
(2016) 08 AHC CK 0169
In the Allahabad High Court
Case No : Writ-B No. 64015 of 2013

Ram Ashrey Prasad Singh	Vs	APPELLANT
Dy. Director of Consolidation		RESPONDENT

Date of Decision : 05-08-2016

Acts Referred:

Transfer of Property Act, 1882 — Section 58(c)

Citation : (2017) 171 AIC 955 : (2017) 3 AILLJ 221 : (2017) 120 ALR 372 :
(2016) 132 RD 736

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

Bench : Single Bench

Advocate : Sharad Chandra Upadhyay, Advocate, for the Petitioner; C.S.C, Rang Nath Pandey and A.P. Tiwari, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J.— Heard Sri Sharad Chandra Upadhyay, for the petitioner and Sri A.P. Tiwari and Sri Rang Nath Pandey, for the contesting respondents.

2. This writ petition has been filed against the orders of Settlement Officer Consolidation dated 10.03.2005 and Deputy Director of Consolidation dated 14.11.2013, passed in title proceeding, under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

3. Devta Prasad Mishra (respondent-3) filed a time barred objection on 07.02.1995 (which was later on registered as Case No. 305 of 2002-03) under Section 9-A of the Act, for recording his name over plot 221 (area 0.57 acre), situated at village Dafi, pargana Dehat Amanat, district Varanasi. He took plea that Hari Nath Singh (father of the petitioner) sold the disputed land to his father Guru Prasad Mishra, through registered sale deed dated 13.08.1959 and handed over possession over it to him. Since then, he had been in possession of the land in dispute. His father died about one and half month ago. On 07.02.1995, when

he went to Court and made inquiry from Lekhpal, then he came to know that name of his father was not mutated in revenue records over disputed land. He searched original sale deed dated 13.08.1959 at his house but it was not found. He had moved an application for issue of certified copy of the sale deed.

4. The petitioner contested the objection and filed a counter objection. The petitioner stated that Hari Nath Singh executed a mortgage by conditional sale, dated 13.08.1959, of the disputed land for Rs. 300/-. Mortgage money was returned on 05.11.1959, in terms of deed. Guru Prasad Mishra made endorsement of receiving back of mortgage money on back of the deed and also signed it. He returned original mortgage deed, to the father of the petitioner. Possession over land in dispute was never handed over to Guru Prasad Mishra. As mortgage has already been redeemed as such Guru Prasad Mishra never derived any right over it, during his life time, who survived up to 1994. After his death, objection has been filed by respondent-3 on false allegations. Other opposite parties namely Badri Narain Singh (respondent-4) and Ram Adhin Singh (now represented by respondents-5 to 9), who were recorded co-tenure holders of the land in dispute, also filed their counter objection, stating therein that the disputed land was joint holding of Hari Nath Singh, Badri Narain Singh and Ram Adhin Singh, in which Hari Nath Singh had ? share only. Possession over disputed land was never delivered to Guru Prasad Mishra. In any case, Hari Nath Singh had no right to sell their ? share in the land in dispute.

5. The case was tried, by Consolidation Officer, who by order dated 16.04.2003, held that document dated 13.08.1959 was not a sale deed but was a sale with condition to repurchase. In terms of the deeds, entire sale consideration was returned. As such, the name of respondent-3 cannot be recorded over disputed land on its basis. On these findings, he dismissed the objection of respondent-3. Respondent-3 filed an appeal (registered as Appeal No. 1706/514) from the aforesaid order. The appeal was heard by Settlement Officer Consolidation, who by his order dated 10.03.2005, held that Consolidation Officer, in his order, although referred the case law relied upon by the appellant but has not discussed them, although question of law was involved in the case. On these findings, he allowed the appeal and remanded the case to Consolidation Officer for fresh decision on merit.

6. The petitioner filed a revision (registered as Revision No. 148/157/208/236/305/1395), respondent-3 filed a revision (registered as Revision No. 143/158/209/237/306/1392) and Badri Narian Singh filed a revision (registered as Revision No. 150/159/210/238/307/1403) from the aforesaid order. All the revisions were consolidated and heard by Deputy Director of Consolidation, who by order dated 14.11.2013, held that under Section 54 of Transfer of Property Act, 1882, transfer of property for consideration through registered sale deed amounts to sale. The document was executed, like a sale deed, in which payment of sale consideration and delivery of possession was admitted. Effect of a registered sale deed can only be taken away by another

registered deed and not by oral agreement or unregistered deed. Fact relating to delivery of possession as mentioned in deed dated 13.08.1959 cannot be rebutted by oral evidence. Endorsement, relating to return of consideration and signature of Guru Prasad Mishra on it, is disputed. Signature of Guru Prasad on registered sale deed dated 30.12.1986, executed by him is not tallying with his signatures on the back of deed dated 13.08.1959. Due execution of this endorsement was not proved according to Section 68 of Evidence Act, 1872. Settlement Officer Consolidation would have decided the appeal finally on merit, in stead of remanding the matter. On these findings, he allowed revision and directed to record the name of respondent-3 over plot 221 (area 0.57 acre). The petitioner was directed to compensate respondent-4 to 9 of their ? share in this land, from his other holdings. Hence this writ petition has been filed.

7. The counsel for the petitioner submitted that deed dated 13.08.1959 is a mortgage by conditional sale as provided under Section 58 (c) of Transfer of Property Act, 1882 and not a sale deed. Order of respondent-1, in this respect, is illegal. Guru Prasad Mishra took whole consideration on 05.11.1959 and returned the original deed, which was produced by the petitioner from his possession. Although Guru Prasad Mishra survived up to 18.12.1994, but he never claimed any right over disputed land. Guru Prasad Mishra executed a registered sale deed dated 13.08.1959, in favour of father of the petitioner, of his other land, which was acted upon. This sale deed was also on record. Deputy Director of Consolidation ought to have compared signature of Guru Prasad Mishra on the back side of deed dated 13.08.1959 from his signature on registered sale deed dated 13.08.1959 and not from his signatures on sale deed dated 30.12.1986, as the signature of semi-literate person may vary after long passage of time. There is serious dispute relating to delivery of possession, inasmuch as there had been three joint tenure holders and Hari Nath Singh was not competent to deliver possession over entire land. It was mortgage by conditional sale and mortgage was redeemed by taking back whole consideration on 05.11.1959 and returned of original document by Guru Prasad Mishra i.e. within three months. In revenue records, possession of the petitioner and his co-tenure holders was recorded through out. In these circumstances, Deputy Director of Consolidation ought to have recorded a categorical finding in respect of possession, after considering entire evidence on record. He has illegally based his findings on recital of the deed and ignored other documentary and oral evidence on record. Impugned orders are illegal and liable to be set aside. He relied upon judgments of Supreme Court in *Bhoju Mandal v. Debnath Bhagal*, AIR 1963 SC 1906, *Tamoli Raman Lal Motilal v. Ghanchi Chimanlal Keshavlal*, AIR 1992 SC 1236, *Vidyadhar v. Manik Rao*, 2000 (Suppl) RD 399 (SC), *Chennammal v. Munimalaiyan*, AIR 2005 SC 4397, *Ramlal v. Phagua*, AIR 2006 SC 623, *Tusli v. Chandrika Prasad*, (2006) 8 SCC 322, *Janak Dulari Devi v. Kapildeo Rai*, AIR 2011 SC 2521, *Raj Kishore v. Prem Singh*, AIR 2011 SC 382 and *Vanchalabai Raghunath Ithape v. Shankarrao Baburao*, AIR 2013 SC 2924 and this Court in *Umesh Chand v. Board of Revenue*, 2002 (2) AWC 932.

8. In reply to the aforesaid arguments, the counsel of respondent-3 submitted that Hai Nath Singh executed a sale deed dated 13.08.1959 of the disputed land. He took entire sale consideration and handed over possession of transferred property. Deed dated 13.08.1959 is a sale deed and not a mortgage deed. Original sale deed dated 13.08.1959 was floated in flood in the year 1978, from the house of respondent-3 and was received by the petitioner, therefore it was produced by him. Hari Nath Singh was posted as Amin, in Collectorate Varanasi as such he in collusion with Lakhpal got his name recorded in khasra, although disputed land was in shape of pit and was never cultivated, as recorded in CH Form-2-A. Guru Prasad Mishra was physically handicap. He used to make his signatures from his left hand. Signature of Guru Prasad Mishra on back of deed dated 13.08.1959 was fabricated by the petitioner. Signature of Guru Prasad on registered sale deed dated 30.12.1986 and other sale deeds, executed by him is not tallying with his signatures on back of deed dated 13.08.1959. Effect of a registered sale deed can only be taken away by another registered deed and not by oral agreement or unregistered deed. Fact relating to delivery of possession as mentioned in deed dated 13.08.1959 cannot be rebutted by oral evidence. Even if the deed dated 13.08.1959 is treated as mortgage by conditional sale then also in view of Section 164 of U.P. Act No. 1 of 1951, it amounts to sale as held by Supreme Court in Smt. Rama Devi v. Dilip Singh, AIR 2008 SC 2015. Writ Petition has no merit and is liable to be dismissed.

9. I have considered the arguments of the counsels for the parties and examined the record. First question arises as to whether deed dated 13.08.1959 is a sale deed or a mortgage by conditional sale. English translation of last paragraph of this deed are " whatever rights seller had in transferred property, all those rights have been obtained by buyer and if seller or his heirs returns entire sale consideration of Rs. 300/- to buyer, in the month of Jeth falling within ten years, the buyer will return transferred property to seller. If he refused to return, then he will be entitle to get it from court". From this clause, it is clear that intention of the parties was not to execute a complete sale. Mortgage by condition of sale is defined under Section 58 (c) of Transfer of Property Act, 1882, which is quoted below:-

Section 58 (c) Mortgage by conditional sale.-Where the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the

sale.

10. Supreme Court in *Tulsi v. Chandrika Prasad*, (2006) 8 SCC 322, held that in terms of Section 58(c) of the Transfer of Property Act, a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must contain a condition that on default of payment of mortgage money on a certain date, the sale shall become absolute or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller. A distinction exists between a mortgage by way of conditional sale and a sale with condition of repurchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby.

11. Supreme Court in *C. Cheriathan v. P. Narayanan Embranthiri*, (2009) 2 SCC 673, held that a document, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefor circumstances attending thereto would also be relevant. For the said purpose, it is essential that all parts of the deed should be read in their entirety. In *Tulsi v. Chandrika Prasad*, (2006) 8 SCC 322, held that Section 91 of the Evidence Act mainly forbids proving of the contents of a writing otherwise than by writing itself and merely lays down the "best evidence rule". It, however, does not prohibit the parties to adduce evidence in a case the deed is capable of being construed differently to show how they understood the same. In *Indira Kaur v. Sheo Lal Kapoor*, (1988) 2 SCC 488, held that Court upon taking into consideration the stipulations made in the deed to the effect that a period of 10 years was fixed for conveying the property and the vendee was prohibited from selling and parting with his right, title and interest for the said period and no order of mutation was passed in his favour, construed the same to be a transaction of mortgage.

12. In the present case, even there was no condition for repurchase. The deed provides that if seller or his heirs returns entire sale consideration of Rs. 300/- to buyer, in the month of Jeth falling within ten years, the buyer will return transferred property to seller. The deed dated 13.08.1959 cannot be said to be an absolute sale. It is not a sale with condition of repurchase. As such no fresh registered sale deed is required to be executed by the buyer. On return of sale consideration with ten years, the property would revert to the seller. Conduct of the parties is very relevant. Guru Prasad Mishra never made any effort to get his name mutated on the basis of this deed, although he survived up 18.12.1994. It is mortgage by conditional sale. Findings of Deputy Director of Consolidation in this respect is illegal.

13. According to the petitioner, entire sale consideration of Rs. 300/- was returned by Hari Nath Singh to Guru Prasad Mishra on 05.11.1959. Then Guru Prasad Mishra made endorsement of receiving money on back side of the deed and returned original deed to Hari Nath Singh, which was produced by the petitioner from his own custody. Respondent-3 stated that in flood of 1978, the deed was floated from his house and received by the petitioner. The petitioner is resident of village Sirgoberdhanpur while respondent-3 is resident of village Dafi. Flood of 1978 in river Ganga crossed all records. If a paper is floated in flood, it would be not possible that it would remain in good condition and be received by another man of other village in same condition. This lame excuse by respondent-3 for not producing original sale deed in court has been illegally believed by respondent-1, ignoring the fact that original deed was produced by the petitioner is good condition and his statement in this respect is more natural and probable. Similarly sale deed dated 13.08.1959 executed by Guru Prasad Mishra was on record. But Deputy Director of Consolidation has not assigned any reason for not tallying signature of Guru Prasad Mishra from his signatures on this sale deed.

14. Now the question arise as to whether he deed dated 13.08.1959 which is found as a mortgage by conditional sale can be treated as sale under Section 164 of U.P. Zamindari Abolition and Land Reforms Act, 1950. Section 164 provides that any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purposes of securing any payment of money advanced or to be advanced shall be deemed to be sale. For application of Section 164, transfer of possession of holding is necessary. There is serious dispute relating to transfer of possession. According to the petitioner and respondents-4 to 9, there had been three co-sharers of the land in dispute and land in dispute was joint on spot. Hari Nath Singh alone had no right to transfer possession of entire joint holding. Possession was never transferred on spot. According to respondent-3 disputed land was a pit and was never cultivated. Then the question arise that in what manner possession was taken by Guru Prasad Mishra on it on 13.08.1959, i.e. in rainy season and how he assert/ establish possession over it. Khasra entries, which are prima facie proof of possession are in favour of the petitioner. Deputy Director of Consolidation, based his findings, in respect of possession, only on recitals of the deed. As noted above, Supreme Court in *Tulsi v. Chandrika Prasad*, (2006) 8 SCC 322, held that Section 91 of the Evidence Act mainly forbids proving of the contents of a writing otherwise than by writing itself and merely lays down the "best evidence rule". It, however, does not prohibit the parties to adduce evidence in a case the deed is capable of being construed differently to show how they understood the same. In such circumstances, Deputy Director of Consolidation ought to have recorded a categorical findings, in respect of possession of the parties over the land in dispute, after considering entire evidence on record but he had illegally ignored other material evidence.

15. It is well settled that no one can transfer a better title than what he had. Hari Nath Singh had ? share in disputed land. On the basis of deed executed by Hari Nath Singh, the petitioner cannot be held as owner of entire holdings, in the absence of any evidence in respect of private partition between co-sharers. Respondents-4 to 9 cannot be deprived from their ? share. Deputy Director of Consolidation directed the petitioner to give holdings of respondents-4 to 9 from his other holdings. This order is also contrary to well settled principle of law.

16. In view of the aforesaid discussion, the writ petition succeeds and is allowed. The order of Deputy Director of Consolidation dated 12.11.2013 is set aside. The matter is remanded to Deputy Director of Consolidation to decide the revisions afresh in accordance with law, expeditiously preferably within four months from the date of producing certified copy of the order before him.