

(1997) 03 PAT CK 0001
In the Patna High Court
Case No : CWJC No. 6676 of 1991

Dr. Giriwar Pandey and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 21-03-1997

Acts Referred:

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 — Section 10B, 26A, 3

Citation : (1997) 03 PAT CK 0001

Hon'ble Judges : A.N. Trivedi, J

Bench : Single Bench

Advocate : Kamal Nayan Choubey and Shiv Narayan Singh in 6676 and M/s Ashutosh Ranjan Pandey, Jagdish Pandey, Ramanuj Pd. Singh and J.K. Pandey in 1209, for the Appellant; J.P. Shukla, Jagdish Pandey and J.K. Pandey (in 6676) and M/s. Kamal Nayan Choubey and Shiv Narayan Singh (in 1209), for the Respondent

Judgement

Ashish N. Trivedi, J.—Both the Writ Petitions are directed against the order dated 29.1.1991 (Annexure "5" in C.W.J.C. No. 6676 of 1991 and Annexure "1" in C.W.J.C. No. 1209 of 1991) passed by the Revisional Authority under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as the "Consolidation Act") and with the consent of the learned counsel for the parties they have been heard together and are being decided by this common judgment. In C.W.J.C. No. 6676 of 1991 the petitioners have challenged the jurisdiction and competence of the Revisional Authority to adjudicate the question of title between the parties but have supported that direction of the Revisional Authority relegating the parties to seek partition of the lands in dispute by metes and bounds in the Civil Court. In C.W.J.C. No. 1209 of 1991 the petitioner supports the other directions of the Revisional Authority but questions the direction of the Revisional Authority by which the parties were directed to approach the Civil Court for effecting partition by metes and bounds of the property in question in view of the Notification issued u/s 26A of the

Consolidation Act.

2. Late Sri Sheo Kumar Tripathi married Chandra Jyota Devi and had two daughters Sharda Devi and Annapurna Devi. Sharda Devi was married to Rajendra Tiwari and Annapurna Devi was married to Vaidyanath Pandey. Vidya Devi is the daughter of Rajendra Tiwari and Sharda Devi. Vidya Devi was married to Dr. Girvar Pandey. Late Sri Sheo Kumar Tripathi being in exclusive possession of his ancestral and self-acquired movable and immovable property executed a registered will dated 15.5.1950, according to which his wife Chandra Jyota Devi was to come in possession of the property after the death of the testator and was required to utilise the usufruct of the property and to protect and manage the property and maintain herself but had not been vested with the right of transfer the property so bequeathed.

3. After the death of Sheo Kumai Tripathi, Vaidyanath Pandey Rajendra Tiwari, Vidya Devi and Chandra Jyota Dev" applied for Probate of the Will in the Court of the District Judge, Ara which was registered as Misc. Judicial Case No. 1" of 1985 and after due enquiry Letters of Administration were granted in their favour. In terms of the Will, Vaidyanath Pandey and Rajendra Tiwari (Sons-in-law of late Sheo Kumar Tripathi) were entitled to one fourth share and Vidya Devi (daughter of Rajendra Tiwari) was entitled to remaining half share in the property mentioned in the Will but since the legatees did not agree for mutual partition, Vaidyanath Pandey filed Title Suit No 14/77/76/85 claiming the partition by metes and bounds to the extent of one fourth (1/4) share of the property described in Schedule "A" & "B" of the plaint.

4. By the judgment and decree dated 27.5.1987, learned Subordinate Judge Sasaram decreed the suit filed by Vaidyanath Pandey and ordered that Vaidyanath Pandey, the plaintiff will get his one fourth share in the suit property as well as Rajendra Tiwari and Vidya Devi was entitled to the remaining half share in the property mentioned in the Schedules to the Plaint. It may be stated that the property which was mentioned in Schedules "A" & "B" to the Plaint inter alia included the agricultural lands situate in four villages. During the pendency of the suit, Notification u/s 3 of the Consolidation Act was issued by the State Government and in view of the provisions contained in Section 4 of the Consolidation Act the suit was ordered to abate insofar as the agricultural lands were concerned.

5. C.W.J.C. No. 6676 of 1991 was filed by Ram Dulari Devi, Petitioner No. 1 (mother-in-law of Vidya Devi, Petitioner No. 2) and since during the pendency of the Writ Petition she died, her heirs and legal representatives including Dr. Girvar Pandey were brought on record.

6. The case of the petitioners is that the subject matter in dispute relates to the lands situate in five villages, namely, Bhabhua, Sudarshanpur, Sheopura, Bhatni and Nimiatar and Vaidyanath Pandey (Respondent No. 4 in the Writ Petition) filed the Petition dated 30.6.1977 u/s 10B of the Consolidation Act which was

registered as Case No. 8/77-78 in the Court of Consolidation Officer, Bhabhua; a copy of which has been annexed as Annexure T to the Writ Petition. The Consolidation Officer by his order dated 16.1.1984 (Annexure "2") dismissed the application of Vaidyanath Pandey, Respondent No. 4 on the ground that separate applications have to be made in respect of each village in consolidation proceedings. Appeal No. 1201 of 1984 preferred by Vaidyanath Pandey, Respondent No. 4 was also dismissed by the Deputy Director of Consolidation, Sasaram by the order dated 18.5.1984 (Annexure "3"). Vaidyanath Pandey, Respondent No. 4 then preferred a Revision (Annexure "4") against the orders of the Consolidation Officer and the Deputy Director of Consolidation before the Revisional Authority which was registered as Revision Case No. 1917 of 1984. The Revisional Authority by the impugned order dated 29.1.1991 (Annexure "5") allowed the Revision of Vaidyanath Pandey and declared the title and possession of the disputed lands.

7. It may be clarified that Revision Case No. 355 of 1978 filed by Vaidyanath Pandey, Respondent No. 4 against Surendra Dubey and Ram Bachan Choudhary is not relevant and is not the subject matter of these Writ Petitions.

8. According to the petitioners of C.W.J.C. No. 6676 of 1991 the lands in question originally belonged to late Sheo Kumar Tripathi who executed the Will and had bestowed only a limited Estate to his wife till her lifetime and thereafter the Estate was to devolve upon the legatees and that Chandra Jyoti Devi died in the year 1976 and the Probate was granted on 20.9.1951. The petitioners point out that it was admitted by Vaidyanath Pandey before the Revisional Authority that the lands situate in Sudarshanpur Village comprise of an area of about 44 acres were auctioned in Certificate Case No. 1403/51-52 and were purchased by one Shahdeo Singh, who transferred the lands to Ram Dulari Devi, the mother-in-law of Vidya Devi by a registered sale deed dated 1.7.1955 (Annexure "6").

9. It appears that 21 acres of the said lands were gifted to Vidya Devi by her mother-in-law in 1976, less than a month before she died at the age of 90 years.

10. The auction sale was questioned by the Respondent No. 4 before the Revisional Authority inter alia on the ground that Vidya Devi had wilfully defaulted in payment of rent which resulted in Certificate Case No. 1403/51-52 in which the lands in question had been auctioned.

11. The petitioners allege that the claim of Respondent No. 4, Vaidyanath Pandey is fallacious, motivated because Vidya Devi was not responsible for payment of rent for the period prior to 1950 or even after 1950 because Sheo Kumar Tripathi was alive till 1950 and therefore default in payment of rent resulting in auction sale in pursuance of Certificate Case No. 1403/51-52 cannot be attributed to any lapse or failure on the part of Vidya Devi. It has been further stated that Ram Dulari Devi, the original Petitioner No. 1 had not been impleaded as Defendant in Title Suit No. 142 of 1977 which was filed in the Court of Subordinate Judge, Bhabhua claiming partition of the property in question.

12. The petitioners however admit that Title Suit No. 142 of 1977 abated u/s 4 of the Consolidation Act insofar as it related to agricultural lands of Villages-Sudarshanpur, Nimiatar, Sheopur, Bhatni but did not abate as regards the lands situate in the municipal area of Bhabhua Town. It is stated that Respondent No. 4 Vaidyanath Pandey never pleaded or urged before the Consolidation Authorities that the lands situate in Village-Sudarshanpur were virtually sold by Vidya Devi. The petitioners claim that they had made an application dated 5.3.1990 (Annexure "9") mentioning the names of witnesses they wanted to examine but no opportunity was given by the Revisional Authority to examine the Petitioners' witnesses. It has been alleged that the Revisional Authority by his order dated 5.3.1990 (Annexure "11") did not permit the petitioners to examine their witnesses and directed that they may lead documentary evidence.

13. A perusal of the order dated 5.3.1990 (annexure "11") reveals that the order was passed in the presence of the petitioners and Respondent No. 4 and it was found by the Revisional Authority that complete description of the witnesses sought to be examined had not been given nor had it been stated as to on what points evidence was sought to be led by the petitioners or the time within which they would produce their witnesses and accordingly directed that the matter be placed on 6.3.1990.

14. However, on 6.3.1990 the original petitioner No. 1 filed a petition raising the preliminary objections questioning the Jurisdiction of the Revisional Authority in view of the Full Bench decision of this Court reported in Kalika Kuer @ Kalika Singh vs. State of Bihar & others (1989 PLJR 1203) and on 6.3.1990 the Revisional Authority fixed 26.3.1990 for hearing of the preliminary objections but according to the petitioners, the case was not taken up from 26.3.1990 till 14.1.1991 and the petitioners were under the impression that their preliminary objections would be considered and decided by the Revisional Authority and that having not been done they were denied opportunity of hearing and leading evidence and making submissions on the question of maintainability of the Revision and jurisdiction of the Revisional Authority to decide the question of title.

15. Counter Affidavit has been filed on behalf of the Respondent No. 4 Vaidyanath Pandey in which it has been stated that the question whether the Revisional Authority had jurisdiction to adjudicate the question of title between the parties and was competent to decide the claim of petitioner No. 1 regarding the lands situate in Village-Sudarshanpur on the basis of the judgment in Title Suit no 142 of 1977 passed by the learned Subordinate Judge, Sasaram and the effect of petitioner No. 1 not being party have already been decided in the judgment dated 13.8.1987 of this Court in C.W.J.C No. 3134 of 1987 and the order dated 12.1.1988 passed by the Supreme Court in SLP No. 12710 of 1987 and these points raised by the petitioners before the Revisional Authority were decided in favour of the Respondent No. 4 on 23.12.1985 and 15.6.1987 in Revision Case No. 1917 of 1984. It has been further stated that the lands situate in Sudarshanpur which were sold in auction having been restored to Smt. Vidya

Devi, one of the legatees, who was actual ly managing the same, no error was commined by the Revisional Authority in holding that the said lands were also liable to partition in terms of the Will. Respondent No. 4 states that the petitioners did not clarify as to on what points/matters they wanted to lead evidence both oral and documentary and the Revisional Authority having heard the counsel for the parties on 14.5.1990 dosed the hearing and directed the parties to lead documentary evidence. Copies of the order-sheets dated 30.1.1988 to 14.3.1988, 28.1.1986 to 28.3.1987 and 15.3.1990 to 14.1.1991 have been annexed with the Counter Affidavit. It has been clarified by the Respondent No. 4 that the lands in question in the consolidation proceedings were in respect of four villages, namely, Sudarshanpur, Sheopura, Bhatni and Nimiatar and the original dispute before the Civil Court was in respect of five villages-the four villages mentioned above and the lands situate in village-Bhabhua.

16. Respondents 22 to 29 in their Counter Affidavit have supported the stands taken by the Respondent No. 4.

17. In the Supplementary Counter Affidavit filed by Respondent No. 4, Vaidyanath Pandey, it has been inter alia stated that at the time of filing of the Title Suit for partition, the Respondent No. 4 was not aware that the lands situate in Village-Sudarshanpur had been sold in auction but the said lands did comprise in the Schedules which form part of the Plaint and further that in Consolidation Case No. 8 of 1977 regarding Sudarshanpur, all the tenants including Ram Dulari Devi were made parties before the Consolidation Officer on the basis of the Government revenue records from 1977 itself when Case No. 8 of 1977 was filed for three villages, namely, Sheopura, Bhatni and Sudarshanpur in which Ram Dulari Devi was an opposite party but she avoided to take notice and therefore the notices were published in the District Gazettes; copies of which have been annexed with the Supplementary Counter Affidavit. It has been stated that Ram Dulari Devi was also a party in Appeal No. 1201/83-84 and she was served the Notice by publication in the District Gazette dated 16.3.1984. It has been asserted by the Respondent No. 4 that the petitioners, Ram Dulari Devi and Vidya Devi were given sufficient opportunity to lead evidence but on one pretext or the other they evaded to do so and questioned the jurisdiction of the Consolidation Authorities. It has been further stated that (sic) had adduced documentary evidence and to substantiate the averments has annexed the List of Documents filed by Vaidyanath Pandey with his Supplementary Counter Affidavit. The averments made in the Counter Affidavit and the Supplementary Counter affidavit have not been controverted.

18. C.W.J.C. No. 1209 of 1991 has been filed by the petitioner, Vaidyanath Pandey (Respondent No. 4 in C.W.J.C. No. 6676 of 1991) challenging that part of the order dated 29.1.1991 (Annexure "1") passed by the Revisional Authority by which he"directed that the parties should approach the Civil Court for partition of the property in question by metes and bounds as Notification u/s 26A of the

Consolidation Act has been issued. The case of the petitioner is that Title Suit No. 142 of 1977 was ordered to date in respect of the agricultural lands situate in Villages, Nimiatar, Sheopura, Sudarshanpur and Bhatni but the said Title Suit was decreed in respect of other property holding that the petitioner is entitled to one fourth share in the property in "uestion on the basis of the registered Will executed by late" Sheo Kumar Tripathi. The petitioner filed an application u/s 10B of the Consolidation Act praying that in the lands in dispute, separate chaks be carved out to the extent of one fourth share which had already been declared by the Civil Court but the Consolidation Officer, Chainpur rejected his application in respect of the lands situate in the Village-Nimiatar which was the subject matter of the Revision Case No. 355/78-79 and likewise the Consolidation Officer, Bhabhua rejected the claim of the petitioner with regard to the lands situate in Villages, namely, Bhatni, Sudarshanpur and Sheopura which were the subject matter of dispute in Revision Case No. 1917 of 1984.

19. The petitioner further states that by the order dated 8.8.1983 the Revisional Authority passed an order in Revision Case No. 355 of 1978 that since the consolidation scheme had been confirmed and the consolidation operations have been denotified u/s 26A of the Consolidation Act, the petitioner should seek remedy in the Civil Court and then the petitioner, Vaidyanath Pandey filed a Writ Petition in this Court which was registered as C.W.J.C. No. 4007 of 1983 and by the order dated 11.4.1985 (Annexure "2" to C.W.J.C. No. 1209 of 1991) remanded the case to the Revisional Authority for decision in accordance with law.

20. The petitioner states that in view of the provisions contained in Section 26A (2) of the Consolidation Act, the direction of the Revisional Authority in the impugned order dated 29.1.1991 (Annexure "1") that the parties should approach the Civil Court for partition of their shares by metes and bounds is illegal and is liable to be quashed inasmuch as Sub-section (2) of Section 26A of the Consolidation Act inter alia specifically provides that in cases where Writ Petitions are pending on the date on which the Notification under Sub-section (1) of Section 26A is issued it shall be deemed that the consolidation operations have not been closed. It has been further stated that insofar as the lands which were the subject matter of dispute in Revision Case No. 197 of 1984 there has been no denotification of the consolidation operation and, therefore, the Revisional Authority erred in law in directing the parties to approach the Civil Court and the Revisional Authority could carve out the chaks after taking consent of the parties and if they do not agree then should proceed to determine their shares by metes and bounds in respect of each of the plots.

21. In the Counter Affidavit filed on behalf of Vidya Devi, Respondent No. 19 and Ram Dulari Devi, Respondent No. 20 in opposition of the Writ Petition it has been stated that after the suit had abated and the consolidation proceedings had been denotified u/s 26A of the Consolidation Act in view of the decision of the Full Bench of this Court in Kalika Kuer @ Kalika Singh (supra) the Consolidation

Authorities had no jurisdiction to decide the question of title. It has been further stated that the appropriate remedy available to the petitioner is to take recourse to the Civil Court for revival of the abated Title Suit No. 142 of 1977. The said Respondents have also stated that though Chandra Jyoti Devi died on 9.10.1976 and she being the owner-in-possession of the lands in dispute in the village-Sudarshanpur had lawfully executed oral deeds of gift to different persons including Surendra Dubey, Ram Bachan Choubey and Vidya Devi. Vidya Devi never came in possession of the disputed lands during the lifetime of Chandra Jyoti Devi directly or indirectly and she was never in constructive possession as a trustee of any disputed land and Vidya Devi was in possession only of 19 acres of 44 acres of land situated in village-Sudarshanpur on the basis of deed of gift by her mother-in-law, Ram Dulari Devi. It has been asserted that no evidence had been led by the petitioner to substantiate his claim and therefore the Revisional Authority erred in law in deciding the disputed question of title in consolidation proceedings. It has been admitted that by the order dated 15.6.1987, the Revisional Authority held that because Vidya Devi had acquired about 19 acres of land by way of gift she was a trustee of the co-owner but Respondent No. 20, Ram Dulari Devi had filed a Writ Petition in this Court challenging the order dated 23.12.1985 and 15.6.1987 which was dismissed in limine against which a SLP was also dismissed by the Supreme Court in limine.

22. Sri Kamal Nayan Choubey, learned Senior Counsel appearing for the petitioner in C.W.J.C. No. 6676 of 1991 and for the contesting Respondents in C.W.J.C. No. 1209 of 1991 contended that no partition could have been made by metes and bounds nor could the suit abate in respect of 44 acres of land situated in village-Sudarshanpur as the aforesaid lands were the self-acquired properties of the petitioners of C.W.J.C. No. 6676 of 1991. He further submitted that the Authorities under the Consolidation Act could not decide the question of title in respect of the said lands as the same had been subjected to auction sale and the subsequent transfers had not been challenged before the Consolidation Authorities. Learned counsel further submitted that after the denotification of the consolidation operations u/s 26A (1) of the Consolidation Act, the parties in any case had to seek partition by metes and bounds in the Civil Court and the Consolidation Authorities much less the Revisional Authority had no jurisdiction to effect partition by metes and bounds of the agricultural lands. Learned counsel further submitted that no evidence was led by Vaidyanath Pandey (Respondent No. 4 in C.W.J.C. No. 6676 of 1991) so as to enable the Authorities under the Consolidation Act to decide the title or rights of parties in respect of the lands in dispute. Learned counsel submitted that the Revisional Authority had not decided the shares of the parties independently and was solely guided by the decree of the Civil Court.

23. Sri Jagdish Pandey, learned Counsel appearing for the Respondent No. 4 in C.W.J.C. No. 6676 of 1991 and the petitioner in C.W.J.C. No. 1209 of 1991 whose submissions were supported by Sri J. P. Shukla, learned Senior Counsel for other Respondents in C.W.J.C. No. 1209 of 1991 contended that the lands situated in

Village-Sudarshanpur were the subject matter of the suit for partition, moreover, the aforesaid lands were the subject matter of partition before the Consolidation Authorities and, therefore, no irregularity or infirmity was committed by the Revisional Authority in holding that the lands in Sudarshanpur were liable to be partitioned to the extent of the shares on the basis of the Decree in the Partition Suit. Learned counsel submitted that after the commencement of the consolidation operations in pursuance of the Notification issued under the Consolidation Act, the declaration and adjudication of rights of tenure holders have to be decided by the Consolidation Authorities and even questions of title can be adjudicated upon in respect of the agricultural lands covered by the Notification. Learned counsel further submitted that in view of the provisions contained in sub-section (2) of Section 26A of the Consolidation Act the Revisional Authority erred in law in relegating the parties to approach the Civil Court for effecting partition by metes and bounds and placed reliance on the decision of the Special Bench in the case of Ramkrit Singh & others vs. State of Bihar & others (1979 BBCJ 259). Learned counsel further submitted that the decision of the Full Bench of this Court in Kalika Kuer @ Kalika Singh (supra) relied upon by the petitioner is of no avail to them inasmuch as the judgment of this Court has been stayed by the Apex Court in Civil Appeal No. 5684 of 1990 by the order dated 25.3.1991 as a result of which the decision of the Special Bench in Ramkrit Singh (supra) is good law. Learned counsel submitted that the Respondent No. 4, Vaidyanath Pandey had led oral and documentary evidence before the Authorities under the Consolidation Act but no effort was made by the petitioners to lead any evidence before the Authorities except for filing a List of Witnesses which did not contain complete particulars of the witnesses, who were sought to be summoned and examined and, therefore, it is not open for the petitioners now to contend that either they had been denied opportunity of leading evidence or that no evidence was led by Vaidyanath Pandey in support of his objections. Learned counsel submitted that after contest Title Suit had been decreed and the Will had been held to be valid and genuine and therefore the Revisional Authority was well within its right to determine the shares of the parties on the basis of the decree of the Civil Court.

24. Having considered the submissions made by the learned counsel for the parties and the material on record I am of the opinion that the direction of the Revisional Authority in the impugned order dated 29.1.1991 (Annexure "5" to CWJC No. 6676 of 1991 and Annexure "V to C.W.J.C. No. 1209 of 1991) that the parties should approach the Civil Court for partition of the lands in question by metes and bounds cannot be sustained.

25. The contention of Sri Kamal Nayan Choubey, learned Senior Counsel for the petitioners in C.W.J.C. No. 6676 of 1991 and for the contesting Respondents in C.W.J.C. No. 1209 of 1991 that the suit could not abate as right, title or interest of the parties in the lands in dispute could not be decided by the Authorities under the Consolidation Act more so when the lands in Village-Sudarshanpur were the self-acquired property of original petitioner No. 1, late Ram Dulari Devi

and Vidya Devi, petitioner No. 2 is untenable and reliance placed by the learned counsel on the decision of the Full Court in Kalika Kuer @ Kalika Singh (supra) is of no assistance to the said petitioners as admittedly the operation of the judgment in Kalika Singh's case has been stayed by the Supreme Court as noticed above and therefore -Special Bench decision of this Court in Ram Krit Singh (supra) holds the field in which it was held that-

The opening words of Section 4 state clearly that the consequence, as mentioned therein shall ensure "from the date specified in the notification till the close of the consolidation operation". The consolidation operation closes by issue of notification envisaged in Section 26A of the Act. The language being clear and explicit effect has to be given to the words used. When the section says that the ensuing consequences are till the close of the consolidation operation, we cannot nullify words aforesaid by saying that the consequences are for all times to come. It is obvious, therefore, that on the close of consolidation operation in a village or area the abated suits would revive.

26. The provisions of the Bihar Consolidation Act are *pari materia* Uttar Pradesh Consolidation of Holdings Act, 1953.

27. In *Sita Ram Vs. C. Bhondey and Others*, their Lordships considered the consequences of issuance of the Notification u/s 4 (2) of the Uttar Pradesh Act and the scope of jurisdiction of the Authorities under the Uttar Pradesh Consolidation Act and observed thus ?

Declaration and adjudication of rights of tenure-holders in respect of land lying in an area for which a notification has been issued u/s 4(2) and adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act had to be done in accordance with the provisions of Act only and the jurisdiction of the civil or revenue courts to entertain any suit or proceeding with respect to rights in such land or with respect to any other matter for which a proceeding could or ought to have been taken under the Act would cover adjudication of questions as to title in respect of the said lands. In the instant case son was claiming an interest in the land lying in the area covered by notification issued u/s 4(2) on the basis that he is the son of "C brother of "N" and the lands were recorded in the name of "N" in a representative capacity on behalf of himself and his other brothers. The claim was disputed by the appellants and other members of family. This claim had to be adjudicated by the consolidation authorities, since, it was a matter falling within the scope of adjudicatory functions assigned to the consolidation authorities under the Act and the jurisdiction of the Civil Court to entertain the suit in respect of the said matter was expressly barred by Section 49 of the Act.

28. It is not in dispute that consolidation proceedings had commenced in pursuance of the Notification issued under the Consolidation Act and therefore it was only the Consolidation authorities who could decide the dispute in the

consolidation proceedings. It has been seen that Vaidyanath Pandey was claiming interest in the lands in question as a co-sharer and co-legatee on the basis of the Will of late Sheo Kumar Tripathi which has been held to be valid and genuine by the Civil Court and therefore in view of the judgment and decree of the Civil Court in the said suit the right, title and interest of the parties have been decided by the Revisional Authority, who had jurisdiction to do so.

29. The contention of Sri Kamal Nayan Choubey, learned counsel for the petitioners that the Authorities under the Consolidation Act could not determine the shares of the parties in respect of the lands situate in Village-Sudarshanpur which had been subjected to auction sale and since subsequent transfers had not been challenged before the Consolidation Authority, the Revisional Authority had no jurisdiction vested in him in determining the shares of the parties in respect of the said lands which were claimed to be the self-acquired property of the original petitioner No. 1, Ram Dulari Devi and the petitioner"no. 2, Vidya Devi.

30. Sheo Kumar Tripathi, the testator died on 28.6.1950 and Letter of Administration was granted on 20.9.1951. It has been stated in the Supplementary Counter Affidavit dated 16.12.1994 filed on behalf of Vaidyanath Pandey, Respondent No. 4 and not controverted by the petitioners that Vidya Devi had filed objection in Ceiling Case No. 20 of 1976 (State vs. Vidya Devi) that the property of Village-Sudarshanpur and other villages were given to the legatees by her Maternal Grand Father, late Sheo Kumar Tripathi and the lands situate in Village-Sudarshan-pur were purchased in an auction by one Shahdeo Singh, resident of District-Palamu, who sold the lands to Ram Dulari Devi by a sale deed dated 1.7.1955 and these lands belonged to the three legatees. In the counter affidavit filed by Vaidyanath Pandey, it has been stated that Vidya Devi managed the property in dispute through her husband, Girvar Pandey and notice of the Certificate Case was sent to the landlords including Vidya Devi who was managing the property and no steps were taken by her to deposit the land revenue. It appears that the default in payment of rent was for the years 1951-52, admittedly when Sheo Kumar Tripathi had died and on 25.10.1954 the lands in question in Village - Sudarshanpur were put to auction in the Certificate Case. After the auction sale Shahdeo Singh transferred the lands in question situate in Village - Sudarshanpur to Smt. Ram Dulari Devi for a paltry sum of Rs. 250/- even before possession could be delivered to Shahdeo Singh and thereafter 21 acres of land were gifted to Vidya Devi by Ram Dulari Devi. In this background it can be safely held that Vidya Devi had 21 acres of land in Village - Sudarshanpur as a trustee for the other two co-sharers and co-legatees and, therefore, shares of the property could be determined by the Consolidation Authorities in respect of the said lands.

31. In this view of the matter the Revisional Authority did not err in law in treating the transfer of 21 acres of land to Smt. Vidya Devi as void and had been rightly ignored by the Revisional Authority. Vaidyanath Pandey and Rajendra Tiwari are entitled to 1/4 share each and the remaining half shall to Vidya Devi in

terms of the Will ar. Decree in the Title Suit.

32. The contention "f the learned counsel for the petitic jrs that the Revisional Authority was right in directing the parties to approach the Civil Court for partition of the property in question by metes and bounds as Notification u/s 26A (1) of the Consolidation Act had been issued is also untenable in view of the fact that Sub-section (2) of Section 26A of the Consolidation Act provides that notwithstanding anything contained in Sub-section (1), any order passed by a Court of competent jurisdiction in cases or writ filed under the provisions of the Constitution of India, in cases or proceedings pending under this Act on the date of issue of the Notification under sub-section (1), was to be given effect to by such Authorities as may be prescribed and consolidation operation shall for that purposes be deemed to have not been closed.

33. The Revisional Authority had erred in law in holding that since the Notification under Sub-section (1) of Section 26A of the Consolidation Act had been issued and the Consolidation proceedings had been closed and on the issuance by the said Notification he could not effect partition by metes and bounds is obviously contrary to the provisions of Sub-section (2) of Section 26A of the Con solidation Act. The Revisional Authority had jurisdiction to effect partition of the property in question by metes and bounds and failure to do so resulted in illegal refusal to exercise jurisdiction vested in him by law.

34. Sri Kamal Nayan Choubey learned counsel further submitted that since the parties have not agreed for partition of joint holdings on the basis of specific plots, the Revisional Authority cannot effect partition by metes and bounds of the shares of the parties in res; et of specific plots. It was submitted that what is prohibited directly cannot be permitted to be done indirectly. In my opinion the contention of the learned counsel for the petitioners is liable to be rejected in view of the fact that in the first instance effort ought to have been made by the Revisional Authority to persuade the parties to agree to partition of specific plots according to their shares and on failure of agreement of the parties, it was open for the Revisional Authority to proceed to decide the shares of the parties by metes and bounds in the specific plots keeping in view the provisions of the Consolidation Act so that the fragmentation of holdings is not contrary to the objects of the Consolidation Act.

35. Learned counsel in support of his contention that no evidence was led in accordance with the Evidence Act by Vaidyanath Pandey to enable the Authorities under the Consolidation Act to decide the right, title and interest of the parties in respect of the lands in dispute relied upon the decision of this Court in Ram Sigashan Pathak Vs. K.P. Sinha, Deputy Director, Consolidation and Others, in which it was held that-

From a perusal of the impugned orders as contained in Annexures 2, 3 and 4 to the writ application, it is evident that neither the documents were proved not the parties adduced oral evidence. The order of the Consolidation Officer

(Respondent 3) appear to be based on his local inspection and a perusal of some documents. From the order dated 8th Feb., 1985, passed by the respondent 2 and as contained in Annexure 3 to the writ application, it appears that the appellate authority proceeded on the basis that the name of Mt. Bigna Kuer was entered in respect of two villages in the record of rights. The appellate authority has further on the basis held that the deed of gift executed by the aforementioned Mr. Bigna Kuer appear to be valid and further purported to have held that as the appellant (respondent 4) was not agreeable to possess the land in accordance with the partition, the purported deed of partition lost all its importance. He further held that the partition deed has also been executed without the permission of the Consolidation Officer."

36. The decision in the case of Ram Sigashan Pathak (supra) has been explained and distinguished by a Division Bench of this Court in Junaid Khan Vs. The State of Bihar and Others and after considering various decisions and the provisions of the Consolidation Act it was held that-

"What requires emphasis is that the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 and rules framed thereunder are self contained Code in respect of the procedure to be followed in respect of leading evidence, examination of the parties and witnesses etc. Section 10 (5) of the Act provides that the Assistant Consolidation Officer shall, after taking into consideration, the opinion of the Consolidation Committee in case no conciliation is arrived at submit the report to the Consolidation Officer who shall dispose of the objection in the manner prescribed. Rule 6-D (9) (b) of the Rules provides as to how the objection has to be decided by the Consolidation Officer. Rule 6-D (9) (b) runs as follows :

On the date fixed under sub-rule (8) or any subsequent date fixed for the purpose the Consolidation Officer shall hear the parties, frame issues on the points in dispute, take evidence both oral and documentary and decide the objections.

The only inescapable conclusion from the aforesaid provision is that the Consolidation Officer has to take evidence, both oral and documentary. But how it has to be taken is silent. The Consolidation Officer has to evolve his own procedure, but the Indian Evidence Act has not been made applicable in terms. But with a view to do justice between the parties, the substance of the procedure has to be followed. But the learned Single Judge was not justified in holding that the Indian Evidence Act would apply in letter and spirit".

37. In the present case it is evident from the material on record (Annexure "Z") to the Supplementary Counter Affidavit dated 16.12.1994 filed on behalf of Vaidyanath Pandey that as many as 42 documents had been filed before the Revisional Authority and thus it cannot be said that no evidence was led by Vaidyanath Pandey in support of his claim.

38. The petitioners grievance that they were denied opportunity to lead evidence

is misconceived in view of the fact the the List of Witnesses filed by them did not contain complete particulars of the witnesses and despite opportunity, they made no effort to supply the complete particulars or took steps for summoning the witnesses.

39. The contention of the learned counsel for the petitioners that the Revisional Authority had not decided the shares of the parties independently and was solely guided by the Decree of the Civil Court is also untenable. The Will in question had not been disputed and had been found to be genuine by the Civil Court on the basis of which the suit filed by Vaidyanath Pandey was decreed and, therefore, it cannot be said that the Revisional Authority committed any error of law or fact in determining the shares of the parties on the basis of the Decree of the Civil Court.

40. It is also evident that Ram Dulari Devi was a party before the Consolidation Officer and in the Appeal as well as in the Revision preferred by Vaidyanath Pandey and notices had been duly served and they had contested the claim of Vaidyanath Pandey before the Revisional Authority and in these circumstances it cannot be said that any predjudice was caused to the petitioners of C.W.J.C. No 6676 of 1991 even if the original petitioner No. 1 had not been impleaded in the suit as a party because after the commence ment of the consolidation operations the right, title and interest in respect of the lands of Village - Sudarshanpur had to be decided by the Authorities under the Con solidation Act more so when all trans ferees/tenants had been impleaded as parties in the consolidation proceedings upon whom notices had been duly served

41. Accordingly C.W.J.C. No. 6676 of 1991 is dismissed and C.W.J.C. No. 1209 of 1991 is allowed and the directions of the Revisional Authority in the impugned order dated 29.1.1991 (Annexure "5" to C.W.J.C. No. 6676 of 1991 and Annexure "1" to C.W.J.C. No. 1209 of 1991) relegating parties to approach the Civil Court for partition of the lands in question by metes and bounds cannot be sustained and are set aside. The Revisional Authority is directed to determine the shares of the parties by metes and bounds on the basis of specific plots of lands if they agree, and if they do not, then to proceed in accord ance with law and determine the shares of the parties in each plot and to carve out their shares so that fragmentations of plots of land are not contrary to the provisions of the Consolidation Act. The Writ Petitions are decided in the manner indicated above. No order as to costs