

(2013) 05 AHC CK 0451**Allahabad High Court****Case No:** Civil Misc. Writ Petition No. 16712 of 1987

Chunnoo

APPELLANT

Vs

Assistant Director of
Consolidation and Others

RESPONDENT

Date of Decision: May 24, 2013**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 145
- Hindu Marriage Act, 1955 - Section 5
- Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 9
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 229B

Citation: (2013) 7 ADJ 22 : (2013) 6 AWC 6513 : (2013) 120 RD 124**Hon'ble Judges:** Sanjay Misra, J**Bench:** Single Bench**Advocate:** S.K. Srivastava, Dan Bahadur Yadav, V.S. Singh and Vishwajeet Singh, for the Appellant; K.K. Singh, Raja Ram Kushwaha, Ram Kishor Pandey and Shashi Kant Shukla, for the Respondent**Final Decision:** Allowed**Judgement**

Sanjay Misra, J.

This writ petition arises out of proceedings u/s 9 of the U.P. Consolidation of Holdings Act 1953. The order dated 22.7.1987 passed in Revision No. 2705 of 1975 (Sitaram v. Chunnoo) by the Deputy Director of Consolidation, Hamirpur has been assailed. The dispute relates to Khata No. 236 situate in Village Bidhokhar-Purai, Pargana Sumerpur, District Hamirpur. The basic year khatauni recorded the name of Devideen (father of respondent Nos. 2 and 3) over the khata. The petitioner filed objection before the Consolidation Officer which was contested by Devideen however Devideen died and his two sons were substituted and they filed the revision before the Deputy Director of Consolidation. Affidavits have been

exchanged between the parties and an interim order dated 15.12.1987 is operating in this writ petition. Learned counsels have also filed their written arguments apart from making their oral submissions.

2. Heard Sri Dan Bahadur Yadav learned counsel for the petitioner, Sri R.R. Kushwaha learned counsel for the respondent Nos. 2 and 3 and learned Standing Counsel for respondent No. 1.

3. The petitioner Chunnoo had filed objection claiming to be co-tenure holder in Khata No. 236 with Devideen. He claimed to be son of Mataiya who had acquired the land and stated that Devideen had 1/8 share. Devideen denied that Chunnoo was son of Mataiya hence he had no share in the khata. The Consolidation Officer framed two issues i.e. whether Chunnoo is co-tenure holder in Khata No. 236 and whether Devideen is the sole owner in possession of the khata.

4. In support of his claim the petitioner led his evidence. He produced the letter which indicated that the village panchayat called the parties to solve the dispute but Devideen did not cooperate. He produced a witness Sunuwa and also deposed himself. The voters list of 1968 was produced which indicated that in House No. 5 at serial No. 13 Devideen is shown as son of Mataiya and at serial No. 16 Chunnoo is shown as son of Mataiya. The Death Register filed by him showed that Sukuru died on 15.1.1940 and the Birth Register filed by him showed that on 17.10.1946 a son was born to Mataiya. The petitioner Chunnoo filed an affidavit of one Bhawanideen son of Sukuru who stated that Chunnoo was son of Mataiya.

5. The opposite party Devideen led evidence to show that he alone was recorded in the revenue records as owner of the khata. He himself deposed as a witness. He filed an order of Case No. 14 u/s 145 Cr.P.C. He also produced Family Register which showed Chunnoo as son of Sukuru.

6. On the basis of the evidence and pleadings of the parties the Consolidation Officer held that when the Birth Register dated 17.10.1946 showed that a son was born to Mataiya then on the date of recording of oral evidence in the case before him 29 years had passed and Chunnoo had stated his age as 30 years approximately. On the other hand Devideen in his oral statement stated his age to be 40 years therefore on 17.10.1946 the child born to Mataiya could not be Devideen but it had to be Chunnoo. He further held that the Kutumb Register filed by Devideen had been filed in Case No. 14 u/s 145 Cr.P.C. and it had several cuttings and over writing in it and further that it was not proved by Devideen before him. The Consolidation Officer held that Devideen did not file any other evidence nor any person of the village came to give evidence in his support.

7. The Consolidation Officer considered the evidence led by the petitioner Chunnoo and held that in oral evidence Bhawanideen son of Sukuru had deposed that Chunnoo is son of Mataiya. The Kutumb Register showed that in House No. 5 Chunnoo is shown as son of Mataiya and the same is also recorded in the voters list

of the house. He found that the evidence indicated that Sukuru and Mataiya were brothers and after Sukuru died his widow started living with Mataiya and they had a son who was Chunnoo. The Consolidation Officer held that Devideen had attempted to prove that Chunnoo was son of Sukuru so that Chunnoo could get a share in the property of Sukuru but Sukuru's son Bhawanideen had in his affidavit clearly stated that Chunnoo is son of Mataiya so that Chunnoo can get a share in Mataiya's property. He concluded that Chunnoo is a member of this family since neither Devideen nor Bhawanideen had set up a case that Chunnoo is not a member of the family. He held that the evidence indicated that Chunnoo is son of Mataiya hence he is a co-sharer in the Khata No. 236 and declared the share of Chunnoo as 1/2 and that of Devideen as 1/2.

8. Devideen feeling aggrieved against the order dated 28.11.1975 of the Consolidation Officer in Case No. 10319 preferred an Appeal No. 1998 of 1975 (Devideen v. Chunnoo) before the Settlement Officer Consolidation. The Settlement Officer Consolidation held that Sundi was married to Sukru and they had a son Bhawanideen. After Sukru died Sundi started living with Sukru's brother Mataiya. Devideen was son of Mataiya from his first wife Rania. He held that as per local customs of Kachi caste it is common that a widow would live with a collateral of her deceased husband as his wife. He believed the Kutumb Register entry and the voter list as also the oral evidence of the witness and held that Chunnoo was son of Mataiya born from his second wife who was widow of Sukru after Sukru had died in 1940. Hence Chunnoo was son of Mataiya from Sundi widow of Sukru and Devideen was son of Mataiya from his first wife Rania. On these findings the Settlement Officer Consolidation dismissed the appeal of Devideen and affirmed the findings recorded by the Consolidation Officer.

9. In the meantime Devideen died and his two sons Sita Ram and Kamtu filed Revision No. 2705 (Sitaram v. Chunnoo) before the Deputy Director of Consolidation, Hamirpur against the order dated 31.12.1975 of the Settlement Officer Consolidation passed in Appeal No. 1998 of 1975. The Deputy Director of Consolidation has allowed the revision, set aside the orders of the Consolidation Officer and Settlement Officer Consolidation and directed that the name of Chunnoo (petitioner) be expunged from the revenue record of Khata No. 236 and the name of Devideen be entered in the record as it was in the basic year.

10. The Deputy Director of Consolidation has given reasons for allowing the revision which are as under:

- (1) The marriage of Mataiya to Sundi widow of Sukru has not been proved hence Chunnoo is not son of Mataiya.
- (2) The voter list produced to show that Chunnoo is son of Mataiya is not a certified copy hence it is not admissible as an evidence.

(3) The Kutumb Register filed is issued by one Ramdeen vaccinator who is not competent to issue such an extract of the Kutumb Register hence it cannot be an evidence.

(4) The Death Register appears not to show that Sukru died on 25.1.1940 but the name of the deceased appears to be Sukra or Muskara hence it is no evidence to prove that Sukru died on that date.

(5) The Birth Register showing that a son was born to Mataiya on 17.10.1946 appears to be not of Chunnoo but it must be of either Punna or Churma hence it is not evidence that Chunnoo was born to Mataiya on 17.10.1946.

(6) The certified copy of Kutumb Register filed by the sons of Devideen relating to House No. 239 shows that Devideen and his family live in this house and the extract of House No. 240 shows that Sundi widow of Sukru and her family live in this house. Therefore when Bhawanideen son of Sukru and Chunnoo son of Sukru are entered as living in House No. 240 hence the two families are living separately and not in the same house.

(7) In proceedings of Case No. 14 u/s 145 Cr.P.C. by order dated 23.3.1965 the land was found to be in possession of Devideen and it was released in his favour.

(8) After the release order dated 23.3.1965 the petitioner Chunnoo did not initiate any proceedings to claim his rights over the land nor he filed any suit u/s 229B of the U.P.Z.A. & L.R. Act to claim share or title in the land hence when for the first time he has filed objection on the start of these consolidation proceedings his objection has been wrongly allowed by the Courts below.

11. For the aforesaid reasons the Deputy Director of Consolidation has held that Sundi's marriage to Mataiya has not been proved and Chunnoo is not son of Mataiya hence he is not a co-sharer in the khata in dispute and his name should be expunged from the revenue record and Devideen's name should be recorded as per the basic year entry.

12. Sri Dan Bahadur Yadav learned counsel for the petitioner has made his oral submissions and has also filed his written arguments. The pedigree given by the petitioner is reproduced below:

13. He has submitted that Mataiya and Sukuru were cousin brothers. Sukuru was married to Sundi and from them Bhawanideen was born. Sukuru died on 25.1.1940 and Sundi re-married with Mataiya cousin brother of Sukuru and from them Chunnoo was born on 17.10.1946. Mataiya died in 1953 and at that time Chunnoo was a minor hence Devideen son of Mataiya from Rania who was step brother of minor Chunnoo was recorded in place of deceased Mataiya his father. Therefore in the basic year the name of Devideen was exclusively recorded over the khata in dispute. The respondent No. 2 Sita Ram and respondent No. 3 Kamta are sons of Devideen hence Chunnoo petitioner is uncle of the respondent Nos. 2 and 3 and

being son of Mataiya from his second wife Sundi he had 1/2 share in the property of Mataiya.

14. Learned counsel states that the dispute is amongst the heirs of Mataiya and not with the branch of Sukuru. While assailing the impugned order of the Deputy Director of Consolidation he has argued that the Deputy Director of Consolidation has lost sight of the fact that the petitioner Chunnoo had amended his objection before the Consolidation Officer and incorporated the averment that Sundi had remarried Mataiya after death of her first husband Sukuru {brother of Mataiya} therefore the finding of the Deputy Director of Consolidation that Chunnoo had not stated such fact in the objection u/s 9 of the Act is patently erroneous. He states that the amendment application dated 25.7.1975 (Annexure 8 of the writ petition) was not opposed by the respondent Nos. 2 and 3 and had been allowed by the Consolidation Officer. According to him the pleadings should receive a liberal construction so as not to defeat justice on hair splitting technicalities and when the parties knew the issues upon which they went to trial then no such plea of absence of pleadings should be raised or entertained in appeal or revision. In support of his submission he has placed reliance on a decision of the Supreme Court in the case of [Bhagwati Prasad Vs. Shri Chandramaul,](#).

15. Sri Yadav has argued that the factum of remarriage of Sundi with Mataiya and birth of a son (Chunnoo) therefrom was proved by the oral statement given by PW-2 Sunuwa who clearly deposed that Sundi was remarried to Mataiya and they were living together as husband and wife and that Chunnoo was born before him. The Deputy Director of Consolidation has ignored the statement of PW-2 when he has held that marriage of Sundi to Mataiya has not been proved. He further relies on Section 1 of the Hindu Widow's Remarriage Act 1956 in support of his submission.

16. Learned counsel for the petitioner has referred to Section 5 of the Hindu Marriage Act, 1955 to state that a presumption can be drawn of a valid marriage when in fact the two persons had been residing together for a long time and have been accepted by the society as husband and wife. He places reliance on a decision of the Supreme Court in the case of [Challamma Vs. Tilaga and Others,](#). He has also argued that a heavy burden lies on the person who seeks to prove that no marriage has taken place. He refers to the decision in the case of [Tulsa and Others Vs. Durghatiya and Others,](#) in support of his submission. He states that the view of the Deputy Director of Consolidation in the impugned order is clearly erroneous and illegal.

17. According to Sri Yadav the Deputy Director of Consolidation has erred in disbelieving the voters list, Kutumb Register etc. which are public documents as contemplated in the Evidence Act hence when the marriage and birth were duly proved even by the oral evidence of the witness he could not have discarded the documentary evidence even if photocopy of the voters list had been filed. Learned counsel states that the view of the Deputy Director of Consolidation while going

through the Kutumb Register, Birth register and death register are only conjectures and surmises hence require to be set aside since he has not recorded his own finding on those documents but has only aired his doubts as to the spelling of the names in those documents.

18. Lastly Sri Yadav has argued that the Deputy Director of Consolidation has committed an illegality in relying upon the extract of Kutumb Register filed by Devideen (father of Respondent Nos. 2 and 3) since it had cuttings and overwriting therein which was rightly discarded by both the Consolidation Officer and the Settlement Officer Consolidation in appeal. He states that the concurrent findings of fact recorded by the two Courts below have not been set aside by the Deputy Director of Consolidation.

19. Sri R.R. Kushwaha, learned counsel for the Respondent Nos. 2 and 3 has made his oral submissions and has also filed his written arguments. He supports the impugned order of the Deputy Director of Consolidation and states that the marriage of Sundi to Mataiya was not proved, the voters list filed by the petitioner was a photocopy and the Kutumb Register was not issued by a competent person hence could not be admissible in evidence. The Birth Register and Death Register did not have the name of Chunnoo or Sukuru respectively but the names were quite illegible and could be read as Punna or Chunna and Sukra or Muskara. He relies upon the Kutumb Register filed by Devideen to state that both the parties were living in separate houses hence it indicated that when in House No. 240 both Bhawanideen and Chunnoo are shown as sons of Sukru then the Consolidation Officer and Settlement Officer Consolidation had wrongly discarded this vital piece of documentary evidence which has been corrected by the Deputy Director of Consolidation.

20. According to him when proceedings in Case No. 14 u/s 145 Cr.P.C. found Devideen (father of respondent Nos. 2 and 3) to be in possession then the Deputy Director of Consolidation could not have ignored that the respondent Nos. 2 and 3 through their father Devideen were in possession of the property and were its owners. He further states that after these Section 145 Cr.P.C. proceeding of the year 1965 the petitioner Chunnoo did not initiate any proceedings for declaration of his rights or interest in the property in dispute hence his claim for the first time before the Consolidation Officer u/s 9 of the Consolidation of Holdings Act ought to have been rejected out right by the Consolidation Officer and the Settlement Officer Consolidation.

21. From the above submissions it is apparent that the issue between the parties is as to whether the petitioner Chunnoo is son of Mataiya born of Sundi. That Sundi was married to Sukuru and they had a son Bhawanideen is not in dispute. The death of Sukuru on 25.1.1940 is disputed by the respondent Nos. 2 and 3 and the Deputy Director of Consolidation has held that the entries in the death register are not very legible. He records that the name entered in the death register might be Sukra or

Muskara. He has not recorded any categorical finding as to whose name is shown in the death register. On the other hand the two Courts of the Consolidation Officer and Settlement Officer Consolidation have recorded categorical finding of fact on the death register entry to hold that Sukuru died on 25.1.1940. These two Courts had clearly held that the respondents had filed only a Kutumb Register as documentary evidence. He had not filed the death register. Therefore when the Consolidation Officer and the Settlement Officer Consolidation had recorded their finding on the death register filed by the petitioner the Deputy Director of Consolidation had to record a specific finding of fact on it but by holding that the name recorded therein might be Sukara or Muskara he had failed to record his finding on the document. The Deputy Director of Consolidation is the last Court of fact hence in case he does not agree with the finding of fact recorded by two Courts below him then he himself has to record a finding of fact. Having not done so the said view of the Deputy Director of Consolidation is clearly erroneous.

22. The other issue is whether Sundi gave birth to Chunnoo (petitioner) from Mataiya. The pedigree shows that Sukuru and Mataiya were cousin brothers. Both were sharers to the extent of 1/2 share in the land in dispute. Devideen (father of respondent Nos. 2 and 3) claimed to be recorded in the basic year even over the 1/2 share of Mataiya. He set up a case that Chunnoo was son of Sukuru from Sundi hence he was brother of Bhawanideen. According to him Chunnoo had no share in the property of Mataiya. The only documentary evidence filed by Devideen was a Kutumb Register. The Consolidation Officer and Settlement Officer Consolidation disbelieved the entry for two reasons. The first was that it had cuttings and over writing and the second was that it was not proved. The Deputy Director of Consolidation has perused the document to hold that in this Kutumb Register Devideen and his family are living in House No. 239 whereas in House No. 240 Sundi alongwith her son Bhawanideen and Chunnoo are living and both are shown as sons of Sukuru. The Deputy Director of Consolidation has failed to record any finding on the cuttings and over writing in this entry. When this register was not proved and the cuttings and over writings were not explained then the Deputy Director of Consolidation ought to have given his reasons for differing from the findings of fact recorded by the two Courts below who had disbelieved it since it was not proved. Devideen did not lead any evidence to prove the cuttings and over writing in this register. As such this conclusion of the Deputy Director of Consolidation is without any reason hence it is illegal.

23. The evidence lead by the petitioner to show that he is son of Mataiya was considered by the Consolidation Officer and the Settlement Officer Consolidation. The Birth Register dated 17.10.1946 showed that a son was born to Mataiya. On that date it could not have been Devideen since Devideen was 40 years of age when he deposed before the Consolidation Officer. At the time of his deposition only 29 years had elapsed from 17.10.1946. Therefore when a son was born on that date to Mataiya it was not Devideen. Devideen has not come up with a case that the son so

born to Mataiya on 17.10.1946 had died. When Chunnoo gave his oral statement before the Consolidation Officer he was 30 years old. The witness Sunuwa also deposed that Chunnoo was son of Mataiya born on 17.10.1946. Devideen did not produce any witness of the village or elsewhere in support of this case. Therefore it was a vague denial of Devideen to the entry made in the Birth Register. The Consolidation Officer and Settlement Officer Consolidation believed the entry in the Birth Register which was supported with the oral statement of the witness Sunuwa. The Deputy Director of Consolidation has disbelieved the entry only for the reason that the name shown in the Birth Register was either Punna or Chunna and not Chunnoo. Even while perusing this document the Deputy Director of Consolidation has not recorded any specific finding as to whose name was recorded therein. The Deputy Director of Consolidation has also totally ignored the oral statement of the witness Sunuwa produced by the petitioner to prove that he was son of Mataiya and was born on 17.10.1946.

24. On the other hand the Consolidation Officer and Settlement Officer Consolidation both have found that Bhawanideen son of Sukuru had deposed that Chunnoo is son of Mataiya. Bhawanideen was born of the wedlock of Sukuru and Sundi. Hence Sundi was his mother. He being the son of Sundi supported the case of the petitioner that after the death of Sukuru on 15.1.1940 his mother Sundi married Mataiya who was the cousin brother of Sukuru. He stated that Chunnoo was son of Mataiya with Sundi. This was a vital piece of evidence led on behalf of the petitioner before the Consolidation Officer and both the Consolidation Officer and Settlement Officer Consolidation believed it. The Deputy Director of Consolidation has ignored this evidence for the reason that the factum of marriage between Mataiya and Sundi was not proved.

25. The Trial Court and the first appellate Court have held that in the Kachi caste it was a tradition or a local custom that a widow would live with a collateral of her husband as his wife. This view of the two Courts is on the basis of evidence. The Deputy Director of Consolidation did not find favour with this view when he found that the factum of marriage had not been proved. It appears that the Deputy Director of Consolidation lost sight of the Hindu Widow's Remarriage Act 1956 wherein Section 1 provides that such a marriage shall not be invalid or illegitimate and in view of Section 5 of the Hindu Marriage Act 1955 a presumption of a valid marriage, having regard to the fact that they had been residing together for a long time and have been accepted in the society as husband and wife can be drawn. It has been held in the case of Challamma (supra) that long cohabitation and acceptance of the society of a man and woman as husband and wife goes a long way in establishing a valid marriage. It was held that in such circumstances a heavy burden lies on the person who seeks to prove that no marriage has taken place. When it was common in the Kachi caste that the widow would live with a collateral of her deceased husband and this fact was proved by the evidence in the present case then the factum of marriage between Mataiya and Sundi was to be presumed

and the Consolidation Officer and Settlement Officer Consolidation held so. The burden of proof was not successfully discharged by the respondent Nos. 2 and 3 or their father Devideen. The Deputy Director of Consolidation was wrong in misdirecting himself to hold that the actual act of marriage was required to be proved.

26. The fact that Devideen (father of respondent Nos. 2 and 3) was living in House No. 239 and Sundi with her two sons Bhawanideen from first husband and Chunnoo from second husband were living in House No. 240 is itself not a proof that Chunnoo was not son of Mataiya and Sundi. Admittedly Mataiya died in 1953. From his first marriage to Rania he had a son Devideen. After Mataiya's death in 1953 it appears that Sundi his widow started living with her natural son Bhawanideen from her first marriage to Sukuru and Chunnoo her second son born from Mataiya also lived with his mother Sundi. Moreover this fact of living together was recorded in the Kutumb Register produced by Devideen. It had several cuttings and overwriting in it. It was also not proved. Hence to say that Chunnoo was son of Sukuru would be incorrect. No other documentary evidence was led by Devideen on this fact. The Deputy Director of Consolidation has gone through these entries but has not explained the cuttings and over writing nor he has set aside the findings recorded by the two Courts below who have disbelieved the entries. The view of the Deputy Director of Consolidation is therefore not in accordance with law.

27. It was conclusively proved that the petitioner was born to Sundi from Mataiya and was therefore the step brother of Devideen. The presumption drawn by the Consolidation Officer and Settlement Officer Consolidation regarding the marriage of Sundi with Mataiya was rightly drawn. The Deputy Director of Consolidation had lost sight of the legal effect of Section 1 of the Hindu Widow's Remarriage Act 1956 and Section 5 of the Hindu Marriage Act 1955 in view of the facts pleaded and evidence on record.

28. The fact that Devideen was exclusively recorded in the basic year has been considered by the Consolidation Officer and Settlement Officer Consolidation and they have reasoned that on the date when Mataiya died in 1953 Chunnoo his son was a minor hence the major son of Mataiya i.e. Devideen was recorded in the revenue records in place of deceased Mataiya. These facts are apparent from the evidence and there is no error in the finding recorded by the two Courts.

29. The Deputy Director of Consolidation has recorded that the petitioner has nowhere pleaded the fact that Sundi remarried Mataiya. This observation of the Deputy Director of Consolidation is clearly against the record. The record indicates that this fact was pleaded by the petitioner in his objection by way of an amendment to his original objection. This amendment was not opposed by the other side. The amendment application dated 25.7.1975 was allowed by the Consolidation Officer.

30. Clearly the impugned order has been passed in ignorance of the evidence led by the parties. The Deputy Director of Consolidation has in a slipshod manner allowed the revision without application of mind. He appears to have decided the revision not on the basis of evidence but only on conjectures and surmises which are also not based on any judicial principles.

31. The impugned order is therefore not sustainable. It requires to be set aside.

32. For the aforesaid reasons the impugned order dated 22.7.1987 passed by the Deputy Director of Consolidation in Revision No. 2705 of 1975 (Sitaram v. Chunnoo) is set aside.

33. This writ petition is allowed.

34. Interim order dated 15.12.1987 is vacated. Cost on parties.