(2002) 02 AHC CK 0085

In the Allahabad High Court

Case No : C.M.W.P. No. 4886 of 2002

Umesh Chand and Others APPELLANT

Vs

Board of Revenue, Allahabad and Others RESPONDENT

Date of Decision : 11-02-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 164, 229B
Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 148, 149

Citation : (2002) 2 AWC 932 : (2002) 93 RD 264

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : R.N. Singh and B. Narain Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—Heard Sri H.N. Singh. counsel for the petitioners and learned standing counsel.

2. This writ petition has been filed by the petitioners praying for quashing of the order dated 20th November, 2001 passed by Board of Revenue, Allahabad and the order dated 22nd April, 1999 passed by Additional Commissioner,

3. The facts of the case as given in the writ petition are ; petitioners'' father filed a suit u/s 229B of U.P. Zamindari Abolition and Land Reforms Act in the Court of Additional Commissioner for declaration of bhumidhari rights of Plot No- 84 impleading respondent Nos. 3, 4 and 5 as defendants. The case of the plaintiff was that father of respondent Nos. 3, 4 and 5. i,e.. late Sri Lobhi, took an advance of Rs. 6,750 and issued a receipt on plain paper containing his thumb impression on 9.5.1979 as advance against plot No. 84 area 8 dismal, It was pleaded by the plaintiff that father of defendants in his life-time avoided to execute the sale-deed and subsequently died, hence, the suit was filed for declaration of bhumidhari rights. Respondent No. 3 filed a written statement denying the plaint allegations. Other defendants appeared but they did not file

written statement and the suit proceeded ex-parte against them. It was stated in the written statement that father of defendants, late Sri Lobhi, did not issue any receipt and his thumb impression on the receipt was denied. The possession was also denied. In the trial court, the plaintiff, Lalmani, also examined one witness. Chauthi, to prove the receipt. The plaintiff also examined himself. The trial court framed the issues and decreed the suit holding that receipt issued by Lobhi after taking money from plaintiff is a sale within meaning of Section 164 of U.P. Zamindari Abolition and Land Reforms Act. The defendants filed an appeal which was allowed by the first appellate court vide its judgment and order dated 22nd April. 1999. The first appellate court recorded a finding that trial court erred in accepting the thumb impression of Lobhi on the receipt without there being valid evidence. It was held that the thumb impression of Lobhi on the receipt ought to have been got examined by expert. It was held by the first appellate court that there was contradiction in the statement of plaintiff and his witness. Chauthi. A second appeal was filed by the petitioners which has been dismissed by the Board of Revenue vide its judgment dated 20th September, 2001. The Board of Revenue while dismissing the appeal held that no substantial question of law has been framed in the second appeal whereas second appeals can be considered only on substantial questions of law as required by Section 100 of Code of Civil Procedure. The second appellate court also noted that the receipt in question which refers to transfer of possession is not registered and has referred to decisions of this Court. The aforesaid judgment of first appellate court and second appellate court have been challenged in the present writ petition.

4. The counsel for the petitioners, Sri H.N. Singh, has made following submissions in support of the writ petition :

(1) There was sale within meaning of Section 164 of U.P. Zamindari Abolition and Land Reforms Act, 1950 in favour of plaintiffs on issuance of receipt by the defendants'' father and transfer of possession.

(2) Rules 148 and 149 of Zamindari Abolition and Land Reforms Rules, 1952, also demonstrate that Section 164 of U.P. Zamindari Abolition and Land Reforms Act will come into play as soon as a report is submitted by Lekhpal. The report of Lekhpal has not to be after any enquiry or investigation regarding transfer of rights in the holding.

5. From the facts of the present case and the submissions raised by counsel for the petitioners, the main question. which arises for consideration in the present case, is with regard to scope and ambit of Section 164 of U.P. Zamindari Abolition and Land Reforms Act. The counsel for the petitioners in support of his submissions has referred to provisions of Sections 152 to 164 of U. P, Zamindari Abolition and Land Reforms Act and Rules 148 and 149 of Zamindari Abolition and Land Reforms Rules. The counsel for the petitioners has also placed reliance on following decisions :

(i) Sati Prasad and Anr. v. Deputy Director of Consolidation, Kanpur and others, 1983 AWC 355 ;

(ii) Thakur Dass v. Deputy Director of Consolidation, Jhansi and others, 1986 AWC 513;

(iii) Writ Petition No. 51895 of 1999, Bashishtha Pandey v. District Judge, Kushi Nagar at Padrauna and others decided on 15.12.1999.

Both the submissions of counsel for the petitioners are interrelated and are taken up together for consideration.

6. Before looking into the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950, it is to be noted that in the present case, petitioners are claiming right u/s 164 of U.P. Zamindari Abolition and Land Reforms Act, 1950, on the basis of a receipt of money executed on a plain paper on revenue stamp by father of defendants showing advance of an amount against Plot No. 84 area 8 dismal. The case of the plaintiff as has been referred by the Court below was to the effect that father of defendants avoided to execute the sale deed in his life time after taking the rest of the amount, hence the suit was filed. Although the receipt is not claimed to be an agreement by the plaintiff but the plaintiff has set up a case that an advance money was taken by defendants'' father against 8 dismal area of Plot No. 84 for execution of sale deed which he failed to execute in his life time. The nature of allegations of plaintiff are to the effect that by taking advance of amount of Rs. 6,750 defendants'' father agreed to transfer the plot in question and give possession to the plaintiff. The trial court in its judgment has noted in substance the pleading of plaintiff which is to the following effect,

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From the above allegations, it is clear that aforesaid advance was given by plaintiff towards the aforesaid plot and he pressed for execution of sale deed after taking the balance amount. The averments claim that the transaction before the plaintiff and defendants was in the nature of agreement to sell.

7. U.P. Zamindari Abolition and Land Reforms Act. 1950 (hereinafter referred to as the Act) contains provisions with heading ''transfers'' from Sections 152 to 168. Section 152 of Ihe Act provides that interest of a bhumidhar with transferable rights shall, subject to the conditions hereinafter contained, be transferable. Section 153 provides that interest of an asami shall not be transferable. Section 154 contains restriction that no bhumidhar shall have the

right to transfer by sale or gift, any land other than tea gardens to any person where the transferee shall, as a result of such sale or gift, became entitled to land which together with land, if any. held by his family will in the aggregate, exceed 5.0586 hectares in Uttar Pradesh. Section 155 provides that no bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced. The section contains prohibition that no bhumidhar shall have the right to mortgage any land with possession. Section 156 contains provision with letting of land. Section 157 pertains to lease by disabled person. Sections 157A and 157AA contain provisions regarding restrictions on transfer of land by members of Scheduled Castes. With regard to registration of lease. Section 158 contains following provisions :

"158. Registration of a lease.--Notwithstanding anything contained in the Transfer of Property Act, 1882 (Act IV of 1882) or the Indian Registration Act, 1908 (Act XVI of 1908), a lease for a term exceeding one year or from year to year may be made either by a registered instrument or in the prescribed manner."

The opening word of Section 164 provides, "Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose ..,.." The section uses word transfer of any holding. The word transfer has not been defined in U.P. Zamindari Abolition and Land Reforms Act or the Rules framed thereunder. The word holding has also not been defined under the U.P. Zamindari Abolition and Land Reforms Act but it adopts the definition of holding as given in U.P. Tenancy Act, 1939. by virtue of Section 3 (26) of U.P. Zamindari Abolition and Land Reforms Act. The word holding has been defined in Section 3 (7) of U.P. Tenancy Act, 1939, as follows :

"holding" means a parcel or parcels of land held under one lease, engagement or grant, or in the absence of such lease, engagement or grant under one tenure and in the case of a ''thekadar includes the theka area ;"

8. Section 129 of U.P. Zamindari Abolition and Land Reforms Act defines tenure which includes bhumidhar with transferable rights and bhumidhar with non-transferable rights. The concept of transferable rights is attached with tenures. As noted above, Sections 152 to 167 relate to transfers and are provisions given under heading of word transfers. The words mortgage, sale, gift have been referred to as Incidence of transfers in provisions of Sections 152 to 167. When the word transfer has not been defined under the U.P.Z.A. and L.R. Act what is the importance and meaning of word transfer has to be looked into. Section 156 (2) ''provides that word lease and its cognate expression have the meaning assigned to them in the Transfer of Property Act. 1882. Section 156 (2) is quoted below :

"156 (2) In this Chapter, the word "Lease" and its cognate expression have the meaning assigned to them in the Transfer of Property Act, 1882 (IV of 1882)."

9. U.P. Zamindari Abolition and Land Reforms Act, which is a special Act, when does not give any special definition or meaning of word transfer, the word transfer as denned in Transfer of Property Act has to be looked into. Section 5 of Transfer of Property Act. 1882. defines transfer of property. Section 5 of Transfer of Property Act is quoted below :

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

In this section "living person" includes a company or association or body of individuals, whether incorporated or not. but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

10. Transfer of holding as contemplated in U.P. Zamindari Abolition and Land Reforms Act is transfer of property. A parcel of land or part of land or land included in a tenure is undoubtedly a property. Section 5 of Transfer of Property Act uses word ''convey''. The word convey has been defined in P. Ramanatha Aiyar''s Law Lexicon 2nd edition as :

"Convey" defined by Act 27 of 1866, Section 2.

CONVEY, to carry ; to bear ; to conduct ; to import ; to take to or from ; to transport ; to carry or transport the thing to another person or place ; to assure ; to grant ; to pass ; to pass a thing from one person to another as by deed, assignment or otherwise ; to transfer ; to transfer title of property.

1. To transport ; to take from one place to another (Section 282. I.P.C.) : 2. transfer property by means of instrument and other formalities ; 3. to transport ; to communicate."

11. Section 9 of Transfer of Property Act relates to oral transfer which provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 54 of Transfer of Properly Act defines tangible immovable property of the value of Rs. 100 and upwards that can be made only by registered instruments. Section 54 is quoted as below :

"54. "Sale" defined.--"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.--Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered Instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.--A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any Interest in or charge on such property."

12. Section 58 of Transfer of Property Act defines mortgage, Section 58(a) defines as under :

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money'' and "mortgage-deed" defined.--(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee ; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

13. Section 59 provides that where principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor. Section 59 is quoted as below :

"59. Mortgage when to be by assurance.--Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

14. This Court in several decisions had applied the provisions of Transfer of Property Act with regard to transfers made by bhumidhar under provisions of U.P. Zamindari Abolition and Land Reforms Act. In Jagat Narain v. Laljee and others 1964 RD 331, question arose as to whether provisions of Section 43 of Transfer of Property Act will be applicable to a transfer made by sirdar when subsequently he acquired bhumidhari rights. This Court applied the provisions of Section 43 of Transfer of Property Act in the aforesaid case. It was held in the aforesaid case that :

"ft must, therefore, be held that if a person professed to transfer the interest of a bhumidhar in a land in which he had only the non-transferable interest of a sirdar but he subsequently acquires in the land the interest of a bhumidhar, the benefit of the subsequent acquisition would go to the transferee, u/s 43 of the Transfer of Property Act, and the subsequently acquired interest of a bhumidhar will be deemed as having passed to the transferee under the transfer in his favour. Section 6 of the Transfer of Property Act cannot stand in the way of the applicability of Section 43 of the Transfer of Property Act because these two provisions have different spheres of operation and the question of conflict between them does not arise."

Thus, it is clear that the provisions of Transfer of Property Act are fully applicable while effecting a transfer of holding by bhumidhar. In the Act, wherever it is mentioned that particular meaning given in Transfer of Property Act or Indian Registration Act be not given to a transaction, specific provision has been made in U.P. Zamindari Abolition and Land Reforms Act. Reference has been made to Section 158 of U.P. Zamindari Abolition and Land Reforms Act which provides that lease for a term exceeding one year or from year to year may be made either by a registered instrument or in the prescribed manner. Section 158 of U.P. Zamindari Abolition and Land Reforms Act has overriding effects to the provisions of Transfer of Property Act and Indian Registration Act whereas Section 107 of Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year can be made only by the registered instrument. Section 158 clearly contemplates that applicability of Transfer of Property Act as well as Indian Registration Act is not ruled out in application to U.P. Zamindari Abolition and Land Reforms Act and the provisions are overridden in specific case. Apart from Section 59 of Transfer of Property Act, Section 17 of Indian Registration Act also provides that registration of instruments to value of more than 100 rupees or more of immovable property is required when such an instrument purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent. Section 17(1) of Indian Registration Act is quoted below :

17. Documents of which registration is compulsory.--(1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1964, or the Indian Registration Act. 1866. or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

la) instruments of gift of immovable properly ;

(b) other non-testamentary instruments which purport or operate, to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property ;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ; and

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare assign, limit or extinguish, whether in present or in further, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

Provided that the State Government may, by order published in the Official Gazette, except from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees."

15. From the above discussions, it is clear that any transfer of any holding regarding an amount of Rs. 100 or more can be only executed by registered documents. "Any transfer of any holding" referred to u/s 164 of U.P. Zamindari Abolition and Land Reforms Act refers to transfer of any interest in any holding if the value is more than 100 rupees of immovable property, the transfer has to be effected in accordance with law. No right or interest can pass in immovable property in a manner contrary to provisions of Transfer of Property Act and Indian Registration Act. The Division Bench of this Court in Mohd. Fasih v. Munir Khan 1987 ALJ 617, considered the scope and ambit of Section 164 of U.P. Zamindari Abolition and Land Reforms Act. The Division Bench held in paragraph 16 :

"16. Counsel for the respondents in this connection urged that in view of Section 164, U.P. Zamindari Abolition and Land Reforms Act, the agreement in question would be deemed to be a transfer inasmuch as it was admitted therein that possession over the property in suit had been delivered to the respondents in pursuance of the said agreement. According to him since possession over the property had been transferred to the respondents in pursuance of the said agreement the agreement was for all purposes a sale of the property. This submission also is on the face of it untenable. Section 164, U.P. Zamindari Abolition and Land Reforms Act. deals with transfer with possession by a bhumidhar. It contemplates transfer of any holding or any part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money referred to in the said section. On the face of it for the application of Section 164 transfer of possession alone is not sufficient. What is required by the section is transfer of possession made in pursuance of transfer of any holding or part thereof. Since an agreement of sale does not have the effect of transferring any holding or part thereof even if possession was transferred of the holding in pursuance of the said agreement it cannot be said that the agreement amounted to a sale u/s 164. Moreover, Section 164 contemplates transfer by a bhumidhar."

16. The Division Bench in the aforesaid judgment has clearly held that u/s 164, transfer of possession alone is not sufficient. It held "what is required by the section is transfer of possession made in pursuance of transfer of any holding or part thereof." Thus, for applicability of Section 164, transfer of possession has to be in pursuance of transfer of any holding. Transfer of any holding is condition precedent for transfer of possession. Thus, even if possession is transferred by bhumidhar without transferring any interest in the holding, the said transfer cannot be covered by Section 164 of U.P. Zamindari Abolition and Land Reforms Act. As observed above, transfer of any right in a holding by bhumidhar can be made of a value more than Rs. 100 by registered document. The Division Bench has also clearly held that even if by registered agreement to sale, transfer of possession is made by bhumidhar, the said transfer will not be covered by Section 164 of U.P. Zamindari Abolition and Land Reforms Act since by agreement to sale, no right or interest is transferred in the holding. When by registered agreement to sale with transfer of possession does not come within Section 164 of U.P. Zamindari Abolition and Land Reforms Act, there is no question of applying provisions of Section 164 of U.P. Zamindari Abolition and Land Reforms Act in the facts of the present case whereas, as noted above, only a plain receipt of revenue stamp was given by the father of defendants as advance for transferring the land in dispute. The case of the plaintiff, as noted above, clearly indicates that the transaction was more or less in the nature of agreement to sale. In view of the Division Bench pronouncement, it is clear that provisions of Section 164 of U.P. Zamindari Abolition and Land Reforms Act are not attracted in the facts of the present case.

17. This Court in several other decisions has taken the same view. In Data Ram v. Additional Civil Judge, Bulandshahr and Anr. 1978 ALJ 840, this Court held that there must be a transfer of holding in law, such as to transfer some right, title or interest of the tenure holder in the holding. It was held in paragraph 4 that :

"4. Having given the matter my anxious consideration, I am unable to agree with the contention of the learned counsel. Although Section 164 speaks of "any transfer of any holding or part thereof made by a bhumidhar", it does not mean that the transfer of holding spoken of thereby may be merely a transfer of possession over land included in the holding. There must be a transfer of the holding in law, such as to transfer some right, title or Interest of the tenure holder in the holding. A transfer of interest in holding cannot be effected in case of property valued at more than Rs. 100 without a registered Instrument. Even if there is transfer of possession under an unregistered agreement, there is no transfer of any right, title or interest of the tenure-holder in the holding. In my opinion a bare transfer of possession of land by a tenure-holder, may be for securing any payment of any advance to him, is not covered by Section 164 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. The object of Section 164 is to convert such transactions as a Zarpeshgi lease or a usufructuary mortgage into sale, and not to convert mere transfers of possession of land by a tenure holder without any transfer of Interest in the holding into sales. In this view of the matter the order of the Additional Civil Judge cannot be said to suffer from any error of law."

In Kedar v. District Judge, Banda 1978 RD 307, it was held that :

"Before this provision applies, the transaction in question has to be a transfer. An agreement to sell cannot be held to be transfer as contemplated by this section, for no title passes to another person as a result of the transaction. This apart, even assuming that such an agreement would fall within the purview of Section 164 of the Act, inasmuch as the Instrument evidencing it was not a registered one, no title at all could pass under this document as the consideration in the agreement to sell was in excess of Rs. 100. This contention must, therefore, be rejected."

In Hasan Raza Khan v. Board of Revenue, U.P. at Allahabad and others 1996 RD 165. this Court in almost similar facts, has taken the view that Section 164 of the Act is not attracted. In the aforesaid case, the claim was that recorded tenure holder had agreed to transfer the land and after accepting Rs. 100 as earnest money had given possession of the land and reliance was also placed on two receipts dated 24.3.1963 and 24.8.1963. This Court held in paragraph 14 as under :

"14. The provisions contained in Section 164 of the Act is to the following effect :

"164. Transfer with possession by a bhumidhar to be deemed a sale. Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan, and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Sections 154 and 163. shall apply. "

In the present case the defendant Asha Singh claimed that the recorded tenure holders had agreed to transfer the land in dispute in his favour and after accepting Rs. 100 as earnest money had put him in possession of the land in dispute in support of which claim he sought to place reliance upon two receipts dated 24.3.1963 and 24.8.1963. The trial court as well as the first appellate court have concurrently found the aforesaid receipts to be forged, interpolated, fictitious and manipulated. However, the fact remains that the entire defence of Asha Singh, the contesting defendant was based on alleged agreement of sale with delivery of possession. The provisions contained in Section 164 of the Act envisage a transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purposes of securing any payment of money advanced or to be advanced by way of loan, existing or future debt or the performance of an engagement which may give rise to a pecuniary anything contained in the document of transfer or any law for the time being in force has to be deemed at all times and for all purposes to be a sale in favour of the transferee. Asha Singh. the defendant had not come up with any such pleading which could lead to an inference that the alleged transfer of possession by the recorded ''tenure holders was for the purposes of securing any payment of money advanced or to be advanced by way of loan or an existing or future debt or the performance of an engagement which may even according to Asha Singh. the defendant himself, the recorded tenure holders had only entered into an agreement of sale in respect of the property in dispute in his favour. This Court in its decision in the case of Kedar v. District Judge, Banda, while considering the implications arising under the provisions contained in Section 164 of the Act had observed that before the said provision could apply the transaction in question had to be a transfer. It was observed further that an agreement to sell cannot be held to be a transfer as contemplated under the said section as no title passes to another person as a result of such transaction. It was further indicated that even if an agreement to sell could be deemed to fall within the purview of Section 164 of the Act in the absence of registration no title at all could pass under a mere agreement of sale in case the consideration in the agreement of sale was in excess of Rs. 100."

18. The counsel for the petitioners, Sri H.N. Singh. has submitted that interest in land has been transferred by the defendants'' father by accepting advance of the amount and by issuing the receipt. He has submitted that by the aforesaid transaction, the interest will be treated to be transferred since the plaintiff acquired interest in the holding having been advanced the amount aforesaid. Relying on Rules 148 and 149, the counsel for the petitioners submitted that these rules also do not contemplate any enquiry by Lekhpal regarding the nature of transfer. Admittedly, when the Lekhpal comes to know about transfer of possession, he can submit the report and on that basis of the report, action has to be taken. This also means that no detailed enquiry regarding his transfer has been contemplated. Rules 148 and 149 are quoted below :

''148. Section 164.--The Lekhpal shall as soon as he learns of a transfer mentioned in Section 164 submit a report to the Assistant Collector in charge of the Sub-Division mentioning therein :

(a) the name, parentage and address of the transferor and the transferee ;

(b) the number and area of the plots transferred ;

(c) the date of the transfer of possession, and

(d) the nature of the transfer.

749. (1) On receipt of the report from the Lekhpal or information from any interested parly the Assistant Collector in charge of the Sub-Division shall call upon the parties to show cause why action u/s 164 should not be taken in respect of the land in question.

(2) After hearing the parties and making such further inquiry as he considers

necessary, the Assistant Collector shall pass suitable orders and shall also order the correction of papers accordingly."

Rules 148 and 149 contain only procedural provisions. Rule 148 itself refers to transfer mentioned in Section 164. Thus, Rules 148 and 149 do not support the contention that transfer of possession is enough if it is in pursuance of some pecuniary interest for attracting Section 164. There is nothing in Rules 148 and 149 which militates against the expressed provision and entitlement of Section 164.

19. The decisions relied by counsel for the petitioners also need to be considered. The first decision relied by counsel for the petitioner is Safi Prasad v. Deputy Director of Consolidation. 1983 AWC 355. In the aforesaid case, the Court held that opposite party has admittedly mortgaged land in 1953, hence by operation of law, it became sale u/s 154. The aforesaid judgment is a short judgment which is quoted below :

"In this petition directed against order passed by Deputy Director of Consolidation the only controversy that arises for consideration is whether opposite parties who admittedly were tenure-holders of land in dispute could have mortgaged the land in favour of petitioner after abolition of Zamindari. The Deputy Director of Consolidation found that petitioners were entered in possession from 1366F to 1375F (1958-59 to 1967-68) which was not denied by opposite parties but they claimed that possession was permissive as it was mortgaged with petitioners for a period of five years in 1953. On this finding it is obvious that the right, interest or title of opposite parties stood extinguished as is clear from a combined reading of Section 164 read with Section 154 of U.P.Z.A. and L.R. Act, 1 of 1951. Section 164 provides that a transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for purposes of securing any payment of money advanced shall be deemed to be sale to the transferee and to every such sale the provisions of Section 154 shall be applicable. As It was admitted to opposite parties that they had mortgaged the land with petitioners in 1953 it is obvious that by operation of law it became a sale in favour of petitioners. u/s 154 the petitioners became entitled to land in dispute and the right, title and interest vested in them. The Deputy Director of Consolidation, therefore, committed an error in rejecting the claim of petitioners.

2. In the result the petition succeeds and is allowed. The order passed by Deputy Director of Consolidation is quashed. As no body has appeared on behalf of respondents there shall be no order as to costs."

The aforesaid judgment proceeded on the finding that opposite parties had mortgaged the land in 1953. u/s 164 if the land is mortgaged with possession. Section 164 will automatically be attracted. This case does not. In any manner, help the petitioners since in the present case neither any mortgage is claimed nor proved. As observed above, the mortgage has to be made in accordance with

Section 59 of Transfer of Property Act.

20. The second case relied by the counsel for the petitioners is Thakur Dass v. Deputy Director of Consolidation, Jhansi and Ors., 1986 AWC 513. In the aforesaid case, this Court held that where possession has been transferred by bhumidhar for the purposes of securing any payment of money advanced ''......................'' would become a sale. In the aforesaid case, reference has been made in paragraph 6 of the judgment, "mortgage deeds dated 19.5.1972 and 19.6.1972. The Court rightly held the said transaction a sale within Section 164. In the aforesaid case Court also held that there is no contradiction in Sections 155 and 164 of the Act. In the aforesaid judgment, there is no discussion as to in which manner aforesaid mortgage deeds were effected. The interest in the holding can be transferred by a mortgage deed and since the possession was given in that case in consequence of a mortgage deed by which interest in holding was transferred, the said transaction was rightly held to be sale within Section 164. In the present case, it was not the case of the plaintiff that any mortgage deed was executed by father of defendants, Lobhi, nor any mortgage deed is claimed in the present case. Thus, the aforesaid judgment also does not help the petitioners.

21. The third judgment which has been relied by counsel for the petitioners is an unreported judgment of this Court dated 15.12.1999 in Bashishtha Pandey v. District Judge, Kushi Nagar at Padrauna and Ors. The aforesaid judgment of learned single Judge has not noticed the Division Bench judgment in Mohd. Fosih''s case (supra). The Division Bench in the aforesaid judgment has clearly laid down that for applicability of Section 164. it is required that transfer of possession is made in pursuance of transfer of any holding or part thereof. Thus, for attracting Section 164 there must be a transfer of holding. Learned single Judge in Bashishtha Pandey''s case has placed reliance on three decisions, namely, (i) Brahma v. Board of Revenue, 1985 RD 292. (ii) Thakur Das u. D.D.C. 1986 RD 35 and (iii) in Re. Ramanand 1993 RD 90. Learned single Judge has observed that in the aforesaid three cases this has been laid down that, "an instrument which purports to transfer rights in immovable property even if it does not comply with the requirement of Registration Act, will be deemed to be valid for the purpose of Section 164 aforesaid." in Brahma''s case (also in 1985 ALJ 697 the Court did not accept the contention that if transfer of possession has taken place in pursuance of agreement to sell person in whose favour the agreement to sell was executed would become bhumidhar. Paragraphs 5 and 6 of the aforesaid judgment is quoted below :

"5. The learned counsel for the petitioner has contended before me that agreement to sell in his favour was dated 14.6.1967 and he came into possession over the disputed land in pursuance of that agreement hence the transfer of possession to him would make him bhumidhar of the disputed land in view of the provisions of Section 164 of the U.P.Z.A. and L.R. Act. In this connection he has placed reliance upon the ruling in Smf. Bhaguwatia v. Deputy

Director of Consolidation at Deoria 1982 AWC 47. No direct case has been cited before me that if transfer of possession has taken place in pursuance of an agreement to sell the person in whose favour agreement to sell was executed would become bhumidhar u/s 164 of the U.P.Z.A. and L.R. Act. The bare perusal of the section would indicate that it only covers the case of usufructuary mortgage in respect of a piece of land. The transaction of agreement to sell is not covered by the provisions of Section 164 of U.P. Act No. 1 of 1951 which reads as below :

"Any transfer of any hold-Ing or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan, and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Sections 154 and 163 shall apply."

6. The ruling relied upon by the learned counsel for the petitioner on this point and in Smt. Bhagwatiya v. Deputy Director of Consolidation, Deoria 1982 AWC 47, is inapplicable to the facts and circumstances of the present case. The aforesaid ruling dealt with usufructuary mortgage of bhumidhari land. To my mind the ruling relevant on the point would be the ruling in Kedar v. District Judge 1978 RD 307 : 1978 ALJ 836. The contention of the learned counsel for the petitioner on this point is devoid of merits."

The aforesaid judgment does not lay down any proposition that any instrument which purports to transfer of rights in Immovable property even if it does not comply with the requirement of Registration Act, will be deemed to be valid for purpose of Section 164, rather It relied on a Judgment in Kedar u. District Judge 1978 ALJ 836, where it was clearly held that no transfer of Interest in immovable property can be made without registered document. The second case referred to by learned single Judge is case of Thakur Das v. D.D.C. 1986 AWC 513. The aforesaid case has already been discussed above. The aforesaid case referred to mortgage deeds dated 19.5.1972 and 19.6.1972. However, in whole judgment it has not been mentioned as to whether aforesaid sale deeds were registered deeds or unregistered. The aforesaid case also do not lay down any proposition that an instrument which purports to transfer rights in immovable property even if it does not comply with the requirement of Registration Act, will be deemed to be valid for the purpose of Section 164 aforesaid. There is some mistake in the reference of third case nor the counsel for the petitioners has brought before me the decisions referred to therein, hence I am not able to examine the aforesaid case.

22. In view of what has been stated above, the aforesaid judgment of learned single Judge does not support the contention of the petitioners since the decisions relied in the aforesaid case do not lay down any proposition as referred

to in the judgment of learned single Judge. It is true that a document which purports to transfer of immovable property and is not registered, will attract the provisions of Section 164 and will be deemed to be sale but only when the value of the Immovable property is not Rs. 100 or more. Thus, the aforesaid law laid down by learned single Judge in Bashishtha Pandey''s case has to be confined to cases in which the value of property is not more than Rs. 100. If the value of property is more than Rs. 100 a transfer can be effected only by a registered instrument as laid down in Data Ram v. Additional Civil Judge 1978 ALJ 840 : Kedar v. District Judge 1978 RD 307. as noted above. In the present case admittedly the amount "in question is Rs. 6,750. hence the interest could have been transferred only by registered deed.

23. In view of the above discussions. It is clear that even if it is accepted for argument sake that the receipt was executed by defendants'' father, Lobhi, no case is made out to declare the aforesaid transaction as sell within Section 164 of U.P. Zamindari Abolition and Land Reforms Act. It is to be further noted that both, first appellate court and second appellate court, have held that plaintiff failed to prove by cogent evidence that thumb impression on the receipt was that of defendants'' father, Lobhi. In view of this also, no error was committed by first appellate court and second appellate court in dismissing the suit. The second appellate court has also held that appellants had not mentioned about any substantial question of law in the second appeal as required by Section 100, Code of Civil Procedure. The Apex Court in Madhavan Nair Vs. Ramankutty and Another, , has laid down that framing of substantial questions of law is mandatory after C.P.C. Amendment Act, 1976. The second appellate court did not commit any error in rejecting the appeal when substantial questions of law were not mentioned in the appeal. u/s 100, C.P.C., in which second appeal was to be entertained, substantial questions of law ought to have been pointed out in the appeal and when the appellants failed to point out any substantial questions of law, no error was committed by second appellate court in rejecting the appeal. However, the second appellate court has also examined the matter on merits and had concurred with the judgment of first appellate court.

24. In view of the above discussions. I do not find any merit in the writ petition. The writ petition lacks merit and is dismissed.

