

(1997) 01 AHC CK 0088

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 36787 of 1997

Pitamber and Anr.

APPELLANT

Vs

Board of Revenue,U.P.Allahabad & Ors.

RESPONDENT

Date of Decision : 13-01-1997

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 22B

Citation : (1997) 01 AHC CK 0088

Hon'ble Judges : S.N.Agarwal, J

Final Decision : Dismissed

Judgement

Sudhir Narain, J.

1. This writ petition is directed against the order of the Board of Revenue, dated 30/7/1997, whereby it has remanded the case to the trial Court to decide the rights of the parties on merits.

2. The facts in brief are that the petitioners instituted suit No. 4 of 1995 on 3/8/1995 in respect of the properties relating to village Shamaspur Panju, Pargana and Tahsil Sahaswan, District Budaun and suit No. 5 of 1995 in respect of properties of village Yahiyapur, Pargana and Tahsil Sahaswan, District Budaun under Section 22B of U.P. Zamindari Abolition and Land Reforms Act in the Court of SubDivisional Officer against Smt. Hira Devi alleged that she had remarried with Siya Ram. The petitioners being brothers of Bihari, after remarriage of Hira Devi succeeded to the rights of Bihari. The notices were issued to Smt. Hira Devi. The summons were returned unserved. The notices were sent by registered post but neither the envelop nor acknowledgement due were received back.

3. Smt. Hira Devi before the institution of the suit by the petitioners on 3rd August, 1995, had executed a sale deed in favour of respondents 6 to 8 on 29th June, 1995. During the pendency of the suit they filed an application before the trial court that Smt. Hira Devi had executed the sale deed in their favour and they should be impleaded as parties. The trial court rejected the application. It

was held that the service of the notice against Smt. Hira Devi was sufficient and proceeded to decide the suits ex pane. On 11 31996, the trial court passed exparte decree declaring the petitioners as Bhumidhars of the land in suit. Against the aforesaid decision, Hira Devi and the transferees from Hira Devi i.e., respondents 6 and 7 filed appeal before the Additional Commissioner on 18th March, 1996 on the finding that the notice against Smt. Hira Devi was sent and as she did not appear in the suit, there was no error in the decree passed by the trial court. The appeal of the transferees was not held to be maintainable as they were transferees from Hira Devi. Against the said decision respondents 6 and 7 filed a revision before the Board of Revenue. The Board of Revenue has allowed the revision holding that the transferees had a right to contest the case. Their applications were wrongly rejected by the trial court. Respondent No. 1 directed that the case be decided after giving an opportunity of hearing to respondents 6 to 8.

4. Shri Anil Bhushan, learned Counsel for the petitioners contended that the transferees were neither necessary nor proper parties. Smt. Hira Devi had executed the sale deed and after the sale deed having been executed, the transferees were bound by the decision given in the suit. He has placed reliance upon the decision of the Apex Court in Sarvinder Singh v. Dalip Singh and others, 1996 (5) SCC 539,

wherein it was held that a transferee was bound by a decree passed in a suit and any alienation by a party to the suit during the pendency of the suit would be hit by the doctrine of lis pendent by operation of Section 52 of the Transfer of Property Act. In this case, the appellants therein were claiming declaration of their rights over the land in dispute on the basis of registered will executed by their mother. They had filed suit for adjudication of their rights. The Civil Court decreed the suit on 2931974. Subsequently, another suit was filed against the defendants for injunction to restrain the defendants from interfering with their possession. During the pendency of the suit the defendants executed a sale deed on 2121991. These transferees applied for their impalement under Order 1, Rule 10, C.P.C. The High Court had directed for their impalement. Their Lordships of the Supreme Court held that as the matter regarding title had already been decided, the decision already given was binding upon them. The transferees were neither necessary nor proper parties. The transaction was made during the pendency of the suit and was hit by Section 52 of the Transfer of Property Act. The Court made the following observations:

"The decree became final. In view of those facts, the necessary conclusion that can be deduced is that the foundation for the relief of declaration in the second suit is the registered Will executed by Hira Devi in favour of the appellant on 2651952. The respondents indisputably cannot challenge the legality or the validity of the Will executed and registered by Hira Devi on 26 51952. Though it may be open to the legal heirs of Rajender Kaur, who was a party to the earlier suit, to resist the claim on any legally available or tenable grounds, those

grounds are not available to the respondents. Under those circumstances, the respondents cannot, by any stretch of imagination, be said to be either necessary or proper parties to the suit."

This case has no application to the facts of the present case. The sale deed was executed by Smt. Hira Devi before the institution of the suit in favour of the respondents 6 to 8 on 29th June 1995 while suit for declaration of rights was filed on 3rd August, 1994. Secondly, Section 146 of the Code of Civil Procedure provides that where any proceedings may be taken in an application made by or against any person, then the proceedings may be taken or the application may be made by or against any person claiming under him. This provision was considered in *Saila Bala Dassi v. Nirmala Sundari Dassi*, AIR 1958 SC 394, wherein it was held that a person has a right to be impleaded as a party when he is claiming right from a person on the basis of assignment or devolution. It was observed as under:

"In our opinion, the application filed by the appellant falls within Section 146 of the Civil Procedure Code, and she is entitled to be brought on record under that section, Section 146 provides that save as otherwise provided by the Code, any proceeding which can be taken by a person may also be taken by any person claiming under him. It has been held in *Sitharamaswami v. Lakshmi Narasunha*, ILR 41 Mad 510: AIR 1919 Mad 755(2) (C), that an appeal is a proceeding for the purpose of this section, and that further the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order XXII, Rule 10. This decision was quoted with approval by this Court in *Jugal Kishore Sara v. Raw Cotton Co. Ltd.* 1955 (1) SCR 1369 : (S) AIR 1955 (SC) 37 (D). wherein it was held that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently passed therein, under Section 146 of the Civil Procedure Code as a person claiming under the decreeholder, even though an application for execution by him would not lie under Order XXI, Rule 16, and it was further observed that the words "save as otherwise provided" only barred proceedings, which would be obnoxious to some provision of the Code. It would follow from the above authorities that whoever is entitled to be but has not been brought on record under Order XXII, Rule 10, in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the second respondent of the mortgaged properties would have been entitled to prefer an appeal against the judgment of P. B. Mukherji, J."

Further, if a party has purchased a property during the pendency of suit, he can move an application for impleadment as one of the party in the suit under the provisions of Order XXII, Rule 10 of Code of Civil Procedure. Smt. Hira Devi after having sold the property if she does not contest the suit or colludes with the plaintiffs, the right of the transferees shall not be affected. In *Nathu Dhoju*

Gholap v. Ramchand Balchand and another, AIR (33) 1946 Bombay 462, it was held that if suit is decided between the plaintiff and defendants on consent or compromise, it must be honest and not fraudulent or collusive. In Annammal and others v. Chellakutti, AIR 1963 Madras 300 (V50 C108), the Court held that dismissal of suit brought about by abandonment by plaintiff would not affect title of purchaser pendente lite.

5. There was no dispute that Smt. Hira Devi had succeeded right and title of Bihari. On contest of the suit, the trial court was to decide as to whether Hira Devi had remarried with Siya Ram as to divest her rights in the property in question and secondly, in which year she had remarried to determine under what provisions of law, the devolution of her interest had taken place.

6. The next submission of the learned Counsel for the petitioners is that Smt. Hira Devi had filed appeal against the order of the Additional Commissioner but she had not joined before the Board of Revenue and secondly, Smt. Hira Devi having served with the notice, the judgment against her having become final, respondents 6 to 8 cannot challenge the same. He has placed reliance upon the decision *Rajjan Lal v. Smt. Rukmi Devi and others*, 1979 All LJ 1237, wherein it was held that if a party has not filed application under Order IX, Rule 13 of Code of Civil Procedure, it cannot be permitted to show cause of his nonappearance on the date of hearing of the case. An appellant cannot show cause of nonappearance on the date of hearing except by filing an application under Order IX, Rule 13 of Code of Civil Procedure. He has to give reasons for his nonappearance and that can be done only by moving an application before the same court but where from the evidence on record, it can be established that party was not served at all in accordance with law, he can file appeal against the decree/order challenging the finding on the question of service of notice. The appellant in that case is not showing any cause of his nonappearance after the service of the notice.

7. Respondent No. 1 has recorded finding that Smt. Hira Devi was not served with the notice in accordance with law. The decision of the Board of Revenue does not require any interference under Article 226 of the Constitution of India.

The writ petition is accordingly dismissed, i WE dismissed.