
(2017) 02 AHC CK 0131
In the Allahabad High Court
Case No : Consolidation No. 624 of 2002

Mahabeer

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 08-02-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 4, Section 5(2)
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 176

Citation : (2017) 3 ADJ 553

Hon'ble Judges : Rajan Roy, J.

Bench : Single Bench

Advocate : Rana M.P. Singh, Braj Nandan Yadav, Desh Mitra Anand, Om Prakash Yadav, Satendra Singh Rana, Advocates, for the Petitioner; C.S.C, D.M. Tripathi, M.P. Yadav, R.N. Gupta, R.P. Verma, Sarvesh Kumar Shukla, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Rajan Roy, J.—; Heard learned counsel for the parties.

This is a writ petition under Article 226 of the Constitution of India assailing the order passed by the Consolidation authorities Under Section 9, 11-A and 48 of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act of 1953") as regards the title of the petitioner viz-a-viz the private respondents which have obviously been passed in favour of the respondents.

The facts of the case in brief are that prior to start of consolidation operation a suit for partition/division of shares in respect of agricultural land in dispute was filed by the petitioners herein before the competent Court under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act 1950. It is alleged by the respondents and has been held by the courts below that a compromise was filed between the parties on 01.03.1986 and on that very day a preliminary decree, based on such compromise, was passed as the matter was already fixed before

the court on the said date. Before further proceedings resulting in a final decree could take place, a notification under Section 4 of the Act, 1953 was issued and the proceedings before the revenue court under Section 176 of the Act abated. At this stage, it may be mentioned that even though the notification under section 4 is said to have been published on 26.07.1986 but order abating the proceedings was passed earlier on 11.06.1986 for which there is no explanation as to how this happened but this does not have a material bearing on the matter as it does not make much of a difference whether proceedings abated on 11.07.1986 or 26.07.1986 and this issue does not appear to have been raised before the Court below.

2. After abatement of proceedings before the revenue court, objections under Section 9-A(2) were filed by the petitioner herein before the Consolidation Officer in the consolidation proceedings for determination of his right viz-a-viz the land in question. In the said proceedings the respondents herein brought on record certified copy of the preliminary decree dated 01.03.1986 passed by the revenue court based on the compromise entered into between the parties in respect of land in question.

3. The Consolidation Officer accordingly rejected the objections of the petitioner in view of the said order.

Being aggrieved the petitioner filed an appeal under Section 11(1) before the Settlement Officer of consolidation which was allowed on the ground that as per the admitted pedigree the petitioner herein i.e. the appellants before the appellate court, had ? share whereas in the compromise they were given only ? share and also that even though the preliminary decree had been passed but the proceedings never culminated in a final decree.

The appellate court opined that once a suit has abated then all rights in respect of agricultural land are to be determined afresh in the consolidation proceeding right from very beginning, therefore, according to him the preliminary decree had no legal effect on these proceedings.

4. Being aggrieved the private respondents filed a revision before the Deputy Director of Consolidation under Section 48 of the Act, 1953 who vide his judgment dated 25.06.2002 upheld the order of the Settlement Officer of Consolidation on the ground that a 3 preliminary decree is a final determination of the rights of the parties in respect of the property sought to be partitioned. It is also appealable but no such appeal was filed by the petitioner herein i.e. respondents before the revisional court. On the allegation of fraud the court perused the records and found that there was no pleading containing requisite denial of thumb impression nor the presence of the concerned in the Court etc. nor evidence to prove any such fraud. The revisional court relied upon the decision of the Supreme Court reported in AIR 1995 SC 2493 (Mool Chand and others v. Deputy Director, Consolidation and others) to hold that a preliminary decree passed in a suit for partition under Section 176 binds the parties even if

those proceedings do not result in a final decree, if the said preliminary decree is not challenged in appeal, therefore, the preliminary decree dated 01.03.1986 passed on the basis of compromise which had been duly proved was binding upon the petitioners and also operated as estoppel and principle of acquiescence also applied. The revisional court also found that after seven years of passing of the preliminary decree, an application for recall of the order was filed on 10.05.1993 which was dismissed on 13.03.1994 as being time barred.

5. The contention of learned counsel for petitioner is that no such compromise was entered into with the private respondents and he had no knowledge whatsoever about the said preliminary decree. Once the suit abated, the preliminary decree could not have been appealed as any proceedings could only take place before the Consolidation authorities. Plea of fraud was taken before the consolidation authorities which was found to be correct by the Settlement Officer consolidation and rightly so. There was no reason for the petitioner to enter into a compromise relinquishing ? share and accepting ? share of the holding but the revisional court without appreciating these aspects of the matter has erred on facts and law in upturning the judgment of the Settlement Officer of Consolidation causing prejudice to the petitioner.

6. Sri V.K. Singh learned counsel appearing for private respondents has relied upon the decision of the Supreme Court in the case of Mool Chand (*supra*) to contend that preliminary decree prepared in regular suit under Section 176 for partition/division of share, which had not been appealed, was binding upon the parties and had to be given effect in consolidation proceedings between the parties, therefore, the revisional Court had adopted a correct approach in deciding the matter. He contended that there was no pleading whatsoever of fraud nor was it ever proved. On the question of variance of shares contrary to what the petitioner was legally entitled, the pedigree being admitted to the parties, he placed reliance upon the judgment of this court report in [2004(97) RD 594 (Smt. Manraji v. Deputy Director of Consolidation and others)], to contend that there are two presumptions in every compromise firstly, the parties entering into the compromise have title in the land in dispute, secondly they are ready to accept less than what is legally due, this is what compromise means. In this view of the matter there is no error in the revisional order.

7. On a bare perusal of the order of Revisional court it is found that it has considered relevant aspects of the matter and issues involved, threadbare. On the question of compromise dated 01.03.1986 and its veracity it has held in detail that in the objections filed before the Consolidation Officer the petitioner herein never denied the thumb impressions on the compromise filed nor their presence on the relevant date. On a perusal of the record it found the thumb impression of the petitioner on the compromise as also that of other parties, as also the fact that based on such compromise the Sub Divisional Magistrate Sandila had passed a decree. It also found that thumb impression of the petitioner had been verified by his Advocate just as those of others parties had

been verified by their counsel and at the back of the compromise the Court of Sub Divisional Magistrate concerned had made his endorsement and signature, therefore, it found the contention of the petitioner herein that no such compromise 5 was presented before the Presiding Officer, to be factually incorrect. It also found that no appeal was filed by the petitioner against the preliminary decree. As per the compromise the petitioner got 6/36 share in the land in question while Putti Lal got 10/36 shares and others collectively got 10/36 share. The revisional court also noticed that the petitioner themselves had filed the suit for partition on 29.09.1984. Based thereon, it opined, even if assuming for a moment that they were not present in the court he would have certainly enquired as to the proceedings on subsequent dates and would have filed an appeal on coming to know of a compromise, if it was fraudulent, but, this was not done by him.

8. The revisional court has also found that petitioner Mahabir along with Puttilal respondent filed an application on 20.03.1986 for summoning the Lekhpal for carrying out the preliminary decree by preparation of Kurras as prayed therein, a certified copy of which had been filed before the revisional Court. The said application also bore the signatures of the original petitioner Mahabir. The said application contained the recital that a preliminary decree had been passed by the Sub Divisional Magistrate concerned on 1.3.1986 based on the compromise between the parties.

9. In view of the above, it opined that as the preliminary decree had not been appealed, therefore, it became final and has attained finality. Thereafter the revisional court has discussed the dictum of the Supreme Court in the case of Mool Chand (Supra) in the light of the facts of the case and has accordingly held that the petitioner herein, the respondents before the revisional court, could not go back on the said compromise followed by the preliminary decree in terms thereof which was binding on them. It accordingly considered the principle of estoppel and acquiescence against them and upturned the order of the Settlement Officer Consolidation.

10. As already noticed earlier the plea of fraud had to be firstly pleaded thereafter proved. In the present case, even if, this court adopts a lenient view of the matter as regards the pleadings, considering that these are consolidation proceedings, there is nothing before this Court to upturn the findings of the revisional court on the question of fraud, which is a question of fact, as, there is nothing to show that at any stage the thumb impression etc. were denied by the petitioners herein as also that the subsequent application was specifically denied. Neither the objections filed before the Consolidation Officer are on record nor the memo of appeal filed by them. This apart, there is nothing to show that any evidence was led by them to prove that the compromise was fraudulent. A categorical query was put to the counsel for the petitioner as to whether he could show that compromise was void on any other ground, he was unable to do so.

11. As far as the effect of the preliminary decree and its legal significance is

concerned, this issue is no longer res-integra, as, the same has been considered in the case of Mool Chand (supra) which was also a case arising out of the proceedings under the U.P. Consolidation of Holdings Act, 1953 wherein the Supreme Court opined that if a preliminary decree is challenged in appeal and during its pendency Section 4 notification is published then the entire proceedings would stand abated, however, it would not be so if the preliminary decree was not challenged and what was challenged was only the final decree. In the latter case the preliminary decree would still hold valid and will have to be given effect during consolidation proceedings. It also held that a preliminary decree determines the rights and shares of the parties and therefore, it is a final decision which can also be appealed under the provisions of the Code of Civil Procedure.

12. The aforesaid proposition is obviously based on the reasoning that an appeal is a continuation of a suit, therefore, if it is filed it means that the proceedings are pending and obviously consequent to a notification being published under Section 4 of the Act, 1953, the entire proceedings from initiation would stand abated in terms of Section 5 thereof.

13. The Supreme Court in Mool Chand's case (supra) disapproved a contrary opinion expressed by a Division Bench of this Court in the case of Ram Garib v. Bhagwati Din reported in (1976) 2 RD 47 while affirming the opinion expressed by it in the case of Ruderpal Singh v. Rampal Singh reported in AIR 1972 All 67; Satish Kumar v. Lalta Tiwari reported in 1974 Revenue Decision 397 and Mohan Lal v. Deputy Director of Consolidation reported in 1981 All LJ 350. The Supreme Court in Mool Chand's case (supra) considered its earlier decisions in Ram Adhar Singh v. Ramroop Singh reported in (1968) 2 SCR 1995, Chattar Singh v. Thakur Prasad Singh reported in (1975) 4 SCC 457, Satyanarayan Prasad Sah v. State of Bihar reported in AIR 1980 SC 2051, Munshi Muqbool Raza v. Hasan Raza reported in (1977) 3 SCC 578 and Miss. Bibi Rahmani Khatoon v. Harkoo Gope reported in (1981) 3 SCC 173, wherein, the view expressed that as a consequence of the notification issued under Section 4 of the Act, 1953 proceedings pending in the Civil Court or in Appeal stands abated, and thereafter it considered the application of the said law in the case of preliminary decrees and after noticing the provisions of Section 97 C.P.C. it held as under :-

"26. Thus, if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the party aggrieved thereby will not be permitted to challenge its correctness in an appeal against final decree.

27. The Privy Council in Ahmed Musaji Saleji and Ors. v. Hashim Ebrahim Saleji and Ors. , held that failure to appeal against a preliminary decree would operate as a bar to raising any objection to it in an appeal filed against final decree. Thus Court in Venkata Reddy v. Pothi Reddy AIR 1963 SC 992 has held that the impact of Section 97 is that the preliminary decree, so far as the matters covered by it are concerned, is regarded as embodying the final decision of the Court passing

that decree. It observed as under :

A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as embodying the final decision of the Court passing that decree....

28. This decision was relied upon in *Gyarsi Bai and Ors. v. Dhansukh Lal and Ors.* : (1965)2 SCR 154 in which it was observed as under :

It is true that a preliminary decree is final in respect of the matters to be decided before it is made. It is indisputable that in a mortgage suit there will be two decrees, namely preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights.

29. In *Shankar Balwant Lokhande (d) by Lrs. v. Chandrakant Shankar Lokhande and Anr.* (1992)IILLJ 18SC while considering the provisions of Order 20, Rule 18 , CPC as also the period prescribed for the execution of decree, under the Limitation Act, it was observed as under:

Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property, The Court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcener or co-sharer, the court should not give a decree only for the plaintiff's share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. " The words "Declaring the rights of the several parties interested in the property, in Sub-rule (2) would indicate that shares of the parties other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for parties is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subjectmatter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.

(Emphasis supplied)

30. There is, thus, a distinction between a case in which an appeal is filed against a preliminary decree and a case in which a preliminary decree is not appealed against and its correctness is not assailed. If, therefore, a Notification under Section 4 of the Act is issued in a case where an appeal against the preliminary decree, was not pending the latter, viz, the preliminary decree, will remain unaffected and will not abate but if the preliminary decree had been assailed in appeal, and the appeal is pending on the date of Notification, the latter namely, the Notification, will have the effect of abating the entire suit/

proceedings including the preliminary decree passed therein. On the contrary, if an appeal is filed against the final decree without there being any appeal against the preliminary decree and the preliminary decree becomes "unassailable" on account of Section 97, C.P.C. the Notification under Section 4 would abate the proceedings relating to the final decree without in any way touching, impairing or affecting the preliminary decree. The reason, to repeat, is obvious. Once, a preliminary decree is passed, the proceedings so far as declaration of rights or interests in the land are concerned, comes to an end. Those rights are to be worked out by the final decree. In a case, therefore, where a preliminary decree has already been passed and only the proceedings relating to the preparation of final decree are pending in any Court, either at the original stage or at the appellate or revisional stage, it cannot be said that proceedings relating to "declaration or determination of rights in the land" within the meaning of Section 5(2) of the Act are pending.

31. The above view was also expressed by the Allahabad High Court first in *Ruderal Singh v. Rampal Singh*, AIR 1972 All 67, and then in *Satish Kumar v. Lalita Tiwari*, 1974 Revenue Decision 397. These two decisions were followed in another case, namely, in *Mohan Lal v. Deputy Director of Consolidation*, 1981 All L.J.350. However, a Division Bench of the Allahabad High Court in *Ram Garib v. Bhagwati Din*, (1976) 2 RD 47 decided the matter as follows:-

"As the notification under Section 4 of the Act had been issued in respect of the land in dispute and the suit related to the determination of the rights of the parties and the matter had gone before the Board of Revenue (sic) validity and in accordance with law and the Board of Revenue was considering the revision in exercise of its jurisdiction, it did not have jurisdiction to decide the question about the abatement of the suit under Section 5(2) of the Act. If the Board had jurisdiction to decide the question whether the suit had abated or not, its decision one way or the other can only suffer from an error of law. It cannot be held to be passed in exercise of jurisdiction not vested in it by law. Hence, so long as the order of the Board of Revenue passed under Section 5(2) of the U.P. Consolidation of holdings Act stands, the preliminary decree passed in the suit will be deemed to be wiped off the record and the suit from the stage of the plaint will be deemed abated."

32. We reiterate that *Ruderal Singh's* case (supra) and that of *Satish Kumar* as also *Mohan Lal's* case (supra) were correctly decided but the Division Bench decision in *Ram Garib's* case (supra) does not lay down the correct law which is hereby reversed."

14. Reference may be made to the judgment of the Supreme Court rendered in the case of *Venkata Reddy and others v. Pethi Reddy* reported in AIR 1963 SC 992, wherein the legal significance of a preliminary decree was considered and it was held that it is a final decision as regards the rights and shares in respect of the property in question that is why an appeal is prescribed in Section 97 of the Code of Civil Procedure and up turned the decision of the High Court which was

to the contrary.

15. In the present case after the passing of the preliminary decree the same was not challenged even though it had been passed on 01.03.1986 and the notification under Section 4 of the Act, 1953 had been published only on 26.07.1986, therefore, the said preliminary decree was liable to be given effect during consolidation proceedings between the parties under Section 9 of the Act, 1953 in view of the pronouncement in Mool Chand's Case(supra).

16. The next question as regards the variation in shares in the compromise vis-a-vis what the petitioner would have been entitled legally, based on the admitted pedigree, this is only one of the factors which would be taken into consideration as regards the validity and veracity of a compromise, but, this by itself can not be a ground for holding a compromise to be void at least in the present case, wherein, the compromise has otherwise not been proved to be so. In the absence of any proof that the compromise was fraudulent or otherwise void, merely because there has been some variation in the share, does not persuade the Court to take any other view of the matter. This is so for the reason every compromise presupposes firstly the title of the parties entering into it, secondly, some give and take between them meaning thereby in such a compromise there is always a possibility of some of the parties getting less than what they were entitled. The Court finds substance in the contention of Sri Singh, learned Senior Counsel appearing for the contesting respondent that often this is done to avoid long drawn legal proceedings and to get all that can be got easily. Moreover, various considerations have there play in such a compromise and unless it is proved to be fraudulent or otherwise legally void, variation in shares by itself would not be a ground for ignoring it, specially, in the facts of a case such as the present one.

In this context reference may be made to the decision of this Court in Manragi (supra) wherein the decision of the Supreme Court in the case of Ram Charan Das v. Girija Nandani Devi reported in AIR 1966 SC 323, was noticed and it was held that the transaction of a family settlement entered into by the parties who are members of a family is to put to an end the dispute amongst themselves and in the case of a family settlement or compromise it is always open for one member of the family to relinquish his/her legal share in part or in full in favour of the other member i.e. one may settle for a lesser share than what he/she may otherwise be legally entitled to. Reference was also made to the decision of the Supreme Court in Sahu Madho Das and others v. Mukhand Ram and others reported in AIR 1955 SC 481 wherein it was observed as under:-

"It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others, as they had previously asserted it, to the portions allotted to them respectively."

Further more, as observed by this Court in the case of Smt. Manraji (supra) the parties to a compromise are bound by estopppe. The said principle estops the parties from resiling from the compromise or to revoke it. Reference was made in this regard to the decision of the Supreme Court in the case of Dhiyan Singh and another v. Jugal Kishore and another reported in AIR 1952 SC 145.

Reference may also be made in this regard to the judgment of the Supreme Court in the case of Subbu Chetty's Family Chairties v. Ganghaka Mudaliap reported in AIR 1961 SC 797; Kale v. Deputy Director of Consolidation reported in 1976 RD 355 SC, wherein the principle of estoppel in the context of compromise and family settlement was considered and enunciated.

However, this court hastens to add that the relevance of this issue will depend upon the facts and circumstances of each case and it would not be appropriate to lay down a straight jacket formula in this regard.

17. In view of the above, the preliminary decree based on compromise having been passed on 01.03.1986 in the suit between the parties under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, the same having remained unassailed by the petitioner herein, it had to be given effect in the consolidation proceedings between the parties and the S.O.C. erred in taking a different view of the matter, whereas, the C.O. and the Deputy Director of Consolidation rightly understood the legal position in this regard and correctly applied the same to the facts of the present case, therefore, the said orders which are impugned herein do not warrant any interference in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India.

The writ petition, thus fails and is dismissed.

The interim order stands discharged.