
(2016) 10 AHC CK 0047
In the Allahabad High Court
Case No : Writ B No. 36397 of 2016

Irshad Ahmad

APPELLANT

Vs

Deputy Director of Consolidation, Siddharth Nagar

RESPONDENT

Date of Decision : 21-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Registration Act, 1908 — Section 17

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 152

Citation : (2016) 133 RD 661

Hon'ble Judges : Ram Surat Ram (Maurya), J.

Bench : Single Bench

Advocate : C.S.C., and Umang Srivastava, Advocate, for the Respondents;
Tripathi B.G. Bhai, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J - Heard Sri Tripathi B.G. Bhai, for the petitioner and Sri Umang Srivastava, for respondents-4 and 5.

2. The writ petition has been filed against the orders of Consolidation Officer dated 07.07.1989, Settlement Officer Consolidation dated 23.06.2004 and Deputy Director of Consolidation dated 05.07.2016, passed in title proceeding under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

3. The dispute related to the land recorded in basic consolidation year khata 44 of village Barhaya, tappa Koat, pargana Bansi Pashchim, district Basti (at present Siddharth Nagar), which was recorded in the names of Polavadi son of Sahab Jad, Neebar son of Dul and Sabbir son of Rahmat. The village was notified under Section 9 of the Act on 26.10.1988. Assistant Consolidation Officer by order dated 25.11.1988, partitioned disputed khata, holding ? share of Polavadi, ? share of Neebar and Sabbir each.

4. Rafiulla (now represented by respondents-4 and 5) filed a time barred objection on 03.03.1989, along with delay condonation application, claiming his 1/10 share in disputed khata. Assistant Consolidation Officer forwarded the objection to Consolidation Officer, along with his report dated 04.03.1989, for its disposal. Thereafter, it is alleged that notices were issued to the opposite party. The case was listed before Consolidation Officer on 27.05.1989. A perusal of order sheet shows that on that day both the parties appeared and 07.07.1989 was fixed for arguments in delay condonation application. On 07.07.1989, a written compromise was filed, giving Polavadi as 2/5 share and Rafiulla as 1/10 share. Consolidation Officer, by his order dated 07.07.1989, condoned the delay in filing objection and decided the objection in terms of compromise and held share of Rafiulla as 1/10 and Polavadi as 2/5 in disputed khata.

5. Admittedly Polavadi and Aulad Mohammad (father of Rafiulla) were real brothers. Polavadi was issue less. Polavadi executed a registered will dated 20.12.1993 in favour of Rafiulla, Samiullah, Abdul Mabood sons of Aulad Mohammad, Bajhul Qamar, Ubaidur-Rahman sons of Safiulla and Smt. Momina widow of Maqsood Alam, in respect of the properties situated at three villages, namely Matehana and Barhaya, tappa Koat and Banderahawa alias Parsohiya Shahpur alias Karmahiya tappa Khoniyawn, pargana Bansi Pashchim, district Siddharth Nagar. In this will, it was provided that Rafiulla would have no concern with the land of village Barhaya. According to the petitioner, Polavadi executed another registered will dated 28.01.1997 in his favour, canceling his earlier will. Respondents-4 and 5 have denied execution of the will dated 28.01.1997 by Polavadi. However, from the will dated 20.12.1993, it is proved that order of Consolidation Officer dated 07.07.1989 was within his knowledge.

6. The petitioner filed a time barred appeal (registered as Appeal No. 345/1538) on 06.07.1998, along with delay condonation application from aforesaid order of Consolidation Officer. Settlement Officer Consolidation, by order dated 23.06.2004 condoned the delay in filing the appeal but dismissed the appeal, holding the disputed land was ancestral property in which Rafiulla had 1/10 share. The compromise was signed by Polavadi and his signature was attested by his counsel Sri Sirajuddin Khan. The order of Consolidation Officer was never challenged by Polavadi during his life time. The petitioner filed a revision (which was at present registered as Revision No. 129 of 2015-16), against aforesaid order. The revision was heard by Deputy Director of Consolidation, who by order dated 05.07.2016, held that although thumb impressions of Polavadi on the compromise was challenged by the petitioner but no evidence has been adduced by him in this behalf. Thumb impressions of Polavadi on the compromise was identified by his counsel Sri Sirajuddin Khan, Advocate. The compromise was verified by Consolidation Officer. Polavadi survived for a long time, after order dated 07.07.1989 but he did not challenge the order during his life time. On these findings the revision was dismissed. Hence this writ petition has been filed.

7. The counsel for the petitioner submitted that disputed land was self acquired

property of Polavati and recorded in his name since before date of vesting. Previous consolidation was held in the village prior to 1367 F. Aulad Mohammad, father of Rafiulla did not file any objection claiming co-tenancy in disputed land either in previous consolidation or in present consolidation. Aulad Mohammad died in 1995. During his life time, Rafiulla could not claim any right over disputed land and his objection under Section 9 of the Act, filed on 03.03.1989, was not maintainable. Consolidation Officer did not issue any notice to Polavadi in the objection filed by Rafiulla nor Polavadi ever appeared before him. His thumb impressions on the compromise and vakalatnama were fabricated by some imposter at the instance of Rafiulla. The order dated 07.07.1989 was obtained by committing fraud on court. Assistant Consolidation Officer has already passed an order dated 25.11.1988 in respect of disputed khata. So long as the order of Assistant Consolidation Officer is not set aside, Consolidation Officer had no jurisdiction to pass another order in respect of same khata. There was no antecedent title of Rafiulla, the compromise as well as order of Consolidation Officer dated 07.07.1989, passed on its basis, amounts to transfer of immovable property and was required to be registered. The petitioner challenged thumb impressions of Polavadi on the compromise and vakalatnama, burden of proof was upon the respondents to prove that thumb impressions of Polavadi were genuine. The petitioner has specifically raised all these grounds in memorandum of appeal and revision but Settlement Officer Consolidation and Deputy Director of Consolidation have illegally not adverted to the grounds raised by the petitioner. The orders of respondents-1 to 3 are illegal and liable to be set aside. He relied upon the judgments of this Court in *Shiv Prasad v. DDC and others*, 2006 (101) RD 624, in which it has been held that if right does not accrue to any person under provisions of U.P. Act No. 1 of 1951, then no right can be granted to him on the basis of compromise to him. *Achhaibar v. DDC and others*, 2006 (1) AWC 397; *Smt. Chinta Devi v. DDC and others*, 2008 (II) RJ 1105; and *Lalta v. DDC and others*, 2013 (120) RD 292, in which it has been held that co-tenancy right can be granted only when if it is proved that co-tenancy was from very inception or jointly inherited by the parties and its unbroken identity is proved.

8. In reply to the aforesaid arguments, the counsel for the respondents submitted that Polavadi was issue less and was through out residing with the family of his only brother Aulad Mohammad. This fact is conclusively proved from registered will dated 20.12.1993, executed by Polavadi in favour of Rafiulla, Samiullah, Abdul Mabood sons of Aulad Mohammad, Bajhul Qamar, Ubaidur-Rahman sons of Safiulla and Smt. Momina widow of Maqsood Alam, (descendants of Aulad Mohammad) in respect of the properties situated at three villages, namely Matehana and Barhaya, tappa Koat and Banderahawa alias Parsohiya Shahpur alias Karmahiya tappa Khoniyawn, pargana Bansi Pashchim, district Siddharth Nagar. In this will, it was provided that Rafiulla would have no concern with the land of village Barhaya. From recital of will dated 20.12.1993, it

is proved that Polavadi voluntarily entered into compromise before Consolidation Officer and order of Consolidation Officer dated 07.07.1989 was within his knowledge. By way of family settlement, he had given 1/10 share to Rafiulla during his life time. In view of Section 17 (2) (vi) of Registration Act, 1908, compromise dated 07.07.1989 filed before Consolidation Officer was not required registration as held by Supreme Court in *Som Dev v. Rati Ram*, (2006) 10 SCC 788 and *K. Raghunandan v. Ali Hussain Sabir*, (2008) 13 SCC 102. Polavadi survived up to 1998 but he did not challenge the order dated 07.07.1989. The petitioner, who is claiming legatee of Polavadi cannot be permitted to challenge the order dated 07.07.1989, after his death. Will dated 28.01.1997, allegedly executed by Polavadi, in favour of the petitioner, canceling his earlier will, is a fabricated document. On the basis of will dated 28.01.1997, the petitioner has filed an objection under Section 12 of the Act, for mutating his names over the properties of Polavadi, in the year 1998 but till today, original will was not produced before Consolidation Officer. It is for the first time, photostat copy of the will has been filed along with writ petition. So long as due execution of will dated 28.01.1997 is not proved, the petitioner has no locus standi to file writ petition.

9. I have considered the arguments of the counsel for the parties and examined the record. The petitioner based his right on the basis of registered will dated 31.01.1997 and has also filed an objection for mutation of his name under Section 12 of the Act, where due execution of the will would be proved. In view of registered will, at present, it cannot be held that the petitioner has no locus standi to file present writ petition. However, this judgment cannot be treated as acceptance of the will dated 31.01.1997 finally. Consolidation Officer will decide the issue as to whether will dated 31.01.1997 is a genuine will and its due execution is proved according to law, without being influenced by any observation in this judgment. In view of recital in will dated 20.12.1993, excluding Rafiulla from the land of village Barhaya, it is proved that Polavadi voluntarily entered into compromise, order of Consolidation Officer dated 07.07.1989 was within his knowledge and no fraud was committed before Court. Findings of respondents-1 and 2, in this respect does not require interference by this Court.

10. Disputed land was recorded as bhumidhari holding of Polavadi. Aulad Mohammad, father of Rafiulla was alive, in 1989. He did not file any objection either in previous consolidation or in present consolidation. During life time of Aulad Mohammad, Rafiulla could have no interest in it. However, being bhumidhar with transferable right, Polavadi had right to transfer the disputed land under Section 152 of U.P. Act No. 1 of 1951. He was competent to relinquish his 1/10 share in favour of Rafiulla by way of compromise.

11. Now question arises as to whether compromise dated 07.07.1989, by which Polavadi had relinquished his 1/10 share in favour of Rafiulla, was required to be

registered compulsory and in the absence of its registration, it cannot be enforced.

The counsel for the respondents submitted that as the compromise was in respect of subject matter of dispute as such in view of Section 17 (2) (vi) of Registration Act, 1908, compromise dated 07.07.1989 did not require registration as held by Supreme Court in <u>Som Dev v. Rati Ram, (2006) 10 SCC 788</u> and <u>K. Raghunandan v. Ali Hussain Sabir, (2008) 13 SCC 102.</u>

12. In order to appreciate the controversy, Section 17 of the Registration Act, 1908 is quoted below:-

<u>17. Documents of which registration is compulsory.-</u>(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely-

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882), shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and, if such documents are not registered on or after such

commencement, then, they shall have no effect for the purposes of the said Section 53-A.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

(i) any composition-deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) any document other than the documents specified in sub-section (1-A) not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or

(vii) any grant of immovable property by the Government; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871 (26 of 1871), or the Land Improvement Loans Act, 1883 (19 of 1883); or

(x) any order granting a loan under the Agriculturists Loans Act, 1884 (12 of 1884), or instrument for securing the repayment of a loan made under that Act; or

(x-a) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish

the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer.

<i>Explanation.</i>-A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

13. Section 17 (2) (vi) came for consideration before Supreme Court in <i>Bhoop Singh v. Ram Singh Major</i>, AIR 1996 SC 196</i>, in which it has been held that it needs to be stated that sub-section (1) of Section 17 mandates that the instrument enumerated in clauses (a) to (e) shall be registered compulsorily if the property to which they relate is immovable property, the value of which is Rs. 100 or upwards. When the document purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest therein, whether vested or contingent, it has to be registered compulsorily. The Act does not define 'instrument'. Section 2(14) of the Indian Stamp Act, 1899, defines 'instrument' to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Sub-section (2) of Section 17 of the Act engrafts exceptions to the instruments covered only by clauses (b) and (c) of sub-section (1). We are concerned with clause (vi) of sub-section (2). Clause (vi) relates to any decree or order of a court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding. Clause (v) is relevant which in contrast reads thus:

"Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another instrument which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;"

The Explanation amplifies that a contract for the sale of immovable property containing a recital of payment of any earnest money or of the whole or any part of the purchase price shall not be deemed to be required or ever to have required registration.

In other words, the court must enquire whether a document has recorded unqualified and unconditional words of present demise of right, title and interest in the property and included the essential terms of the same; if the document, including a compromise memo, extinguishes the rights of one and seeks to

confer right, title or interest in praesenti in favour of the other, relating to immovable property of the value of Rs. 100 and upwards, the document or record or compromise memo shall be compulsorily registered.

14. In *Som Dev v. Rati Ram*, (2006) 10 SCC 788, it has been held that it was really a decree on admission and the admission was of the pre-existing right set up by the plaintiffs as created by Sheo Ram. The decree by itself did not create any right in immovable property. It only recognised the right set up by the plaintiffs in that suit in respect of the property involved in that suit.

Suffice it to say that on a plain reading of clause (vi) of Section 17(2) all decrees and orders of the court including a compromise decree subject to the exception as regards properties that are outside the subject-matter of the suit, do not require registration on the ground that they are hit by Sections 17(1)(b) and (c) of the Act. But at the same time, there is no exemption or exclusion, in respect of clauses (a), (d) and (e) of Section 17(1) so that if a decree brings about a gift of immovable property, or lease of immovable property from year to year or for a term exceeding one year or reserving an early rent or a transfer of a decree or order of a court or any award creating, declaring, assigning, limiting or extinguishing rights to and in immovable property, that requires to be registered.

15. Supreme Court in *K. Raghunandan v. Ali Hussain Sabir*, (2008) 13 SCC 102, held that a statute must be construed having regard to the purpose and object thereof. Sub-section (1) of Section 17 of the Act makes registration of the documents compulsory. Sub-section (2) of Section 17 of the Act excludes only the applications of clauses (b) and (c) and not clause (e) of sub-section (1) of Section 17. If a right is created by a compromise decree or is extinguished, it must compulsorily be registered if the compromise decree comprises immovable property which was not the subject-matter of the suit or proceeding. Clause (vi) is an exception to the exception. If the latter part of clause (vi) of sub-section (2) of Section 17 of the Act applies, the first part thereof shall not apply.

16. Supreme Court in *Phool Patti v. Ram Singh*, (2009) 13 SCC 22, found that there is inconsistency in the decisions of this Court in *Bhoop Singh's* case and *K. Raghunandan's* case, (supra) and referred the matter for consideration by a larger Bench. However Larger Bench in *Phool Patti v. Ram Singh*, (2015) 3 SCC 465, did not find any inconsistency between the judgments in *Bhoop Singh's* case and *K. Raghunandan's* case and again remitted the matter to Division Bench. Division Bench in *Phool Patti v. Ram Singh*, (2015) 3 SCC 164, held that the family settlement could relate to the ancestral as well as self-acquired property. It appears that it related only to the ancestral property and not the self-acquired property (hence the reference to a *hibba*). The decree relating to 32 kanals of land did not require compulsory registration, as mentioned above. However, the self-acquired property of

Bhagwana that is 20 kanals, therefore, in view of the law laid down in Bhoop Singh's case the gift of 20 kanals of land by Bhagwana in favour of Ram Singh, notwithstanding the decree in the first suit, requires compulsory registration since it created, for the first time, right, title or interest in immovable property of a value greater than Rs. 100 in favour of Ram Singh.

17. In view of the aforesaid discussions, it is held that compromise dated 07.07.1989, created right in favour of Rafiulla in immovable property of value exceeding Rs. 100/-, for the first time as he had no antecedent right over it as such it required to be registered compulsorily. In the absence of registration, order of Consolidation Officer dated 07.07.1989 was illegal and liable to be set aside.

18. In view of the aforesaid discussions, the writ petition succeeds and is allowed. The orders of Consolidation Officer dated 07.07.1989, Settlement Officer Consolidation dated 23.06.2004 and Deputy Director of Consolidation dated 05.07.2016 are set aside. The matter is remanded to Consolidation Officer, who shall consolidate this case along with cases relating to inheritance of Polavadi and decide on merit in accordance with law.