
(2014) 12 AHC CK 0084

In the Allahabad High Court

Case No : Writ-B Nos. 67583 and 67584 of 2014

Parsadi and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10 (2), Order 22 Rule 10, 146, 80
Criminal Procedure Code, 1973 (CrPC) — Section 145
Transfer of Property Act, 1882 — Section 52

Citation : (2015) 109 ALR 136 : (2015) 126 RD 370

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : Surendra Tiwari, Advocates for the Appellant

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri Surendra Tiwari, for the petitioners. The writ petitions have been filed against the orders of Board of Revenue, U.P. dated 21.10.2014 allowing impleadment application of M/s. Lee Way Clothing Private Limited (respondent-11) in second appeal and revision filed by the petitioners, on the ground that during pendency of the litigation it has purchased the land in dispute through registered sale-deed dated 4.12.2012 executed by Ujjwal Sagar Suri and others (respondents-5 and 8).

2. The dispute relates to plot 1743 (area 0-10-0 bigha), 1744 (area 1-5-0 bigha) and 1745 (area 1-2-0 bigha) of village Arthala, pargana Lord, district Ghaziabad. The petitioners filed a suit (registered as Suit No. 68 of 1988) for declaring them as "bhumidhar with transferable right" of the land in dispute. It has been stated by the petitioners that they were in possession of the land in dispute for last 30 years from the time of their grand-father Cheetar and have acquired "bhumidhar with transferable right" over it. The defendants were not in possession of it. The suit was contested by Ujjawal Sagar Suri and others (respondents-5 and 8). They filed their joint written statement and denied plaint allegations. They have stated that Cheetar got forged entry in his favour in column IX of the khatauni without

serving PA-10 upon them although he was never in possession of the land in dispute. He filed a suit for declaration of himself as "bhumidhar with nontransferable right" under section 229-B of U.P. Act No. 1 of 1951, which was dismissed by Trial Court. Thereafter, he filed an appeal from the decree of the Trial Court, which was got dismissed as withdrawn without liberty to file a fresh suit. On the application of Ravi Khanna, proceedings under section 145 Cr.P.C. was initiated, in which possession of Ravi Khanna was held by order dated 4.2.1976. No notice under section 80 C.P.C. was given.

3. It has been stated that the suit was dismissed in default on 31.3.1993. The petitioners filed an application dated 7.4.1993 for recall of the order dated 31.3.1993. Initially the land in dispute was within the limit of tahsil Dadri. However, after carving new district Gautam Budh Nagar, village Arthala was included in tahsil Ghaziabad. The petitioners moved an application dated 27.2.1998 for transfer of the suit along with recall application from Sub-Divisional Officer Dadri to Sub-Divisional Officer Ghaziabad. Sub-Divisional Officer Dadri by his order dated 1.4.1998 transferred the suit but under some confusion dismissed the recall application. Later on, suit was again dismissed in default by Sub-Divisional Officer Ghaziabad by order dated 29.6.1998. The petitioners filed an appeal (registered as Appeal No. 66 of 1997-98) from the order the dated 29.6.1998, which was partly allowed by Additional Commissioner by order dated 4.1.2000 and order dated 29.6.1998 was set aside and matter was remanded to Sub-Divisional Officer Ghaziabad for deciding the suit on merit after giving opportunity to the parties for evidence/hearing.

4. After remand, the petitioners filed an application dated 11.2.2004 before Sub-Divisional Officer Ghaziabad to readmit the suit and proceed with the trial. The respondents then filed an objection that the suit was dismissed in default on 31.3.1993. The petitioners filed an application on 7.4.1993 for recall of the order dated 31.3.1993. The recall application was dismissed on 1.4.1998. The petitioners did not file and appeal from order dated 31.3.1993 and 1.4.1998 as such no fresh hearing can be done in the suit. Sub-Divisional Officer Ghaziabad, by order dated 24.1.2005, accepted the objection of the respondents and "rejected the application of the petitioners dated 11.2.2004 and held that in view of the orders dated 31.3.1993 and 1.4.1998, fresh trial cannot be held in the suit. The petitioners filed an appeal (registered as Appeal No. 28 of 2004-05) from the order dated 24.1.2005, which was dismissed by Additional Commissioner by order dated 23.1.2008. The petitioners then filed a second appeal (registered as Second Appeal No. 77 of 2008) from the aforesaid decree. The petitioners filed an application for interim injunction in the aforesaid second appeal, which was rejected by Board of Revenue, U.P. by order dated 7.10.2013. The petitioners filed a writ petition (registered as Writ-B No. 889 of 2014) from the aforesaid order, which was allowed by this Court by order dated 8.1.2014; and the matter was remanded to Board of Revenue, U.P. to decide the injunction application of the petitioners by a reasoned order and till disposal of the injunction application, parties were restrained from transferring the land in

dispute. On legal advice, Sue petitioners also filed a revision (registered as Revision No. 17 of 2013) along with delay condonation application on 28.12.2013 against the order of Sub-Divisional Officer Ghaziabad dated 1.4.1998.

5. In the meantime, Ujjwal Sagar Suri and others (respondents-5 and 8) through their power of attorney executed a registered sale-deed dated 4.12.2012 of the land in dispute in favour of M/s. Lee Way Clothing Private Limited (respondent-11). Respondent-11 filed impleadment applications in the aforementioned second appeal and revision filed by the petitioners on 16.9.2014. The petitioners filed objections on 21.10.2014 in the impleadment applications and stated that respondent-11 being pendente-lite transferee was neither necessary nor proper party and he was not entitled to be impleaded. Board of Revenue, U.P., by orders dated 21.10.2014 allowed the impleadment applications of M/s. Lee Way Clothing Private Limited (respondent-11). Hence these writ petitions have been filed.

6. The Counsel for the petitioners submitted that under Order 1, Rule 10 (2) C.P.C., the Court has discretion to implead a person, whose presence is necessary for effectual and complete adjudication of the questions involved in the suit. "Necessary party" is a person against whom relief is sought and "proper party" is a person whose presence is necessary for deciding the controversy in the suit. Section 52 of Transfer of Property Act, 1882 prohibits the parties to the suit from transferring the property in dispute, except with the leave of the Court. Respondent-11 is a pendente-lite transferee, without leave of the Court. Respondent-11, knowingly purchased the litigation on its own risk. He was neither "necessary nor proper party" and he was not entitled to be impleaded in the second appeal and the revision. The plaintiff is dominus litis, he cannot be compelled to implead a person who is neither "necessary nor proper party". Board of Revenue, U.P. has not recorded any findings as to whether respondent-11 was necessary or proper party. The reason for allowing the impleadment application as recorded by Board of Revenue, U.P. is that right of respondent-11 was tagged with its vendor and it was given opportunity to watch its interest along with vendors, which is no reason in the eye of law. He relied upon the judgments Supreme Court in Sarvinder Singh Vs. Dalip Singh and Others, , in which it has been held that a necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. In either case the respondents cannot be said to be either necessary or proper parties to the suit in which the primary relief was found on the basis of the registered Will executed by the appellant's mother, Smt. Hira Devi. Moreover, admittedly the respondents claimed right, title and interest pursuant to the registered sale-deeds said to have been executed by the defendants-heirs of Rajender Kaur on 2.12.1991 and 12.12.1991, pending suit. They were not entitled to be impleaded. He also relied upon judgments of this Court in Shyoraj Singh and Others Vs. Zahir Ahmad and Others, , and Smt. Raj

Kumari and Others Vs. IVth Additional District Judge, Azamgarh and Others, .

7. I have considered the arguments of the Counsel for the petitioners and examined the record. In order to appreciate arguments, relevant provisions of Transfer of Property Act, 1882 and Civil Procedure Code, 1908 are quoted below:--

"52. Transfer of property pending suit relating thereto.--During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

146. Proceedings by or against representatives.--Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Order 1 Rule 10. Suit in name of wrong plaintiff.--(1)

(2) Court may strike out or add parties.--The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Order XXII, Rule 10. Procedure in case of assignment before final order in suit.--

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

8. Section 52 of Transfer of Property Act, 1882 safeguard the right of the litigant

from pendente lite transfer. The Court is empowered to have the control over the subject matter of the suit so that decree obtained by successful party may not be defeated by pendente lite transfer. However it does not impose a complete prohibition of the transfer of subject matter of the suit as the Court is given jurisdiction to grant leave to transfer. The issue in this respect came for consideration before a Bench of three Hon''ble Judges of Supreme Court Jayaram Mudaliar Vs. Ayyaswami and Others, , in which it has been held that expositions of the doctrine of lis pendens indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous. The purpose of section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward. Supreme Court again in Hardev Singh Vs. Gurmail Singh (Dead) by LRs., , held that section 52 of the Transfer of Property Act, 1882 merely prohibits a transfer. It does not state that the same would result in an illegality. Only effect of this provision is the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect. Same view has been taken in T.G. Ashok Kumar Vs. Govindammal and Another, , and Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others, .

9. Without taking notice, of the aforesaid judgments of Supreme Court, this Court in Shyoraj Singh and Others Vs. Zahir Ahmad and Others, , held that pendente lite transfer shall be bad from its inception, giving no right to incumbent in whose favour it has been executed. In view of authoritative pronouncements of Supreme Court, contrary view taken by High Court are not good law and have no binding effect.

10. Order 1, Rule 10 C.P.C., the Court has jurisdiction to direct impleadment of necessary and proper party. Under Order 1, Rule 10(2) C.P.C., the Court is required to record a finding that person sought to be impleaded as party in the suit is either necessary or proper party. While section 146 read with Order XXII, Rule 10 C.P.C. confers right upon the person claiming title through a party to the litigation to be impleaded with the leave of the Court and continue the litigation. While deciding an application under section 146 and Order XXII, Rule 10 C.P.C., the Court is not required to go in to the controversy as to whether person sought to be impleaded as party in the suit is either necessary or proper party. If the person sought to be implead as party is legal representative of a party to the suit, it is sufficient for the Court to order impleadment/substitution of such person. A transferee pendente lite is a legal representative of the party.

11. A Bench of four Hon''ble Judges of Supreme Court in Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, , held that section 146 was introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the

exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficial provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. The right to file an appeal must therefore be held to carry with it, the right to continue an appeal which had been filed by the person under whom the applicant claims, and the petition of the appellant to be brought on record as an appellant in Appeal No. 152 of 1955 must be held to be maintainable under section 146.

12. Supreme Court in *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, , held that the plain language of Order XXII, Rule 10 C.P.C. does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the Court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of a party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of *Shri Mishra* is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Similar view are taken by Supreme Court in *Raj Kumar Vs. Sardari Lal and Others*, .

13. Supreme Court in *Amit Kumar Shaw and Another Vs. Farida Khatoon and Another*, , held that a transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order XXII, Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which

must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case. This judgment has again been followed in Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others, .

14. Thus in view of judgment of Supreme Court in Jayaram Mudaliar's case (supra) that purpose of section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward and such a transfer is not void and in Saila Bala Dassi's case (supra) holding that the object of section 146 is to facilitate the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense.

15. The Counsel for the petitioner also submitted that respondent-11 moved application under Order 1, Rule 10 C.P.C. and not under section 146 read with Order XXII, Rule 10 C.P.C. The argument in this respect has no force. Supreme Court in Chandra Singh Vs. State of Rajasthan and Another, , held that mentioning of a wrong provision or omission to mention the correct provision would not invalidate an order so long as the power exists under any provision of law. Similarly, the arguments that Board of Revenue, U.P. has not recorded any findings as to whether, respondent-11 was necessary or proper party is also irrelevant as Board of Revenue, U.P. found that respondent-11 is a pendente lite transferee. In view of the aforesaid discussions, the orders of Board of Revenue allowing impleadment applications of respondent-11, do not suffer from any illegality. The writ petitions have no merit and are dismissed.