(1997) 02 AHC CK 0137

In the Allahabad High Court

Case No : C.M.W.P. No. 30304 of 1994

Ziley Singh APPELLANT

Vs

Dy. Director of Consolidation and Others RESPONDENT

Date of Decision : 06-02-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 68
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 12, 9

Citation : (1997) 02 AHC CK 0137

Hon'ble Judges : S.P. Srivastava, J

Bench : Single Bench

Advocate : B. Malik, for the Appellant; R.B. Garg, S.C. and G.N. Verma, for the Respondent

Judgement

S.P. Srivastava, J.—Feeling aggrieved by an order passed by the Deputy Director of Consolidation, Muzffarnagar, whereunder setting aside the orders passed by the Consolidation Officer and the Settlement Officer, Consolidation passed in appeal and directing for the expunging of the names of Smt. Pushpa Devi and Kabul Singh from Khata Nos. 8 and 8A the name of Raghubir Singh was ordered to be recorded as Bhumidhar determining his share to be one half and the share of the Petitioner to be one half so far as Khata No. 8 was concerned and the share of the Petitioner to be l/3rd and that of Raghubir Singh to be 2/3rd so far as Khata No. 8A was concerned, the Petitioner has now approached this Court seeking redress praying for the quashing of the aforesaid order.

2. I have heard Sri B. Malik, learned counsel for the Petitioner and Sri G. N. Verma, learned counsel for the Respondents and have carefully perused the record.

3. The facts in brief shorn of details and necessary for the disposal of this case, lie in a narrow compass. In the proceedings u/s 9 of the U.P. Consolidation of Holdings Act, an objection was filed by the Petitioner claiming l/3rd share in

Khata No. 8A asserting that the remaining 2/3rd share was that of Smt. Pushpa Devi. It was further asserted that Narendra Kumar and Gyan Singh, the Respondents No. 3 and 4 had no concern with the holdings pertaining to the aforesaid Khata. Another objection was filed by Smt. Pushpa Devi claiming 2/3rd share in Khata No. 8A and remaining to be that of Ziley Singh, the Petitioner. It was asserted that she had not transferred her interest in favour of Narendra Kumar and Gyan Singh. The third objection was filed by Raghubir Singh claiming that he had purchased l/4th share of Narendra Kumar and l/4th share of Gyan Singh in Khata No. 8 vide the sale-deed dated 3.10.1980 and was entitled to half share in the said Khata. He had prayed for recording of his name as bhumidhar in respect of half share of the holding pertaining to Khata No. 8.

4. The Consolidation Officer came to the conclusion that Smt. Pushpa Devi had not transferred her interest in the land in dispute nor the alleged transferees had entered in the possession of the holdings of which they claimed to be the transferees. It was also found that Narendra Kumar and Gyan Singh had no right or interest which could be transferred in favour of Raghubir Singh and therefore, the sale-deed relied upon by him was legally in effectual.

5. On the findings recorded by him, the Consolidation Officer directed that the names of Narendra Kumar and Gyan Singh be expunged from the revenue records pertaining to Khata Nos. 8 and 8A and the name of Smt. Pushpa Devi be recorded, the objection of Raghubir Singh was also dismissed. The Consolidation Officer determined the share Smt. Pushpa Devi to be one half in Khata No. 8 and the other half to be that of Ziley Singh. So far as Khata No. 8A was concerned he determined the share of Smt. Pushpa Devi to be 2/3rd and that of Ziley Singh to be 1 /3rd.

6. Feeling aggrieved by the aforesaid order, Narendra Kumar and Gyan Singh filed an appeal. This appeal was confined to Khata No. 8A. The Appellant had placed reliance upon three sale-deeds alleged to have been executed by Smt. Pushpa Devi. One sale-deed was dated 16.5.1978, and the other sale-deeds were of the date 24.5.1978.

7. At the appellate stage, additional evidence in the shape of affidavit dated 25.1.1985 was filed and in this affidavit Mahipal Singh had stated that the sale-deed dated 16.5.1978 had been executed by Smt. Pushpa Devi of her own free will and had not been obtained by practicing fraud.

8. The Settlement Officer, Consolidation on an appraisal of evidence and materials on the record came to the conclusion that the sale-deeds relied upon had not been proved in accordance with law and maintaining the findings recorded by the Consolidation Officer, dismissed the appeal.

9. Thereafter, two revisions were filed challenging the order of the Settlement Officer, Consolidation. One revision had been filed by Narendra Kumar and the other by Raghubir Singh. These revisions were heard together and were disposed by the Deputy Director of Consolidation by a common order.

10. During the pendency of the revisions, Smt. Pushpa Devi died and her legatees were allowed to be brought on record in her place.

11. The Deputy Director of Consolidation on consideration of evidence on the record came to the conclusion that since Smt. Pushpa Devi had not denied the execution of the sale-deeds by her in the year 1978 and the only plea set up by her was that these sale-deeds had been obtained fraudulently but the alleged fraud had not been proved by her therefore, the aforesaid sale-deeds were liable to be accepted as having been duly executed.

12. It may be noticed that in her objection Smt. Pushpa Devi filed by her before the Consolidation Officer in paragraph 6 thereof she had stated that she had filed an objection in the proceedings u/s 12 of the U.P. Consolidation of Holdings Act Initiated by Narendra Kumar and Gyan Singh seeking mutation on the basis of the sale-deeds executed by her and in that objection she had asserted that the sale-deeds had been obtained fraudulently. In paragraph 8 of the aforesaid objection she had again reiterated that at the instance of her Counsel Sri Mahipal Singh, Advocate she had executed a sale-deed in favour of Narendra Kumar and Gyan Singh indicating further that she had not been paid any consideration for the sale and the execution was obtained fraudulently. In clear and categorical terms Smt. Pushpa Devi and come up with a case in the objection filed by her that the sale-deeds had been obtained fraudulently. She however, had reiterated the genuineness of the execution of the agreement of sale dated 5.6.1976 by her in favour of Dal Singh.

13. In her deposition before the Consolidation Officer when Smt. Pushpa Devi was confronted with her statement referred to hereinabove, she stated that she did not remember as to whether she had stated that Narendra Kumar and Gyan Singh had obtained the sale-deed fraudulently. She further stated that she did not remember as to whether Mahipal Singh had signed the sale-deed and Udaiblr Singh had also signed as a witness.

14. Narendra Kumar who had been examined as a witness had proved the execution of the sale-deeds executed by Smt. Pushpa Devi and had also stated that she had put her thumb impression on the same. Smt. Pushpa Devi had also stated that Mahipal Singh and Udaibir Singh had signed as witness. The scribe of the sale-deed was also examined. He had also stated that Smt. Pushpa Devi had executed the sale-deed in his presence and the witnesses had also signed in his presence.

15. Inspite of the aforesaid findings, the Consolidation Officer had come to the conclusion that the execution of the sale-deeds had not been proved according to law.

16. The Settlement Officer Consolidation, noticed that the sale-deeds had been duly registered and the endorsement of the Registrar indicated that so far as the two sale-deeds dated 24.5.1978 for an amount of Rs. 7,500 and for an amount of Rs. 15.500 were concerned, the amount of sale consideration was

acknowledged to have been received prior to the registration. Relying upon the provisions contained in Section 68 of the Indian Evidence Act, the Appellate Authority came to the conclusion that in case the execution of the sale-deed had been specifically denied in that event it was necessary to examine attesting witnesses which could not be deemed to have been so done in the present case. It is in this view of the matter, that the Settlement Officer Consolidation had come to the conclusion that since the execution of the sale-deeds had been specifically denied by Smt. Pushpa Devi and no attesting witness had been produced, the execution of the sale-deeds could not be deemed to have been proved in accordance with law. In the aforesaid circumstance, the appeal was dismissed.

17. The Deputy Director of Consolidation however, had come to the conclusion that the execution of the sale-deeds in question by Smt. Pushpa Devi had been duly proved. In this connection, he also made an observation that during the pendency of the appeal an affidavit of Mahipal Singh had been filed who was attesting witness and that affidavit could be read in evidence.

18. The learned counsel for the Petitioner has contended that the sale-deeds in question had to be treated as void and consequently being legally ineffectual they had no effect and could not result in the passing of the interest of Smt. Pushpa Devi in the holdings in question in favour of the contesting Respondents. In this connection, it has also been asserted that the execution of the sale-deeds in question had been specifically denied by Smt. Pushpa Devi and since she was an illiterate and Pardah Nashin lady, the burden of proof in regard to the due execution of the sale-deeds in question entirely lay on the transferees themselves and the burden to prove in this regard could not be deemed to have been discharged as held by the Deputy Director of Consolidation and that too on the basis of the affidavit of Mahipal Singh which was allowed to be brought on record at the appellate stage without affording any opportunity to the Petitioner to cross-examine the deponent of the said affidavit.

19. Learned counsel for the contesting Respondents however, has asserted that the sale-deeds in question even according to the case set up by Smt. Pushpa Devi herself could not be treated to be void but at the most fell in the category of voidable documents. What has been contended in that Smt. Pushpa Devi herself had come up with a case even prior to the filing of the objection u/s 9 of the U.P. Consolidation of Holdings Act, that is, at the time when she had objected to the mutation sought for on the basis of the sale-deeds in question indicating that the sale-deeds had been obtained fraudulently without disputing at all the execution thereof. What has been asserted is that her case was that the sale-deeds had been obtained fraudulently without paying any consideration and were fictitious transactions. In the circumstances, what has been contended is that once the execution is not disputed and the case is that the sale-deeds were obtained fraudulently the authorities under the U.P. Consolidation of Holdings Act could not ignore the sale-deeds treating the same to be void and had to proceed taking

them to be binding between the parties so long as the sale-deeds were not cancelled by a civil court of competent jurisdiction.

20. It has further been contended that in view of the absence of any specific denial of the execution of the sale-deeds in question, the provisions contained in Section 68 of the Evidence Act could not be deemed to have been attracted at all.

21. I have given my anxious consideration to the rival contentions of the learned counsel for the parties.

22. It seems to me that the expression "specifically denied" as contained in the proviso to Section 68 of the Evidence Act, means that the denial in question should be express, distinct and definite and must relate to the specific document which is sought to be denied and should be clear and unqualified and not ambiguous or vague, being something over and above a general denial. The proviso does not dispense with the proof of the document altogether but if the execution thereof is not specifically denied, it is not necessary to call an attesting witness for proving the same. Nonetheless, the evidence must of course be adduced for proving it by another witness. The proviso only removes the necessity of calling attesting witness to prove due execution in case of specific denial but does not purport to relieve the party of the necessity to prove the same by adducing other evidence in that behalf in the absence of specific denial. The effect of the proviso is that when an execution of a document referred to u/s 68 of the Evidence Act is neither admitted nor its execution specifically denied, the law requires the proof of the document in a less formal manner, that is, by evidence of one who is not necessarily an attesting witness. Attestation is required by law as a special precaution against forgery or fraud. Attacking a deed as a sham and nominal transaction cannot be taken to be a specific denial of execution.

23. It may further be noticed that the certified copy of the written statement filed by Smt. Pushpa Devi in Original Suit No. 138 of 1979 Dal Singh v. Smt. Pushpa Devi was brought on record by way of additional evidence during the pendency of the revision before the Respondent No. 1. In that written statement, Smt. Pushpa Devi had asserted that during the pendency of the suit filed by Dal Singh seeking specific performance of an agreement of sale at the instance of Mahipal Singh her Advocate, she had executed the sale-deeds in question for which she had not been paid any consideration and the transaction was fraudulent. During her cross examination when deposing before the Consolidation Officer when she had been confronted with the aforesaid assertions, she gave an evasive reply stating that she did not remember about having her said as above. During the pendency of the revision, Smt Pushpa Devi had died and on the basis of her Will dated 11.5.1989, Sri Arvind and Sarvind sons of Sri Shyam Singh had been brought on record as her heirs and legal representatives. Even the Petitioner had put forward a case claiming to be her heir and legal representative on account of being her husband''s brother and her co-tenure holder. This application was however, not allowed and the legatees of Smt. Pushpa Devi were

brought on record. These persons have submitted to the order passed by the Deputy Director of Consolidation. In this view of the matter, the claim of the Petitioner in regard to the validity or otherwise of the sale-deeds in question claimed to have been executed by Smt. Pushpa Devi cannot be permitted to be raised now specially when her legatees who had been brought on record as her only heirs and legal representatives as noticed in the impugned order passed by the Deputy Director of Consolidation, have not been impleaded in the present case.

24. There is yet another aspect of the matter which cannot be lost sight of. This Court in its decision in the case of Ram Nath v. Smt. Munna 1976 AWC 412 , rendered by a Full Bench had observed after taking into consideration the implication arising under the decision of the Apex Court in the case of Gorakh Nath Dube Vs. Hari Narain Singh and Others, that void and voidable instruments could not be taken to stand at par with reference to the provisions contained in Section 5 of the U.P. Consolidation of Holdings. Act. The void documents have to be treated to be invalid and liable to be disregarded by the consolidation authorities. However, so far as the other class of documents, viz., the voidable documents are concerned their legal effect can be taken away only by their being cancelled or set aside and such documents could be cancelled only by a court having power to cancel them, indicating that such documents remained binding so long as they were not cancelled. The Full Bench also indicated that the consolidation authorities had no power to cancel such documents. It is therefore, obvious that under the law, the documents which are voidable cannot be cancelled by the consolidation authorities and further they remain effective till cancelled and liable to be given effect to by consolidation authorities till they are cancelled by a competent court. The Full Bench approved of the decision of a learned single Judge of this Court in the case of Ram Bharose Lal Vs. Sukhdei and Others, wherein it had been clarified that a voidable transfer can only be avoided in a civil suit and could not be avoided in consolidation proceedings.

25. It seems to me that an instrument may be held to be void as opposed to voidable in those cases only when the element of consent to it is totally lacking that is when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. This involves a case where a party has been misled into essentially different from one he intended to execute or sign. In such cases, the aggrieved party is not precluded from proceeding on the footing that the deed in question is legally in effectual having no adverse effect on his right so as to require its cancellation. However, if the deed is merely voidable it continues to have a binding force and cannot be ignored so long as it is not cancelled by a court of competent jurisdiction.

26. In the present case, considering the claim of Smt Pushpa Devi as contained in her pleadings and in the evidence led by her as well as from her pleadings in the earlier proceedings including the proceedings relating to the Original Suit No. 138 of 1979, referred to hereinabove, the transactions in question could at the

most be taken to fall within the category of voidable transactions which could not be ignored by the Respondent authorities in the absence of their being cancelled by a civil court of competent Jurisdiction.

27. Learned counsel for the Petitioner has strenuously contended that the impugned order stand vitiated as the revising authority has based its findings on the question relating to the attestation of the sale-deeds under dispute on the affidavits of the attesting witnesses which were brought on record during the pendency of the appeal without affording an opportunity to the Petitioner of cross-examining the deponents of those affidavits. The Settlement Officer, Consolidation has refused to place reliance on the two affidavits of Mahipal Singh and Udaibir Singh, the attesting witnesses on the ground that the Petitioner had no opportunity to cross examine the deponents of those affidavits and the affidavits could not be taken to be evidence of the attesting witnesses. The Deputy Director of Consolidation however, did not agree with the aforesaid view of the Settlement Officer Consolidation and took the affidavits into consideration treating them to be admissible in evidence. The contention of the learned counsel for the Petitioner in this regard has lost its significance as in the facts and circumstances of the case in the absence of specific denial of the execution as noticed hereinabove, the proviso to Section 68 of the Indian Evidence Act could not be deemed to have been attracted so as to make it necessary to call an attesting witnesses in proof of the execution of the documents in question. The Deputy Director of Consolidation has noticed that even in the mutation proceedings initiated subsequent to the execution of the sale-deeds in question, Smt. Pushpa Devi had not filed any objection. Further from her case as taken up in the written statement filer! in Original Suit No. 138 of 1979, it could not be said that the transactions which the documents in question purported to effect were essentially different in substance or in kind from the transactions intended as according to Smt. Pushpa Devi herself, the deeds had been executed to defeat the claim of Plaintiff of Original Suit No. 138 of 1979. In the circumstances, therefore even if it is assumed that Smt. Pushpa Devi was entitled to the protection available to an illiterate or Pardahnashin lady in regard to the burden of proof, on the findings recorded on the materials brought on record, the transferees had discharged the burden effectually to prove the execution of the deeds in question which had been duly registered and their binding effect could be taken away only on their cancellation invoking the jurisdiction of civil court of competent jurisdiction. The contention of the learned counsel for the Petitioner in this regard therefore, is not acceptable.

28. In view of my conclusions indicated hereinabove, no ground has been made out justifying any interference in the impugned order passed by the Deputy Director of Consolidation, while exercising the extraordinary jurisdiction envisaged under Article 226 of the Constitution of India.

29. The writ petition is accordingly dismissed.

30. There shall however, be no order as to costs.

