

(2013) 10 AHC CK 0206
In the Allahabad High Court
Case No : Writ B. No. 52717 of 2013

Ram Briksha and Another	Vs	APPELLANT
Dy. Director of Consolidation and Others		RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2013) 121 RD 637

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

Bench : Single Bench

Advocate : Sushma Devi and D.S.P. Singh, for the Appellant; A.P. Tiwari and S.S. Tripathi, for the Respondent

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri D.S.P. Singh, Counsel for the petitioners and Sri A.P. Tiwari, for the contesting respondent. The Counsel for the petitioners submitted that the names of the petitioners were recorded over the land in dispute, since 1359F. Ram Belash (respondent-4) did not file any objection, claiming his rights, in previous consolidation, as such, his objection in subsequent consolidation proceeding, claiming right in it, is barred u/s 49 of under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. The Counsel for the respondent submitted that consolidation authorities held that Ram Belash (respondent-4) was the real brother of the petitioners and was co-sharer along with them as such bar contained u/s 49 of the Act would not apply, as held by this Court in Amur Singh v. State of U.P. and others 2008(104) RD 421.

3. Section 49 of the Act was initially enacted as follows:--

Section 49.--Bar to Civil Court Jurisdiction.--No person shall institute any suit or other proceeding in any Civil Court with respect to any matter arising out of consolidation proceeding or under the provision of this Act.

By U.P. Act No. 38 of 1958, section 49 was amended as follows:--

Section 49.--Bar to Civil Court Jurisdiction.--Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of right of tenure holder, in respect of any land lying in any area, for which notification has been issued under sub-section (2) of section 4 or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under the Act.

4. Section 49 of the Act bars jurisdiction of Civil or Revenue Court to entertain any suit or proceeding with respect to rights in any land lying in area, for which notification was previously issued under sub-section (2) of section 4 of the Act and (i) the declaration and adjudication of right of tenure holder has been done or (ii) a proceeding for declaration and adjudication of right of tenure holder could or ought to have been taken, therein. Supreme Court in *Sita Ram v. Chhota Bhondey*, 1990 RD 439 (SC) held that as Chhota Bhondey, who was claiming an interest, in the land lying in the area covered by notification issued u/s 4(2), on the basis that he is the son of Chhota, brother of Nanha and that the lands were recorded in the name of Nanha in a representative capacity on behalf of himself and his other brothers. This claim which fell within the ambit of section 5(2) of the Act, had to be adjudicated by the consolidation authorities. Since it was a matter falling within the scope of adjudicatory functions assigned to the consolidation authorities under the Act, the jurisdiction of the Civil Court to entertain the suit in respect of the said matter was expressly barred by section 49 of the Act. Similar view was again taken by Supreme Court in *Narender Singh and Others Vs. Jai Bhagwan and Others*, in which it was held that the sons, even after becoming major and fully aware of the execution of the agreement of sale by their father, had not made any attempt to get their names jointly recorded in the revenue papers by appropriate proceedings under the Act of 1953. The sons have been brought on record of the suit only as legal representatives after the death of their father, the original defendant. Section 49 of the 1953 Act bars jurisdiction of the Civil Court to adjudicate upon dispute of rights and title of the sons, relating to lands included in consolidation proceedings. In this case, the sons claimed themselves as co-sharer with their father and took plea that the name of the father was recorded in representative capacity and he had no right to execute an agreement to sell of the entire land.

5. The law relating to joint property/co-sharers is differently recognized in various decisions of Apex Court as well as other Courts. In *Kailash Rai Vs. Jai Jai Ram and Others*, Supreme Court held that one can very well visualize a family consisting of father and two sons, both of whom are minors. Normally, the cultivation will be done only by the father. Does it mean that when the father is

found to be cultivating the land on June 30, 1952, he alone is entitled to the bhumidhari rights in the land and that his two minor sons are not entitled to any such rights? In our opinion, the normal principle that possession by one co-sharer is possession for all has to be applied. Further, even when one co-sharer is in possession of the land, the other co-sharers must be considered to be in constructive possession of the land. The expression "possession" in Clause (a), in our opinion, takes in not only actual physical possession, but also constructive possession that a person has in law. If so, when the defendants were in possession of the lands and when no plea of ouster had been raised or established, such possession is also on behalf of the plaintiff-appellant. Under such circumstances, the lands can be considered to be in the "possession" of the appellant or, at any rate, in his constructive possession. Supreme Court again in *Karbalai Begum Vs. Mohd. Sayeed and Another*, held that it is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Again in *Parshotam Singh (Dead) Through Lrs. Vs. Harbans Kaur and Another*, held that joint family remained joint unless divided/partitioned between the co-sharers.

6. Supreme Court in *Bhagwant P. Sulakhe Vs. Digambar Gopal Sulakhe and Others*, held that the character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property. Holding property in representative capacity by one member in joint Hindu family is also well recognized principle in various cases and it has been through out held that possession of one co-sharer is possession of all and on every inch of the land, including *Bhaiya Ramanuj Pratap Deo Vs. Lalu Maheshanuj Pratap Deo and Others*, *Gaya Din (D) Through Lrs. and Others Vs. Hanuman Prasad (D) Through Lrs. and Others*, . Supreme Court in *Ranganayakamma and Another Vs. K.S. Prakash (D) by L.Rs. and Others*, held that amongst the Hindu governed by Mitakshara Law it is well-settled principles that when a son gets a property from his father, as soon as sons are born to him, a joint family is constituted with the father. Although this principle is not applicable in tenancy holding but in case of death all the heirs inherit jointly.

In the present case, the land in dispute was inherited by the petitioners from their father and the consolidation authority found that respondent-4 was also their brother as such he had also simultaneously inherited the property in dispute from his father. Thus on this finding, respondent-4 was held as co-sharer along with the petitioners of 1/3 share of the disputed land.

7. Supreme Court in *N. Padmamma and Others Vs. S. Ramakrishna Reddy and Others*, held that a right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-

A of the Constitution protects such right. The provisions of the Act, seeking to divest such right, keeping in view of the provisions of Article 300-A of the Constitution of India, must be strictly construed. The Act contemplates divesting of right of an inamdar. It does not contemplate cessation of a right of a co-sharer or recognition of a right in favour of other co-sharer. The right has to be determined having regard to the possession by way of personal cultivation. The word "possession" in such cases should be given a broader connotation. Possession of one sharer would be deemed to be the possession of others. It is a legal concept. This legal concept cannot be held to have been done away under the Act. With the aforesaid observation, the matter was referred for consideration by a larger Bench.

8. The consolidation operation is a state imposed litigation. The primary object of the Act is to allot a compact area to the tenure holders in place of their scattered plots, with a view of land reforms so that tenure holders may have their private source of irrigation at one place and also to save crops etc, the land from boundary disputes. Section 7 of the Act, casts a duty upon the District Deputy Director of Consolidation to revise the record and annual record so revised are prepared and maintained u/s 10 of the Act. In this process, the disputes relating to correction of mistake, claim relating to land and partition etc. are decided. If a co-sharer being minor and was fully depending upon his father/brother or for any other reason has not raised a dispute relating to land or partition of the joint property u/s 9 of the Act his right is barred u/s 49 of the Act in second contingency as stated above.

9. Although, the issue has been decided by Supreme Court in Site Ram's and Narender Singh's cases (supra) but in view of the observations in N. Padmamma and Others Vs. S. Ramakrishna Reddy and Others, that State Legislation is requires reconsideration on the touch stone of Constitutional right, the matter requires reconsideration. As an important point of law arises for consideration, which will affect the public at large of the State, it will be appropriate that the issue be decided by a larger Bench of this Court. The office may place the papers before Hon"ble Chief Justice for formation of Bench for decision on the following questions: --

(i) Whether use of words "could or ought to have been taken" in latter part of section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection u/s 9 of the Act for separation of his share?

(ii) Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available

under Article 19(1)(f) and now Article 300-A of the Constitution?

(iii) Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end u/s 49 of the Act, on the notification u/s 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?

10. Respondents-1 to 3 are represented by Chief Standing Counsel and respondent-4 is represented by Sri A.P. Tiwari and Sri S.S. Tripathi, Advocate. The Counsel for the respondents are granted four weeks time for filing Counter Affidavit and two weeks thereafter is granted to the Counsel for the petitioners to file Rejoinder Affidavit. List thereafter. As the claim of respondent-4 has been accepted by all the consolidation authorities, who is found to be the real brother of the petitioners, as such, it will be appropriate that the parties shall maintain status quo with regard to their possession over the land in dispute and shall not change its nature till further order of the Court.