(2015) 03 AHC CK 0133

Allahabad High Court

Case No: Writ-B No. 27257 of 2013

Ishaq and Others		APPELLANT
	Vs	
D.D.C. and Others		RESPONDENT

Date of Decision: March 20, 2015

Acts Referred:

- Constitution of India, 1950 - Article 227
- Evidence Act, 1872 - Section 48, 50
- Penal Code, 1860 (IPC) - Section 218
- Uttar Pradesh Land Revenue Act, 1901 - Section 57

Citation: (2015) 127 RD 603

Hon'ble Judges: Ram Surat Ram (Maurya), J

Bench: Single Bench

Advocate: Sharfuddin Ahmad, O.P. Rai, Onkar Nath Rai, Uttam Kumar Goswami, C.K. Rai and Anil Tiwari, for the Appellant; J.P. Pandey, Juned Alam and R.C. Singh, Advocates for the Respondent

Final Decision: Allowed

Judgement

Ram Surat Ram (Maurya), J.

Heard Sri C.K. Rai and Sri Anil Tiwari, for the petitioners and Sri R.C. Singh and Sri Juned Alam, for respondents-4 to 11 and 13. The writ petition has been filed against the orders of Consolidation Officer dated 28.2.1984 and Deputy Director of Consolidation dated 9.4.2013, passed in title proceeding under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. The dispute relates to basic consolidation year khatas 314 and 375 of village Pakadiyar Poorabpatti, pargana Sidhuwa Jobna, district Deoria (at present Kushi Nagar). Khata 314 was recorded in the names of Nazir, Paigamber Din, sons of Ishu, Ibrahim, Israil, Ismail, Ishaq sons of Habib and khata 375 was recorded in the names of Paigamber Din son of Ishu, Ibrahim, Israil, Ismail, Ishaq sons of Habib, Jumrati

son of Daud, in basic consolidation records. During partal, dispute was noted that the name of Jumrati son of Daud be recorded as co-tenure holder. Several other disputes were noted regarding share of the various co-tenure holders and correction of area of various plots of the khatas. Nazir filed an objection claiming co-tenancy in khata 375. Paigamber Din filed an objection for changing parentage of Nazir as Daud in place of Ishu and for deleting the name of Jumrati. Paigamber Din filed another objection, claiming sole tenancy of plots 954 Smt. Nabi Hasan and Smt. Hafizan filed an objection claiming co-tenancy of 1/2 share jointly in plots 960 and 961. Assistant Consolidation Officer referred the dispute to Consolidation Officer. Now in this writ petition, the dispute is confined to the parentage of Nazir. According to the petitioners, Nazir was son of Daud while according to Nazir and Jumrati, Nazir was son of Ishu.

3. It is admitted that Daud and Ishu were real brothers and sons of Nasaralli. Daud was married to Smt. Mashihna, from whom Jumman was born. Ishu was married to Smt. Bakilna from whom Habib was born. According to the petitioners, after birth of Jumman, Smt. Mashihna died and Daud remarried to Smt. Jumratna, from whom two sons Jumrati and Nazir were born and thereafter, Daud died. Then Smt. Jumratna was remarried to Ishu from whom Paigamber Din was born. While according to Nazir and Jumrati, after death of Smt. Mashihna, Daud remarried to Smt. Jumratna, from whom only one son Jumrati was born, thereafter, Daud died. Then Smt. Jumratna remarried to Ishu from whom two sons, Nazir and Paigamber Din were born. The Consolidation Officer, after hearing the parties, by order dated 28.2.1984 held that the land in dispute was jointly recorded in the names of Daud and Ishu in 1323 F. In 1347 F, khatauni, the land in dispute was recorded in the names of Ishu son of Nasaralli and Jumman, Jumrati sons of Daud and same entry continued up to 1375 F. In Voter Lists of the year 1965, 1968, 1969, 1971 and 1973 names of Nazir and Paigamber Din sons of Ishu were recorded in house No. 156. Name of Jumman son of Daud was recorded in house No. 155 and Jumrati son of Daud was recorded in house No. 154. At that time Ishu was alive and no dispute was raised either by Ishu or Paigamber Din. In the copies of Family Register, issued on 17.7.1974 and 1.10.1982, parentage of Nazir was mentioned as Ishu. In the copy of Family Register, issued on 26.11.1982, parentage of Nazir was noted as Daud. From khatauni 1347 F, it is clear that in case, Nazir had been son of Daud, then his name must have been recorded along with two other sons of Daud. Same entry was continued up to 1375 F and no objection was raised by any of the parties. As such it is proved that Nazir was son of Ishu and not Daud. The claim of Smt. Nabi Hasan and Smt. Hafizan was not found to be proved. Issue relating to Jumrati was not dealt with. On these findings, objections of Paigamber Din, Jumrati son of Daud and Smt. Nabi Hasan and others, so far as it was for changing parentage of Nazir was dismissed and so far as it was for deleting the name of Jumrati was allowed. Nazir was held as co-sharer in both the khatas, having 1/3 share and share of remaining persons of the branch of Ishu were given according to the pedigree in both the

khatas.

4. Paigamber Din and others filed an appeal, Smt. Nabi Hasan and Smt. Hafizan filed other appeal and Jumrati son of Daud filed third appeal from the order of Consolidation Officer. These appeals (registered as Appeal Nos. 51, 52 and 53) were consolidated and heard by Assistant Settlement Officer Consolidation, who by order dated 2.6.2001 allowed the appeal of Jumarati son of Daud in respect of khata 375, holding his share as 1/6 and allowed appeal of Paigamber Din and held that Nazir was son of Daud and his share in khata 375 was held as 1/6. The land of khata 314 was held as exclusive property of Habib and Paigamber Din sons of Ishu and dismissed the appeal Smt. Nabi Hasan and Smt. Hafizan. Nazir filed a revision (registered as Revision No. 72/79) and Jumrati filed another revision (registered as Revision No. 73/80) against the aforesaid orders. Both the revisions were consolidated and heard by Deputy Director of Consolidation, who by order dated 9.4.2013 held that Daud died in 1935 and after his death names of Jumman and Jumrati sons of Daud was recorded as his heirs in the revenue record as is proved from khatauni 1347 F. Had Nazir been also son of Daud, then there would have been no reason for not recording the name of Nazir also along with names of Jumman and Jumrati sons of Daud. Consolidation Officer found that entry of 1347 F continued till 1375 F without any objection to any one. In Voter List of 1965, names of Nazir and Paigamber Din sons of Ishu was recorded in house No. 156, which shows that they were real brothers. In Pariwar Register also parentage of Nazir was noted as Ishu, which was later on changed. Assistant Settlement Officer Consolidation, merely on the ground that in patta taken by Nazir of Gaon Sabha land, his parentage was noted as Daud, reversed the findings of Consolidation Officer, without examining khatauni, Pariwar Register and Voter List prior to 1975, which is liable to be set aside. In the order of Consolidation Officer, in place of khata 375, khata 314 was written, which is a clerical error and is liable to be corrected. On these findings, both the revisions were allowed and order of Assistant Settlement Officer Consolidation was set aside. Jumrati son of Daud was given 1/3 share in khata 375 and Nazir was given 1/6 share in khatas 375 and 1/3 share in khata 314. Hence this writ petition has been filed.

5. The Counsel for the petitioners submitted that neither Consolidation Officer nor Deputy Director of Consolidation referred or considered the oral evidence of the parties. The petitioner examined Shivji Giri, an independent witness of the village, who has proved that Nazir was son of Daud. Hafizan, who was a family member, has stated that Nazir was son of Daud, her statement was admissible in evidence under section 50 of the Evidence Act, 1872. Nazir, himself obtained patta of Gaon Sabha land, in which his parentage was noted as Daud. The patta contains the admission of Nazir and was best evidence, which can be relied upon against him. Parentage of Nazir was corrected in Pariwar Register in the proceedings under section 6-A of U.P. Panchayat Raj Act, 1947 by the competent authority. The order of Assistant Development Officer dated 7.11.1974 was recalled ex-parte, from which the

petitioners have filed an appeal, which is pending. Voter List was also corrected. But these documents have been illegally ignored. Deputy Director of Consolidation is a last Court of fact, his order was also a order of reversal as such he was required to consider entire evidence and record an independent finding but he has illegally relied upon, the order of Consolidation Officer. At the time of death of Daud, Nazir was of tender age and on remarriage of his mother Smt. Jumratna, he began to live along with Ishu as such inadvertently Patwari omitted to record his name also as an heir of Daud. Nazir has been set up by his brother Jumrati as by shifting him as son of Ishu, Nazir will get share in both the khatas, and share of Jumrati will increase. Jumrati filed a false objection that Nazir was son of Ishu. Nazir, in his statement could not give name of his mother, which shows that he was concealing true facts and his statement was false. Ishu was an illiterate man, he could not notice that after death of Daud, name of Nazir was not recorded as an heir of Daud along with his brothers. Remark in this respect was illegal. In any case, the parentage of Nazir ought to have been decided on the basis of evidence on record and not on omission/negligence of Ishu only. Deputy Director of Consolidation was last Court of fact. The order of Deputy Director of Consolidation was an order of reversal. Before reversing the order of Settlement Officer Consolidation, he would have considered entire documentary and oral evidence on record. He has illegally relied upon the order of Consolidation Officer, which had already been set aside. Order of Deputy Director of Consolidation is illegal and liable to be set aside.

6. In reply to the aforesaid arguments, the Counsel for the respondents submitted that Nazir was born to Smt. Jumratna, after her remarriage to Ishu from him. Daud died in 1935, while from the age as given by Nazir in his statement, his birth comes in the year 1945. Parentage of Nazir was recorded as Ishu in Pariwar Register and Voter List, during life time of Ishu and no objection was ever raised. After death of Ishu, Supervisor Kanoongo by his order dated 8.11.1980, mutated the name of Nazir along with his other heirs. It is only when, the dispute arose, then behind the back of Nazir, his parentage was changed as Daud, in Pariwar Register by making forgery as is clear from certified copy of Pariwar Register obtained subsequently. Both the parties have adduced their documentary evidence to prove/disprove the parentage of Nazir as Ishu. As such during arguments before the consolidation authorities, documentary evidence were pressed and relied upon. Oral evidence were not worth consideration as such it were neither relied upon nor pressed. Real uncle of Shivji Giri, witness of the petitioner, was Pradhan, he in order to create an evidence in favour of the petitioners wrongly noted father''s name of Nazir as Daud, in the patta. The patta was a fake patta in which land of public rasta has been allotted to Nazir. Shivji Giri, in his statement, gave his age as 36 year. Hafizan, in her statement, gave her age as 40 years, while they admitted age of Nazir as 50 years as such they cannot prove the parentage of Nazir. Nazir was living in the house of Ishu, his parentage was noted as Ishu in Family Register and Voter List, while sons of Daud were living in separate houses and there was no reason for these witnesses to

believe that Nazir was son of Daud, even from the conduct of the parties. These witnesses could not give the name of mother of Nazir. They were absolutely not reliable witnesses, due to which the petitioners never placed reliance on the statement of the witnesses before the consolidation authorities as such they cannot be allowed to raise a ground that consolidation authorities have illegally ignored the oral evidence. It is admitted to the parties that Nazir was son of Smt. Jumratna as such even if in cross examination under some confusion, he could not state the name of his mother, this fact being a admitted fact, no adverse inference can be drawn. The writ petition is concluded with the findings of facts and liable to be dismissed.

7. I have considered the arguments of the Counsel for the parties and examined the record. A perusal of the order of Deputy Director of Consolidation shows that he has held that Assistant Settlement Officer Consolidation had set aside the order of Consolidation Officer only for the reason that in the patta obtained by Nazir, his parentage was noted as Daud, without considering the other material evidence on record. He further held that Consolidation Officer have considered the material evidence on record and held that after death of Daud in the year 1935, names of Jumman and Jumrati alone were mutated in the record as his heirs as is proved from khatauni 1347 F. In the Voter List of the year 1965 as well as Pariwar Register of the year 1960, parentage of Nazir was noted as Ishu and he was residing in the same house in which Paigamber Din was residing. Although Ishu survived up to 1974 but he did not raise any objection in this respect. As such the findings of fact recorded by Consolidation Officer that Nazir was son of Ishu, did not suffer from any illegality. Thus, Consolidation Officer and Deputy Director of Consolidation gave two reasons for holding that Nazir was son of Ishu namely (i) after death of Daud names of Jumman and Jumrati alone were mutated as his heirs and (ii) Ishu survived up to 1974 but he did not raise any objection either in respect of revenue entries or in respect of Voter List and Pariwar Register, in which parentage of Nazir was noted as Ishu. They have failed to notice evidence of the petitioners by which they tried to prove that Nazir was born before death of Daud on 20.10.1935.

8. Before Consolidation Officer, the petitioners filed following documentary evidence:--

"(i) Basic year khatauni of khata No. 485 in which parentage of Nazir was noted as Daud.

(ii) Voter list of the year 1979 in which in House No. 122, name of Nazir was noted and his parentage was mentioned as Daud while in this very house, name of Paigamber Din, son of Ishu, was also noted.

(iii) Copy of the pariwar register of the year 1960 in which parentage of Nazir was noted as Daud.

(iv) Copy of the plaint of the case (Paigamber Din v. Uma Shankar).

(v) Judgment of Criminal Case No. 383 of 1981 under section 218 IPC.

(vi) Extract of Birth Register dated 1.10.1915.

(vii) Extract of Birth Register of the year 1928.

(viii) Extract of Birth Register on the year 1917, 8.3.1938 and 10.3.1938.

(ix) Extract of Birth Register 1918.

(x) Extract of Death Register, showing date of death of Daud as 20.10.1935.

(xi) Extract of death Register of Rasul showing date of death 29.6.1927."

9. In rebuttal of these documents Nazir filed (i) Khatauni 1323 F, (ii) Khatauni 1347 F, (iii) Khatauni 1375 F, (iv) Khatauni 1382-1387 F, (v) Copy of the order in Register Malikan of the year 1374 F, (vi) Khatauni 1379-1380 F (vii) copy of plaint dated 8.9.1999, (vii) Copy of the compromise, (viii) Copy of the khatauni 1380-81 F, (ix) receipt of irrigation dues (x) extract of birth register of the year 1915, 1918, 1928, 1917, 1927 and 1928 (xi) extract of Ganna register report (xii) copy of order of Naib Tahsildar in case No. 313.

10. Khatauni 1347 F, is a settlement year khatauni as such in view of section 57 of UP Land Revenue Act 1901 a presumption relating to its correctness has to be raised. On the basis of khatauni 1347 F, subsequent year khatauni were prepared in which names of Jumman and Jumrati alone were recorded as sons of Daud. Supreme Court in Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others, AIR 1974 SC 1178 : (1974) 1 SCC 675 : (1974) 3 SCR 101 : (1974) 6 UJ 153 , and Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by Lrs. and Another, AIR 1977 SC 1712 : (1977) 2 SCC 49 : (1977) 2 SCR 671 , held that there is no abstract principle that whatever will appear in the record-of-rights will be presumed to be correct when it is shown by evidence that the entries are not correct. Thus the presumption of record of right is rebuttable.

11. The petitioners by filing the extract of Death Register of Daud proved that Daud died on 22.10.1935. The petitioner by filing various extract of Birth Registers tried to prove that sons and daughters of Daud from his wife Smt. Mashihna and after her death from his second wife Smt. Jumratna, were born in between 1915 to 1928. He further tried to prove that two sons were born from Smt. Jumratna before death of Daud as such Nazir was also son of Daud. From Ishu, only one son was born to Smt. Jumratna in the year 1938. Thus the petitioners have filed mass of documentary evidence to rebut the presumption raised on the basis of khatauni 1347 F or subsequent year khataunis as well as entries of Voter List and Pariwar Register. On behalf of the respondents also several extracts of Birth Register were filed. Extracts of Birth Registers and Death Register have been totally ignored by consolidation authorities. Thus these were the material evidence on record and correctness of revenue entries were liable to corroborated on its basis.

12. A perusal of extract of Pariwar Register filed by Nazir (filed as Annexure-CA-2) and Voter Lists (filed as Annexure-CA-4) to the Counter Affidavit show that in Pariwar Register, date of birth of Nazir was noted as 7.4.1925 and from the age mentioned in Voter List, his year of birth comes to 1931. It has been admitted to the parties that Smt. Jumratna remarried to Ishu only after death of Daud. From the extract of Death Register filed by the petitioners, it was proved that Daud died on 22.10.1935. Thus these are material evidences which were liable to be considered and corroborated from other documentary and oral evidence. But no exercise has been done by the consolidation authorities. They have neither considered nor recorded any finding for ignoring these documents. Thus the judicial mind has not been applied to the entire evidences on record. Rule 26 (2) of the Rules castes a duty upon the consolidation authorities to frame issues on the points in dispute, take evidence, both oral and documentary and decide the objection after hearing the parties. The procedure prescribed under the Rules has not been followed. Supreme Court in Achutananda Baidya Vs. Prafullya Kumar Gayen and others, AIR 1997 SC 2077 : (1997) 2 CTC 333 : (1997) 5 JT 75 : (1997) 3 SCALE 475 : (1997) 5 SCC 76 : (1997) 3 SCR 709 : (1997) AIRSCW 1904 : (1997) 3 Supreme 673 , held that if the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior Court or Tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact.

13. A Division Bench of this Court in Paras Nath and others v. Wajiul Hasan and others 1974 Unreported Revenue C 615 (DB) , held that the oral evidence has vital role in the trial of the case and is material piece of evidence. Oral evidence ought to have been examined and corroborated with the documentary evidence while recording findings in respect of the issues involved in the Case. Ignorance of oral evidence is illegal. This judgment has been followed by this Court in Bal Kishan Vs. Board of Revenue and Others, (1994) 3 AWC 1377 : (1994) RD 318 ., and in Writ Petition No. 1814 of 1988, Raunaq Ali and another v. State of U.P. and others, decided on 3.12.2007. The consolidation authorities have ignored the entire oral evidence on record.

14. The consolidation authorities are given powers to decide the title of the tenure holders finally forever. But it has been noticed that consolidation authorities are deciding the cases in very hasty manner, without considering entire evidence on record and they are not discharging their judicial function properly. This Court therefore reminds the principles as laid down by Supreme Court for deciding the appeals as well as in judgments of reversal. In Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., (2001) 251 ITR 84 : (2001) 2 JT 407 : (2001) 1 SCALE 712 : (2001) 3 SCC 179 : (2001) 1 SCR 948 : (2001) AIRSCW 723 : (2001) 1 Supreme 642 it has been held that First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The

judgment of the Appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. The task of an Appellate Court affirming the findings of the Trial Court is an easier one. The Appellate Court agreeing with the view of the Trial Court need hot restate the effect of the evidence or reiterate the reasons given by the Trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice. We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the Appellate Court for shirking the duty cast on it. While writing a judgment of reversal the Appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the Trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact arrived at by the Trial Judge. As a matter of law if the appraisal of the evidence by the Trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the Appellate Court is entitled to interfere with the finding of fact. The rule is-and it is nothing more than a rule of practice- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the Trial Judge''s notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate Court should not interfere with the finding of the Trial Judge on a question of fact. Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the Trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first Appellate Court had discharged the duty expected of it.

15. Again in H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam, AIR 2011 SC 1492 : (2011) 268 ELT 436 : (2011) 3 JT 522 : (2011) 2 RCR(Civil) 385 : (2011) 3 SCALE 290 : (2011) 4 SCC 240 : (2011) 5 SCR 587 : (2011) AIRSCW 1886 : (2011) 2 Supreme 427 , it has been held that it must be evident from the judgment of the Appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the Appellate Court''s judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the Appellate Court are well founded and quite convincing. It is mandatory for the Appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final Court of fact, the first Appellate

Court must not record mere general expression of concurrence with the Trial Court judgment rather it must give reasons for its decision on each point independently to that of the Trial Court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed in adherence to the requirements of the said statutory provisions.

16. The argument of the Counsel for the respondents in respect of oral evidence that oral evidence were not worth reliable thereafter it was not pressed by the petitioners as any stage as such this point cannot be raised before this Court. However, this Court finds that not only the oral evidence but the vital documentary evidence which were decisive of the issue involved in the case, have also been ignored, as such this Court does not propose to examine relevancy of oral evidence as it will prejudice the mind of the Court below. The argument of the Counsel for the respondents that order of the Settlement Officer of Consolidation was ex-parte order. The petitioner has not disputed this fact. In view of Explanation (3) to section 48 of the Act, Deputy Director of Consolidation is competent to decide the issue of fact and has very wide power as such remand to Settlement Officer Consolidation will unnecessarily delay the hearing. In view of the aforesaid discussions, the writ petition succeeds and is allowed. The order of Deputy Director of Consolation dated 9.4.2013 is set aside. The matter is remanded to the Deputy Director of Consolidation who after hearing the parties shall decide the revision afresh in accordance with law, without being influenced by any of the observations made in this judgment. The parties are appearing before this Court, they shall appear before the Deputy Director of Consolidation on 6.4.2015, who shall fix a date for hearing of the revisions according to the convenience of the parties and decide the revision expeditiously, preferably within a period of four months.