

(2008) 03 AHC CK 0115
In the Allahabad High Court
Case No : Writ petition no. 2631 of 2006 (m s)

Ramesh Chandra Verma and Others	Vs	APPELLANT
Incharge, District Judge, Barabanki and Others		RESPONDENT

Date of Decision : 05-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10, Order 9 Rule 13
Specific Relief Act, 1963 — Section 28(3)
Transfer of Property Act, 1882 — Section 52

Citation : (2008) 03 AHC CK 0115

Hon'ble Judges : Rajiv Sharma, J

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—The present writ petition arises out of the orders passed by the Courts below rejecting the application of the petitioners for impleadment moved by them in the execution proceedings.

2. Factual matrix of the case is that an agreement for sale was entered into between one Shiv Narain alias Ram Narain and opposite party No. 3. As the sale deed was not being executed, the opposite party No. 3 filed a Suit for specific performance against opposite party No. 4 Krishna Mohan, Solate Ganesh Prasad, which was decreed by the judgment and order dated 25.11.1985. The said judgment was not challenged and as such opposite party No. 3 filed an application on 16.12.1985 and again on 13.5.1986 for execution of the decree but the same remain pending thereafter. The opposite party No. 4 on coming to know regarding the ex parte decree moved an application under Order IX Rule 13 of the Civil Procedure Code [hereinafter referred to as the "Code"] for setting aside the exparte decree, but the same was rejected on 3.2.1988.

3. Feeling aggrieved by the order dated 3.2.1988 rejecting the application under Order IX Rule 13 of the Code, the opposite party No. 4 preferred an appeal [Appeal No. 14 of 1988] which was allowed vide order dated 5.4.1999, subject to

the payment of cost of Rs. 100 with in fifteen days.

4. As the application dated 16.12.1985 and 13.5.1986 remained pending before the Execution Court and as such on 17.4.2004, an application under Section 28 (3) of the Specific Relief Act, was filed stating therein that since the Suit has already been decreed vide judgment and decree dated 25.11.1985, where by the opposite party No. 4 was required to execute the sale deed on payment of Rs. 12.000, the necessary orders in pursuance to the decree dated 25.11.1985 may " be passed. On 7.4.2005, the application so filed by the opposite party No. 3 was allowed and he was permitted to deposit Rs. 12.000. After the aforesaid order dated 7.4.2005, the opposite party No. 4 Krishna Mohan moved an application on 29.4.2005 with the prayer that he may be permitted to deposit the cost of Rs. 100/ as awarded by the Appellate Court vide order dated 5.4.1999. The said application was rejected on 23.7.2005.

5. Ramesh Chandra, Kishan Nigam and Yogesh Verma, who are the petitioners in the instant writ petition, made an application for impleadment in M.C.C. No. 35 of 2004 on the ground that they have purchased the disputed property under registered sale deed dated 31.3.2004 from opposite party No. 4 Krishna Mohan. Being the bona fide purchasers, they are not only the necessary but are proper parties as any order passed would adversely affect their interest. The said application was rejected on 5.4.2005 by the Civil Judge, Barabanki. The order passed by the Civil Judge, Barabanki rejecting the application for impleadment was challenged in revision before the District Judge, which too was dismissed on 3.3.2006, hence the petitioners have filed the instant writ petition questioning the correctness and validity of the order dated 3.3.2006 and 5.4.2005 passed by the Courts below.

6. It has been contended by Shri Mohd. Arif Khan, learned Senior Advocate appearing for the petitioners that the revisional Court as well as the trial Court while rejecting the application have erred in law in not considering the vital fact that the petitioners are the bona fide purchasers for valuable consideration and they are the necessary and proper parties, as their presence is necessary for adjudication of the dispute. It has also been stated that the execution proceedings which have been initiated after nineteen years of the decree are barred by limitation.

7. Relying upon *Dhurandhar Prasad Singh v. Jai Prakash University and others*, (2001)6 SCC 534 it has been argued by the learned Counsel for the petitioners that under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles the person, who has acquired an interest in the subject matter of the litigation by an assignment or creating or devolution of interest pendente lite or suitor or any other person interested, to apply to Court for leave to continue the suit. He further argued that though the initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge but 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.

8. Sri Arif next contended that the law laid down in Dhurandhar Singh's case has been reiterated in *Jaskirat Datwani v. Vidyavati and others*, (2002) 5 SCC 647, where in it was again emphasised that the trial of a Suit cannot be brought to an end merely because interest of a party in the subject matter of the Suit has devolved upon another during its pendency. It was also held that such a Suit may be continued with the leave of the Court by or against a person upon whom such interest has devolved.

9. It has also been urged by Sri Arif Khan that under Order XXII Rule 10 of the Code no detailed enquiry at the stage of leave is contemplated. The Court is to be satisfied for exercising its discretion in granting them leave for continuing the Suit by or against a person on whom the interest has devolved. In *Amit Kumar Shaw and another v. Farida Khatoon and another*, 2005 (2)ARC 174, the Hon'ble Apex Court permitted the impleadment holding that the appellants who are transferees pendente lite should be made as parties to the pending Civil Appeals, therefore, the Court below, in the present case, has committed an error in rejecting the application for impleadment made by the petitioners as they are the necessary and proper parties. In *Amit Kumar Shaw's* case, the Apex Court in paragraph 10 has held as under:

"The power of Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right."

10. Refuting the contentions raised by Sri Mohd. Arif Khan, Sri D. C. Mukherjee appearing for opposite party No. 3 submitted that Santosh Kumar opposite party No. 3 moved an application for execution of the decree dated 25.11.1985 on 16.12.1985 and there after on 13.5.1986, but on account of the proceedings drawn under Order IX Rule 13, C.P.C. by Krishna Mohan opposite party No. 4, the said application for execution of the decree could not be proceeded. There after the opposite party No. 3 on 17.4.2004 again made an application for restarting the proceeding for execution of the decree and it cannot be said to be barred by time as it was made in continuation of the application preferred in the year 1985 and May, 1986. In support of his submission he has relied on the Full Bench decision of this Court in the case of *B. Shiva Shankar Das and others v. Mufti Syed Yusuf Hasan*, AIR 1934 All 481 as also the Full Bench decision of Rajasthan High Court in the case of *Government of Rajasthan and another v. Sangram Singh and others*, AIR 1962 Raj 43.

11. The Full Bench of this Court in the case of *B. Shiva Shankar Das and others v. Mufti Syed Yusuf Hasan*, AIR 1934 All 481, has emphasised that when an application is made by a decree holder the Court has to decide whether it is a fresh application or one in continuation of an application already made with in

time, which has been lying dormant. The test is to see whether the character of the fresh application is different from that of the former application.

12. Sri D. C. Mukherjee also invited my attention towards a Full Bench decision of Rajasthan High Court in the case of Government of Rajasthan and another v. Sangram Singh and others, AIR 1962 Raj 43, in which the view taken by the Bench is as follows :

33."... In considering whether an application is for the revival of the previous application or not there is no question of partial or total stay. What is to be considered is whether the previous execution application was disposed of or was kept pending. If it was kept pending, it automatically follows that it can be revived either suo motu by the Court or being invited to do so by the decree holder. This point should be borne in mind while applying the principles of revival. Consigning of a case to record without properly disposing it off is an act of the Court and a decree holder cannot be penalised by treating such application as disposed of and not pending....."

13. In the instant case, application for executing the decree dated 25.11.1985 was filed on 16.12.1985 and 16.5.1986 and the same remained pending and as such in continuation of these applications, another application on 17.4.2004 was moved which cannot be said to be time barred in view of the aforesaid two decisions of the L Bench. Accordingly, the plea of time barred for initiation of execution proceedings of the petitioners is negated and it is held that the execution proceedings are within time.

14. As regard the impleadment of the petitioners, Sri D. C. Mukherjee submitted that the petitioners have no legal right to be impleaded as opposite parties in the execution proceeding, as they were not party to the Suit which was decreed on 25.11.1985 and has attained finality. He further submitted that the alleged sale deed was the result of collusion and was executed with ulterior motives just to frustrate the decree dated 25.11.1985. The decree was confined in between the decree holder and the judgment debtor, therefore, the Courts below were legally justified in rejecting the application for impleadment preferred by the petitioners.

15. He also submitted that the execution proceedings have finally come to an end on 7.3.2007 as the execution application was allowed and the SubRegistrar, Nawabganj, District Barabanki was directed to register the sale deed. A copy of the letter dated 29.3.2007 has been annexed along with the counter affidavit.

16. Sri D. C. Mukherjee also contended that the decisions cited by the petitioners' Counsel are not applicable in the present case as in the aforesaid cases either the suit was going on or the appeal was pending whereas in the instant case, however, neither the suit was pending nor any proceedings arising out of the said suit i.e. the appeal etc. was pending and the application for impleadment was made in the execution proceedings. He vehemently argued that the proceedings of Suit and execution are two different proceedings which are independent to each other.

17. Counsel for the opposite party No. 3 also placed reliance on AIR 1996 SC 2755, Vijay Pratap and others v. Sambhu Saran Sinha and others, and submitted that in the instant case too Special Leave Petition preferred against the rejection of the impleadment application was dismissed. The facts of the case are that a suit for specific performance was pending, where in the father during his life time is alleged to have entered into a compromise and requested to delete his name from the array of the parties as respondent No. 1. The deletion of the first respondent came to be made after his demise. Pending suit before compromise memo was recorded, an application under Order 1 Rule 2 on the ground that they were necessary and proper parties. The trial Court rejected this application on the ground that the petitioners are neither necessary nor proper parties. The High Court upheld the same. Against this order, S.L.P. was preferred which was rejected by the Apex Court holding that petitioners in the aforesaid case to be the necessary parties and affirmed the orders passed by the Courts below.....

18. Shri D.C. Mukherjee in support of the above contentions has also placed reliance on AIR 1995 All 21, Smt. Lalita Deviv. Smt. Kamla Devi, and recent decision of Supreme Court reported in 2007 (25) LCD 313, Sanjay Verma v. Manik Roy and others. In Sanjay Verma's case the Supreme Court after considering the law laid down in Dhurandhar Prasad Singh's case (supra) and there after held in paragraph 12 as under:

"The principles specified in Section 52 of the T. P. Act are in accordance with equity; good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of lis by the pendens embodied in Section 52 of the T.P. Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. This section only postulates a condition that the alienation will in no manner affect the right of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court."

19. Before proceeding further, it would be useful to reproduce Order 22 Rule 10 and Section 52 of the Transfer of Property Act for proper adjudication of the case :

"Order 22 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.

(2) The attachment of a decree pending an appeal there from shall be deemed to

be an interest entitling the person who procured such attachment to the benefit of sub rule (1).Section 52 of the Transfer of Property Act

" Transfer of property pending suit relating there to.During the pendency any Court having authority with in the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusion and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise deal with by any party to the suit or proceeding so as to affect the right of any other party there to under any decree or order which may be made there in, 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."

20. From the perusal of aforesaid provisions and Order 22 Rule 10, it is eminently clear that the interest is to be devolved during the pendency of the suit proceedings or decree pending appeal and further Section 52 of the Transfer of Property Act also clearly establishes that it would be attracted in the cases where the suit proceedings are pending. It is also pertinent to mention that the doctrine of lis pendence applies where the lis is pending.

21. Admittedly, in the present case, the suit terminated by passing a final decree dated 25.11.1985 against which no appeal was filed. Thus when the petitioners made an application for impleadment neither the suit was pending nor the appeal, which is said to be in continuation of the suit trial was pending. Only the execution proceedings were pending. The petitioners themselves have stated that they made application under Order I Rule 10, C.P.C. in M.C.C. Case No. 35 of 2004. Here, it may also be mentioned that the cases relied by the petitioners' Counsel are also of no avail as in those cases application for impleadment was moved either when the suit proceedings or the appeal was pending whereas in the instant case the suit proceedings have culminated and undisputedly, the application was made in the execution proceedings.

22. It would be relevant to point out at this juncture that from the perusal of the judgment and the pleadings it would be evident that the application for execution of the decree was moved on 17.4.2004, which was allowed on 1.12.2004 and it is only after filing of an application for executing the decree on 17.4.2004 in continuation of the earlier application, the opposite party No. 3 has sold the property in dispute and thereafter the petitioners have moved an application for

impleadment which itself establishes the collusiveness of the parties concerned to defeat the execution of the decree passed on 25.11.1985 in the regular suit.

23. In view of the above, the petitioners were neither the necessary nor the proper parties and the Court below rightly rejected the application for impleadment which of course was made after termination of proceedings of suit. It is trite to say that the execution Court is bound by the judgment award decree passed by the Trial Court and it cannot travel beyond it.

24. Taking the holistic view of the matter, no good ground for interference is made out and the writ petition is liable to be dismissed, which is here by dismissed.

25. Costs easy.