

(2017) 05 AHC CK 0072
In the Allahabad High Court
Case No : 2435 of 1984

Bashir Khan

APPELLANT

Vs

Somnath

RESPONDENT

Date of Decision : 12-05-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 141](#),
[Section 11](#), [Order 23Rule 1](#) Order
23Rule 1(4) - Miscellaneous proceedings - Res Judicata

Citation : (2017) 05 AHC CK 0072

Hon'ble Judges : Siddhartha Varma

Bench : Single Bench

Advocate : M.C. Misra, Manish Chandra Tiwari, V.K.Singh, M.M. Ahmad,
M.Ahmad, M.Islam, Monica Vaish, S.U. Khan, V.M.Zaidi

Final Decision : Dismissed

Judgement

1. This is a defendant's second appeal filed against the judgement and decree dated 11.7.1984 passed by First Appellate Court.

2. The suit was filed by the plaintiff-respondent no. 1 with a relief for declaring the auction of House No. 237, Dondipur, Allahabad, held on 20.11.1975 and confirmed on 26.11.1975 as illegal and void and that he was the owner of it. A further relief for possession was also made by the plaintiff. The plaintiff's case was that he had purchased the house from one Abdul Majid- the defendant-respondent no. 4 by means of a registered sale deed dated 4.7.1970. He has alleged that when on 2.2.1976 the plaintiff came to know through his tenant that the house in question had been sold in auction for Rs. 4,000/- in lieu of a loan that was taken by Abdul Majid, he filed the suit, claiming that when the property comprising in House No. 237, Dondipur, Allahabad, was sold by Abdul Majid to the plaintiff Som Nath on 4.7.1970 then the same could not have been sold in auction on 20.11.1975. The defendant-appellant Bashir Khan who was the auction purchaser had contested the suit and claimed that by the agreement

dated 22.3.1965 Abdul Majid had entered into an agreement with the State of Uttar Pradesh that he would return the sum of Rs. 7,000/- and the interest thereon in monthly installments and that if he defaulted then the amount could be recovered from the property which was mortgaged to the creditor or "from any other property" of the borrower. The defendant had relied upon paragraph nos. 2, 3 and 4 of the agreement and submitted that the borrower Abdul Majid had, in fact, by the agreement dated 22.3.1965, agreed that if he was unable to pay the loan amount then the same could have been recovered from him by selling off any of his properties.

3. The trial court, after framing nine issues, found that the property in dispute, as per the agreement dated 22.3.1965, was a mortgaged property and, therefore, was rightly sold in auction.

4. However, the First Appellate Court reversed the finding as was given by the trial court and found that the sale of the disputed house without making an attempt to sell the mortgaged House No. 235 was illegal and that the plaintiff was the owner of the property in question. It also found that without first recovering from the mortgaged property it was not proper to have auctioned the property of the plaintiff and, therefore, allowed the plaintiff's appeal and decreed the suit.

5. Counsel for the appellant Bashir Khan, who was the auction purchaser has made the following submissions:-

I. The agreement between the borrower - respondent no. 4 - and the State of U.P. clearly stipulated that in the event of a failure of the return of the borrowed money, the State could recover the same either from the mortgaged property or from "any other property" of the borrower. He has submitted that the mortgaged property was the property of the surety - Mustaq Ahmad and therefore in view of 2006 (10) SCC 332 (Ashok Mahajan Vs. State of U.P. And Others), 2004 ACJ 1914 (Pawan Kumar Jain Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Others.) and 2011 (3) ADJ 842 (Nirmal Jain Vs. Pradeshia Industrial & Investment Corporation of U.P. and Another) first the property of the borrower had to be sold and thereafter the property of the surety had to be touched.

II. The recovery of the loan amount was initiated by the issuing of a recovery certificate on 28.1.1968 and, therefore, the plaintiff-defendant respondent no. 1 could not have bought the property on 4.7.1970.

III. The defendant appellant submitted that once when the plaintiff had filed a writ petition being Writ Petition No. 841 of 1976 and the Court had passed the following order:-

" The list has been revised. No one appears in support of the petitioner. The writ petition is accordingly dismissed. There will be no order as to costs."

then the trial court exceeded its jurisdiction by the entertaining the suit as the

suit was barred by principles of res judicata. He has relied on 2012 ACJ 2401 (Nitin Gunwant Shah Vs. Indian Bank and Others) and 2012 ACJ 2185 (The Committee of Management, Kayatha Pathshala Society, Jaunpur and another Vs. The State of U.P. and Others.) to bolster his submission.

IV. The appellant further submitted that once a property is sold in auction then an indefeasible right accrues to the auction purchaser and relying on A.I.R. 1967 SC 608 (Janak Raj, (appellant) V. Gudial Singh and Another, (respondents)) submitted that the auction purchaser's right was perfected and that it could not be withdrawn.

6. In reply the answering plaintiff/respondent no. 1 submitted that the agreement dated 22.3.1965 is absolutely clear. In the event of a failure by the borrower in depositing the loan amount, first the mortgaged property had to be sold which comprised House No. 235 even if it belonged to the surety Mustaq Ahmad and that if the loan amount could not be recovered by the sale of the mortgaged property then "any other property" of the borrower could have been sold. In the instant case, the property was sold to the plaintiff on 4.7.1970 by the respondent no. 4, therefore, the borrower lost all interest in the suit property, namely, House No. 237 Dondipur, Allahabad. Auction of the already sold property took place on 20.11.1975 in favour of the defendant-appellant and the auction was also confirmed on 26.12.1975, meaning thereby a property was sold in auction which did not belong to the borrower and, therefore, the same could not have been sold in auction.

7. Replying to the appellant's argument that the suit was barred by principles of res judicata, the counsel for the respondent has submitted that an order of dismissal of the writ petition in default would not bar a subsequent suit as the writ petition had not decided any issue and has further submitted that by virtue of Section 141 of C.P.C., Section 11 of the C.P.C. did not apply.

8. Having heard the counsel for the parties and after having gone through the record of the case, I am of the view that the substantial questions of law as had been framed by the Court at the time of admission do not, in fact, raise any substantial question of law. In fact, the argument of the appellant that the property of the borrower alone could have been sold as per the agreement before the property of the surety could be auctioned has no legs to stand. In the instant case, when the property in question itself had been sold on 4.7.1970 then it could not have been said that there was anything left with the borrower which he owned and, therefore, the only property which should have been sold was House No. 235 which was mortgaged with the State of Uttar Pradesh. Under such circumstances, the decisions as have been cited by the counsel for the appellant do not apply in the present case.

9. Further argument of the learned counsel for the appellant that in view of 1967 SC 608 an indefeasible right had accrued to the purchaser also is not appealing. In that case it has been held that if a judgment debtor's property is sold in

auction because of an ex parte decree and subsequently the ex parte decree is recalled then the auction purchaser's right could not be touched. In 1967 SC 608, the property which was attached and sold by the decree holder belonged to the judgment debtor. In the instant case, the property after having been sold on 4.7.1970 did not belong to the borrower at all and, therefore, by the auction sale no rights passed to the auction purchaser.

10. The third leg of the argument of the appellant that the suit could not have been entertained as it was barred by principles of res judicata as an earlier writ petition filed by the plaintiff respondent no. 1 had been dismissed also must fail. The law on this point is clear. Even if Section 11 of C.P.C. because of Section 141 C.P.C. does not apply on proceedings under Article 226, yet the principles of res judicata does. If any particular writ petition on certain issues is decided then the principle of res judicata would apply. A simple dismissal of a writ petition in non-prosecution or dismissal of a writ petition upon it being withdrawn as not pressed would not attract the principles of res judicata.

11. In 1981 SC 960 (Ahmedabad Manufacturing and Calico Printing Co. Ltd., Appellant V. The Workmen and another, Respondents), a Special Leave Petition was withdrawn in the Supreme Court and, thereafter, the High Court had not exercised its jurisdiction under Article 226 saying that the writ petition was barred by principles of res judicata. However, the Supreme Court in paragraph no. 20 has stated that-

" After having analyzed the various cases cited, we are of the view that permission to withdraw a leave petition cannot be equated with an order of its dismissal. We also come to the conclusion that in the circumstances of the case the High Court has not exercised a proper and sound discretion in dismissing the writ petition in limine on the sole ground that the application for special leave on the same facts and grounds had been withdrawn unconditionally".

In AIR 1982 K 23, in paragraph no. 15 it has been stated

" There cannot be any doubt for the proposition that general principles of res judicata do apply, if a writ petition for the same purpose is dismissed. This court in the case of T.N. Perumal Reddy V. State of Karnataka (ILR (1980) 2 Kant 774) reviewing the decisions of the Supreme Court has observed: " That general principles of res judicata do apply if an earlier writ petition for the same relief had been dismissed."

12. This is what is observed in para 20 of the above judgment:

"Thus, it is obvious that the general principles of res judicata ("Prangnyaya") derive their strength even from our own ancient common law and it is, as stated above, well settled that the general principles of res judicata, apart from the technical rules as contemplated in Section 11 of the Code of Civil Procedure, apply to proceedings before the Court."

13. The learned counsel for respondents-plaintiff, however, invited my attention

to the fact that when the writ petition was dismissed by the single judge, the present tenants were not parties to the writ petition at all. They further invited my attention to the order passed in appeal which reads:

" Writ appeal is dismissed as withdrawn. It is made clear that this shall not in any way prejudice adjudication of the rights of the parties in O.S. 1575/80, O.S. 1579/80 and O.S. 1576/80 on the file of the first Munsiff, Bangalore."

14. Thus, there is no substance in the contention that the order passed in the writ petition operates as res judicata and the suits are not maintainable as barred by general principles of res judicata" "

and so when a writ petition is dismissed without any adjudication then a suit for the same issue could not be barred by the principles of res judicata. In 2012 ACJ 2401 (Nitin Gunwant Shah Vs. Indian Bank and Others), the Supreme Court has laid down that if a suit is dismissed for non-prosecution then the subsequent suit is barred under Order XXIII Rule 1(4) and in 2012 ACJ 2185 (The Committee of Management, Kayatha Pathshala Society, Jaunpur and another Vs. The State of U.P. and Others.) this Court has laid down that if a writ petition is got dismissed as withdrawn without any condition then the subsequent writ petition cannot be filed. In the case at hand, the writ petition was dismissed in default without there being any adjudication and, therefore, the subsequent suit would not be barred by the principles of res judicata. The suit was maintainable and was rightly filed.

Thus, for what has been stated above, the second appeal lacks merits and is, accordingly, dismissed.