

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1987 of 2016

In
Civil Writ Jurisdiction Case No.2589 of 1994

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1. Mostt. Chandeshwari Devi, W/o of late Shyam Lal Gope
2. Sabita Devi, W/o Ram Naresh Singh
D/o Lt. Shyam Lal Gope
Both R/o of village- Makhdumpur, P.S.- Khodaganj, District-
Nalanda

... .. Appellant/s

Versus

1. The State of Bihar
2. The Joint Director, Consolidation -cum- Research Officer, Consolidation,
Patna, Bihar
3. The Deputy Director, Consolidation, Nalanda
4. The Consolidation Officer, Nalanda
5. Suresh Gope @ Suren Gope S/o Late Basudeo Gope, R/o of village – Baira,
P.O. Kochara, P.S.- Khodaganj, District- Nalanda

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Gauri Shankar Thakur, Advocate
For the State	:	Mr. Md. Khurshid Alam- AAG12
For the Respondent No.5:		M/s Mallika Mazumdar and Prem Kumar, Advocates

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE DR. JUSTICE RAVI RANJAN

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 29-08-2018

Heard parties.

This appeal is directed against the judgment dated 24.07.2015 passed by a learned Single Judge of this Court in C.W.J.C. No. 2589 of 1994. By the said judgment, the learned Single Judge has allowed the writ petition after setting aside the order dated 06.02.1994 passed by the Joint Director-cum- Research Officer, Consolidation, Bihar, Patna by which he had



set aside the order dated 11.05.1992 passed by the Deputy Director, Consolidation, Nalanda in Appeal Case No. 17 of 1990 and had restored the order of the Consolidation Officer dated 15.12.1989 passed in Consolidation Case No. 53 of 1989.

Short facts which emanate out of the records stand enumerated as under:-

The present appellants, i.e., the respondent Nos. 5 and 6 of the writ petition filed Partition Suit No. 140 of 1979 in the court of Subordinate Judge, Biharsharif for partition by carving out 1/3rd share in the joint family property. In view of the notification brought by the State of Bihar under Section 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as "the Act") declaring its intention to make a scheme for consolidation of holdings in the area concerned, the court below passed an order declaring that the partition suit would abate in view of the provisions contained in Section 4(c) of the Act. It was also mentioned that the parties may approach the consolidation authorities itself for partition of their share under Section 8A of the Act. As a result of which, the suit abated on 04.09.1980 under the aforesaid provision. According to the writ petitioners, the Consolidation Officer published the draft publication of



register of land prepared under Section 9(2) and statement of principles prepared under Section 9A as per the provisions contained in Section 10 of the Act and objection was invited under Section 10(2). Since nobody raised any objection, the draft scheme was prepared under Section 11 of the Act which was finally published as per the provisions contained under Section 12 of the Act and, since nobody objected to it by filing any application under Section 12A of the Act, the scheme was confirmed and submitted to the Director, Consolidation under Section 13 of the Act. Thereafter, according to writ petitioners, certificates etc. were also distributed, however, the notification under Section 26A of the Act declaring closure of the consolidation operation was still awaited. Subsequently, in the year 1999, the appellants filed an application under Section 10-B of the Act before the Consolidation Officer claiming partition and also claiming that the property do not include any self-acquired property of late Hemraj Gope, as he was not having such type of property. It was claimed that said Hemraj Gope was trying to usurp the joint family property on the basis of the sale deed executed in favour of his grandson. Since at that point of time he was minor, therefore, the sale deed would be void and fraudulent as no minor can either transfer or get the properties



transferred in his name and, in fact, late Hemraj Gope, who was vendor, was the guardian of his minor grandson, i.e., the vendee, and, as such, a fraud was committed and on the basis of such invalid/void transaction, it cannot be held that it was self-acquired property of his grandson. There were several other points also involved, for example, that the appellants claimed that they are co-owners and possessing the joint family property jointly and collectively.

On such petition having been filed under Section 10-B of the Act, Consolidation Case No. 53 of 1989 was registered. The Consolidation Officer rejected the claim of the appellants-respondent Nos. 5 and 6 with respect to some Chaks, however, with respect to others, he ordered that the name of the respondent No. 5 should be entered as half co-sharers along with Basudeo Gope. An appeal bearing Consolidation Appeal No. 17 of 1990 was preferred by the appellants-respondent Nos. 5 and 6. The writ petitioner (respondent herein) also filed appeal before the Deputy Director, Consolidation, which was numbered as 04/1990. The Deputy Director, Consolidation set aside the order passed by the Consolidation Officer on the ground that the same was passed despite the bar created to exercise any statutory power under Section 10-A of the Act. Thereafter,



Revision No. 273 of 1992 was filed before the Director, Consolidation which was finally decided by the Research Officer, Directorate of Consolidation holding that the appellate authority ought not to have rejected the claim with reference to bar created under Section 10-A of the Act as right and title of Raiyat cannot be adversely affected by operation of said bar.

The learned Single Judge has accepted the submission made on behalf of the writ petitioners that once no objection in respect of any entry made in the map or register prepared under Section 9 of the Act or the statement of the members prepared under Section 9-A relating to the concerned area was made which ought to have been raised under Section 10 of the Act, no one could have been allowed to raise if the Consolidation Officer was not allowed to hear the matter and at any subsequent stage of consolidation proceeding. After making reference to a decision of a Division Bench of this Court rendered in **Jagarnath Thakur and Another Vs. The State of Bihar and Others [1984 BBCJ 140]**, learned Single Judge has come to the conclusion that the learned counsel for the writ petitioners was right in her submission that the revisional authority has not at all gone into the question of statutory bar created under Section 10-A and bypassing it, it has restored the



order passed by the Consolidation Officer. However, it is further recorded in the judgment impugned that even the counsel for the writ petitioners was not in a position to inform as to whether there has been any notification under Section 26A of the Act or not with respect to concerned area. In the aforesaid background of the matter, he has set aside the order passed by the revisional authority and has held that if notification is published under Section 26A of the Act, then the suit preferred by the respondent Nos. 5 and 6 would automatically stand revived and the *inter se* disputes between the parties, as regards the title can be decided in the facts and circumstances of the case by a civil court of competent jurisdiction.

So far the view of the learned Single Judge with respect to the statutory bar created under Section 10-A of the Act is concerned, the same appears to be correct. There is no quarrel with the proposition that in the facts and circumstances, bar under Section 10-A was operational and a petition under Section 10-B of the Act, in such a case, was maintainable or not, that was required to be decided by the revisional court. However, the real question is that if the matter has travelled up to the revisional court under Section 35 of the Act coupled with fact that the Subordinate Judge had passed an order that partition suit



would abate under Section 4 (c) of the Act and the parties can get their partition done by the Consolidation authorities Itself, whether the Director, Consolidation himself could have exercised his powers under Section 35 of the Act or not? Whether Section 10-A of the Act would stand as a bar to the powers of Director, Consolidation also?

It is now well-known that the consolidation operation stands initiated after notification by the State Government under Section 3 of the Act declaring its intention for such purpose. There are two manners by which the consolidation operation can be terminated or closed. First is by publishing a notification under Section 4A of the Act as under such provision State Government has got power at any point of time to cancel the notification made under Section 3 of the Act in respect of whole or part of the area specified therein. Second manner is by publishing a notification under Section 26A of the Act after the consolidation records are prepared and certificates of transfer having been issued to the Raiyat under the scheme. The State Government has to publish notification in official gazette stating that the consolidation operations have been closed in the unit. What would happen thereafter was considered by a Full Bench of this Court rendered in **Ramkrit Singh and Ors. Vs.**



The State of Bihar and Ors. [1979 BBCJ 259]. The Full Bench has held that after closer of consolidation in the village or area by publication of notification under Section 26A of the Act, the abated suit would revive but revival of those suits would not create any problem as suit will have to be decided in conformity with the decisions arrived at in the consolidation proceeding in so far as rights or interests in any land covered by consolidation proceeding is concerned. However, a subsequent Full Bench rendered in **Kalika Kuar @ Kalika Singh Vs. The State of Bihar and Others [1989 PLJR 1203]**, has held that the consolidation authorities being a court of limited jurisdiction, after notification under Section 26A of the Act, the abated suit would revive and the parties concerned may get their *lis* decided by a civil court of competent jurisdiction even after a decision by the consolidation authority. The Full Bench has held that the earlier Full Bench, i.e., the decision rendered in **Ramkrit Singh (supra)** to be *per incurium* as it did not consider the issue that the consolidation authorities are courts of limited jurisdiction, therefore, their judgments cannot be made binding upon the civil court.

However, this decision was put to challenge before the Apex Court rendered in **The State of Bihar and Others Vs.**



Kalika Kuar @ Kalika Singh [(2003) 5 SCC 448]. The Hon'ble Supreme Court held, in the facts and circumstances of the case and the issue involved, that the Full Bench could not have discarded the earlier decision of the Full Bench holding it *per incurium* and, after holding that there was no consideration by the later Full Bench regarding the decision rendered by earlier Full Bench, the Apex Court opined that the judgment has to be set aside. Accordingly, the decision rendered in **Kalika Kuar @ Kalika Singh (supra)** was set aside and the matter was remanded and the issue is to be considered by an appropriate Bench.

In our view, the learned Single Judge should not have concluded the matter after setting aside the revisional order only as the same should have been remanded to the revisional authority for passing a fresh order after considering each and every aspect as answer to the issue as to what would happen after notification is published under Section 26A upon revival of suit, lies in the womb of morrow as the same is yet to be decided by the appropriate Bench after remand by Hon'ble Supreme Court.

Here a question would arise as to whether the Director, Consolidation is empowered under Section 35 of the Act to take



up the matter and decide it even though a statutory bar is there under Section 10-A of the Act? This issue was kept open by the Division Bench in **Jagarnath Thakur (supra)** upon which reliance has been made by the writ petitioners-respondents and which forms the basis of passing of the impugned judgment. The relevant passages from the judgment of the Division Bench in **Jagarnath Thakur (supra)** are reproduced as under for better appreciation:-

“11. It was submitted by the learned Additional Advocate-General that in view of section 35 of the Act the Director of Consolidation could have passed an order as the one passed by the Deputy Director. Section 35 of the Act is as follows:--

The Director of Consolidation may of his own motion or on the application of any party or on reference being made by any subordinate authority, call for and examine the record of any case decided or proceedings taken by such authority for the purpose of satisfying himself as to the regularity of the proceeding; or, as to the correctness, legality or propriety of any order passed by such authority in the case or proceeding, and may after allowing the parties concerned an opportunity of being heard, make such order in the case or proceeding as he thinks fit;

Section 35 vests supervisory power in the Director of Consolidation, who may of his own motion or on the application of any party call for and examine the record of any case for the



purpose of satisfying himself as to the regularity, correctness, legality or propriety of any order and can pass an order as he thinks fit. No doubt, the power under section 35 is very wide which has to be exercised under the conditions mentioned therein by the Director of Consolidation, but, in the instant case, the power has been exercised by the Deputy Director and not the Director under section 35 of the Act.

11. Apart from that, section 35 does not have a non obstinate clause. As such, it is not easy to answer as to whether the provision of section 35 shall override section 10-A of the Act. The matter would have been different if section 35 contained a clause saying “notwithstanding anything contained in the Act.” I may point out that under section 10-D, which has been introduced in the year 1982, the words “notwithstanding the provisions of section 10-A” are there.

12. Learned Additional Advocate-General, however, urged that there is no necessity of deciding in this case whether the bar under section 10-A operates even on the power of the Director of Consolidation under section 35, which might be considered in some other appropriate case. This attitude was taken by the learned Additional Advocate-General because the impugned order has not been passed by the Director of Consolidation in exercise of the powers under section 35 of the Act. He has simply refused to interfere with the order of the Deputy Director.”



However, later on, a Single Judge Bench of this Court in the decision rendered in **Shiv Kumar Thakur Vs. The State of Bihar and Anr. [1985 PLJR 986]** had categorically held that Section 35 would override the power created under Section 10-A of the Act and the Director, Consolidation in its revisional power can examine the regularity of the proceeding and the propriety of any order apart from its correctness and its legality. Same view was taken by another Single Judge in **Shyam Bihar Upadhyay and Ors. Vs. The State of Bihar and Ors. [AIR 1985 Pat 275]**. Let it be noted here that the learned Single Judge, who was the author of the judgment of the Division Bench in **Jagarnath Thakur (supra)** affirming the bar created by Section 10-A in the consolidation proceeding but keeping the issue of its effect upon the revisional powers of the Director, Consolidation under Section 35 of the Act entirely open, had decided as a Single Judge in the aforesaid case that Section 10-A would not operate as bar on the powers of the Director, Consolidation, who can exercise supervisory jurisdiction under Section 35 of the Act for rectifying any mistake in the order or proceedings taken for ends of justice. Identical view was taken by another learned Single Judge in **Smt. Leela Devi and Ors. Vs. The State of Bihar and Ors. [1989 PLJR 170]**. In this



case, the learned Single Judge has gone one step ahead and has held that in case a proceeding was pending before the revisional authority, i.e., the Director, Consolidation, at the time when the notification was published under Sub-section (1) of Section 26A of the Act declaring closure of consolidation operations, even then in view of the provisions contained in Sub-section (2) of Section 26A of the Act, the Director would be empowered to complete the revisional proceeding by pronouncing the final order.

In such a situation, when the learned Single Judge has said that aspect of the matter, as to whether, in view of the statutory bar created under Section 10-A of the Act, the Consolidation authorities were empowered to exercise the power under Section 10-B or not, the matter was essentially required to be remanded on that count also because the learned Single Judge has not answered the issue finally.

In our view, that issue is no longer *res integra* as the consolidation authorities would not have such power to partition the holding even after confirmation of Mauza under Section 10-B of the Act, in view of the bar created under Section 10-A of the Act. However, since the matter has travelled up to the Director, Consolidation and it has been held in **Shiv Kumar**



Thakur (supra) and **Shyam Bihar Upadhyay (supra)** that bar created by Section 10-A would not be operational upon the revisional powers to be exercised by the Director, Consolidation, and since the matter relates to the right, title and interest of the parties and partition of holding for which a suit was filed but has already abated, in our view, being in full agreement with the aforesaid views, it is a fit case for remand to the Director, Consolidation to take a fresh decision in the matter after hearing the parties concerned, as we are of the view that the Revisional Authority has not passed a reasoned order rather in a mechanical manner, it has simply affirmed the views of the Consolidation Officer. Complicated question of title and partition of holding cannot be decided in such a mechanical manner. In view of the decision rendered in **Smt. Leela Devi (supra)**, though it is contended by both the parties that notification under Section 26A is still awaited, we are making it clear that in view of the decision rendered therein, even after notification under Section 26A (1), in view of the provisions contained in Sub-section (2) of the aforesaid provision, there would be no impediment in exercise of revisional power by the Director, Consolidation in the present matter, as the same has remained pending before this Court in a writ petition filed under



Article 226 of the Constitution of India.

As a result, this appeal is allowed to the extent as indicated above and the judgment rendered by the learned Single Judge is modified to the extent that the matter is remanded to the Director, Consolidation for passing a fresh order after granting reasonable opportunity to the parties concerned on its own merit and in accordance with law. However, there would be no order as to costs.

(Mukesh R. Shah, CJ)

(Dr. Ravi Ranjan, J)

Spd/-Sanjay

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.10.2018
Transmission Date	NA

