
(2011) 08 AHC CK 0006
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 11924 and 11962 of 1986

Lalji

APPELLANT

Vs

D.D.C. and Others

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 10, 10, 11, 11, 11A
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 154, 155,
164, 202

Citation : (2011) 8 ADJ 243

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : S.K. Lal and R.S. Mishra, for the Appellant; Surendra Nath Singh,
C.K. Rai, Faujdar Rai and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—These two petitions were heard together and are being disposed of by a common judgment as was done by the authorities below also. The facts of the case are interwoven and interlinked. Fortunately, there appears to be no dispute on fundamental facts of the case. These petitions arise out of the proceedings under the U.P. Consolidation of Holdings Act The admitted facts of the case are being noticed with reference to the writ petition No. 11924 of 1986 which are as follows:

1. In the basic year the land in dispute was recorded in the name of Havaladar, the respondent No. 6 in the writ petition, who on 20th of August, 1952 had mortgaged the three disputed plots numbered as 175 area 0.31, 177 area 0.11 and 374 area 0.19 (total area 0.61) in favour of Vishwanath and Raghunath sons of Janki. Vishwanath is respondent No. 4 herein and Raghunath has died and he is represented by his son Chhedi, respondent No. 5.

There is some typographical error with regard to the third plot. Somewhere it is described as 375 area 0.19 acre and somewhere as plot No. 374 area 0.19 acre.

2. During the consolidation operation in village various persons, filed objections. It was registered as Case Nos. 837, 843, 842, 841, 840, 839 and 838. The respondent Nos. 4 and 5 filed objections u/s 9A(2) of the Consolidation of Holdings Act that they are in possession of land in dispute for more than 12 years and have perfected their title. A compromise was arrived at between the parties i.e. Havaladar, on one hand, and Vishwanath and Raghunath, on the other hand. It was agreed upon that Vishwanath and Raghunath sons of Janki may remain in occupation as an asami till the payment of mortgage money including interest amounting to Rs. 800/-. In pursuance of the aforesaid compromise, the Consolidation Officer passed the order dated 23rd of October, 1971 and ordered that the names of Vishwanath and Raghunath sons of Janki be recorded as mortgagee over the plot Nos. 175, 177 and 375 on the share of Havaladar (mortgagor).

3. In the final revenue record in pursuance of the aforesaid compromise, ultimately the name of Havaladar was recorded as Bhumidhar over the plots in question in addition to other plots.

4. The petitioners, Lalji and Janardan sons of Hari Das purchased Chak No. 292 consisting of eleven plots measuring 1.34 acres by means of sale-deed executed by Havaladar after having obtained permission from the Settlement Officer of Consolidation.

5. The petitioners on the strength of the sale-deed in their favour filed an application u/s 12 of the Consolidation of Holdings Act for mutation of their names over the plots purchased by them in place of Havaladar, giving rise to writ petition No. 11924 of 1986.

6. The contesting respondent Nos. 4 and 5 also filed mutation application u/s 12 of the Act for mutation of their names as Bhumidhar on the basis that they have acquired Bhumidhari right being in adverse possession and their names may be recorded, giving rise to writ petition No. 11962 of 1986.

The parties led evidence in support of their respective cases. It was registered as Case No. 256/1029. These mutation applications were rejected. It was ordered that the existing entries shall continue by the order dated 26th of May, 1982. The said order was challenged by the petitioners of both the writ petitions separately by filing two separate appeals. Both the appeals were heard and rejected by a common order dated 30.7.1983 by the Settlement Officer Consolidation and the order of the Settlement Officer Consolidation has been confirmed in revision Nos. 615/216 and 616/223 by the common order dated 29th of May, 1986 by the Deputy Director of Consolidation. Hence, the present two petitions.

2. All the three authorities below have proceeded on the footing that the property was mortgaged after commencement of the U.P.Z.A. & L.R. Act, hence it is void and it shall be deemed to be a "sale" in favour of the contesting respondents herein. This being so, Havaladar lost his title and could not execute the sale-deed on 22.6.1976 in favour of the petitioners herein. This is crux of the

impugned orders.

3. Heard Sri Arun Kumar, learned counsel for the petitioners, Sri Faujdar Rai, learned counsel for the contesting respondents and perused the record.

4. The learned counsel for the petitioners submitted that the plea that mortgage is valid or not or it would amount to "sale" within the meaning of Sections 154 and 164 of the U.P.Z.A. & L.R. Act was not open to be gone into the proceedings u/s 12 of the Act. Only such limited questions which fall within the parameters of Section 12 of the Act can be gone into. The question with regard to the validity of the mortgage deed or it would amount to "sale" was beyond the purview of Section 12 of the U.P. Consolidation of Holdings Act. Alternatively, the mortgage was valid mortgage as it was not mortgage with possession. A mortgage without possession by a Bhumidhar is permissible under the provisions of the U.P.Z.A. & L.R. Act. Secondly, in view of the compromise between the parties wherein the contesting respondents have admitted that they would be asami of the land in question, they cannot acquire any better title, The proceedings between Havaladar and contesting respondents u/s 9A(2) of the Act became final, conclusive and binding. The Chaks were carved out and the necessary entries regarding Havaladar as Bhumidhar were made in the revenue record. In view of Section 30 of U.P. Consolidation of Holdings Act, Havaladar became Bhumidhar of the plots in question free from all encumbrances and thus, validly executed the sale-deed in favour of the petitioners. Finally, it was also argued that in any case, the authorities below were not justified in rejecting the mutation application in its entirety for the reason that the mortgage was admittedly in respect of three plots total area 0.61 acre, while the petitioners have purchased eleven plots total area 1.34 acre. Meaning thereby, in any case, petitioners' names should have been mutated over the area other than the mortgaged area, at least.

5. In reply, Sri Faujdar Rai, learned counsel for the contesting respondent Nos. 4 and 5 (Vishwanath son of Janki and Chhedi son of Raghunath--mortgagee) submitted that the mortgage in question was transfer of land with possession, which is not permissible under the U.P.Z.A. & L.R. Act. In view of Section 164 of U.P.Z.A. & L.R. Act such transaction would amount to "sale" and therefore, the contesting respondents have become Bhumidhar of land in question. Havaladar lost his right, title and interest and therefore, he could not execute the sale-deed in favour of the petitioners.

6. Considered the respective submissions of the learned counsel for the parties and perused the record. On the pleadings and arguments of the learned counsel for the parties, the following points fall for consideration in the present writ petition:

(a) Whether the question that mortgage deed in dispute amounts to "sale" within the meaning of Section 155 read with Section 164 of UPZA & LR Act could be agitated and gone into, u/s 12 of the U.P. Consolidation of Holdings Act, particularly in view of the earlier adjudication between the parties u/s 9A(2) of

the Act?

(b) Whether the authorities below were justified in rejecting the mutation application which was filed on the basis of the sale-deed wherein 1.34 acre of land was purchased and area of the mortgaged land was 0.61 acre?

POINT NO. 1

7. The first question which falls for determination is with regard to the ambit and scope of inquiry u/s 12 of the Consolidation of Holdings Act. The said section for the sake of convenience is reproduced below:

12. Decision of matters relating to changes and transactions affecting rights or interests recorded in revised records.--(1) All matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under sub-section (1) of Section 10 for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress, may be raised before the Assistant Consolidation Officer as and when they arise, but not later than the date of notification u/s 52, or under sub-section (1) of Section 6.

(2) The provisions of Sections 7 to 11 shall mutatis mutandis, apply to the hearing and decision of any matter raised under sub-section (1) as if it were a matter raised under the aforesaid sections.

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8. A close reading of the aforesaid section would show that it talks about the decision of the matters relating to changes and transaction affecting the rights or interest recorded in the revised record. Thereon only a restricted jurisdiction has been given to raise limited dispute "for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress". These are the keys words. To put it differently only such matters for which a cause of action has arisen after the close of proceedings under Sections 7 to 9 can be agitated u/s 12. In other words, a cause of action which had arisen at the stage of Sections 7 to 9 could not be subject matter of adjudication u/s 12 of the Act. Section 12 of the Act was subjected to legislative changes and the Apex Court had an occasion to consider the Section 12 as it originally stood and the effect of the legislative changes therein in the case of Malkhan Singh Vs. Sohan Singh and Others, . It held that under the Consolidation Act as prevailing earlier there was no provision for the adjudication of rights and title after the statement of proposals had become final. But that is now not so after 1963 amendment in Section 12 of the Act.

9. The other relevant provision is Section 11A, which is reproduced below:

11-A. Baron objection.--No question in respect of--

(i) claims to land,

(ii) partition of joint holdings, and

(iii) valuation of plots, trees, wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual register u/s 10,

relating to the consolidation area, 5[which has been raised u/s 9 or which might or ought to have been raised under that section], but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings.

10. A brief survey of the U.P.C.H. Act would show that a person who disputes the title of a recorded tenure holder in the basic year is required to file an objection u/s 9A of the Act. The said objection shall be heard and disposed of after full fledged trial by the Consolidation Officer, then in appeal u/s 11 by Settlement Officer of Consolidation and finally in revision u/s 48 by Deputy Director of Consolidation. Section 11A is analogous to the provisions of Section 11 of Code of Civil Procedure. It bars any question in respect of claim to land, partition of joint holding and valuation of trees etc. relating to the consolidation area which has been raised u/s 9 or which might or ought to have been raised under that section, but has not been so raised, shall not be raised or heard at any subsequent stage of the consolidation proceedings. The objection which has been raised or might or ought to have been raised but not raised u/s 9A cannot be raised at any subsequent stage of consolidation proceedings. It contains the principle of res judicata and constructive res judicata. The idea behind Section 11A is that all disputes between different claimants in respect of whatsoever right or title may be, be raised and settled and finally adjudicated upon u/s 9A of the Act.

11. A conjoint reading of Sections 9A, 11A and 12 would show that a plea which was available at the stage of Section 9, could not be agitated in the proceedings u/s 12 of the Act. Section 12, on account of its limited and restrictive application, is not available to the mortgagee respondents herein.

12. Coming to the admitted facts of the case, an objection u/s 9A(2) was preferred and got adjudicated upon in terms of the compromise by the Consolidation Officer by his order dated 23rd of October, 1971. Paras 2 and 3 of the said compromise are reproduced below:

13. The Consolidation Officer by the order dated 23rd of October, 1971 accepted the aforesaid compromise and ordered accordingly. The plea that the contesting respondents are Bhumidhar or they have perfected their title being in adverse possession was neither set up nor proved nor accepted in the proceedings u/s 9A of the Act. Similarly, the plea that the said mortgage is void or it will amount to "sale" within the meaning of Section 164 of the U.P.Z.A. & L.R. Act, was absent and was not raised at that stage and even if so raised in the objection shall be deemed to be given up or negatived in view of order dated 23rd October, 1971. It was neither argued nor pleaded that the plea of Section 164 of the UPZA & LR Act was not available or cause of action for the said plea arose after the close of

proceedings u/s 9A of the Act. This being so, the said plea is no longer open to be pressed in service at the stage of Section 12 of the Act. The cause of action on the basis of the mortgage deed had arisen as soon as the registered mortgage deed was executed and at any rate when the objections u/s 9A(2) were entertained by the Consolidation Authority and its adjudication by the Consolidation Officer i.e. on or before 23rd of October, 1971. The scheme of U.P.C.H. Act clearly lays down the two stages at which an objection can be raised. On the commencement of consolidation, an aggrieved person whose name is not recorded in the basic year or if he has any other grievance with regard to title may file objection u/s 9A (2) of the Act. This is the first stage. The second stage is as contemplated by Section 12 when revised records have been prepared, and a person having some grievance to revised record may raise a dispute relating to changes and transfers recorded in revised record.

14. Therefore, the argument of the learned counsel for the petitioners merit acceptance. Pleas by the contesting respondents that mortgage amounts "sale" on this fact and situation, could not be entertained u/s 12 of the Act. The authorities below went wrong in non suiting the petitioners in view of Section 164 of the UPZA & LR Act or wrongly going into the question with regard to the effect of the mortgage deed if any. The said plea was no longer open for adjudication in view of clear bar u/s 11A of the Act. The authorities below could not examine the legality and validity of mortgage deed and pleas related to it, as they were already set at rest by the Consolidation Officer in his order dated 23.10.1971. Section 11A bars such plea.

15. The other aspect of the case is that a reading of mortgage deed does not show that through the said document, the possession was transferred. A copy of the mortgage deed has been filed alongwith supplementary rejoinder-affidavit. It states only this much that the mortgagor has taken a loan of Rs. 800/- and undertook to repay the same alongwith interest at the agreed rate on or before Jyeshtha Sudi (Purnmasi) (Full Moon Day) of agriculture year 1365 Fasli. This is a registered deed and there is no indication that the mortgagor ever agreed to transfer the possession of the mortgaged property. In the compromise also, the parties agreed upon that the mortgagee would be in occupation as asami. The case of the petitioners is that Havaladar permitted them to plough the field on Adhiya basis i.e. as licensee (crop sharing basis) but it was an independent contract and has nothing to do with the mortgage. It is equally settled law that once a mortgage is always a mortgage. Under the compromise also right to recover the mortgage amount and the interest was given to the mortgagee through the Court in case of default in payment. Even if the mortgagees remained in possession, their possession would be that of a licensee and they would not acquire any higher right. At this stage, the attention of the Court was drawn to Section 30 of the Consolidation of Holdings Act, clause (e) in particular. The said section provides consequence which will ensue on exchange of possession. It reads that w.e.f. the date on which a tenure holder enters, or his deemed to have entered into possession of the Chak allotted to him, in

accordance with the provisions of the Act the consequences as set out therein shall ensue. Clause (e) reads as follows:

(e) the encumbrances, if any, upon the original holding of the tenure-holder entering, or deemed to have entered, into possession, whether by way of lease, mortgage or otherwise, shall, in respect of that holdings, cease, and be created on the holdings, or on such part thereof, as may be specified in the final Consolidation Scheme.

16. A bare reading of the aforesaid section would show that the plots on allotment would be free from any encumbrances. The new tenure holder will have the same right, title or interest and liabilities in the plots of new Chaks as he had in his original holding subject to such encumbrance, as may be specified in the final consolidation scheme.

17. It is not the case of the contesting respondents that any such encumbrance was specified in the final consolidation scheme.

18. Havaladar before executing the sale-deeds in favour of the petitioners applied for and was granted permission to sell by the Settlement Officer Consolidation by the order dated 11th of June, 1976 and the sale-deed was executed on 22.6.1976. Havaladar was recorded as Bhumidhar in the revenue record over the new plots allotted free from any encumbrance to him as a result of consolidation operation in the village. New plots were sold to the petitioners. There is no iota of evidence, at least none was referred during the course of argument, nor any evidence, if any, has been enclosed alongwith, the counter-affidavit or the connected writ petition to show that the names of the contesting respondents were recorded in any manner in the revenue record. This being so, Havaladar being Bhumidhar over the plots in question after having obtained the permission from the Settlement Officer Consolidation validly executed the sale-deeds in favour of the petitioners.

19. The authorities below swayed away by the consideration that a suit was filed by Havaladar against the contesting respondent Nos. 4 and 5 u/s 202 of the UPZA & LR Act which was dismissed as withdrawn subject to the payment of cost. It was averred before them that an appeal is pending but nothing was placed before this Court in this regard. They have proceeded on the footing that there is no evidence regarding the payment of cost. I fail to understand the relevancy, if any, of such plea in view of the final revenue record prepared as a result of consolidation.

20. Contention of the learned counsel for the petitioners is that in pursuance of the compromise mortgage money was deposited by Havaladar in Court for payment to the mortgagees which was withdrawn by them. The said plea was vehemently opposed by Sri Faujdar Rai, the learned counsel for the contesting respondents. There being no such pleading nor any such finding, the argument has been noticed to keep the record straight. But the fact remains that in the final consolidation scheme, continuance of mortgage was not specified, a fact

which goes a long way to indicate that the new plots were free from any charge.

21. I see no relevancy of the *Amresh Chandra Pandey v. Deputy Director of Consolidation and others*, 2007 (102) RD 440, relied upon by the learned counsel for the respondents.

22. The upshot of the above discussion is that the plea that mortgage amounts to "sale" within the meaning of Section 164 of the UPZA & LR Act could not be canvassed in the proceedings u/s 12 of the Act in view of specific bar as contained in Section 11A of the Act. Secondly, Havaladar's name was recorded over the plots allotted to him as Bhumidhar and he sold the disputed plots with prior permission of the Settlement Officer Consolidation dated 11th of June, 1976 to the petitioners and the said sale-deed is valid. The authorities below were not justified in rejecting the mutation application to record the names of the petitioners over the aforesaid plots. Thirdly, new plots were allotted to Havaladar and they were free from any encumbrances including the mortgage in view of Section 30(e) of the Act. The contesting respondents at the most were, entitled to receive the mortgage amount if not withdrawn by them from the Court. They could under the compromise file a suit for recovery of the mortgage amount due if any and not more than that.

POINT NO. 2

23. This point was not urged in the manner it has been raised here. The available materials and admitted facts on record do not present any difficulty in addressing the issue. The petitioners contend that they have purchased eleven plots area 1.34 acres as noticed in the order of Settlement Officer Consolidation on page 35 of the Paper Book. A perusal of the mortgage deed would show that the mortgage was in respect of lesser area of the land measuring 0.61 acres.

Firstly, there is nothing on record to show that the plots which were subject matter of mortgage were sold to the petitioners. The record shows that Havaladar had number of other plots in his Khata. Out of them only three plots measuring 0.61 acre were mortgaged.

Secondly, as much more area measuring 1.34 acre was sold and therefore, obviously the contesting respondents could claim 0.61 acre area at the most and not more than that. The authorities below were not justified in rejecting the mutation application filed by the petitioners in its entirety.

24. The claim of the contesting respondents, who have filed writ petition No. 11962 of 1986, is that they have perfected their title by way of adverse possession and thus, they have become Bhumidhar, has not been accepted by any of three authorities below and rightly so in view of bar u/s 11A and Section 12 of the Act. The learned counsel for the contesting respondents who is appearing on behalf of petitioner in the connected writ petition could not place any material to challenge the said finding. The only argument put forward by him was with regard to the Section 164 of the UPZA & LR Act which has already been

discussed and rejected. Any other point was not pressed. There is no merit in writ petition No. 11962 of 1986.

25. In the result, the writ petition No. 11924 of 1986 succeeds and is allowed. By moulding the reliefs, all the three orders dated 26.5.1982 passed by the Consolidation Officer, 30.7.1983 by the Settlement Officer Consolidation and 29.5.1986 by the Deputy Director of Consolidation are hereby quashed. The mutation application filed by the petitioners of writ petition No. 11924 of 1986 stands allowed; and the objection and application filed by the contesting respondents namely Vishwanath and others are hereby dismissed. The writ petition No. 11924 of 1986 is allowed with cost of Rs. 5,000/- payable by heirs of the contesting respondent Nos. 4 and 5 to the petitioners and the writ petition No. 11962 of 1986 is hereby dismissed.

5. Subs. for the following words by U.P. Act No. 4 of 1969 --"which might or ought to have been raised u/s 9"