A.F.R.

RESERVED ON 13.12.2019

DELIVERED ON 11.06.2020

In Chamber

Case :- WRIT - B No. - 26978 of 2013

Petitioner :- Bhrigurasan And 2 Ors.
Respondent :- D.D.C. And 2 Ors.
Counsel for Petitioner :- Arun Srivastava,Nagendra Nath Mishra,Naveen Srivastava,P.M. Tripathi,Sanjeev Singh
Counsel for Respondent :- C.S.C .,R.K. Shahi,Siddharth Nandan,Sita Ram Vishwakarma,T.P. Singh

Hon'ble Salil Kumar Rai,J.

1. Heard Shri Sanjeev Singh, learned counsel for the petitioners, Shri T.P. Singh, Senior Counsel, assisted by Shri Siddharth Nandan, Advocate, representing respondent no. 3 and the learned Standing Counsel, representing respondent Nos. 1 and 2. The counsel for the parties have also filed their written arguments which are part of record.

2. The present writ petition arises from proceedings registered under Section 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as, 'Act, 1953'). The plots in dispute in the consolidation proceedings and in the present writ petition are Plot Nos. 448/2, 381/2, 447/1 and 396/1 (hereinafter referred to as, 'disputed plots') included in Khata Nos. 59 and 116 and situated in Village-Singaha, District-Kushinagar (previously District-Deoria). One Gaya, son of Parag, was the original tenure holder of the disputed plots. Shivraji was the widow of Gaya. Munia was the daughter of Gaya and Shivraji. Petitioners are the sons of Munia. Gaya belonged to the Lohar community. Gaya died before the date of vesting as defined in Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as, 'Act, 1950'), and in the revenue records of 1359 Fasli and 1379 Fasli Shivraji was recorded as

tenant of the disputed plots. After the death of Shivraji, the petitioners were recorded as tenants of the disputed plots and continued to be recorded as such in the basic year records of the village, i.e., the records available on the date the notification under Section 4(2) of the Act, 1953 was published notifying the village under consolidation operations.

3. During the consolidation operations, the respondent no. 3 filed objections against the entries in the basic year records claiming himself to be the sole tenant of the disputed plots. On the objections of respondent no. 3, Case no. 1016 under Section 9-A(2) of the Act, 1953 was registered before the Consolidation Officer, Hata at Kasya, District-Deoria (hereinafter referred to as, 'C.O.'). The case set up by respondent no. 3 was that Gaya and Shivraji had two sons, namely Thakur and Pheku, and respondent no. 3 was the son of Thakur. Thakur died before Gaya. It was the case of respondent no. 3 that Pheku had died issueless, therefore, the share of Pheku also devolved on respondent no. 3.

4. The petitioners contested thecase set up by respondent no. 3. The petitioners denied that Thakur and Pheku were the sons of Gaya or that respondent no. 3 was the grandson of Gaya. However, the petitioners admitted that Thakur and Pheku were the sons of Shivraji. The case of the petitioners was that Gaya had only one daughter namely Munia, and the petitioners were the sons of Munia. The petitioners alleged that, before her marriage with Gaya, Shivraji was married to one Budhai, resident of Village-Khairatiya and Thakur and Pheku were the sons of Budhai. The petitioners alleged that Thakur and Pheku came with Shivraji after her marriage to Gaya. On their aforesaid pleadings, the petitioners claimed to be the tenants of the disputed plots under Section 171(2)(h) of the Act, 1950 because they were the sons of the daughter of Gaya. In the alternative, the petitioners also alleged that before his death, Gaya had executed a registered Will dated

29.3.1946 bequeathing his entire property, including the disputed plots, in favour of petitioner no. 1. On the aforesaid pleadings, the petitioners prayed that the objections of respondent no. 3 be rejected and the entries in the basic year records be retained.

5. In order to decide the dispute as who was the heir of Gaya and consequently the tenant of the disputed plots, the C.O. framed issues relating to the validity of the Will dated 29.3.1946 and correctness of the rival pedigrees pleaded by the parties. Before the C.O., respondent no. 3 filed certified copies of the extracts of birth register of 1916 and 1928 and certified copy of the death certificate of 1943 to prove that Thakur was the son of Gaya. The certified copies of the extracts of birth registers of 1916 and 1928 indicated that sons were born to Gaya in the said years and the death certificate indicated that one Thakur, son of Gaya had died in the aforesaid year. The petitioners, in support of their case, filed a copy of the Will dated 29.3.1946, family register of Village-Singaha and a copy of the birth register of birth for the year 1918 and 1916 to show that Thakur, referred by respondent no. 3, was not the son of Gaya Lohar, but was the son of one Gaya Koeyri. The Will dated 29.3.1946 contains a recital allegedly made by Gaya that he had no son but only one daughter namely Munia, who had one son named Bhrigurasan. Bhrigurasan is petitioner no. 1 in the present writ petition. Apart from the aforesaid evidence filed by the parties, the C.O. also summoned the original birth register of 1916, a perusal of which revealed that the entry in the original birth register related to Gaya Koeri and not Gaya Lohar and the certified copy filed by respondent no. 3 did not correctly reflect the contents of the original. Other evidence were also filed by the parties to prove their respective cases, but I am not referring to them as they are not relevant for a decision of the present writ petition and in view of the final orders proposed to be passed in the present writ petitions. It is also

relevant to note that before the C.O., the respondent no. 3 admitted in his cross-examination that Munia was the daughter of Gaya and the petitioners were the sons of Munia.

6. The C.O. vide his order dated 31.12.1984 dismissed the objections filed by respondent no. 3 and held the petitioners to be the tenure holders of the disputed plots with 1/3 share each. The C.O. rejected the certified copy of birth register of 1916 filed by respondent no. 3 because a perusal of the original birth register showed that a son was born to Gaya Koeri and not to Gaya Lohar who was the original tenure holder of the disputed plots. The certified copy of the birth register of birth for the year 1927-28 filed by respondent no. 3 showed that a son was born to Gaya Lohar but the evidence was rejected by the C.O. on the ground that it was inconsistent with the case of respondent no. 3 that Gaya had two sons namely Thakur and Pheku. The Will dated 29.3.1946 pleaded by the petitioners was also rejected by the C.O. on the ground that under the Uttar Pradesh Tenancy Act, 1939 (hereinafter referred to as, 'Act, 1939') Gaya had no right to transfer the disputed plots and, therefore, the Will was not enforceable. However, while accepting the case of the petitioners, the C.O. relied on the recital in the Will wherein Gaya had allegedly stated that he had no son, but only one daughter Munia, who had one son Bhrigurasan (the petitioner no. 1). The C.O. held the Will to be proved in light of Section 90 of the Indian Evidence Act, 1872 (hereinafter referred to as, 'Act, 1872'). Consequently, the C.O. held that the respondent no. 3 had not been able to prove that Thakur and Pheku were the sons of Gaya. The C.O. further held that after the death of Gaya, Shivraji, being the widow of Gaya, became the tenant of the disputed plots and after her death, succession had to be determined in accordance with Section 172(2)(b) read with Section 171 of the Act, 1950, and the petitioners being the sons of Munia, the daughter of Gaya, were the heirs and successors of Gaya and thus the tenants

of the disputed plots under Section 171(2)(h) of the Act, 1950.

7. Against the order dated 31.12.1984, the respondent no. 3 filed Appeal no. 0839 under Section 11 of the Act, 1953, which was allowed by the Settlement Officer of Consolidation, Kasya, District-Kushinagar, i.e., respondent no. 2 (hereinafter referred to as, 'S.O.C.') vide his judgment and order dated 28.2.2003. Against the judgement and order dated 28.2.2003 passed by the S.O.C., the petitioners filed Revision no. 157/161 under Section 48 of the Act, 1953, which was dismissed by the Deputy Director of Consolidation, Kushinagar, i.e., respondent no. 1 (hereinafter referred to as, 'D.D.C.') vide her judgement and order dated 30.4.2013. In their judgement and orders dated 28.2.2003 and 30.4.2013, the S.O.C. and the D.D.C. held that the original birth register of 1916 had been tampered by changing the word 'Lohar' to 'Koeri', after the certified copy of its extract was issued to respondent no. 3 and the certified copy of the extract of birth register filed by respondent no. 3 proved the case of respondent no. 3 that a son was born to Gaya who was the original tenure holder of the disputed plots. The S.O.C. and the D.D.C. reasoned that the entries in the birth register were in 'Urdu' language and transcribed in the Persian Script where even a dot could change the alphabets and consequently the word itself. The S.O.C. and the D.D.C. also relied on the death certificate filed by respondent no. 3 which showed that Thakur had died in 1943 and indicated that he was the son of Gaya. The S.O.C. and the D.D.C. reasoned that as the petitioners had admitted the marriage of Shivraji and Gaya and also that Thakur and Pheku were the sons of Sjivraji, therefore, the burden to prove that Thakur and Pheku were not the sons of Gaya but the sons of Budhai was on the petitioners and the petitioners had failed to prove the same. The S.O.C. and the D.D.C. rejected the Will dated 29.3.1946 on the ground that it was void. The S.O.C. and the D.D.C. held

that it was proved from evidence that Thakur and Pheku were the sons of Gaya Lohar and respondent no. 3 was the son of Thakur and, therefore, respondent no. 3 was entitled to succeed to the estate of Gaya. On their aforesaid reasoning, the S.O.C. set aside the order dated 31.12.1984 passed by the C.O. and the revision filed by the petitioners was rejected by the D.D.C. The orders dated 30.4.2013 and 28.2.2003 passed by the D.D.C. and the S.O.C. have been challenged in the present writ petition.

8. Before proceeding further, it would be relevant to note that the petitioners have filed a supplementary affidavit annexing certain revenue records and proceedings of some Case No. 1002 registered under Section 9-A(2) of the Act, 1953 before the C.O. The aforesaid case relates to some Khata No. 565 of which Pheku appears to be the recorded tenant and has been registered at the instance of respondent no. 3 in which Godhani has been impleaded as the opposite party. Godhani is the daughter of Pheku. The proceedings of Case no. 1002 have been filed by the petitioners to show that Pheku had a daughter namely Godhani. The records of Case No. 1002 annexed with the supplementary affidavit reveal that in the said case, the respondent No. 3 claims himself to be the heir of Pheku on the basis of some Will executed by Pheku in his favour. It is also pertinent to note that the facts disclosed in the supplementary affidavit that Pheku had a daughter namely Godhani or that respondent no. 3 claims himelf to be heir of Pheku in Khata No. 565 on the basis of a Will executed by Pheku has not been denied by respondent no. 3 in his supplementary counter affidavit. The revenue records annexed with the supplementary affidavit are of 1333 Fasli and 1347 Fasli and the said revenue records have been annexed in support of the averment in the supplementary affidavit that one Gaya, son of Mantu Lohar, resided in the same village and respondent no. 3 had taken advantage of the records relating to Gaya, son of Mantu Lohar to prove his case. The petitioners

have also annexed with the supplementary affidavit a copy of the revenue records of 1356 Fasli which shows that Shivraji was recorded as tenant of the disputed plots in 1356 Fasli. The revenue records annexed with the supplementary affidavit show that Gaya had died before the Act, 1950 came in operation.

9. Challenging the orders dated 28.2.2003 and 30.4.2013 passed by the S.O.C. and the D.D.C., the counsel for petitioners has argued that Gaya had a heritable and transferable interest in the disputed plots as he was a hereditary tenant with special privilege, i.e., Class-9 tenant as shown in Paragraph No. 124 of the Uttar Pradesh Land Records Manual, therefore, the Will dated 29.3.1946 was valid and enforceable and the findings recorded by the consolidation courts that the Will was void is contrary to law. It was further argued that the recital in the Will dated 29.3.1946 made by Gaya that he had no son and only one daughter namely Munia, who had a son, i.e., petitioner no. 1, proved that Thakur and Pheku were not the sons of Gaya Lohar. It was argued that even if the Will dated 29.3.1946 executed by Gaya was void , the Will and the recital in the same were still admissible under Section 32(6) of the Indian Evidence Act, Act, 1872 (hereinafter referred to as, 'Act, 1872') and were relevant and material evidence to be considered while deciding the issue as to whether Thakur and Pheku were the sons of Gaya and the failure of the SO.C. and the D.D.C. to consider the Will vitiates the impugned orders for non-consideration of relevant materials. It was further argued by the counsel for the petitioners that the burden to prove the pedigree as alleged by respondent no. 3 was on respondent no. 3, who had failed to prove the pedigree as alleged by him inasmuch as the original birth register of 1916 summoned by the C.O. clearly indicated that a son was born to Gaya Koeyri and not to Gaya Lohar. Relying on the revenue records of 1333 Fasli and 1347 Fasli filed alongwith the supplementary affidavit, the

counsel for the petitioners has argued that there was another person by the name of Gaya in the same village and respondent no. 3 took advantage of the records relating to the aforesaid Gaya, son of Mantu Lohar to prove his relationship with Gaya Lohar who was the original tenure holder of the disputed plots. It was further argued that the entries in the birth registers and the family registers, though relevant, are not conclusive of genealogy and relationship, but require corroboration to prove the pedigree and respondent no. 3 had not produced any evidence to corroborate the alleged entries in the certified copies of the extracts of birth registers filed by him. It was argued by the counsel for the petitioners that after the death of Gaya, his widow Shivraji, became the tenant of the disputed plots under Section 35(b) of the Act, 1939 and after the death of Shivraji succession had to be decided in accordance with Section 171 read with Section 172(2)(b) of the Act, 1950 and the disputed plots would devolve on the nearest surviving heir of Gaya, the last male tenant of the disputed plots. It was argued that the petitioners being the sons of the daughter of Gaya, became the tenants of the disputed plots under Section 171(2)(h) of the Act, 1950. It was argued that for the aforesaid reasons, the orders dated 28.2.2003 and 30.4.2013 passed by the S.O.C. and the D.D.C. are illegal and contrary to law and liable to be quashed. In support of his contention, the counsel for the petitioners has relied on the judgements of Supreme Court and of this Court reported in ***State of Bihar Vs. Radha Krishna Singh, AIR 1983 SC 683, M Vs. Board of Revenue, 1962 RD, (1) (H.C.), Ram Prasad Sharma Vs. State of Bihar, AIR 1970 SC 326, Madhuri Devi & Another Vs. Board of Revenue, U.P. at Lucknow & Others, 2011 (114) RD 465, Sebastiao Luis Fernandes Vs. K.V.P. Shashtri, 2014 AIR SCW 155, Anil Rishi Vs. Gurbaksh Singh, AIR 2006 SC 1971;*** and ***Vinod Kumar Dhall Vs. Dharampal Dhall & Others, AIR 2018 SC 3470.***

10. Rebutting the argument of the counsel for the petitioners, the counsel for respondent no. 3 has supported the reasons given by the S.O.C. and the D.D.C. in their orders dated 28.2.2003 and 30.4.2013. The counsel for respondent no. 3 has argued that in view of Section 33 of the Act, 1939 the interest of Gaya in the disputed plots was heritable but not transferable and, therefore, Gaya had no right to execute a Will regarding the disputed plots and the Will dated 29.3.1946 was void ab initio and non est and had no legal consequences. It was argued that both the C.O. and the S.O.C. had held that the Will dated 29.3.1946 was void and the said findings were not challenged by the petitioners in the revision filed by them before the D.D.C. and, therefore, the findings recorded by the consolidation courts that the Will was not enforceable cannot be challenged by the petitioners for the first time before this Court. It was further argued that as the Will dated 29.3.1946 was void *ab initio*, therefore, it cannot be read in evidence and any recital in the same allegedly made by Gaya was also inadmissible in evidence and was rightly ignored by the appellate and the revisional courts. It was argued that the copies of the birth registers produced by respondent no. 3 for the year 1916 and 1928 showed that sons were born to Gaya, the original tenure holder of the disputed plots and the death register of 1943 proved that Thakur was the son of Gaya and no illegality has been committed by the S.O.C. and the D.D.C. in relying on the aforesaid documents to hold that Thakur and Pheku were the sons of Gaya and respondent no. 3 was the grandson of Thakur. It was argued by the counsel for respondent no. 3 that the original birth register was tampered by adding the word 'Koeyri' after the name of Gaya after the certified copy was issued to respondent no. 3. It was argued that the S.O.C. and the D.D.C. have rightly accepted the certified copies of the extracts of birth registers filed by the respondent no. 3 to hold that Gaya had two sons. It was argued that, admittedly, Shivraji was married to Gaya and

also that Thakur and Pheku were the sons of Shivraji, therefore, the burden to prove that Thakur and Pheku were not the sons of Gaya Lohar was on the petitioners and the petitioners had failed to discharge their burden as they could not produce any evidence to prove that any person named Gaya Koeyri resided in the village or any evidence to prove the marriage of Shivraji with Budhai. It was argued that the findings recorded by the S.O.C. and the D.D.C. in their impugned orders dated 28.2.2003 and 30.4.2013 are based on evidence on record and not subject to interference by this Court under Article 226 of the Constitution of India. It was argued that for the aforesaid reasons, the writ petition is liable to be dismissed. In support of his argument, the counsel for respondent no. 3 has relied on the judgements of the Supreme Court and this High Court reported in ***Prem Singh & Others Vs. Birbal & Others, 2006 (5) SCC 353, Ibrahim Khan Vs. Additional Collector (Administration) Lucknow & Others, 2016 (131) RD 161, Suzuki Parasrampuria Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. & Others, AIR 2018 SC 4769, Kalpesh Hemantbhai Shah Vs. Manhar Auto Stores & Others, 2014 AIR SCW 1959; and State of U.P. & Others Vs. Maharaj Dharmander Prasad Singh, AIR 1989 SC 997.***

11. I have considered the rival submissions of the counsel for the parties.

12. It is not disputed by the parties that Gaya had died before the date of vesting as defined in the Act, 1950 and Shivraji was recorded as tenant of the disputed plots in the revenue records of 1356 Fasli and 1359 Fasli. It is also admitted between the parties that Thakur and Pheku were the sons of Shivraji and also that Munia was the daughter of Shivraji and Gaya. The dispute between the parties relates to the paternity of Thakur and Pheku. Respondent no. 3 pleads

that Thakur and Pheku were the sons of Gaya while the petitioners allege that Thakur and Pheku were the sons of Budhai to whom Shivraji was married before her marriage to Gaya. The dispute as to whether Thakur and Pheku were the sons of Gaya is relevant to decide the heir of Gaya and the tenancy of the disputed plots under Section 171 of the Act, 1950. The answer to the question as to who is the heir of Gaya and on whom the tenancy of the disputed plots devolve is also dependent on the validity of the Will dated 29.3.1946 allegedly executed by Gaya. The Will is a registered document. The consolidation courts have rejected the Will on the ground that Gaya had no transferable interest in the suit property and, therefore, the Will was void. The petitioners have challenged the said findings of the consolidation courts. The issue regarding the relationship of Gaya with Thakur and Pheku would be relevant only if the findings of the consolidation courts on the Will dated 29.3.1946 is affirmed. Therefore, first, the issue regarding the validity of the Will.

13. The counsel for the petitioners, while challenging the findings of the consolidation courts that Gaya had no right to execute the Will dated 29.3.1946, has argued that Gaya was a hereditary tenant with special privilege, i.e., Class-9 as enumerated in Paragraph No. 124 of the U.P. Land Records Manual, and therefore, the interest of Gaya in the disputed plots was both heritable and transferable and thus the Will dated 29.3.1946 was valid and legally enforceable.

14. The contention of the counsel for the petitioners can not be accepted. The petitioners have not brought on record any document to show that Gaya was a hereditary tenant or Class-9 tenant of the disputed plots. Any consideration of the tenancy rights of Gaya, in light of the arguments raised by the counsel for the petitioner would require an enquiry into disputed question of facts, i.e., the tenancy rights of Gaya in the disputed plots, the records relating to which have not been

produced before this Court. Apart from the aforesaid, a perusal of the revenue record of 1347 Fasli, annexed as Annexure no. SA-2 to the supplementary affidavit, shows that Gaya was an occupancy tenant and was recorded as Class 6(1) tenant in the revenue records. Under Section 33 of the United Provinces Tenancy Act, 1939 an occupancy tenant had no transferable interest except in the circumstances mentioned in Act, 1939. It is not the case of the petitioners that any of the circumstances mentioned in Act, 1939 existed which gave Gaya a transferable interest in the disputed plots. The said document does not support the contention of the petitioners regarding the nature of tenancy of Gaya in the disputed plots. Further, the findings recorded by the C.O. and the S.O.C. that Gaya did not have a transferable interest in the disputed plots and, therefore, the Will dated 29.3.1946 was void and not legally enforceable was not challenged by the petitioners in the revision filed by them before the D.D.C. In the circumstances the petitioners can not, for the first time before this Court in proceedings under Article 226 of the Constitution of India be permitted to challenge the said findings of the S.O.C. and D.D.C.

15. At this stage it is necessary to clarify that no statutory provision in the Act, 1939 was brought to the notice of this Court by the counsel for the respondent to show that Act 1939 prohibited bequest by the class of tenants included in Section 33 of the Act, 1939. **But as the counsel for the petitioners did not raise any argument challenging the approach of the consolidation courts in treating the Will to be a transfer of property, I am not expressing any opinion on the correctness of the findings of the consolidation courts regarding the legality of the Will on the said ground**. The challenge by the petitioners to the findings of the consolidation courts regarding the validity of the Will is being rejected only on the ground that the petitioners, can not for the first time, be permitted to raise the said argument in the

writ petition and because the argument of the petitioners that the Will was enforceable and not void is based on the nature of tenancy rights of Gaya in the disputed plots and the documents annexed with the supplementary affidavit negate the facts pleaded by the petitioners to support their argument that Gaya had a transferable interest in the plots.

16. In order to prove their respective cases, regarding the descendants of Gaya, i.e., as to whether Munia was the only child of Gaya or whether Thakur and Pheku were the sons of Gaya, the parties relied on the certified copies of the extracts of different birth and death registers. The petitioners also relied on the recital in the Will to prove their case and disprove the pedigree pleaded by respondent no. 3.

17. The respondent no. 3, in order to prove his case, filed a certified copy of the extract of Birth register of 1916 which showed that a son was born to Gaya. A reading of the judgement dated 31.12.1984 passed by the C.O. indicates that there was some doubt regarding the authenticity of the certified copy and, therefore, the C.O. summoned the original birth register. The original birth register indicated that the entries related to one Gaya who belonged to the Koeyri community. Gaya who was the original tenure holder of the disputed plots belonged to the Lohar community. The C.O., therefore, relying on the entries in the original register held that birth register of 1916 did not prove that Thakur was the son of Gaya who was the original tenure holder of the disputed plots. The findings of the C.O. was reversed by the S.O.C. on the ground that entries in the birth birth are in Urdu language and in the Persian Script where a mere dot can completely change the transcribed Urdu word. The S.O.C. and the D.D.C. relied on the certified copy filed by respondent no. 3 to hold that Thakur was the son of Gaya Lohar and held that the entries in the original birth register had been tampered because admittedly the certified copy filed by respondent no.

3 was issued to him.

18. The contents of the certified copy filed by respondent no. 3 differed from the original. The consolidation courts did not summon any officer from the concerned department to verify the genuineness of the certified copy filed by respondent no. 3. The certified copy of a document is a secondary evidence under Section 63 of the Evidence Act, 1872. The original document is a primary evidence under Section 62 of the Act, 1872. The contents of a document are, except in circumstances mentioned in Section 65 of the Act, 1872 must be proved by the primary evidence, i.e., the document itself (section 64 of the Act, 1872). It is true that certified copy of a public document is admissible in evidence under Section 77 read with Section 65(e) of the Evidence Act, 1872 **in proof of the contents of the public document** or part of the public document of which it purports to be a copy. Under Sections 77 and 79 of the Act, 1872 the courts raise a presumption that the certified copy reflects the contents of the original. The presumption in favour of the certified copy is not conclusive but a rebuttable presumption. The presumption in favour of the certified copy that it reflects the contents of the original can be rebutted by production and perusal of the original record. The utility of a certified copy as evidence is to prove the contents of the original public document where the original is not on record. A reading of Sections 61 to 65 of the Evidence Act, 1872 indicates that secondary evidence in proof of the document or its contents can be given only where the original, i.e., the primary evidence can not or is not produced as evidence. If both primary and secondary evidences are on record and there is a conflict between the contents of the two, the contents of the primary evidence, i.e., the original, are to be accepted. The certified copy loses its evidentiary value if it does not correctly reflect the contents of the original. The certified copy and its contents are by themselves not an evidence of any tampering or forgery in the original if the

contents of the original are different from the contents of the certified copy. The alleged tampering or manipulation in the original has to be proved by other evidence. Thus, the certified copy of birth register of 1916 filed by respondent No. 3 was not a material evidence to hold that the original birth register had been tempered and the S.O.C. and the D.D.C. by relying on the certified copy of birth register of 1916 have considered irrelevant material to hold that the original birth register of 1916 had been tampered.

19. In their impugned orders the S.O.C and the D.D.C. have noted that a mere dot in Persian Script can change the word itself, and have, therefore, concluded that the original register has been tampered and entries in the original have been changed. The aforesaid opinion is a mere surmise. No linguistic expert was called by the respondent No. 3 or the consolidation courts to verify the aforesaid fact. I have myself looked at the Persian Script of the words 'Koeyri' and 'Lohar' and it is apparent that the script of the two words is totally different and a mere dot would not change the word itself. The way 'Koeyri' is written in the Persian Script is totally different from the way 'Lohar' is written in the Persian Script and it can not be said that a mere addition of dot in the word 'Lohar' would change it to the word 'Koeyri'. Further, even if the birth register of 1916 was tampered and entries forged, the said tampering only reduces or extinguishes the probative value of the entries and does not prove the case of respondent no. 3 because there is nothing on record to indicate the initial entry in the records.

20. The birth register of the year 1928 indicates that one son was born to Gaya Lohar and the copy of the death register of 1943 filed by respondent no. 3 indicates that one Thakur, son of Gaya had died in the aforesaid year.

21. However, it was held by this Court in ***Madhuri Devi (Supra)*** that, "an entry in a revenue record or in the family

register is no final proof of the parentage of a person". (Paragraph no. 13). The death and the birth registers, by themselves, are not conclusive proof of a pedigree pleaded by a party and the entries in the said documents require corroboration. There is no evidence on record corroborating the entries in the birth register of 1928 and the death register of 1943. In any case, the probative value of the entries in the different registers mentioned above and filed by respondent no. 3 had to be assessed in light of other evidences brought on record by the parties. The petitioners, in order to disprove that Thakur and Pheku were the sons of Gaya, had filed the Will dated 29.3.1946 which contained a recital by Gaya that he had no son but only a daughter named Munia. The recital in the aforesaid Will has not been considered by the S.O.C. and the D.D.C. while assessing the different evidence filed by the parties to prove their respective cases. The issue before this Court is as to whether the failure of the S.O.C. and the D.D.C. to consider the Will dated 29.3.1946 and the recital in it vitiates their orders requiring interference by this Court?

22. The counsel for the petitioners has argued that the Will, even if void because Gaya had no right to execute the said Will, was admissible in evidence under Section 32(6) of the Act, 1872 to disprove the alleged relationship between Thakur and Gaya. The counsel for respondent no. 3 has argued that the Will was void and thus non est and therefore the Will or any part of it was not admissible in evidence and can not be read in evidence for any purpose and the appellate and the revisional courts rightly refused to consider the same. In support of his argument the counsel for respondent no. 3 has relied on the judgement of this Court in ***Ibrahim Khan (Supra)*** and of the Supreme Court in ***Prem Singh (Supra).***

23. 'Void' and 'non-est' are two different concepts. The concept of void refers to the enforceability of a contract/document/ transaction and when a contract or a

document is referred as void it implies that the same is not legally enforceable. 'Non-est' means 'non-existent' and is used to deny the execution of the document itself. A void document is not necessarily 'non-est'. It is only an existing document which a party can plead to be 'void'. If a document is executed by a person who had no authority to execute it or no authority to indulge in the transactions incorporated in the document, the document would be void but not 'non-est'. If a document is void then it can not be sued upon and enforced but the aforesaid does not mean that other legal consequences of the document shall not follow. A contract or any other document which creates a right would be enforced by a court only if the person who executed the document has the authority to execute it, the document is admitted in evidence and proved in accordance with the provisions of Evidence Act, 1872. The admissibility in evidence or the probative value of a document or its contents does not depend on its enforceability by the courts. For example, if a Will is not proved in accordance with Section 68 of the Act, 1872 because no attesting witness of the Will who is alive, and subject to the process of the court and capable of giving evidence has been called to prove its due execution, the Will would not be enforced and the Will **shall not be read in evidence for the purposes of enforcing the Will but can still be read in evidence for any purpose other than for enforcing the Will**. In such a case, the document purporting to be a Will will be read in evidence not as Will but as any other document provided it has been proved in accordance with Sections 67, 72 and other provisions of the Evidence Act, 1872. Similarly in case, where a Will is not used or relied upon as a document conferring any enforceable right, the same can be read in evidence even if the requirement of Section 68 are not fulfilled and the said document is proved in accordance with Sections 67 and 72 of the Act, 1872. A Will which is executed by a person who had no right to make a bequest of the properties would not be

enforceable by a court and in that sense it would be void. But, the said Will can be used for purposes other than its enforcement and would be admissible in evidence for such other purposes.

24. In my aforesaid view, I am supported by a Division Bench judgement of this Court rendered in ***Mahadeo Prasad Vs. Ghulam Mohammad, AIR 1947 ALL 161***. Paragraph Nos. 9 and 9A of the aforesaid judgement are relevant for the purpose and are reproduced below :-

> "9. The main question which has to be decided in this appeal is whether the statement contained in Mt. Sahodra's will referred to above was admissible in evidence and the learned judge was right in relying on the same. it must be remembered that in the present case **we are not concerned with the validity or invalidity of the will as such. It is obvious that Mt. Sahodra, being in possession of the property as a limited owner under the Hindu Law, whether as the widow of the last owner Bhau Ram or as the mother of the last owner Kallu Ram had no right to transfer the property by will. Section 68, Evidence Act would certainly come into play if any of the two parties to this litigation had founded his claim on the will but that is not the case here.** This will of Mt. Sahodra is a registered document and it has been specifically referred to in the sale deed in favour of the defendant. It has been exhibited by the Court of first instance as Ex. QQ and, therefore, it is clear that it was tendered in evidence. The statement of the defendant's witness, Sheo Cham, in favour of whose wife Mt. Moti Kunwar, the will was executed has definitely stated in the course of his deposition that Mt. Sahodra executed "a will" in favour of his wife Moti Kunwar in 1934. No objection seems to have been raised in the course of the proceedings in the Court of first instance with regard

to the existence of this Will or its execution by Mt. Sahodra. A glance at the statement of Sheo Charan would show that first of all he referred to this will in his examination in-chief. In cross-examination learned counsel for the plaintiff appears to have repeatedly questioned Sheo Charan with reference to this will, but the questions were all put to the witness with a view to eliciting from him the facts bearing upon the invalidity of the will. It is true that the will Ex.QQ does not bear on it any statement to the effect that its execution was admitted, but on a careful examination of the long statement of Sheo Charan there can be no doubt whatsoever that the cross-examination of Sheo Charan proceeded on the footing that the registered document dated 10-9-1934 purporting to be a will of Mt. Sahodra was a document executed by Mt. Sahodra.

9A. **It must, therefore, be taken that the only contention raised on behalf of the plaintiff with regard to this document in the trial Court was that it has not been proved in accordance with the provisions S.68, Evidence Act**. And it is well settled that an objection that a document which per se is not admissible (inadmissible?) in evidence, has been improperly admitted in evidence in the trial Court, can not be entertained in the court of appeal. If such an objection had been taken in the trial Court it might have been easily met and the proceedings regularised : vide AIR 1931 Pat 224, AIR 1915 PC 111, 34 Cal 1059: 34 IA 194 and AIR 1923 CAL 378. **As mentioned already, S.68 would apply only if the document were relied upon as a Will and therefore as a document requiring attestation. It has been repeatedly held that non-compliance with the provisions of S.68 does not prevent the document from being used in evidence under S.72 for any other or collateral purpose**. Reference might be made to the case in

> 13 ALJ553; also to the case in 16 ALJ 121. Similarly reference might be made to the decision of a Bench of two learned Judges of this Court in 1939 ALJ 142."
>
> (Emphasis added)

25. Previously, a Division Bench of this Court in a judgement reported in ***Ft. Shyam Lal Vs. Lakshmi Narain, AIR 1939 ALL 269***, held that, "*Section 68 on the other hand states : if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.* ***The question at issue is whether the words : it shall not be used as evidence until one attesting witness at least has been called", etc. are to be held to imply the words "it shall not be so used as evidence for any purpose", or whether the words are to be held merely as applying to a suit for enforcement to the document leaving the ordinary provisions of law in Sec. 67 to apply where the document is to be used for any other purpose. On general considerations it would appear difficult to hold that Sec. 68 must always apply to the use of a document in evidence which is required by law to be attested***". It was further observed by the Division Bench that, "*The Evidence Act codified the law and we should have expected that if s.68 was intended to express that a document required by law to be attested should not be used as evidence for any purpose until on attesting witness at least had been called, then the words "for any purpose" would have found a place in the Section. Those words are not in the Section and therefore we conclude that this was not the intention of the framers of the Act.* ***It is not possible to see why an admission in one document should require a different kind of proof from an admission in another document***.

The mere fact that one of the document requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. For these reasons we consider that the view of the appellant is correct and S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission."

(Emphasis added)

26. Thus, even if the Will dated 29.3.1946 is not enforceable for being void or may not be relevant under Section 32(6) of the Act, 1872 as a Will, it would still be admissible and relevant under Section 32(5) of the Act, 1872 because the relevant recital in the Will is a statement in writing of the deceased and relates to the existence of a relationship by blood about which the testator had special means of knowledge as the husband of Shivraji. The statement is obviously *ante litem motam*, i.e., made before any dispute regarding the succession to the estate of the testator started between the parties. Thus, the Will dated 29.3.1946 was admissible in evidence and was relevant under Section 32(5) of the Act, 1872 to decide the pedigree of respondent No. 3 and had to be considered by the S.O.C. and the D.D.C. while assessing the different evidence filed by the parties to prove or disprove the pedigrees as pleaded by them.

27. A reading of the impugned orders passed by the appellate and the revisional courts shows that the recital in the Will has not been considered by the said courts. The recital was a material evidence, the non-consideration of which vitiates the judgements of the appellate and the revisional courts.

28. The judgements of this Court in ***Ibrahim Khan***

(Supra) and of Supreme Court in ***Prem Singh (Supra)*** referred by respondent no. 3 do not deal with the issue regarding the relevance or admissibility in evidence of a void and uneforceable document for purposes other than the enforceability of the document and are therefore not applicable in the present case.

29. It is true that this Court under Article 226 of the Constitution of India, does not interfere in findings of fact recorded by the tribunals but in the present case the S.O.C. and the D.D.C. have ignored material evidence, i.e., the Will dated 29.3.1946 and the original birth register of 1916, and have also considered an irrelevant material, i.e., the certified copy of the birth register of 1916 filed by respondent no. 3, to support their findings. The reasons recorded by the consolidation courts to not consider the Will dated 29.3.1946 and the recital in it while assessing the different evidence filed by the parties is vitiated by error of law which is apparent on the face of record. Thus, the impugned orders passed by the S.O.C. and the D.D.C. are liable to be quashed and the matter is liable to be remanded back to the S.O.C. to pass fresh orders in accordance with law.

30. In view of the reasons recorded previously, no opinion is required to be expressed on the probative value of other evidences filed by the parties which shall be considered by the S.O.C. in light of the observations previously made in the present judgement.

31. For the aforesaid reasons, the orders dated 30.4.2013 and 28.2.2003 passed by the Deputy Director of Consolidation, Kushinagar and the Settlement Officer of Consolidation, Kasya, District-Kushinagar are hereby quashed. The matter is remanded back to the Settlement Officer of Consolidation, Kasya, District-Kushinagar to pass fresh orders in accordance with law and in light of the observations made in the judgement. The settlement Officer of Consolidation shall

pass fresh orders within a period of six months from today and the consequential revision filed by the aggrieved parties shall also be decided by the Deputy Director of Consolidation within two months from the date of filing. It is clarified that in any case, the proceedings restarted as a consequence of the present order shall be completed within a period of one year from today. In order to ensure that the proceedings are completed within one year from today the consolidation authorities shall be at liberty to hold day to day hearing in the cases filed before them. The Collector, Kushinagar, is directed to ensure compliance of the present order.

32. The Register General of this Court is directed to send a copy of this order to the Collector, Kushinagar.

33. The parties shall maintain *status quo* and not create any third party rights in the disputed plot till the culmination of the proceedings as directed above.

34. With the aforesaid directions, the writ petition is ***allowed***.

Order Date :- 11.06.2020
Anurag/-