(1991) 11 AHC CK 0057

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 17653 of 1984

Goverdhan Singh and Others APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 26-11-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 134, 157(2), 164, 167, 167(1)
Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 159, 160, 161, 162, 163

Citation : (1992) 1 AWC 185 : (1992) RD 117

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : G.N. Verma, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Singh, J.—Present Petition under Article 226 of the Constitution of India is directed against the concurrent judgments and orders dated 11-10-83, 17-8-1984 and 26-11-1984 passed by Respondents 3, 2 and 1 respectively, dismissing the Petitioners'' suit u/s 229-B of (U.P. Act No. 1 of 1951) UP ZA and LR Act filed on 24-9-1979 for declaration that they were Co-Bhumidhar of Khasra Plot No. 158, (area 8-2-2-) situated in village Sunari P.S. Bichpuri District Agra along with Respondent Raghubar on the basis of a registered sale deed whereby Raghubar (Respondent) transferred 7/16th of his share in the plot in favour of the Petitioners. The Revenue courts have concurrently taken the view that the sale deed was hit by section 168-A of U.P. Act No. 1 of 1951 and accordingly, the Petitioners'' suit was dismissed by the trial court vide judgment and decree dated 11-10-1983. The appeal preferred against the said decree was dismissed by the Additional Commissioner vide judgment and decree dated 17-8-1984, which was affirmed and maintained by the Board of Revenue, which dismissed the Petitioners'' second appeal by means of the judgment and order dated

26-11-1984. The Petitioners have now come up to this Court under Article 226 of the Constitution of India challenging the validity of the aforesaid judgment.

2. The facts of the case are not in dispute. The total area of disputed Khasra Plot No. 158 was 8 Bighas, 2 biswas and 3 biswansis. The Respondent Raghubar was to sole tenure holder of the said plot. By means of registered sale deed dated 20-6-1974, he transferred 7/16th share in the said plot in favour of the Petitioners for a cash consideration of Rs. 21,000/- The Petitioners applied for mutation of their names in the revenue records but the same was refused by means of the order dated 6-6-1979 on the ground that the sale deed being in the teeth of section 168-A of the U. P Act No. 1 of 1951 was void and the Petitioners were not entitled for mutation of their names. It was thereafter that the Petitioners filed suit u/s 229-B which was initially decreed on 15-9-80 but the said decree was set aside in appeal by the, Additional Commissioner vide judgment and order dated 5-8-81 and the suit was dismissed on the ground that the deed was hit by section 168-A of the Act. The Board of Revenue however allowed the second appeal and remanded the suit back to the trial court vide judgment and decree dated 19-7-82. It may be worthwhile to mention here that though the execution of the sale deed was denied by Respondent Raghubar but the Revenue Courts have recorded finding that the Respondent Raghubar had in fact executed the sale deed and not the mortgage deed as alleged by him. The Revenue Courts have also come to the conclusion that even if it be held to be a mortgage deed, it would be deemed to be a sale deed in view of the provisions contained in Section 164 of U.P. Act No. 1 of 1951 inasmuch as possession was admittedly delivered to the Petitioners pursuant to the deed.

3. The only question involved in the case is to whether the sale-deed executed by Raghubar is hit by section 168-A of the Act. Sri S.N. Varma Learned Counsel for the Petitioner contended before me that since it was a sale deed in respect of a share only it would not amount to fragmentation of holding. The Learned Counsel for the Respondent refuted this submission of Sri Varma and contended that the share to the extent of 7/16th transferred by Raghubar if converted in terms of area, works out to about 3 Bighas, 1 Biswa and 18 Dhoors, which is a ''fragmentation'' as defined in Section 3(8-A) of the Act inasmuch as it is less than 3.125 acres, the prescribed extent of land less than which fragmentation in terms of Section 3(8-a)(b) Section 168-A was added by Section 9 of U.P. Act No. XVIII of 1956 subject to the saving contained in Section 23 thereof. This section as it now stands amended from time to time, reads as under:

168-A. Transfer of fragments.--

Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale,, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure holder the whole or so much of the plot in which person has bhumidhari rights, which pertains to the fragment is thereby transferred.

(2) The transfer of any land contrary to the provisions of Sub-section (1) shall be void.

(3) When a Bhumidhar has made any transfer in contravention of the provisions of Sub-section (1) the provisions of Section 167 shall mutatis mutandis apply.

4. It ma y be pertinent to mention here that by Section 2 of U.P. Act No. XVIII of 1961,the expression "whole of the plot to which the fragmentation pertains is hereby transferred" occurring, in the original section, was substituted by the present words "whole or so much of the plots in which the persons have Bhumidhari rights which pertains to the fragmentation is hereby transferred."

5. The expression "notwithstanding the provisions of any law for the time being in force" occurring in Section 168-A makes it clear that the provisions contained in Section 168-A have over-riding effects and any transfer whereby sale, gift or exchange of any fragments situate in ,a consolidated area, is prohibited except in favour of a tenure holder, who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure holder the whole or so much of the plot in which the person has bhumidhari right, which pertains to the fragment, is transferred. The question came up for consideration by Hon. Supreme Court in Mithlesh Kumari v. Fateh Bahadur Singh 1991 RD 184, wherein, it was observed by the Hon. Supreme Court that "the object of the section is to prevent fragmentation of land situated in a consolidated area and transfers that would result in fragmentation or further fragmentation shall be void and to such transfers Section 167 will mutatis mutandis be applicable. The section comes into play only when a fragment situated in a consolidated area is transferred. If transfer of a fragment is made in favour of tenure holder who has a plot contiguous to the fragment, the purpose of law is not defeated inasmuch as it will be consolidated with the contiguous plot of the transferee. When the land held by a person, in a consolidated area is already a fragment then as was provided previous to the amendment in 1961, the whole of the plot to which the fragment pertained was to be transferred. After the amendment, the invalidity and applicability of Section 167 is limited to a case where the transfer is not in favour of any such tenure holder and to the whole or so much of the plot in which the person has bhumidhari rights which pertains to the fragment is thereby transferred. If the transferor had bhumidhari rights on the whole of the fragment the whole has to be transferred. If the person has bhumidhari rights only in a part of the plot that part on which he has bhumidhari rights can he transferred. There, is no doubt that under Sub-section (2) transfer of any plot contrary to the provisions of Sub-section 1 shall be void and under Sub- Section 3 the provisions of Section 167 shall mutatis mutandis apply."

6. It is clear from the above authority of the Hon. Supreme Court that ''transfers that would result in fragmentation or further fragmentation shall be void and to such transfers, Section 167 will mutatis mutandis be applicable'' But in the instant case, the transfer as, such in favour of the Petitioners is not in respect of a fragment. Rather it is in respect of a defined share, the result of which is that

the Petitioners became co-bhumidhars along with Respondent Raghubar in the plot in dispute entitled to remain in joint possession and enjoy the fruits of the land in dispute in proportion to their share. Revenue courts while holding that sale deed was hit by Section 168A of the Act, appear to have converted the share transferred in favour of the. Petitioner in terms of the area, this to my mind, was not based upon true import of the section. Under the scheme of the Act, two or even more persons can hold Bhumidhari rights together in a land which is ''fragment'' within the meaning of Sub-section (8-A) of Section 3 of the Act. What is prohibited u/s 168-A(1) is transfer of a ''fragment'' defined in terms of area and not of a defined share in the fragment so as to make the transferee a co-sharer in the ''fragment''. For example, if a Bhumidhar having a Bhumidhari plot which is a fragment in itself, dies leaving two sons, devolution of his interest upon them, would not result in fragmentation of the holding. Similarly a Bhumidhar having land situated in a consolidated area admeasuring more than 4.6875 acres in Bundelkhand area specified in Sub-clause (1) or more than 3.125 acres in the rest of Uttar Pradesh as specified in Clause (b) of Sub-section (8-A) of Section 3 of the Act, transfers his entire holding in favour of two or more persons, it would not result in fragmentation within the meaning of Section 168-A read with Section 3(8-A) of the Act, even if their individual share (of each of the transferees) converted in terms of area, comes to less than the prescribed extent. Such co-bhumidhars are entitled to retain the holding jointly and if they intend to get it transferred, the holding be put to auction so as to avoid fragmentation in the event of partition, as is evident from the provisions enacted in Section 178 of the Act, which as it stands amended from time to time, is quoted as below for ready reference.

178. Mode of division of a holding--(1) Except as provided in Sub-section (3) Whenever in a suit for (division) a court findings that the aggregate area of the holding or holdings to be divided) does not exceed three and one eighth acres, the court shall instead of proceeding to decide the holding or holdings, direct the sale of same and distribution of proceeds thereof, in accordance with such principles as may be prescribed.

(2) The rules framed under Sub-section (1) shall prescribe the circumstances in which compensation may be awarded to a co-tenure holder in lieu of his share of holding and for the admission by the (land Management Committee) of such co-tenure holder to land under provisions of Section 195.

(3) Where a co-tenure holder has--

(a) let out only a share in any holding under Sub-section (2) of Section 157; or

(b) duly acquired bhumidhari rights u/s 134 (as it stood immediately before the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1977) with respect only to a share in any holding.

The court shall divide the holding by separating the share aforesaid, but in respect of the remainder of the holding, the provisions of Sub-section (1), if applicable, shall be follows.

Section 178 read with related rules contained in rules 159 to 164 of UP ZA and LR Rules 1952, makes it clear that two or more persons can co-share in a holding which itself is a fragment'' or whose share if converted in terms of area becomes a fragment subject to the provisions of Section 178 of the Act. Therefore, transfer of a share is distinguishable from a transfer of a portion of the plot in terms of area amounting to ''fragment'' within the Meaning of Section 168-A of the Act, the transferees of a defined share are however, entitled to co-share in the holding along with the transferor and if any of the co-sharers applies for division of holding which may result in fragmentation, the same would be taken care of by the law and fragmentation, would be prevented as is evident from Section 178(1) of the Act read with related rules. In view of this, I am of the considered view that the sale deed executed by Raghubar was not hit by Section 168-A of the Act and the revenue courts have erred in dismissing the suit. The Plaintiffs were entitled to a declaration that they are co-bhumidhars of the plot in dispute along with the Defendant-Respondent Raghubar. The view I am taking is fortified by the decision of this Court in '' Santokhi v. Board of Revenue U.P. 1971 RD 518, as is evident from the following observation.

Where undivided interest of one of the co-tenure holders is transferred, it cannot be said that the transfer involves transfer of a ''fragment'', or, in other words, transfer of a land of less extent than 3.125 acres for the simple reason that what is transferred is undivided interest in the land and not any specific land. The prohibition contained in Section 168-A is in respect of land which is a fragment i.e. which is lesser in extent than the prescribed area and not of undivided interest in the land. That being so, Section 168-A as it stood had no application where a co-tenure holder transferred his undivided interest in the land.

The only difference between the two cases is that in the case of Santokhi supra, it was transfer of undivided share by a co-tenure holder, whereas in the instant case, it is a transfer of specified share out of the whole of a sole tenure holder.

7. In the result, the petition succeeds and is allowed. The impugned judgments and orders dated 26-11-1984, 17-8-84 and 11-10-1983 passed by Respondents 1, 2 and 3 respectively are quashed. The Petitioners as a consequence, shall be recorded in the revenue records over the plot in dispute as co-bhumidhars along with Respondent Raghubar.

8. Parties to bear their own costs.