

**Neutral Citation No. - 2023:AHC:216039**

**Reserved on : 06.11.2023**

**Delivered on : 09.11.2023**

**Court No. - 48**

**Case :-** WRIT - B No. - 14454 of 1981

**Petitioner :-** Maqbool

**Respondent :-** Mst. Baitula

**Counsel for Petitioner :-** Sanjai Misra, Dinesh Pathak, N.N. Mishra, Rakesh Pathak, S. Misra, Shailesh Kumar Tripathi

**Counsel for Respondent :-** S.C., A. Shafat, Afshan Shafat, Madhur Prakash  
**Hon'ble Saurabh Shyam Shamsheery, J.**

1. The present case is arising out of a proceeding under Section 9-A(2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred as 'Act of 1953').

2. The original petitioners before this Court have claimed their right on a share of their uncle namely, Shareef on basis of a sale deed executed by vendor (Shareef) on 23.7.1975 in their favour. The sale deed was challenged at instance of petitioner's uncle. However, since consolidation proceedings commenced, therefore, the suit was abated.

3. In the aforesaid circumstances the original petitioners have filed objections in regard to land described in the sale deed being chak no. 700 of village Birdpur No.6, chak No.2 of village Mahdaiya and chak No.56 and 85 of village Marvatiya @ Narchahva, situated in Tehsil Naugarh, District Basti. The aforesaid objections were opposed by contesting respondents. In all there were 10 objections. The Consolidation Officer after considering rival pleadings has framed following five issues :-

*" विवाद के आधार पर इसमें निम्न वाद बिन्दु निर्णित किये गये हैं:-*

*1- क्या मकबूल आदि विवादित भूमि पर जरिए बैनामा भूमिधर से अधिपत्य है।*

*2- शरीफ की मृत्यु किस तिथि को हुयी है आया बैनामा लिखने के पूर्व या बाद में और उसका प्रभाव क्या है।*

*3- क्या बैनामा बिना पूर्व अनुमति बन्दोवस्त अधिकारी के है यदि हाँ तो प्रभाव।*

*4- क्या बैनामा वहक मकबूल आदि मिन जानिव शरीफ वैधानिक है यदि हाँ तो प्रभाव।*

*5- शरीफ मृतक का वैधानिक वारिस कौन है?"*

4. The Consolidation Officer by order dated 1.3.1980 decided aforesaid issue Nos.1 and 4 in negative. So far as issue No.3 it was

decided in affirmative and in regard to issue no.2, it was held that since vendor Shareef has not taken any proceeding to declare himself to be Bhoomidhar, as well as no permission was sought to execute a sale deed in terms of provisions of Act of 1953, therefore, he had no right to sell. The relevant part of the order is mentioned hereinafter :-

"मकबूल के तरफ से एक नकल आदेश परमीशन को दाखिल किया गया है इस नकल की विपक्ष ने फर्जी व जाली तैयार करना कहा है इस सम्बन्ध में उसने एक प्रार्थना पत्र दे भी दिया है। नकल परमीशन को गौर से देखने से यह विदित होता है कि इस नकल पर सहायक बन्दोबस्त अधिकारी चकबन्दी की मुहर लगी है जबकि नकल एस०ओ०सी० के यहां से जारी होती है फौतियों को देखने से यह विदित होता है कि इसमें प्रतिलिपि संलग्न है जो शब्द लिखा था उसकी एक दियेवर से मिलकर प्रतिलिपि है कर दिया गया है बीच में एक लाइन ऐसी लिख दी गयी है फौतियों जो x x x किया गया था उसकी इंक दियेवर से लाइन पर की मिटाकर उस पर इबारत लिखी गयी है एक सवाल जवाब के परपत्र पर विपक्षी ने रोवत्य में यह दाखिल किया है कि 01.06.75 से 29.07.1975 के बीच शरीफ पुत्र तिलान बर्डपुर नं० 6 मरवटिया उर्फ नरचहवा व महदिया के बाबत कोई परमीशन सही प्राप्त किया है इससे भी यह परमीशन की नकल पुर्जा सिद्ध है जो प्रत्यक्ष नकल देखने से भी स्पष्ट है। मल्देइया का चक नम्बर है जबकि इसमें चक नम्बर 20 लिखा है इससे यह सिद्ध हो जाता है कि बैनामा बिना पूर्व अनुमति ब०अ०च० द्वारा प्राप्त किया गया है।"

*(emphasis supplied)*

5. The aforesaid order was challenged at behest of the petitioners by way of filing an appeal before the appellate authority, however, same was rejected by an order dated 27.5.1981 and relevant part thereof is mentioned hereunder :-

"चक संख्या 700 ग्राम बर्डपुर नं० 6 सीरदारी है इसमें शरीफ ने अपने अंश का 20 गुना जमा किया है परन्तु वह अपने जीवन काल में भूमिधर घोषित नहीं हुए थे बल्कि यह मुकदमा अन्ततः अवैत हुआ जहां तक अपील कर्ता के विद्वान अभिभाषक के इस तर्क का प्रश्न है कि अब सभी सीरदारी भूमिधर हो गये हैं इसलिए इसका लाभ अपीलकर्ताओं को दिया जाये मैं उनके इस तर्क से सहमत नहीं हूँ सभी सीरदार 1977 ई० में भूमिधर घोषित हुए हैं और उससे बहुत पूर्व शरीफ का देहान्त हो गया था इसलिए शरीफ अपने जीवनकाल में चक सं० 700 में अपने अंश के भूमिधर घोषित नहीं हुए थे बल्कि यह भूमि सीरदारी की थी और इसके बैनामे का कोई प्रश्न नहीं उठता इसलिए यदि शरीफ ने अनुमति लेकर भी चक सं० 700 का बैनामा किया होता तब भी उसके दाखिल खारिज का कोई प्रश्न नहीं उठता था।"

*(emphasis supplied)*

6. The fate of revision petition filed at behest of the petitioners also remained same and revision was dismissed by order dated 7.11.1981 and relevant part thereof is mentioned hereunder :-

"उपरोक्त विवेचन के आधार पर मैं यह पाता हूँ कि मकबूल ने अपने बयान में यह स्वीकार कर लिया है कि परमीशन नहीं लिया गया था इसके अतिरिक्त परमीशन से सम्बन्धित आदेश की प्रतिलिपि जो पत्रावली में दाखिल है उसके बारे में चकबन्दी अधिकारी तथा सहायक बन्दोबस्त अधिकारी ने जो निष्कर्ष निकाले हैं वे उचित हैं। सवाल जवाब के फार्म से भी सिद्ध होता है कि कोई परमीशन नहीं लिया गया। चक संख्या 700 ग्राम बर्डपुर नम्बर 6 सीरदारी भूमि है। शरीफ उसके भूमिधर नहीं घोषित

हुए थे। ऐसी परिस्थिति में कोई भी ऐसा बिन्दु नहीं बचा है जिसके लिये पत्रावली अधीनस्थ न्यायालय को प्रत्यावर्तित की जा सके। अधीनस्थ न्यायालयों के आदेशों में कोई त्रुटि परिलक्षित नहीं होती है और वे न्यायसंगत एवं उचित हैं।"

*(emphasis supplied)*

7. The aforesaid orders passed by the three authorities under Act of 1953 are impugned in the present writ petition.

8. Sri A.K. Srivastava and Shailesh Kumar Tripathi, learned counsel for petitioners have vehemently urged that since challenge to the sale deed before civil court was abated, therefore, the consolidation authorities have no power to cancel it or to withhold its legal consequences. The vendor Shareef has heritated his share and it was rightful for him to make sale deed in favour of the petitioners in regard to his share. The sale deed was executed by vendor after taking proper permission as required under Section 5(1) (c) of Act of 1953, which was placed on record and finding returned by the Consolidation Officer upheld by other two authorities that the document of permission was a forged document was perverse since it was returned without any proper enquiry.

9. Learned counsel in alternative has submitted that even sale deed is considered to be unenforceable, still petitioners have a right to have share of Shareef being his uncle, who died issueless, however, such issue was not dealt or considered by any authorities.

10. Per contra Mr. Madhur Prakash, learned counsel for respondent No.3 vehemently urged that not only permission was considered to be a doubtful document on basis of content thereof but since vendor of the original petitioner was not declared bhoomidhar, therefore, he was not legally empowered or entitled to execute any sale deed.

11. Learned counsel has referred the statement of petitioner No.1 (Makbool) that he has accepted that no such permission was sought. Counsel also added that land in dispute was a Sir land, therefore, it could not be sold.

12. In rejoinder, learned counsels for petitioners have referred Section 91 of the Evidence Act that since the document of permission was on record, therefore, no oral evidence could be raised.

13. Heard counsel for parties and perused the records.

14. On basis of above referred factual and legal position, the challenge before this Court is concurrent finding of three authorities under the Act of 1953 and has held by Supreme Court in case of **Krishnanand (Dead) through Legal Representatives and others vs. Deputy Director of**

**Consolidation and others, (2015) 1 SCC 553**, any concurrent finding could be interfered in writ jurisdiction only when it suffer with perversity or passed beyond jurisdiction. Relevant paragraph thereof are mentioned hereinafter :-

*"12. The High Court has committed an error in reversing the findings of fact arrived at by the authorities below in coming to the conclusion that there was a partition. No doubt, the High Court did so in exercise of its jurisdiction under Article 226 of the Constitution. It is a settled law that such a jurisdiction cannot be exercised for re-appreciating the evidence and arrival of findings of facts unless the authority which passed the impugned order does not have jurisdiction to render the finding or has acted in excess of its jurisdiction or the finding is patently perverse. In the present case, though the High Court reversed the concurrent findings of the authorities below and came to the opposite conclusion on matter of facts, the High Court did not do so on the ground that the authorities below acted in excess of their jurisdiction or without jurisdiction or that the finding is vitiated by perversity.*

*13. We are of the view that the High Court ought not to have entered into re-appreciation of evidence and reversed the findings of fact arrived at by the three authorities below, especially since, the authorities had neither exceeded their jurisdiction nor acted perversely. The High Court has nowhere stated that it was of the view that there is any perversity, much less the High Court failed to demonstrate any such circumstances."*

(Emphasis Supplied)

15. The dispute which requires consideration is in regard to a permission allegedly granted under Section 5(1) (c) of the Act of 1953. All the three authorities have returned a concurrent finding that purported permission was not genuine as well as that no such permission was ever issued, therefore, it would be a case of fraud.

16. The relevant findings returned by three authorities have already been reproduced in preceding paragraphs.

17. Learned counsels for petitioners has tried to convince this Court that a document which was placed on record, could not be doubted on oral evidence and for that he has referred Section 91 of the Evidence Act. A copy of said document is not on record, therefore, finding returned by the Consolidation Officer on perusal of purported permission that there was use of ink remover and overwriting thereof, therefore, document was considered to be a doubtful document i.e. not a genuine document. In this regard, learned counsel for petitioners have not placed any substantial material or argument to disbelieve finding returned by the Consolidation Officer and as referred above further upheld by two authorities namely Appellate as well as Revisional.

18. In the aforesaid circumstances, I am of considered opinion that document purportedly a permission granted under Section 5 (1) (c) of Act of 1953 could not be considered to be a genuine document, therefore, the argument of learned counsel for respondent No.3 that land was a *Sir* land, therefore, it could be sold and further that there was no document on record that by paying 10 times rent, the vendor has become *bhumidhar* also became relevant.

19. It would apposite to refer a judgment passed by Supreme Court in the case of **Placido Francisco Pinto v. Jose Francisco Pinto**, 2021 SCC OnLine SC 842 that oral evidence of a written document is excluded except when it is sought to be alleged the document as a sham transaction and as discussed above, alleged document of permission was held to be a forged document. The relevant paragraphs of the **Placido Francisco Pinto (supra)** are reproduced hereinafter :-

*“24. Mr. Dhruv Mehta relied upon judgments of this Court reported as Smt. Gangabai w/o Rambilas Gilda v. Smt. Chhabubai w/o Pukharajji Gandhi (1982) 1 SCC 4 and Roop Kumar v. Mohan Thedani (2003) 6 SCC 595 to contend that the respondents can lead oral evidence to rebut the contents of the document but not the appellants who had relied upon the sale deed. In Gangabai, the plaintiff entered into an agreement with the appellant for a loan of Rs. 2,000/- and it was decided that simultaneously the plaintiff would execute a nominal document of sale and a rent note. It was alleged by the plaintiff that documents were never intended to be acted upon. The trial court decreed the suit holding that the sale deed was never intended to be acted upon but the First Appellate Court held that the sale has taken place but the transaction between the parties constitutes a mortgage. The High Court held that Section 92 of the Indian Evidence Act, 1872 did not prevent plaintiff from establishing the true nature of the transaction. In appeal, this Court held that first proviso to Section 92 permits any fact which may prove which would invalidate any document, such as fraud, intimidation, illegality, want of due execution can be led into evidence. This Court while dismissing appeal of the defendant held as under:*

*“11. ...It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a*

*question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties...”*

*25. A reading of the aforesaid judgment would show that it was open to the plaintiff to assert that the document was never intended to be acted upon and the document is a sham. Such question arises when one party asserts that there has been a different transaction altogether than what is recorded in the document. It is for that purpose oral evidence is admissible.*

*26. In Roop Kumar, this Court was seized of an appeal filed by the defendant arising out of a suit for possession and for rendition of accounts. The plaintiff claimed that he entered into an agency-cum-deed of license with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licensing agreement was incorporated in an agreement dated 15.5.1975. The stand of the defendant was that he was in lawful possession as a tenant under the plaintiff. The trial court decreed the suit holding that the transaction between the respondent and the appellant evidenced by an agreement dated 15.5.1975 amounts to license and not sub-letting. The question before the High Court was whether a relationship between the parties is that of a licensor and licensee or that of a lessor and lessee. The first appeal was dismissed. This Court held that it is general and most inflexible rule that in respect of written instruments, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It was held that in Section 92 of the Evidence Act, the legislature has prevented oral evidence from being adduced for the purpose of varying the contract, such contract can be proved by production of such writing. It was held that Section 91 is concerned with the mode of proof of a document with limitation imposed by Section 92. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. This Court held as under:*

*“17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract*

*of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)*

*18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.*

XXXXXX

*21. The grounds of exclusion of extrinsic evidence are : (i) to admit inferior evidence when the law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.*

*22. This Court in Gangabai v. Chhabubai [(1982) 1 SCC 4 : AIR 1982 SC 20] and Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434 : AIR 2000 SC 426] with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.”*

27. A perusal of the above judgment would show that the oral evidence of a written agreement is excluded except when it is sought to be alleged the document as a sham transaction.”

20. In the present case, it was alleged that document of permission was a sham i.e. not a genuine document, therefore, there was no bar to raise evidence.

21. The outcome of the above referred discussion on facts and law is that since the petitioners have failed to point out any perversity or irregularity in the impugned order and has discussed above, all the argument raised have no legal basis, therefore, there is no ground to interfere with concurrent finding of three authorities, therefore, this writ petition is accordingly, **dismissed**.

**Order Date :- 9.11.2023**

Md Faisal