
(2006) 09 AHC CK 0175
In the Allahabad High Court
Case No : Civil Revision no.40 of 2006

Kisanotthan Co-Operative Housing Society Ltd., Lucknow	APPELLANT
Vs	
O.P.Srivastava	RESPONDENT

Date of Decision : 21-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 115

Citation : (2006) 09 AHC CK 0175

Hon'ble Judges : Rakesh Sharma, J

Final Decision : Dismissed

Judgement

Rakesh Sharma, J.—This is a fresh case listed for admission/hearing today. Sri U.K. Srivastava appears for the revisionist and Sri Umesh Chandra Pandey has put in appearance on behalf of the opposite party.

2. This Civil revision has been filed under Section 115 of the Code of Civil Procedure against the order dated 3.3.2006, passed by the Court of Civil Judge (Senior Division) Malihabad, Lucknow in Misc. Case No.94C/2005 M/s. Kisanotthan Cooperative Housing Society Ltd., Lucknow v. O.P. Srivastava, under Section 47 C.P.C.

3. It emerges from record that the revisionist Society had purchased Khasra plots Nos.713A and 713B having an area of 3 Bigha, 3 Biswa and 13 Biswansi, situate at village Kanchanpur Matiyari, P.S. Chinhath, District Lucknow, from its previous owner late Deokali through a registered saledeed dated 15.11.1994. The revisionist Society thus claims itself to be the absolute owner of the said land. As per learned counsel for the revisionist, the Society has developed the abovesaid land and carved out small pieces of plots for residential houses and the same have been sold to its members. Some houses have also been constructed on the land. The revisionist Society learnt that a Regular Suit No.174 of 1991 for recovery of some amount was filed by Sri O.P. Srivastava, opposite party against the previous owner late Deokali. The said suit was later on decreed on 5.9.1991. The opposite party had sought execution of the decree by filing

Execution Case No.20 of 1995. The revisionist entered into this litigation by filing a formal application under Order 21 Rule 58 CPC for setting aside the attachment order. This application was dismissed in default. However, another application was filed by the revisionist Society under Section 47 and Order 26 Rule 9 CPC raising objections to the execution proceedings. The revisionist submitted an application (paper No.Ga13) seeking appointment of an Advocate Commissioner, who could inspect the site, land in dispute and submit his report. This application was rejected by the learned Civil Judge (Senior Division) Malihabad, Lucknow vide order dated 3.3.2006. Feeling aggrieved of the said order, the revisionist has preferred this revision.

4. Sri Umesh Kumar Srivastava, learned counsel for the revisionist has assailed the impugned order on the ground that the learned Court below has committed manifest error of law and jurisdiction in to considering the fact that the auction sale has been conducted in respect of a land, over which several residential houses were constructed and are in existence. The learned Court below has ignored the settled principles of law that only that property can be attached and sold, over which the judgment debtor has a saleable interest. The Court below has acted illegally in ignoring the fact that the property in question was not subjectmatter of dispute in Regular Suit No.174 of 1991 and was purchased by the revisionist Society much before the initiation of execution proceedings. According to Sri Srivastava, the revisionist Society was deprived of its right to plead its case with evidence; the application ought to have been allowed by the learned Court below.

5. Sri Umesh Chandra Pandey, learned counsel for the opposite party has strongly opposed the revision petition. At the outset, it has been submitted that the revisionist Society was neither a party, nor a representative of any party to the regular suit which was filed by the opposite party. The application of the revisionist under Order 21 Rule 58 CPC had already been dismissed in default on 7.2.2003. The application for recall of the said order filed on 21.2.2003 was also dismissed on 21.8.2004. As per learned counsel for the opposite party, the impugned order dated 3.3.2006 rejecting the application for issuance of a commission moved under Order 26 Rule 9 CPC is merely an interlocutory order; it does not amount to a case decided within the meaning of Section 115 CPC and as such it is not revisable. According to the opposite party, the revision may be dismissed as not maintainable.

6. Learned counsel for the opposite party has further submitted that Smt. Deokali, the original owner of abadi Khasra plots Nos.713A and 713B having an area of 3 Bigha, 3 Biswa and 13 Biswansi situate at village Kanchanpur Matiyari, P.S. Chinhat, district Lucknow, had entered into a registered Agreement for sale of the said land on 25.3.1985 and received a sum of Rs.20,000/ as advance. This amount was advanced for purchase of the aforesaid plots. On the failure of Smt. Deokali to execute a registered sale deed, Regular Suit No.174 of 1991 was filed against her for recovery of the said amount together with interest. This suit was

decreed by the II Additional Judge, Small Causes Court, Lucknow, on 5.9.1992. The decretal amount is a charge on the above said property i.e. Khasra plots No.713A and 713B. Smt. Deokali died leaving behind her legal heirs and successors, who succeeded her estate alongwith her liabilities. Against the decree, no appeal or revision was preferred by any of the concerned parties, hence this order had become final and executable. Accordingly, for execution of the said order, the opposite party filed Execution Case No.20 of 1995 and prayed for attachment of the land in question. The learned executing Court attached the said land vide order dated 1.2.2000. The proceedings for sale of the property were initiated and the same were completed by the concerned Amin on 8.8.2005. A publication in the newspaper was made indicating the details of the property. The revisionist Society despite knowing the fact that Regular Suit No.174 of 1991 was decreed on 5.9.1992 and the execution of the decree was to be proceeded, purchased the said property. The revisionist Society had knowledge of the registered agreement for sale of the above property in favour of the opposite party. Smt. Deokali was a member of the Scheduled Cast and the revisionist Society or its members had no right to purchase the said Abadi land without obtaining permission from the Collector, Lucknow as contemplated under Section 157A of the U.P. Zamindari Abolition and Land Reforms Act. The transfer, if any, of the property in question in favour the Society without such permission was void ab initio. The revisionist Society, on the basis of alleged saledeed, did not get any right or interest in the property in question.

7. Learned counsel for the opposite party has further submitted that unless and until the decreed amount was paid, the revisionist Society's interest in the property was not absolute; the property could not be said to be free from all encumbrances. In fact the revisionist Society had mischievously and fraudulently purchased the land in dispute despite having knowledge of there being a registered Agreement to sale and a decree passed by the Court dated 5.9.1992 in favour of the opposite party. The property attached is liable to be sold in execution of the said decree. Learned counsel for the opposite party has brought to the notice of the Court that the revisionist Society preferred an application bearing Misc. Case No.8C/2000 under Order 21 Rule 58 CPC. Objections were filed by the answering opposite party indicating therein that the said application was not maintainable. However, this application of the revisionist was dismissed for nonprosecution on 7.2.2003. To set aside the said order, a restoration application bearing Misc. Case No.17C/2003 was filed but the same was also dismissed in default on 21.8.2004. Against this order, an application, Misc. Case No.83C/2005 was filed by the revisionist Society for restoration of the case, but the case has not been restored till date and as such the revisionist Society has no legal right to file the present revision.

8. Learned counsel for the opposite party has further submitted that the execution relates to money decree and as such the present revision is not maintainable without paying the decretal amount, which is a charged obligation on the property in dispute. It has also been brought to the notice of the Court

that the auction sale was conducted after adopting all steps and informing the public in general by publication. Full description of the property was given in the advertisement in compliance of Section 283 of the U.P. Zamindari Abolition and Land Reforms Act. This notice was published in the newspaper and it was made known to everyone concerned. In these circumstances, there was no need to issue a commission under Order 26 Rule 9 CPC. The application was rightly rejected by the learned Court below. Learned counsel for the opposite party has placed reliance on the decisions as reported in AIR 1940 Madras 569, Manthiri Goundan v. Arunachalam Goundan and another and AIR 1947 Nagpur 56, Ram Nath Ram Krishna Agrawal v. Wasudeo and another in support of his submissions.

9. I have heard learned counsel for the parties and perused the record including the impugned order dated 3.3.2006.

10. It is admitted to the parties that a Regular Suit No.174 of 1991 was instituted by the opposite party O.P. Srivastava for recovery of the amount paid to Smt. Deokali, who had entered into a registered agreement to sale executed on 28.3.1985 for sale of the property i.e. land of Khasra plots Nos.713A and 713B measuring 3 Bigha, 3 Biswa and 13 Biswansi, situate in village Kanchanpur Matiyari, P.S. Chintahat, district Lucknow. Smt. Deokali was paid a sum of Rs.20,000/ as advance in furtherance of the sale of the said property. Admittedly, the suit was decreed on 5.9.1992 i.e. much before the purchase of the said plots, property by the revisionist Society on 15.11.1994. There is a gap of more than two years and two months between the issue of said decree on 5.9.1992 and the alleged purchase of the property in question by the revisionist on 15.11.1994. It has also come on record that Smt. Deokali belonged to Scheduled Caste and as such obtaining a permission from the Collector, Lucknow was a condition precedent for sale of the property as per provisions of Section 157A of the U.P. Zamindari Abolition and Land Reforms Act. There is nothing on record as to how and when permission for such transfer and execution of the sale deed on 15.11.1994 was obtained by the revisionist Society or the alleged seller. Late Smt. Deokali had received Rs.20,000/ as advance and executed a registered agreement to sale on 28.3.1985. There was a charge obligation on the property in suit as a result of an unchallenged judgment and decree passed on 5.9.1992 i.e. much before the execution of the sale deed dated 15.11.1994 in favour of the revisionist Society.

11. It is also apparent from record that the revisionist Society's application under Order 21 Rule 58 CPC, registered as Misc. Case No.8C/2000 was dismissed for nonprosecution on 7.2.2003. The restoration application bearing Misc. Case No.17C/2000 was also dismissed in default on 21.8.2004. The said case has not yet been restored. Therefore, the revisionist has no right to present this revision.

12. The learned Court below, vide impugned order dated 3.3.2006 has rejected the application of the revisionist under Order 26 Rule 9 CPC for issuance of a commission. The matter relating to right, title and interest in the property is yet to be decided on merit under Section 47 CPC. The order dated 3.3.2006

impugned in the revision does not amount to a case decided and as such the revision is not maintainable. It has also been brought to the notice of the Court that before the auction sale was conducted, the description of the property to be auctioned was published in the newspaper. A formal notice containing details, description of the property is published in compliance of the provisions of Section 283 of the U.P. Zamindari Abolition and Land Reforms Act. This procedure appears to have been followed in the present case. All the concerned persons were made known about the description details of the property in dispute to be sold in the auction. In view of this fact also, I find substance in the submissions of the learned counsel for the opposite party that there was no need to issue a commission under Order 26 Rule 9 CPC. The revisionist, knowing fully well that in respect of the property a decree passed by a Court of competent jurisdiction was already in existence, endangered itself and its members. Naturally they have to face the risk and consequences of the purchase of a disputed property.

13. In view of above, no case for interference by this Court in exercise of its revisional jurisdiction under Section 115 of the CPC is made out. The revision lacks merit and the same is dismissed with costs.

14. The executing Court is directed to proceed with the execution case expeditiously, as the decree was passed in favour of the opposite party on 5.9.1992 and the same has not been executed so far though a period of about fourteen years has passed.

(Revision dismissed)