

(1987) 04 AHC CK 0051

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 14113 of 1983

Kalpanath and Another

APPELLANT

Vs

The Deputy Director of
Consolidation and
Others

RESPONDENT

Date of Decision: April 22, 1987

Acts Referred:

- Evidence Act, 1872 - Section 90, 90(2)

Hon'ble Judges: R.P. Singh, J

Bench: Single Bench

Advocate: Sankatha Rai, for the Appellant; Faujdar Rai and S.C., for the Respondent

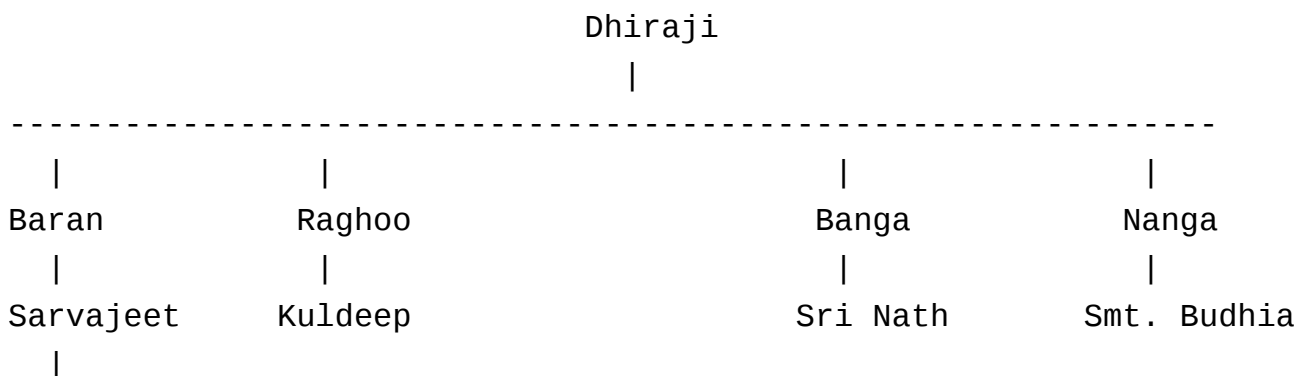
Final Decision: Dismissed

Judgement

R.P. Singh, J.

By means of this writ petition, the Petitioners have challenged the order passed by the Deputy Director of Consolidation, dated 23rd September, 1983, holding Smt. Phulrasani, Respondent No. 3, to be the sole bhumidhar of the Khatas in dispute.

2. For appreciating the facts of the case, the admitted pedigree given below would be relevant:



3. Brief facts of the case are that both the parties were recorded as co-bhumidhars over the khatas in dispute in the basic year. Smt. Phulrasani, Respondent No. 3, filed an objection claiming to be the sole bhumidhar of the khatas in dispute i.e. Khatas Nos. 737, 738, 379, 318 and 842 on the ground that her father Sarvajeet was originally the tenure-holder of the Khatas in dispute and after obtaining bnumidhari sanad, executed a registered sale deed in favour of her daughter Respondent No. 3 in the case on 1.8.1967 and hence she is the sole tenure-holder of the same and that the names of the Petitioners are liable to be expunged therefrom. Respondent No. 3 in support of her case filed 3 registered partition deed executed on 20.10.1947 which was duly signed by Sarvajeet, Kuldeep and Sri Nath on the basis of which the Khatas in dispute came to the share of Sarvajeet alone and hence Sarvajeet duly executed the sale deed in respect thereof after obtaining bhumidhari sanad in favour of her daughter, Respondent No. 3 on the basis of which Respondent No. 3 became the sole bhumidhar.

4. The objection filed by the Respondent No. 3 was contested by the Petitioners on the ground that the parties are coming down from the common ancestor i.e., Dhiraj and hence they are all entitled to the share in the Khatas in dispute as co-tenure-holders and on the basis of the pedigree set up in the case they claimed that they are rightly recorded as co-tenure-holders and that the partition deed, dated 20.10.1947 set up by the Respondent No. 3 was never acted upon and hence the Respondent No. 3 is not entitled to be recorded as sole bhumidhar over the khatas in dispute.

5. The Consolidation Officer held that the partition deed, dated 20.10.1947 set up by Smt. Phulrasani, Respondent No. 3, in support of her claim was never acted upon between the parties and hence dismissed the objection filed by Smt. Phulrasani allotting shares to both the parties in accordance with the admitted pedigree set up in the case. However, in respect of Khata No. 842, the name of Kuldeep, the Petitioner's father, was ordered to be expunged and hence both the parties filed appeals before the Settlement Officer (Consolidation), who partly allowed the appeal of Smt. Phulrasani, Respondent No. 3 and upheld the shares of the parties on the basis of the pedigree holding that the partition deed dated 20.10.1947, was not acted upon. Thus the claim of Respondent No. 3 on the basis of the said partition deed was also dismissed by the Settlement Officer (Consolidation). Feeling aggrieved, both the parties went up in revision before the Deputy Director of Consolidation, who, however, on appraisal of the evidence on record, held that the partion deed, dated 20.10.1947 was acted upon between the parties and since the signatures on this family partition deed by Kuldeep and others had never been denied by them, nor they at any point of time filed any suit for cancellation of this deed, hence the parties are bonnd by the partition deed executed by them which was acted upon and thus allowed the revision filed by Smt. Phulrasani, Respondent No. 3, holding her to be sole tenure-holder of the khatas in dispute and dimissed the revision filed by the Petitioners. Feeling aggrieved, the Petitioners have filed this writ petition before this Court.

6. The crucial question to be decided in the present case whether the title in the case would be decided on the basis of the pedigree set up or whether on the basis of the partition deed, dated 20.10.1947, Sarvajeet alone became sole tenure-holder of the khatas in dispute and on the basis of the sale deed executed by Sarvajeet, his daughter Smt. Phulrasani, Respondent No. 3, is entitled to be the sole tenure-holder of the same.

7. Learned Counsel for the Petitioners strenuously urged that Smt. Phulrasani, Respondent No. 3, did not base her claim on the basis of the partition deed, dated 20.10.1947 in her objection. Hence the Deputy Director of Consolidation could not travel outside the pleadings and decide the case on the basis of the family partition deed of 20.10.1947. Further that the Deputy Director of Consolidation has not given any finding regarding possession to see if the partition deed has been acted upon between the parties. Learned Counsel for the contesting Respondent in reply has submitted that the partition deed had already been filed as a piece of evidence by Smt. Phulrasani in support of her case and that her case was that her father Sarvajeet had executed registered sale deed in her favour on 1.8.1967 in respect of the land in dispute which had come to him on the basis of this partition deed of 1947 and hence it cannot be said that the Petitioners were taken by surprise. Further in the present case the Petitioners were clearly aware of the evidence that was led by the parties and hence no prejudice has been caused to the Petitioners. Moreover, the Consolidation Officer and the Settlement Officer (Consolidation) also had applied their mind to this partition deed of 1947 but did not accept this partition deed only because in their opinion, the partition deed was not acted upon. However, the Deputy Director of Consolidation on appraisal of the evidence on record believed the partition deed, recorded a categorical finding that the partition deed was acted upon between the parties and on the basis of this deed held the Respondent No. 3 to be sole bhumidhar of the land in dispute and in doing so no illegality has been committed by the Deputy Director of Consolidation.

8. Now we have to examine if the partition deed had been acted upon between the parties and whether the same could be relied upon by the Respondent No. 3 in support of her claim for being recorded as sole tenure-holder of the land in dispute. A copy of the partition deed, dated 20.10.1947 has been filed as Annexure "18" to the writ petition. This deed has been signed by Kuldeep, the father of the Petitioners and Kuldeep has not denied his signatures on the partition deed. No proceeding was ever taken by Kuldeep, the Petitioners' father, challenging this partition deed. Then Smt. Budhia, widow of Nanga as shown in the pedigree, herself transferred her share in favour of Smt. Phulrasani, Respondent No. 3, and the plots that were transferred in favour of Phulrasani by Smt. Budhia were the same that came to the share of Smt. Budhia in the partition deed of 1947 and it is important to note that this document of transfer of Smt. Budhia in favour of Respondent No. 3, has been signed by Kuldeep, the father of the Petitioners, which shows that the partition deed had been acted upon between the parties and it is the same plots which came to the share of Smt. Budhia in the partition deed of 1947 that were subsequently transferred in favour of Respondent No. 3. After the death of Dhiraj, the

common ancestor of the parties, the name of Sarvajeet alone was recorded over the disputed Khata in 1359 F which also shows that since these khata came to the share of Sarvajeet in the partition of 1947 and hence Sarvajeet alone was recorded as sole tenure-holder in 1359F and not the other sons or grand-sons of Dhiraj. Then it may also be noted here that even though Sarvajeet had executed a registered sale deed in favour of her daughter fcmt. Phulrasani, Respondent No. 3, on 1.8.1967 in respect of disputed khata, no suit was ever filed by Kuldeep for cancellation of the sale deed. The circumstances, stated above, were relied upon by the Deputy Director of Consolidation in arriving at a conclusion that the partition deed of 1947 between the parties was acted upon on the basis of which the disputed Khata came to the share of Sarvajeet alone and hence Sarvajeet was entitled to execute the sale deed in respect thereof in favour of Respondent No. 3 and consequently became sole bhumidhar of the same and I see no illegality or error committed by the Deputy Director of Consolidation in arriving at the finding that the partition deed of 1947 was acted upon between the parties on the basis of which, the Respondent No. 3 is entitled to be the sole bhumidhar of the khata in dispute.

9. The learned Counsel for the Petitioners has placed reliance on the case of [Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and Others](#), wherein it was held that the decision of a case cannot be based on grounds outside the plea of the parties. However, the facts of that case were that the High Court in appeal for the first time made out an entirely new case of benami transaction which was neither pleaded nor was the subject matter of the trial. In the present case, the Respondent No. 3 claimed to be sole tenure-holder of the land in dispute on the basis of the sale deed executed by her father Sarvajeet in her favour on 1.8.1967. In support of her case, she filed documentary evidence to show how Sarvajeet was the sole tenure-holder of the khata in dispute which he transferred in her favour and in support of her case she had filed the family partition deed of 1947 to which the Consolidation Officer had applied his mind and after discussing the evidence held that this partition deed was not acted upon between the parties and hence decided the case on the basis of the pedigree. The Settlement Officer (Consolidation) also applied his mind to the partition deed and hence it cannot be said that it was for the first time that this partition deed was relied upon by Smt. Phulrasani, Respondent No. 3, in revision before the Deputy Director of Consolidation and that the Petitioners were in any way taken by surprise and had no opportunity to meet this evidence. Hence the principle laid down in the case of Siddu Venkappa Devadiga (supra) relied upon by the learned Counsel for the Petitioners does not apply to the facts of the present case.

10. Learned Counsel for the Petitioners also relied upon the case of Nifikir v. Deputy Director of Consolidation, (?) Allahabad Law Reports, 696 where it was held that a plea not raised in the pleading or in the written statement cannot be allowed to be raised at the time of arguments. The facts of that case were that the Respondents had never raised any plea in their written statement before the consolidation authorities that the land in dispute had been allotted to the two widows in lieu of maintenance. On the contrary, their

case before the consolidation authorities was that there was a family settlement as a result of which all plots fell to the share of the two widows. Hence it was held in the circumstances of that case that it was not open to the Respondents to raise a new plea at the time of arguments which was contrary to the stand taken by them in the written statement. Thus it was held in that case that the consolidation authorities committed an error in entertaining a new plea of allotment in lieu of maintenance at the time of arguments which was contrary to the plea taken by them in the written statement. This case thus has no application to the facts of the present case where no arguments contrary to the case set up by Respondent No. 3 was raised at the time of arguments.

11. Learned Counsel for the Respondent No. 3 has relied upon the case of [Nagubai Ammal and Others Vs. B. Shama Rao and Others](#), wherein it was held that although no specific plea that the sale in favour of the Defendants was affected by the doctrine of lis pendens was raised in pleading of the Plaintiff and no specific issue was directed to that question the Defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the same. It was held that, in the circumstances, the absence of a specific pleading on the question was a mere irregularity, resulted in no prejudice to them. This case fully applies to the facts of the present case where the evidence had been led by the parties in support of their claim of title and the Respondent No. 3 had filed a copy of the partition deed of 1947 to which the counsel for the parties made an issue in the course of their arguments and the consolidation authorities applied their mind specifically to the same and hence it cannot be said that the Petitioners were in any way prejudiced on account of the Deputy Director of Consolidation deciding the case on the basis of this partition deed in support of the claim of Respondent No. 3 to be sole bhumidhar of the Khatas in dispute.

12. The learned Counsel for the contesting Respondent also relied upon the case of Chandi Prasad Rai v. Deputy Director of Consolidation 1982 AWC 105 where it is held that the claim of a party shall not be thrown out on mere technicality of pleadings. The consolidation authorities have to decide the case on the basis of evidence led by the parties, who are well aware of the case of each other. It was further held in that case that where parties led evidence knowing full well the case of each other, it can hardly be said that any prejudice was caused to the Petitioner on account of non-framing of issues on the particular point. This case also fully applies to the facts of the present case inasmuch in the present case also the parties were fully aware of the case of each other and led evidence in that respect and hence no prejudice has been caused to the Petitioners on the mere technicality of non-framing of an issue regarding the partition deed. In fact the issue framed was whether Smt. Phulrasani is sole bhumidhar of the land in dispute and Respondent No. 3 was claiming title on the basis of sale deed executed by her father Sarvajeet who got the land in dispute in his share through partition deed long back in the year 1947 and hence no prejudice could be said to have been caused to the Petitioners on account of non-framing of any issue regarding the partition deed.

13. The partition deed of 1947 is a registered deed and hence it is admissible in evidence u/s 90(2) of the Evidence Act. In fact before the consolidation authorities, it was at no stage challenged that the partition deed is not admissible in evidence on any account. The presumption u/s 90 of the Evidence Act as to the genuineness of a document is a matter which is within the discretion of the lower courts and its genuineness having never been challenged, the partition deed is clearly a genuine document rightly relied upon by the Deputy Director of Consolidation.

14. The Deputy Director of Consolidation has thus appraised the evidence in detail and various circumstances on the basis of which he recorded a finding that the partition deed, dated 20.10.1947 had been acted upon by the parties which is binding on them and the Deputy Director of Consolidation was fully within his jurisdiction in appreciating the evidence and relying on the document of the partition deed and consequently holding the Respondent No. 3 to be the sole tenure-holder of the Khatas in dispute.

15. There is thus no merit in the writ petition. It is accordingly dismissed. In the circumstances of the case, I make no order as to costs.