(2009) 10 AHC CK 0198

In the Allahabad High Court

Ram Dular Singh APPELLANT

Vs

Deputy Director of Consolidation and Others RESPONDENT

Date of Decision : 13-10-2009

Acts Referred:
Evidence Act, 1872 — Section 107, 108
Penal Code, 1860 (IPC) — Section 191, 417, 420, 463, 465

Citation : (2009) 10 AHC CK 0198

Hon'ble Judges : S.S. Chauhan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.S. Chauhan, J.—This petition has been filed for quashing of the orders dated 27.12.2008 and 8.1.2008 passed by the Deputy Director of Consolidation and the Settlement Officer Consolidation respectively.

2. This is a unique case of chequered history of fraud being perpetuated by near ones, who have shown a recorded tenure holder to be dead and thereby usurping his property by getting a forged Will deed prepared and getting their property recorded in their name and thereafter executing the sale deeds in favour of opposite parties.

3. The facts giving rise to the present petition are that Ram Dular Singh (petitioner) S/o Ram Dev Singh and Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh were the recorded co-tenure holders of Khata No. 146 measuring 42-0-4 situated in Village Maholia, Pargana Dewa, Tehsil Nawabganj, District Barabanki. They were recorded as Bhumidhar with transferable rights. Apart from it, Shiv Pujan Singh, Shiv Dhari Singh and Dev Dhari Singh sons of Gayaj Singh were the co-tenure holders of Khata No. 116 measuring 10-0-0 situated in the aforesaid village. Kailash Singh S/o Shobh Nath Singh alleging Ram Dular Singh S/o of Ram Dev Singh and Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh to be dead moved two applications for mutation on the basis of a registered Will deed in his favour; one

is against the registered Will deed by Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh and the other is alleged to be the Will deed executed by the petitioner. Both the cases proceeded separately and Naib Tehsildar, North, Tehsil Nawabganj, District Barabanki passed an order for mutating the name of Kailash Singh S/o of Shobh Nath Singh, r/o Village Dharkanda, Pargana Danwar, District Rohtas, Bihar on 14.2.1986. Kailash Singh moved an application along with his brother Harihar Singh claiming execution of the registered Will deed by the petitioner and on that basis he sought mutation. The said application was allowed on 18.2.1986 by Naib Tehsildar, North, Tehsil Dewa, District Barabanki. After the said mutation orders were passed on the basis of the alleged registered Will deeds executed in favour of Kailash Singh and Harihar Singh S/o Shobh Nath Singh, an application u/s 201 of the U.P. Land Revenue Act (hereinafter referred to as the ''Revenue Act'') was moved by the petitioner alleging therein that he was very much alive and the alleged registered Will deed was never executed by him, but in fact it is a forged and fabricated document prepared at the behest of Kailash Singh and the Will deed was executed by some impostor and in fact he has never executed any Will deed at any point of time and Kailash Singh was a forgerer. It is also stated that he was deputed to look after the property of the petitioner and manage the agriculture, but taking advantage of the aforesaid fact he got executed a forged Will deed and got his name recorded and thereafter he fraudulently executed sale deeds in favour of certain persons. Mudit Verma, opposite party No. 3 moved an application for impleadment. He also filed an objection by raising a preliminary objection that the matter was pending in the consolidation court. The court of Naib Tehsildar after coming to the conclusion that the proclamation has not been issued in accordance with law and the death of the petitioner was not proved and the petitioner had appeared before the court and submitted his written as well as oral evidence recalled the order dated 18.2.1986 and restored the same to its original number at a cost of Rs. 500/- vide order dated 20.9.2002. Similarly, Kedar Singh and Raj Kishroe Singh S/o Kashi Nath Singh through their Attorney, Ram Govind Singh moved an application u/s 201 of the Revenue Act challenging the mutation order dated 14.2.1986 on identical allegations that it was a forged Will deed prepared at the instance of Kailash Singh and in fact Kashi Nath Singh had expired prior to 1984 and during his life time he has not executed any Will deed. Kashi Nath Singh was resident of Bihar and Kailash Singh happens to be his servant and looking after the affairs of the agriculture. He could not come to know about the aforesaid forgery and, therefore, as and when it came to his knowledge he moved an application for recall. Kedar Singh and others moved an application for substituting their names, which was rejected on 5.12.1986. The Attorney holder, Ram Govind Singh again moved an application for substitution, which was rejected on 3.8.1987 for non-prosecution. On 1.4.1998 again he moved an application for substitution, which too was rejected on 29.8.1998. Thereafter, an application was moved for recalling the order dated 14.2.1986. The court after considering the evidence on record came to the conclusion that there was no mention in the proclamation about the death of the tenure holder and the service was affected only by pasting. Kallu Ram, Pradhan of the Village and the Revenue inspector''s report dated 11.11.1986 did not establish the death of the petitioner and the recall application was allowed at a coat of Rs. 1,000/-. Another unregistered Will deed was executed by Shiv Pujan Singh, Shiv Dhari Singh and Dev Dhar Singh S/o Gayaj Singh in favour of Kailash Singh S/o Shobh Nath Singh. After recall of the order, the parties pursued their case before the consolidation authorities regarding which objections were pending before the Consolidation Officer. Specific point was raised before the Naib Tehsildar that the matter is pending before the consolidation authorities and notification has been issued u/s 4 of the Consolidation of Holdings Act (hereinafter referred to as the ''CH Act'') and so the order cannot be recalled, the Naib Tehsildar overruled the objection relying upon the decision of the Board of Revenue in the case of Bhaggan v. Ganesh 1988 RD vide order dated 20.9.2002. The said order was not challenged anywhere and it became final.

4. In the consolidation proceedings objection was filed u/s 9 of the CH Act by the petitioner through his Attorney, Ram Govind Singh and Mohd. Azizullah S/o Hasmatullah, Shiv Pujan Singh, Shiv Dhari Singh, Dev Dhari Singh Sons of Gayaj Singh also filed objections. Gram Sabha, Maholia also filed objection claiming certain property to be the Gram Sabha property. The Consolidation Officer after consolidating all the objections framed five issues and decided the case on 24.4.2006. Against the order dated 24.4.2006 of the Consolidation Officer two appeals numbering 2916 and 2919 were filed by the opposite parties No. 3 and 12 along with the application for interim relief. The appellate court rejected the interim relief application of the opposite parties vide order dated 5.5.2006, against which three revisions were filed numbering 1057, 1060 and 1037. All the three revisions were consolidated together and were disposed of by a common order dated 10.8.2006 and the order of the Settlement Officer Consolidation was set aside. The case was remanded to the appellate court with the direction that in view of the observations made above, the vendees may be impleaded as party and thereafter the interim relief application may be considered on merit. During the pendency of the appeals before the appellate court an application for transfer was moved and the Additional Director (Consolidation) vide order dated 25.4.2007 transferred the case from the court of Settlement Officer Consolidation, Barabanki to the court of Settlement Officer Consolidation, Faizabad. Anil Kumar etc. were impleaded as party and the application for amendment of the memo of appeal moved by the petitioner was also accepted and Harihar Singh was impleaded as opposite party No. 13. The case was not argued by the petitioner on 3.1.2008 and so a direction was given for filing written arguments and the case was fixed for orders on 8.1.2008. On 8.1.2008 both the appeals were allowed and the order of the Consolidation Officer dated 24.4.2006 was set aside and the matter was remitted to the Consolidation Officer. Feeling aggrieved against the aforesaid order, two revisions were filed by the petitioner as well as by opposite party No. 3 before the Deputy Director of Consolidation and the Deputy Director of Consolidation vide order dated

27.12.2008 dismissed the revision filed by the petitioner and disposed of the revision filed by opposite party No. 3. Hence this petition.

5. Submission of learned Counsel for the petitioner is that the very basis of the claim of opposite parties No. 3 to 6 and 12 is based on the sale deeds, which are alleged to have been executed by Kailash Singh and Harihar Singh sons of Shobh Nath Singh on the basis of a mutation order passed in their favour. Once the mutation order was set aside on 20.9.2002, then the very basis of the right to execute the sale deed came to an end and any sale deed, which has been executed on the basis of a forged mutation order obtained by opposite party No. 11 cannot confer any right in favour of opposite parties No. 3 to 6 and 12. It is also submitted that the Settlement Officer Consolidation as well as by the Deputy Director of Consolidation also recorded a finding on merit which the Consolidation Officer will not be able to dispose of anything otherwise except to follow the finding recorded while remanding the matter in regard to the identity of the petitioner and also the fact that he was very much in existence and was a living being. Further submission is that the petitioner appeared before the trial court on many dates and he has singed the order-sheet continuously, so the very existence of the petitioner cannot be doubted and he is very much alive and in fact he has given evidence before the trial court. The opposite parties have not been able to produce any evidence in regard to the death of the petitioner and have tried to linger on the proceedings since 1991 to 2006 and have not discharged their burden in regard to the death of the petitioner and when the case was likely to be decided by the Consolidation Officer, opposite party No. 12, Ajijullah, moved an application for transfer of the case and the proceedings were stayed restraining the pronouncement of the judgment by the Consolidation Officer by the court of the Settlement Officer Consolidation. It is also submitted that the parties were directed to file written arguments as they were avoiding to argue the matter and were trying to linger on the proceedings by hook or crook and so the Consolidation Officer had no option but to ask for written arguments. It is submitted that the order-sheet brought on record by the petitioner reveals that he has singed the order-sheet from time to time and has appeared before the court below and his identity has not been disputed during the course of proceedings before the Consolidation Officer. The case was fixed on 23.3.2006, on which date the parties were directed to file written arguments before 25.3.2006 and the case was fixed for orders on 25.3.2006. It is submitted that on application moved by Mohd. Azizullah, opposite party No. 12 an interim order was granted staying pronouncement of judgment on 21.3.2006 and the interim order continued up till 22.4.2006. On 25.3.2006 the next date was given as 31.3.2006 with the rider that the written arguments be filed by that date. Then the case was taken up on 7.4.2006 wherein again a last opportunity was given to file written arguments by 15.4.2006, failing which the case would be decided on the basis of the evidence available. On 15.4.2006, again written arguments were not filed and a prayer was made by Mudit Verma, opposite party No. 3 for some more time. Considering the request of the parties, another opportunity was given

to opposites party No. 3 to file written arguments and the case was posted for 18.4.2006. On 18.4.2006 again it was found that the written arguments were not filed and so it was directed that the parties may file written arguments by 22.4.2006. Therefore, submission is that the opposite parties have deliberately avoided to file written arguments and wanted the adjournment of the case on one pretext or the other. The Consolidation Officer, therefore, was having no option but to decide the case on the basis of the evidence available on record. The order-sheet dated 4.2.2006 goes to indicate that the petitioner appeared in the case and he was cross-examined by Mudit Verma, opposite party No. 3. Thus, the submission is that the identity of the petitioner has never been doubted nor challenged and no evidence has been adduced or placed on record, which may prove the death of the petitioner. It is further submitted that merely doubting the identity of the petitioner will not be a proper defence under law and it was incumbent upon the opposite parties to have proved that the petitioner had died on such and such date and ample evidence ought to have been adduced in this regard, which they failed to do. The petitioner has discharged his burden of proof by stating that he is alive and thereafter the burden shifted upon the opposite parties to prove that the petitioner was dead. The further submission is that any amount of fraudulent or forged documents can not confer any right in favour of opposite parties as Kailash Singh and Harihar Singh have never appeared in the witness box nor they were cross-examined nor the validity of the Will has been proved during the period 1991 to 2006 and in absence of any such evidence on record the Consolidation Officer has rightly proceeded to decide the case and ordered for expulsion of the names of khata holders whose names were recorded during the life time of the petitioner. It is also submitted that the Deputy Director of Consolidation should have decided the case finally in stead of remanding the matter as there was ample evidence on record and the remand order has been passed in utter violation of the settled principles of law laid down by the apex court. The petitioner is residing in the State of Assom and, therefore, he could have produced evidence from the State of Assom regarding his identity and being alive and, therefore, the said evidence could not have been discarded by the Settlement Officer Consolidation on this score. The application for summoning the documents was also a device to delay the proceedings and to linger on the proceedings, therefore, the said application was rightly ignored by the Consolidation Officer. The judgment pronounced by the Consolidation Officer on 24.4.2006 has been doubted merely on the ground that 23.4.2006 was Sunday and the transfer application was rejected on 22.4.2006 as such the judgment could not have been pronounced on 24.4.2006, is also baseless on account of the fact that the Consolidation Officer was not debarred from preparing the judgment on the basis of the evidence available on record and the same could have been pronounced on 24.4.2006. It is further submitted that from the order-sheet, it is evident that the proceedings were going on and the parties were directed to file written arguments. It is also submitted that there was no grievance of the other opposite parties except Azizullah, opposite party No. 12, who filed the transfer application. It is also submitted that opposite party

No. 3 happens to be the brother of Senior IAS Officer, Sri Shashank Shekhar, who happens to be the Cabinet Secretary at the moment and on account of the aforesaid pressure the Settlement Officer Consolidation and the Deputy Director of Consolidation remanded the case in stead of deciding the same on merit. He further submits that so far the question of objection by the Gram Sabha is concerned, he does not lay his claim in regard to the property of the Gram Sabha and, therefore, the proceedings may be deemed to be final to that extent in respect of the petitioner. It is submitted that the District Magistrate ordered for holding an enquiry by the Sub-Divisional Magistrate by means of letter dated 2.5.2001 and a report was submitted by the Sub-Divisional Magistrate on 21.3.2001, which proved that the petitioner was very much alive. The Settlement Officer Consolidation and the Deputy Director of Consolidation have committed gross illegality in doubting the identity of the petitioner in absence of any cogent evidence to the contrary that the petitioner had expired at any point of time. It is further submitted that the opposite parties are waiting for the death of the petitioner, so that they may be able to manipulate the evidence in their own way and deny the rightful claim of the petitioner. It is also submitted that an F.I.R. was lodged against Kailash Singh, Harihar Singh, Devendra Kumar, Kallu, Mudit Verma, Ashok Mehrotra, Gur Prasad, Dyan Singh, Mohd. Azizullah, Kaiser Aziz W/o Azizullah, Ram Chander, Ram Harakh and Ram Swaroop under Sections 420/468/471/467/465/417/463/191/506 I.P.C. and a charge sheet has been filed against Kailash Singh, Harihar Singh, Devendra Kumar, Kallu, Mudit Verma, Ashok Mehrotra, Mohd. Azizullah, Kaiser Aziz W/o Azizullah, Ram Chander, Ram Harakh under Sections 420/468/471/467/465/417/463/191/506 I.P.C. and the matter is pending for trial. The last submission is that the opposite parties have played a concerted fraud upon the court as well as prepared forged documents on the basis of which they have got executed Will deeds and sale deeds in their favour and so no right can accrue in favour of the opposite parties on the basis of the Will deeds alleged to have been executed by certain persons, who got their name mutated during the life time of the petitioner on the basis of the forged registered Will deeds.

6. Learned Counsel for the opposite parties, on the other hand, has submitted that no arguments have taken place and the opposite parties were not given any opportunity to argue the case before the Consolidation Officer and the objection of the Gram Sabha remains un-disposed of and no finding has been recorded in that regard. It is further submitted that the documents in pursuance to the application preferred by opposite party No. 3 were not summoned and no judgment could have been pronounced on 24.4.2006 as no time was given to opposite parties to argue the case. The identity of the petitioner is disputed and he has filed all the documents of the State of Assom and the said documents cannot be made the basis of the claim of the petitioner being alive. It has further been submitted that the petitioner is not the real person as alleged by him and he is trying to take advantage in the court in the name of the petitioner. It has also been submitted that in some places the petitioner has put his thumb

impression and some documents he has singed.

7. I have heard learned Counsel for the parties and gone through the record.

8. The first question, which falls for consideration is as to what extent this Court can interferer with the remand orders passed by the Settlement Officer Consolidation and the Deputy Director of Consolidation. On the face of the reasonings recorded by the Settlement Officer Consolidation and the Deputy Director of Consolidation, it is apparent that they have not only remanded the case, but also recorded a finding in regard to the merit of the matter in the form that they have doubted the identity of the petitioner and have also recorded a finding that certain applications have not been disposed of, but except of doubting the identity of the petitioner, no evidence has been brought on record to prove the death of the petitioner. The Court before proceeding to record a finding feels its duty to consider as to what extent this Court can interfere with the remand order when certain findings have been recorded on merit while remanding the matter and further whether it was necessary that the case should be remanded when there was ample evidence on record to prove the fact that the petitioner was alive.

9. In the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, the apex court considering the fact that the suit was filed in the year 1978 and the parties have been in litigation for the last 25 years proceeded to decide the case itself. In para 10 of the judgment it has been held as under:

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The questions framed by the High Court did not arise as substantial questions of law based on the findings recorded by the courts below---concurrently in this case. In our opinion, the High Court''s judgment deserves to be set aside on this short ground and the case remitted back to the High Court for decision afresh and in accordance with law, after reframing only such substantial questions of law, if any, as do arise in the appeal. But since the suit was filed in the year 1978 and the parties have been in litigation for the last 25 years, we are refraining from remitting the case back to the High Court for redicision on merits.

10. In the case of Sheikh Natthu and Anr. v. Deputy Director of Consolidation, Kanpur Camp, Hamirpur and Anr. 2009 (106) RD 96, this Court while considering the question that the remand order should not be passed in a routine manner has relied upon the following decisions of the apex court, which are quoted as under:

In Pasupuleti Venkateswarlu Vs. The Motor and General Traders, the apex Court has held that if a finding is required on a particular issue then the entire order of the Trial Court should not be set aside. A finding on the said issue may be called for from the Trial Court.

The Apex Court in Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, has held that the High Court should not ordinarily remand a case under Order XLI Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the Trial Court and considered whether the order of the Trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in that case, such remand orders would lead to further delay and uncertainty. Thus the remand by the High Court was not necessary.

Apex Court in P. Purushottam Reddy and Anr. v. Pratap Steels Ltd. 2002 (48) ALR 319 (SC), considered the powers of the Appellate Court as conferred on it under Order XLI Rules 23, 23-A and 25 of the Civil Procedure Code. While setting aside the order of remand passed by the High Court, it has been laid down that the High Court was to examine whether such finding of the Trial Court was sustainable or not in eyes of law and on facts. Even otherwise also the question could have been gone into by the High Court and a finding could have been recorded on the basis of available material inasmuch as the High Court being the Court of first appeal, all the question of fact and law arising in the case were open before it for consideration and decision.

11. In the case of Preetam Singh (Dead) by LRs and Ors. v. Assistant Director of Consolidation and Ors. 1996 (87) RD 192, the apex court held as under:

When the matter was in revision before the Assistant Director (Consolidation), he had the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revisional jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court of revisional jurisdiction otherwise having suo moto power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war or legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation).

Thus for the above reasons we allow this appeal, set aside the impugned orders of the High Court without dilating upon the abstract question of law, except in pointing out the aforesaid two decisions of this Court and remitting the matter back to the Assistant Director (Consolidation) for fresh decision of the entire matter in accordance with the law. No costs.

12. The above proposition of law goes to indicate that this Court is not precluded in interfering with the remand order when it has found that the remand order on the face of record was not passed in accordance with law. When ample evidence was available with the Settlement Officer Consolidation and the Deputy Director of Consolidation they could have analyzed the evidence and could have decided the case as the same was pending since 1991, but in stead of deciding the case on merit the same was remitted to the court of Consolidation Officer with a view to prolong the matter and further with a view to start second round of litigation although the petitioner was cross-examined by the opposite party No. 3 and the very existence of the fact that the petitioner was alive could have been appreciated in extenso on the basis of the demeanor of the witnesses by the Consolidation Officer before whom the evidence was recorded.

13. It is to be noted that Ram Dular Singh (petitioner) S/o Ram Dev Singh, Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh were the recorded co-tenure holders of Khata No. 146 measuring 42-0-4 situated in Village Maholia, Pargana Dewa, Tehsil Nawabganj, District Barabanki. They were recorded as Bhumidhar with transferable rights. Apart from it, Shiv Pujan Singh, Shiv Dhari Singh and Dev Dhari Singh sons of Gayaj Singh were the co-tenure holders of Khata No. 116 measuring 10-0-0 situated in the aforesaid village. The fraud initially started when two registered Will deeds were prepared by Kailash Singh and Harihar Singh S/o Shobh Nath Singh, who were deputed to look after the property of the petitioner. The Will deed was registered on 4.7.1985 and on 16.7.1985. One Will deed dated 16.7.1985 was executed in favour of Kailash Singh and Harihar Singh sons of Shobh Nath Singh, whereas the other Will deed dated 4.7.1985 was executed by Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh in favour of Kailash Singh S/o of Shobh Nath Singh. An unregistered Will deed was also executed in favour of Kailash Singh S/o Shobh Nath Singh by Shiv Pujan Singh, Shiv Dhari Singh and Dev Dhari Singh sons of Gayaj Singh. Kailash Singh, who was deputed as a servant took the advantage of his being care taker of the property of the petitioner and others and by planting some impostor in place of the petitioner and others got the registered Will deeds executed. An application for mutation was moved by Kailash Singh and Harihar Singh and their names were recorded in the revenue records showing the petitioner to be dead on the basis of the registered Will deed dated 16.7.1985 by means of order dated 18.2.1986. Similarly, an application was also moved by Kailash Singh in respect of the property of Kashi Nath Singh, Sri Krishna Singh and Nandji Singh sons of Roop Singh and they were also shown to be dead and on the basis of the registered Will deed and name of Kailash Singh was recorded. The petitioner and others as and when came to know about the aforesaid order,

he moved an application through his Attorney, Ram Govind Singh for recalling the order dated 18.2.1986 u/s 201 of the Revenue Act. The parties were heard and thereafter the said order, which was passed ex-parte on the basis of the defective proclamation, was recalled at a cost of Rs. 500/- on 20.9.2002. In identical manner the order dated 14.2.1986 was also recalled at a cost of Rs. 1,000/-. A specific objection was raised before the Naib Tehsildar, Dewa, District Barabanki while he was hearing the recall application u/s 201 of the Revenue Act that the consolidation proceedings have started and, therefore, the application would not be maintainable, but the Naib Tehsildar relying upon a judgment of the Board of Revenue reported in 1988 RD, Bhaggan v. Ganesh over ruled the objection and allowed the recall application. The said order dated 20.9.2002 was not challenged anywhere and attained finality. The parties have approached the consolidation court where objections were filed by the petitioner u/s 9 of the CH Act through his Attorney, Ram Govind Singh. Azizullah S/o Hasmatullah. Shjiv Pujan Singh, Shiv Dhari Singh and Nandji Singh also filed objections claiming therein that no such Will deed was ever executed and it is a forged Will deed and the petitioner was very much alive and during his life time the property could not have been recorded in the names of Kailash Singh and Harihar Singh sons of Shobh Nath Singh.

14. It is also to be noted that as soon as names of Kailash Singh and Harihar Singh were recorded in the revenue records, they executed sale deeds in favour of opposite parties No. 3 to 6 and 12. Before the Consolidation Officer five issues were framed and the case was decided on 24.4.2006. The petitioner appeared before the Consolidation Officer and signed on the order-sheet on various dates and he was also cross-examined by opposite party No. 3 and during the entire proceedings the death of the petitioner could not be proved and neither any evidence was adduced in this regard. The petitioner filed various documents of the State of Assom, where he is residing along with his son and he has also filed the report of the Sub-Divisional Magistrate dated 21.3.2001 and the letter of the District Magistrate dated 2.5.2001 to prove that he is alive. The petitioner also filed the certificate issued by the Sub-Divisional Magistrate, Medical Certificate of being alive, Domicile Certificate and various other documents to prove that he is alive. The petitioner also appeared before the Consolidation Officer from time to time, which is apparent from the signatures appended on the order-sheet by the petitioner, which has been placed on record. The Consolidation Officer after recording the evidence and after going through the demeanor of the witnesses, came to the conclusion that the petitioner was alive and, therefore, no Will deed has been executed by him while he was alive. The Will deed could not have been acted upon and the names of Kailash Singh and Harihar Singh could not have been recorded in the revenue records and if any sale deed has been executed on the basis of the aforesaid forged and unauthorized Will deeds during the life time of the petitioner, then the same would be a void sale deed in the eye of law.

15. The fraud committed by the opposite parties is further established from the fact that an F.I.R. was lodged on 13.4.2001 against these persons under Sections

420/467/468/471/465/417/506/463/191 I.P.C. and a charge sheet has also been filed against them in the competent court and the matter is pending for trial. The petitioner was cross-examined on 23.2.2006 and for further cross-examination the case was fixed for 4.3.2006 and on 4.3.2006 the cross-examination was completed and the case was fixed for final hearing on 8.3.2006. On 8.3.2006 a request was made for adjournment of the case and the case was adjourned on the request of opposite party No. 3 giving last opportunity and the case was again fixed for 18.3.2006 for hearing. On 18.3.2006 a general date was given as 22.3.2006 and on 22.3.2006 the opposite party No. 3 again prayed for adjournment of the case and moved an application. The application was moved by opposite party No. 3 with a view to delay the proceedings as the entire evidence has completed and the evidence was closed after the cross-examination of the petitioner by opposite party No. 3. The Consolidation Officer adjourned the case by directing the parties to file written arguments by 25.3.2006. On 25.3.2006 the case was fixed for 31.3.2006 with the direction that the earlier order be carried out. Then on 31.3.2006 next date was given as 7.4.2006. On 7.4.2006 again the Consolidation Officer ordered that the case be fixed for orders as written arguments were not filed and so he fixed the date as 15.4.2006 with the rider that before that date the written arguments may be filed. He further ordered that in case the written arguments are not filed by 15.4.2006, the orders would be passed on the basis of the evidence available on record. On 15.4.2006, the petitioner filed written arguments and opposite party No. 3 again asked for certain time to file written arguments and again he was given one more opportunity and the case was fixed for 18.4.2006. A specific direction was given that before that date the opposite party No. 3 may file written arguments. On 18.4.2006, the written arguments were not filed by opposite parties No. 3 and 12 and the case was fixed for 22.4.2006 with the direction that the opposite parties No. 3 and 12 will file written arguments before that date. On 22.4.2006 the case was fixed for 24.4.2006 and on the said date the order was pronounced. On 21.3.2006 an interim order was passed to the effect that final judgment would not be pronounced in the matter, but it is to be noted that neither the preparation of the judgment nor the said proceedings were stayed. The opposite party No. 3 moved an application for transfer, which came to be rejected on 22.4.2006 and thus the judgment was pronounced on 24.4.2006. The opposite parties have been continuously running away and avoiding the proceedings with a view that the final judgment may not be rendered in the case and the case was pending before the Consolidation Officer since 1991 and it came to be decided in the year 2006. Therefore, for such a long time when the matter was pending, then it was the duty of the opposite parties to have cooperated in the hearing. The deliberate conduct of the opposite parties goes to indicate that they were avoiding the disposal of the case and trying to delay the proceedings in their own ulterior design. The Consolidation Officer finding that the petitioner was alive and there was ample evidence on record to prove the same, proceeded to decide the case. It is also to be noted that Kailash Singh and Harihar Singh did not appear in the entire course of proceedings to prove the execution of the Will and execution of the sale deeds. Kashi Nath Singh alleged to have died prior to 1984 and, therefore, he could not have executed the Will deed on 4.7.1985. The petitioner was very much alive and he proved his presence before the Naib Tehsildar, on the basis of which the mutation order was recalled. Similar was the case of Shiv Pujan Sihgh, Shiv Dhari Singh and Dev Dhari Singh sons of Gayaj Singh, who were alive on the date of execution of the unregistered Will deed in favour of Kailash Singh. It appears that a well planned forgery was committed by the opposite parties in collusion with Kailash Singh and Harihar Singh sons of Shobh Nath Singh in order to usurp and grab the property of the petitioner, who was very much alive and was shown to be dead as the petitioner was living in the State of Assom along with his son. Kailash Singh and Harihar Singh, who were looking after the affairs of the property of the petitioner were well in position and hence with a view to grab the property of the petitioner, they got executed forged registered Will deed at the instance of some impostor and that is why no evidence was lead by them and neither they came forward to prove the execution of the Will deed, which is alleged to have been executed by the petitioner. There was ample evidence on record to prove that the petitioner was alive and, therefore, the question of execution of registered Will deed does not arise and in case any Will deed was executed, then the same would operate only after the death of the petitioner and no mutation order could have been passed before his death when the petitioner was alive.

16. The petitioner also proved his existence of being alive before the Consolidation Officer. He was cross-examined by opposite party No. 3. The opposite parties when became confident that there was no choice of there success in the case, they moved an application for adjournment again and again and ultimately an application for summoning certain documents, which was not warranted at the belated stage and that too in the year 2006 when the case was nearing conclusion.

17. The opposite parties have submitted that the petitioner''s identity was in dispute and he should prove that he is alive. The negative burden cannot be put upon the petitioner. The petitioner has discharged his burden by stating that he is alive and once he has asserted himself to be alive, he has discharged his burden and it was the duty of the opposite parties to have proved the death of the petitioner by cogent and reliable evidence, but no such evidence in any form has come forward or has been placed on record to prove the death of the petitioner.

18. In the case of Saroop Singh Vs. Banto and Others, while dealing with the question of burden of proof the apex court relying upon the following decisions, which are quoted as under:

In Lal Chand Marwari v. Mahant Ramrup Gir AIR 1926 PC 9 it was observed:

Now upon this question there is, Their Lordships are satisfied, no difference between the law of India as declared in the Indian Evidence Act and the law of

England: Rango Balaji v. Mudiyeppa ILR (1899) Bom 296; searching for an explanation of this very persistent heresy Their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from Phene''s Trusts, In re (1870) 5 Ch. A. 139 run as follows:

If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the persons who claims a right to the establishment of which that fact is essential.

Following these words, it is constantly assumed - not perhaps unnaturally - that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one ''of not less than seven years''.

19. In L.I.C. of India Vs. Anuradha, , this Court held:

12. Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years'' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

20. While dealing with the similar question in the case of L.I.C. of India (supra) the apex court held as under:

As to Indian decided cases of authority, we are relieved of the need of entering into a research and review thereof on account of availability of two recent decisions of this Court on the point. In N. Jayalakshmi Ammal and another Vs. R. Gopala Pathar and another, this Court went in depth into the jurisprudential concept underlying Sections 107 and 108 of the Evidence Act and referred to commentaries of settle authority by eminent jurists such as Sri John Woodroffe and Amir All''s Law of Evidence, M. Monir''s Principles and Digest of the Law of Evidence, Sarkar on Evidence as also the leading authority of Judicial Committee of the Privy Council in Lal Chand Marwari v. Mahant Ramrup Gir which has stood the test of the time for over three quarters of a century by now. The law laid down in N. Jayalakshmi Ammal and others case (supra) has been reiterated in Darshan Singh and Ors. v. Gujjar Singh (D) by Lrs. and Ors. 2002 (46) ALR 451 (SC).

Peter Murphy states in ''A practical approach to Evidence'' (Second Edition, pp. 460-461) - " The presumption is only that the subject died at some time during the period; his death on any particular day will not be presumed, and must be proved by evidence if in issue". The learned author having set out in brief the facts of the cases in Re Phene''s Trust (1870) 5 Ch. Ap 139 and Chipchase v. Chipchase (1939) P.391 and having noticed the law laid down therein proceeds to state - "The period of seven years is, however, strictly insisted upon, and it is often pointed out that, though the rule is to some extent illogical, a period of six years and 364 days is not enough. Nor is there any presumption that the subject died from any particular cause, died childless or died celibate, though these matters may be capable of inference on the evidence, as a question of fact. It should be remembered that it is always open to the Court to infer death (of that someone is alive) as a matter of fact, as it is to make any other proper inferences from the evidence. No question of the presumption arises in such a case; it is a matter of circumstantial evidence. What is sometimes called the ''presumption of continuance'' an instance of which is that if a person is shown to be alive at a certain time, his continuing life may be inferred is no more than an example of such an inference, and will yield to the presumption of death where the latter applies.

21. The opposite parties have further submitted that all the documents pertaining to the State of Assom and, therefore, they are doubtful. The petitioner is residing in the State of Assom along with his son, who is an ex-Army personnel, therefore, it was but natural for him to file the documents issued in the State of Assom.

22. The opposite parties cannot take advantage of any fraud, which has been committed by them. The apex court while considering the question of fraud in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, has categorically ruled that fraud vitiates all the proceedings and any order, which has been obtained on the basis of fraud, is a nullity and cannot be given effect under law. The relevant portion of the aforesaid judgment is quoted below:

Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

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The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who''s case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

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A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another''s loss. It is a cheating intended to get an advantage. xxx A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

23. While dealing with the similar question in the case of A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, the apex court held as under:

Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

Fraud avoids all judicial acts, ecclesiastical or temporal.

24. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

25. In the leading case of Lazarus Estates Ltd. v. Beasley (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, Lord Denning observed:

No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud.

26. In Duchess of Kingstone, Smith''s Leading Cases, 13th Edn., p.644,

explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

27. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

28. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

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29. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.

30. On the aforesaid proposition of law as propounded by the apex court, there is no option except to hold that the sale deeds executed were without authority of law and were nullity in the eye of law and the registered Will deeds were also forged Will deeds at the instance of Kailash Singh and Harihar Singh, who did not come forward to assert the execution of the Will deed during the course of trial. The opposite parties are already facing criminal charges and a charge sheet has already been filed against them. The fraud is apparent on the face of the record and the petitioner has also appeared before the Naib Tehsildar while moving an application for recall of the mutation order and the opposite parties have not been able to prove the death of the petitioner since then i.e. from the date of the recall application to the order passed on 20.9.2002. The Settlement Officer Consolidation and the Deputy Director of Consolidation have not exercised the discretion in a proper and judicious manner. The entire evidence was available before them and they could have decided the case on merit in stead of relegating

the same to the Consolidation Officer after expiry of 17 years. The petitioner is aged about 95 years and he has been produced in the Court before me and he has stated that he is Ram Dular Singh and is alive, so the very existence of the petitioner being alive canto be denied in any manner.

31. The Settlement Officer Consolidation and the Deputy Director of Consolidation have doubted the identity of the petitioner. The case as set up by the opposite parties was with regard to the death of the petitioner and hence they were required to prove and place on record the evidence regarding the death of the petitioner, which they could not do so. The proceedings have been prolonged only with a view that the petitioner may die in the meantime and they may succeed thereafter in disproving the identity of the petitioner. The petitioner has stated In Court that he has appeared before the Consolidation Officer and his name is Ram Dular Singh and he lives in the State of Assom along with his son. The remand of the case by the consolidation authorities, therefore, as stated above was not justified and it will result in misuse of the court process and further the petitioner would not be able to get any justice after such a long period and his land will be usurped at the instance of the opposite parties, who, prima facie, appear to be land grabbers as they got executed the sale deed by unauthorized persons, who were not at all authorized to execute any sale deed. The doubt expressed by the opposite parties that at some places signatures have been put by the petitioner and at some places thumb impression has been put, is also devoid of merit and looking to the old age of the petitioner, it may be possible that at some places he must have put his thumb impression, which would have been easy for him. The identity of the petitioner as doubted by the Settlement Officer Consolidation and the Deputy Director of Consolidation is also not established in view of the fact that the petitioner has been produced before this Court. The unregistered Will deed has also been prepared during the life time of the living persons. It seems that the Settlement Officer Consolidation and the Deputy Director of Consolidation were under certain pressure as the opposite party No. 3 appears to be highly connected with the present ruling party and that is why they adverted to this safest method by remanding the matter to the Consolidation Officer in stead of adjudicating the matter on merit.

32. The complaint of the opposite parties that the interim order dated 31.3.2006 passed on the transfer application provided that the proceedings shall go on, but final order shall not be passed, was vacated and the transfer application was dismissed on 22.4.2006. On 23.4.2006 was Sunday and on 24.4.2006 the judgement was pronounced and, therefore, the opposite parties were not given any opportunity of hearing to argue their case. The said complaint cannot be made by the opposite parties as the opposite parties themselves have taken advantage of similar situation and after transfer of the appeal from Barabanki to Faizabad vide order dated 24.4.2007 by the Additional Consolidation Commissioner an order was passed on 3.1.2008 to file written arguments as the petitioner failed to argue the matter and the date was fixed as 8.1.2008 for filing written arguments. Thereafter, the Settlement Officer Consolidation did not give

any opportunity to the petitioner and decided the case on 8.1.2008 and set aside the order dated 24.4.2006 passed by the Consolidation Officer. So the opposite parties as well as the petitioner both stand on the same footing. The opposite parties avoided to argue the case as stated above before the Consolidation Officer and so the case was decided by the Consolidation Officer by giving various opportunities, whereas in the case of the petitioner only one date was given and on the next date the order of the Consolidation Officer was set aside. So the compliant of the opposite parties stands reduced to no illegality.

33. Learned Counsel for the petitioner has categorically stated that petitioner does not lay his claim in respect of the Gram Sabha land and, therefore, the claim of the petitioner in respect of the Gram Sabha land is rejected.

34. On a consideration of the aforesaid reasonings and the law on the subject, I am of the opinion that the orders passed by the Settlement Officer Consolidation and the Deputy Director of Consolidation are not justified as there was no occasion to remand the case to the Consolidation Officer. Therefore, they are liable to be set aside.

35. The writ petition is accordingly allowed. The orders dated 27.12.2008 and 8.1.2008 passed by the Deputy Director of Consolidation and the Settlement Officer Consolidation are hereby set aside and the order of the Consolidation Officer dated 24.4.2006 is maintained except in respect of the Gram Sabha land, regarding which the petitioner has given up his claim.