

(1984) 11 AHC CK 0006

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4582 of 1976

Smt. Sharda Devi

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 14-11-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 151

Constitution of India, 1950 — Article 226

Evidence Act, 1872 — Section 44

Limitation Act, 1963 — Article 59

Transfer of Property Act, 1882 — Section 5, 55, 8

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 176, 229B, 229C, 229K, 331(4)

Citation : (1985) AWC 113 : (1985) RD 93

Hon'ble Judges : B.L. Yadav, J

Bench : Single Bench

Advocate : S.N. Sahai and K.M. Singh, for the Appellant; K.B. Garg and R.N. Singh and S.C., for the Respondent

Final Decision : Allowed

Judgement

B.L. Yadav, J.—The present petition, under Article 226 of the Constitution is directed against order dated 30th July 1976 passed by Board of Revenue (Annexure "4"). The case has got a chequered history. A suit u/s 176 of the UP ZA & LR Act (hereinafter referred to as the Act for the sake of brevity) was filed by Sri Bhargunath Singh and Pbuleshar Singh, the Respondent Nos. 9 and 10. The Petitioner, however, was not a party to that suit. The suit was decided by a compromise dated 20th August 1963, these 6 plots in dispute (plots No. 20, 38, 13, 20, 14, 15 etc) were given in the share of Ramakant Singh and Shivkant Singh, Respondent Nos. 7 and 8.

2. The Petitioner who was not a party to this suit, filed another suit in respect of these plots u/s 229-B of the Act for declaration of Bhumidhari and Sirdari rights and Respondent Nos. 7 to 12 were also made parties along with State of U.P. and

Gaon Sabha concerned. The contesting parties of the suit, however, entered into a compromise, and in consequence a compromise decree was passed on 25th April 1964 and (he Petitioner was declared sirdar and bhumidhar of these 6 plots. The other Respondents who were parties to the suit, were however given other land (other than these six plots) and they felt satisfied.

3. It is worth mention that no appeal or revision was filed against the compromise decree dated 25-4-64 in favour of the Petitioner and the said decree became final between the parties in all respects. By an order dated 28-7-66 the name of the Petitioner was entered in revenue papers in pursuance of aforesaid compromise decree. Rama Kant Singh and Shivkant Singh, Respondent Nos. 7 and 8, executed a sale-deed on 11th July, 1966 in favour of Respondent Nos. 2 to 6 in respect of 6 plots in dispute, even though the aforesaid compromise decree in favour of the Petitioner became final.

4. It is further noticeable that after the compromise decree dated 25th April 1964 in which the Respondent Nos. 7 and 8 were parties and they accepted the claim of the Petitioner in respect of these 6 plots in dispute, they had no right left to execute a sale-deed in favour of Respondent Nos. 2 to 6. It was, however, open to them to challenge the compromise decree dated 25th April 1964 if so advised before the appellate or revisional court or it was open to them to have filed a civil suit for cancellation of the said compromise decree within a period of three years from the date of decree as provided under Article 59 of the Limitation Act, 1963. But nothing was done by them. They executed the aforesaid sale deed, hence such sale deed cannot ensure for the benefit of transferees.

5. The Respondents No. 2 to 6 on the strength of aforesaid sale-deed filed a miscellaneous application purporting to be u/s 151 CPC for setting aside the compromise decree dated 25-4-64. This application was dismissed by Assistant Collector I Class on 28-10-69. They preferred revision before the Additional Commissioner which was referred by order dated 7th May 1972 to the Board of Revenue with the recommendation that the same may be dismissed.

6. The Respondent Nos. 2 to 6, however, also have filed another suit u/s 22V-B of the Act, during pendency of the aforesaid application, alleging that they have become bhumidhars on the basis of the aforesaid sale-deed dated 11th July, 1966, and that the Petitioner has incorrectly got his name entered in revenue papers on the basis of the said compromise decree dated 25-4-64 and the said compromise decree was fraudulent and collusive and was not a legal decree, nor it was binding on the Respondents No. 7 and 8, the vendors, hence it was prayed that they may be declared bhumidhars of the plots in dispute.

7. This suit was contested by the Petitioner alleging that after genuine, valid and legal compromise decree dated 25th April, 1964, Respondent Nos. 7 and 8 have no right left in them to execute any sale-deed and in case they intended to themselves exonerate from the binding effect of the compromise decree on the ground that the said decree was fraudulent or illegal they could have challenged

it before proper court either by filing a suit for cancellation of the decree, or by preferring an appeal or revision, but they utterly failed to do so, hence Respondent Nos. 7 and 8, the vendors being bound by the compromise decree had no right left in themselves for the execution of any sale-deed dated 11-7-66 in favour of Respondent Nos. 2 to 6, hence the letter could not get any rights or title. It was further pleaded that the compromise decree was genuine, valid and legal and it was neither collusive nor fraudulent and vendors were bound by it and the same shall operate as res-judicata or in any case as an estoppel. The name of the Petitioner was correctly recorded as sirdar on the basis of the aforesaid compromise and the suit of Respondent Nos. 2 to 6 was liable to be dismissed.

8. The trial court dismissed the suit of Respondent Nos. 2 to 6 by his judgment and order dated 11th August, 1971 and their appeal was also dismissed by Additional Commissioner on 2-5-72. Their second appeal, however, was allowed by Board of Revenue by its judgment and order dated 30-7-76 and by this order the earlier reference made by Additional Commissioner has also been decided and the reference has also been allowed along with second appeal. It is thus judgment dated 30-7-76 which has been challenged by the present petition.

9. I have heard Sri K.M. Singh, learned Counsel for the Petitioner and Sri R.N. Singh, learned Counsel for Respondents at considerable length. Sri K.M. Singh has urged that the compromise decree was binding on the vendors and vendees, the Plaintiff-Respondents and in case they wanted to avoid it they could have done so by preferring an appeal or revision. The vendors, namely, Respondent Nos. 7 and 8 who were parties to the compromise decree could challenge the same but they also accepted the decree to be legal and valid and the persons bound by decree have no right to execute the sale deed Ignoring the decree. The learned Counsel further contended that the findings of the Additional Commissioner, about fraudulent or collusive nature of the decree which cannot be assailed in second appeal, were findings of Fact and these findings were based on the basis of evidence on record. Scope of Section 100 CPC permitted only questions of law to be raised and decided in second appeals and findings of facts based on evidence, howsoever grossly erroneous they may appear, cannot be challenged in second appeal, but the Board of Revenue exceeded the jurisdiction vested in him by law.

10. Sri R.N. Singh, the learned Counsel for the Respondents, urged that the judgment of the Board of Revenue was perfectly correct and there was no error apparent on the face of record. The State Government and Gaon Sabha were not parties in the compromise, hence the compromise was a nullity. He lent support to his arguments by relying on Surendra Narain Dubey v. Deputy Director of Consolidation 19/3 RD 328. This was a Division Bench decision of this Court in which it was held that in a suit filed u/s 229-C of the Act, all the parties entered into compromise in which it was admitted by Respondents that Appellants were bhumidhars and the Respondents had no interest in the disputed property. Gaon

Sabha and State Government were necessary parties but they were not impleaded. In that case a suit u/s 229-C was limited to the declaration of adhivasi right on the date of the suit i.e. in 1960. The adhivasis have become sirdars since 30th October 1954 after the enforcement of U.P. Act No. XX of 1954 hence it was held that suit u/s 229-G cannot be a substitute for a suit u/s 229-B and the controversy about declaration of Sirdari rights cannot be decided in a suit u/s 229-C and particularly in the absence of State Government and Gaon Sabha no valid decree can be passed. That case, however, is clearly distinguishable from the present case. In the present case, the suit was filed u/s 229-B and it was not a suit u/s 229-C and the State Government and Gaon Sabha were parties to the suit and they were properly served.

11. There was, however, a controversy as to whether notice on the State of U.P. can be deemed to have been validly served and as the State of U.P. has not raised any objection hence I think that, that controversy cannot be taken too far particularly when the learned Counsel for Respondents has not assailed the validity of the compromise decree on the basis whether State of U.P. was properly served or not. He has rather urged that the State of U.P. and Gaon Sabha were not made parties which was not correct, inasmuch as State Government and Gaon Sabha have been made parties. It appears from the judgment of the trial (?) and Additional Commissioner etc. that the State Government and Gaon Sabha have not contested the suit of the Petitioner in which compromise dated 25-4-64 was arrived at, hence the case of Surendra Nath Dubey v. Deputy Director of Consolidation (Supra) 1973 RD 328 would not apply to facts of the present case.

12. The learned Counsel for the Respondents next contended that the compromise decree can be proved to be fraudulent or collusive in view of provisions of Section 44 of the Evidence Act. In this connection he invited my attention to a Division Bench case reported in *Ibne Hasan v. Smt. Hasina Bibi* 1984 AWC 230. In that case it was held that any decree can be avoided on the ground that it was fraudulent or collusive or that it has been passed by the court having no jurisdiction. I have all respects for the proposition of law laid down in that case. But I am sorry to say that it does not apply to the facts of the present case. It was for the Respondents to have proved that the compromise decree dated 25-4-1964 was fraudulent or collusive but the same has not been proved by Respondents No. 2 to 6 inasmuch as there is a clear finding of fact recorded by Additional Commissioner after appreciating the evidence on record that the compromise decree dated 25-4-1964 was not fraudulent or collusive nor the same was fictitious and in case any fraud was committed at all it was not at the instance of the Petitioner, but it was committed by Defendants No. 2 and 3, namely, Ramakant Singh and Shiva Kant Singh (the Respondent Nos. 7 and 8.) who were vendors and executed the sale-deed in favour of Respondent Nos. 2 to 6. It has further been held that in case Respondent Nos. 2 to 6, the vendees were aggrieved, they were aggrieved, by the conduct of Respondents No. 7 and 8, the vendors and they could have got refunded their amount of sale

consideration and they should have no grievance against the Petitioner who got the land on the basis of the compromise decree dated 25-4-1964 which was not challenged by any person who was a party to the suit or who was signatory to the compromise. If some body (Respondent Nos. 2 to 6 vendees) has obtained any tale deed from some of the signatories (Respondent Nos. 7 and 8), in that event he should have no grievance against the Petitioner and at his instance the compromise cannot be challenged or set aside.

13. There is another aspect that the Respondent Nos. 2 to 6 being vendees were as provided u/s 55 of the Transfer of Property Act, where it has been provided that seller was bound to disclose to the buyer any material defect in the property or in the seller's title, and to produce to the buyer on his request for examination all documents of title relating to the property which are in seller's possession or power and to answer to the best of his information all relevant questions put to him by buyer. Similarly buyer was also bound to disclose the seller any defect in the interest of seller in the property which was in the knowledge of the buyer and not in the knowledge of the seller. [In this way legislature has contemplated that the buyer should make enquiries from the seller about the nature of the title of the seller and if there was any defect that can be discovered before the actual transaction, of sale takes place, but in this case it is surprising that nothing was done by Respondent Nos. 2 to 6 and if (hey have any cause of action the same was against the vendors. and not against the Petitioner. I am of the view that Respondent Nos. 2 to 6 have purchased litigation.

14. Further reliance has been placed by learned Counsel for Respondents on *Bhojai v. Salimullah* 1968 ALJ 656. In that case "fraud" has been dealt with. The facts of that case were that summonses and notices issued to the Defendants were falsely suppressed by the Plaintiff and incorrect report relating to service of summons was secured from the process server and the court was thus led to believe that the summonses or notices were properly served, hence ex-parte decree was passed, and the person against whom decree was passed had no knowledge at all. It has been held in that case that this was a clear case of fraud and the decree was vitiated by fraud. In that case Hon'ble Gangeshwar Prasad, J. has very clearly explained as to what facts would constitute fraud, how the allegations should be made about fraud, what evidence would prove fraud but that case is entirely on different facts. I am surprised to learn as to why that case was cited here. Here the Petitioner has not done anything fraudulent against Respondent Nos. 2 to 6. The Respondent Nos. 7 and 8 were bound by aforesaid compromise decree which they did not assail either by filing any civil suit for cancellation of the same or by preferring any appeal or revision before a proper court nor any writ petition was filed before this Court, hence It cannot be said that Respondent Nos. 7 and 8 wanted to challenge the compromise decree rather they accepted it voluntarily and were bound by it and were estopped from challenging the same. The Respondent Nos. 7 and 8, vendors, were left with no right so as to convey that right in favour of Respondent Nos. 2 to 6 by aforesaid sale-deed. Even if any fraud was committed it was by Respondent Nos. 7 and 8

against Respondent Nos. 2 to 6 but that fraud would not vitiate the compromise decree dated 25-4-1964. It is crystal clear that the Respondent Nos. 2 to 6 did not purchase the property rather they deliberately purchased litigation for which they should thank themselves. They unnecessarily dragged the Petitioner in the arena of luxurious litigation.

15. In this case the correctness of the decision rendered by the Board of Revenue has to be judged. The Board of Revenue was exercising jurisdiction u/s 100 CPC and has recorded a finding to the effect that the suit u/s 176 of the Act was filed by Respondent Nos. 9 and 10 against other Respondents and a compromise was arrived at on 20-8-1963 but it is noteworthy that in this suit and compromise the Petitioner was not a party hence it was not binding on the Petitioner. Another suit u/s 229-B of the Act was filed by the Petitioner and State Government and Gaon Sabha were made parties and Respondent Nos. 7 to 14 etc. were made Defendants and in that suit compromise was arrived at and the Respondents No. 7 to 12 admitted the case of the Petitioner about 6 plots in dispute. The Board of Revenue has taken an incorrect view that it is not beyond suspicion as to how suit u/s 176 of the Act for partition of holding was decreed but the Respondent Nos. 7 to 12 entered into compromise in favour of the Petitioner. But that was not an impossible affair inasmuch as any suit for partition might have been filed and a compromise might have been arrived at but as the Petitioner was not a party to that suit, any such compromise shall not be binding on the Petitioner. Later on a suit was filed u/s 229-B of the Act against the successful party in the previous suit, the latter could enter into a compromise in favour of the Petitioner but there is no question of any fraud being committed by the Petitioner. Just on suspicion fraud cannot be deemed to have been proved, particularly in the absence of any pleadings and evidence to prove the same.

16. Further under the facts and circumstances of the present case there was no finding recorded by the Additional Commissioner but the fraud having been committed. It has been clearly stated earlier that the Additional Commissioner has clearly held that no fraud or collusion was proved. This finding was recorded after consideration of entire evidence on record. It is well known that findings about fraudulent nature of transaction or about undue influence or whether a person is in a position to dominate will of another and procure certain deed by undue influence, are findings of fact and cannot be assailed in a second appeal. The second appeal is maintainable only on question of law and procedure.

17. There is a string of decisions i.e. Afsar Sheikh v. Suleman-bibi AIR 1976 SC 163, Ladli Parsad v. Karnal Distillery Co. Ltd. AIR 1963 SG 1279 Mst. Rajrani v. Rajaram AIR 1980 All 2020 and Mst. Kharbuja Kuer Vs. Jangbahadur Rai, , & on the basis of the ratio of these cases it is clear that finding that no fraud or collusion was proved by Respondent Nos. 2 to 6 are findings of fact and the Board of Revenue has exceeded its jurisdiction u/s 100 CPC to set aside these findings of fact. In view of the provisions of Section 331(4) of the Act second appeal would lie only on the question of law and not on the question of fact,

hence Board of Revenue has clearly committed an error apparent on the face of record in setting aside the findings of fact recorded by first appellate court and the trial court about fraudulent nature of transaction. Further just en suspicion it cannot be assumed nor findings of fact can be set aside but the Hoard of Revenue has held that "there appears to be some suspicion that after the decree in suit u/s 176 of the Act why should successful patty enter into compromise, surrender the lights in suit u/s 229-K of the Act. But the trial could not judge the evidence of the patties. But if the convenience of parties lay in entering into compromise subsequently, Board of Revenue should not stand in the way". It is well known that bad compromise is better than a good law suit. In case the vendees have entered into compromise admitting claim of Petitioner hence they had no rights in the plots to execute the sale deed in favour of Respondent Nos. 2 to 6.

18. There is yet another aspect of the matter. The well known maxim "*assignatus utitur jure auctoris*" which means that an assignee is clothed with the rights of his principal, is applicable to the facts of the; present case. In this case Respondent Nos. 7 and 8, vendors executed the sale deed on 11-7-1966 In favour of Respondent Nos. 2 to 6 with respect to six plots; in dispute, even though the aforesaid compromise decree in favour of the Petitioner has become final and the vendors did not take any steps to cancel the compromise decree in favour of the Petitioner. Hence the vendors were left with no rights to execute the sale deed in favour of Respondent Nos. 2 to 6. There is yet another maxim "*nemo plus juris ad alium transferee potest quam ipse haberet*" supplementing the aforesaid maxim, which simply means that any transferor can not transfer greater rights or interest than he himself possesses. In the instant case, as stated above as the vendors lost their rights in the compromise decree by which they agreed not to have any interest or the right in the six plots in dispute and they did not challenge the same, hence they were totally incapable of conveying any rights or title to the vendees.

19. It would be pertinent to have a concept of the transfer of property as envisaged by the Legislature in the Transfer of Property Act. The statutory provision of Section 5 of the Transfer of Property Act, so far as it is relevant for our purpose, is set out below:

Transfer of property defined:- In the following sections "transfer of property" means an act, by which a living person conveys property in present or in future to one or more other living persons, or to himself or to one or more other living persons and to transfer property is so perform such act.

20. The aforesaid section uses the term "transfer" in the most comprehensive sense comprehending all the species of contract, which passes real rights in the property from one person to another. In this way it is abundantly clear that unless some real rights are transferred from one living person to another, the transaction cannot amount to transfer. The concept of transfer has been considered by a five Judge Full Bench case of this Court in *Gapal Pandey v.*

Purshottam Das ILR 5 137 (FB) and the similar question was considered In Matadin Kosodhan v. Kazim Husain ILR 13 All 432 In which Mehmood, J. held at page No. 473 that where the property has been used in Its most general and comprehensive sense in the transfer of property, although the Act does not contemplate any scientific and comprehensive definition of the transfer of property, nevertheless the enactment must be read containing more comprehensive meaning. In Matcdin Kesodhan v. Kazim Husain (supra) it was held that the term "transfer" includes rights known as equity of redemption. Similarly in Umrao Singh Vs. Kacheru Singh and Others, a five Judge Full Bench has again considered the meaning of "property" used In Section 5 of the Transfer of Property Act, at page 425 All sop, J. held that where property may be used in the objective sense of concrete things which has supplied ownership or other rights; or it may be used in the sense of rights and interest of the owner or other person in that property. It is in the later sense that the term has been used in the Transfer of Property Act.

21. Under these circumstances, the question as to whether the vendors having no rights left after entering into compromise could have made any transfer in favour of Respondent Nos. 2 to 6. I think the answer would be in negative. In Aveline Scott Ditchm v. James J. Miller AIR 1931 PC 203, the Privy Council held at page 206; where the interest or the estate which it purported to assign had at the date of the deed no existence and it is well settled that neither at law nor in equity can the assignment of such an interest operate according to its tenor. See Performing Rights Society v. London Theatre of Varieties Ltd. 1922 2 KB 433, Collyer v. Issacs 1882, 19 Ch. D. 342, Performing Rights Society Ltd. v. Theatre of Varieties Ltd. 1924 AC 1. Similar view has been taken in Jugal Kishore Sarraf v. Raw Cotton Co. Ltd. AIR 1955 SC 376 and similar principle has been enunciated by Lord West-bury in Holryd v. Marshall 1962 10 HALC 191 in the following words:

It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law simply because there is nothing to convey.

Section 8 of the Transfer of Property Act provides:

Unless a different intention is expressed or necessarily implied the transfer of property passes forthwith to the transferee of the interest which the transferor is then capable of passing in the property and in the legal incident thereon.

22. In the aforesaid provision the emphasis by the Legislature is on all the interest which the transferor is then capable of passing in the property. In other words it is only the interest of the transferor which he is capable of conveying in the property that would pass to the vendee and in case he is not capable of passing any interest in the property, nothing would pass to the vendee. In the instant case the vendors were left with no rights as they lost all rights, title and interest in the plots in dispute in the aforesaid compromise and these plots were

given in favour of the Petitioner and in lieu thereof some corresponding plots were given to the vendors. Hence the vendors had no interest left so as to convey the same to the transferees. It is thus crystal clear that the vendees had not derived any right, title or interest in the sale deed executed by the vendors in their favour.

23. In view of the discussion hereinbefore, I am of the view that the Board of Revenue has clearly exceeded jurisdiction u/s 100 CPC read with Section 331(4) of the Act. There was no scope of the second appellate court to set aside the findings of fact recorded by the Additional Commissioner about the fraudulent or collusive nature of the decree. The findings of fact were also based on evidence and howsoever grossly erroneous they may appear to be, when in fact they were not erroneous, much less grossly erroneous, the second appellate court has no jurisdiction to interfere with the same. The vendors, Respondent Nos. 7 & 8 had no right, title or Interest left in the plots in dispute after admitting the claim of the Petitioner in the compromise decree, so as to be able to transfer any interest by the sale deed dated 11-7-66 in favour of vendees. Hence the vendees did not derive any title out of the sale deed.

24. In the result the writ petition succeeds and is allowed and the judgment and the order of the Board of Revenue dated 30-7-76 is hereby quashed, the Petitioner would also be entitled to her cost.