a posthumous son would acquire right by inheritance and succession in the property left by his deceased father, on the doctrine that he would be deemed to have been in existence on the date of death of his father and in view of Division Bench decision in Ram Dayal's case (supra) the said doctrine would apply in the matter of inheritance and succession to the agricultural tenancy land governed by tenancy laws. A posthumous son would, therefore, be entitled to inherit the land u/s 171(1) of the U.P. Zamindari Abolition and Land Reforms Act being male lenial descendant in the male line of descent.

14. Learned Counsel for the Petitioner, however, contended that on the death of Petitioner's father they alone were born and living alive and so the land in dispute had devolved and vested in them absolutely u/s 171 (a) of the said Act and as such even if opposite party No. 1 be deemed to be in existence on the date of the death of their father, being in embryo, the Petitioners could not be divested of their vested rights in the land in dispute and thus on this ground opposite party No. 1 cannot be held to be entitled to one third share in the holding in question. I do not find any merit in this contention as well.

15. It is now well settled that even a vested estate is divested by birth of a preferable heir such as a son or a daughter who was conceived at the time when succession opened. See Mulla's Hindu Law, Section 28 (2), 12th Edition page 97. Thus, there appears to be no good reason why this principle of Hindu law should not apply to the present case. A child in embryo is deemed to be living at the death of his father and as such he would be deemed to be a male lenial descendant in the male line of descent and entitled to inherit in equal share per stripes along with his other brothers even at the time when succession had opened. A posthumous son will thus get interest in the tenancy holdings on his birth along with his other brothers divesting them of the interest in the land in dispute to the extent of his share to which he would be entitled as a legal heir and successor of the deceased tenure holder when succession opened, as if he was then alive. A posthumous son would acquire interest in the land absolutely and to the exclusion of any such other heir upon whom the tenancy land on the opening of succession, might have devolved u/s 171 (b) to (r), being a preferential heir u/s 171 (a) of the U.P. Zamindari Abolition and Land Reforms Act. The vested estate in the remoter heir would stand divested and vested absolutely in posthumous son upon his death if he was in embryo at the time when succession opened.

16. Thus, in this view of the matter, the Petitioners cannot successfully urge that since the land in dispute had vested in them absolutely at the time when succession had opened and so they cannot be divested of the interest in the land in dispute to the extent of one third share, which has been claimed by opposite party No. 1, who was born after the death of their father.

17. In view of what has been said above, I am of the opinion that it has been rightly held that opposite party No. 1 is entitled to get one third share in the land in dispute, which admittedly belonged to his father. I, therefore, do not find any error has been committed by the Deputy Director of Consolidation in holding opposite party No. 1 to be entitled to one third share in the land in dispute.

18. In the result the writ petition, being devoid of merit, is dismissed.