

(1982) 02 AHC CK 0006

In the Allahabad High Court

Case No : Second Appeal No's. 919 and 1092 of 1977

Shyam Nath and Others

APPELLANT

Vs

Durga Prasad etc.

RESPONDENT

Date of Decision : 04-02-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, Order 41 Rule 22(1), 100
Limitation Act, 1908 — Article 138, 180, 28

Citation : AIR 1982 All 474

Hon'ble Judges : K.M. Dayal, J

Bench : Single Bench

Advocate : G.C. Dwivedi and S.P. Srivastava, for the Appellant; B.D. Mandhyan, Ad, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Dayal, J.—These two appeals have been filed by the defendants.

2. Suits for possession and injunction in respect of two separate portions of a house have been decreed against them by both the Courts below.

3. Suit No. 349 of 1965 was filed by Durga Prasad for possession of the house, removal of construction and for an injunction restraining the defendants from interfering in plaintiff's possession and from making any constructions over the open land Suit No. 350 of 1965 was filed by Beni himself alleging that he was the owner of the entire house. He had transferred the northern portion to Ramji and in his turn Ramji transferred the same to Durga Prasad. Beni Madho continued to be the owner of the remaining portion Kha-Ga-Gha-Cha. It was alleged that the defendant No. 1 was the Chairman of the Chuaar Municipal Board and was an influential person of the locality and he was real brother of the other defendants.

The defendants forcibly occupied the portion sold to Durga Prasad and forcibly dug the foundation for making new constructions. They fixed a new latch (chain

or Sikri) in the door that opened towards the house of the plaintiff and forcibly took possession of that house as well.

4. The plaintiffs in both the suits claimed possession over the house, removal of constructions and perpetual injunction against the defendants restraining them from interfering with the possession over the said portion.

5. The defence of Shyam Nath and other defendants was that they had purchased the disputed house from Ram Lakhan, Moti and Ram Prasad, sons and heirs of Mst. Yashoda on 19-4-1965 for Rs. 8,000/-. They were put in possession by the aforesaid vendors, Smt. Yashoda was the sole owner of the entire house and she expired on 17th Jan., 1964, and the house was inherited by her sons.

6. It was pleaded in para 9 of the written statement that the disputed house was purchased by Mst. Bela, mother of Mst. Yashoda. and her husband Gopal by virtue of two sale deeds in the years 1890 and 1900, After death of Bela and Gopal Mst. Yashoda became absolute owner in possession having rights of transfer etc. Her sons had rightly sold and delivered possession of the property to the defendants. The rights of Mst Yashoda as pleaded in para 9 are :

"Musallam Malik Wa Qabiz Wa Akhtiyar Intkal Harguna Hui."

This phrase denotes that Mst. Yashoda as an heir of Gopal and Bela became absolute owner in possession with right to transfer. It was further contended that the plaintiff Beni Madho was permitted to reside in the house without any right and had no right to interfere or claim any title to the property.

7. Further particulars under Order 6, Rule 5, C. P. C, were called for from the plaintiffs in the suits. They were directed to give the details about their title to the disputed property. The same were filed and it was alleged in the same that the entire property belonged to Gopal and his wife Smt. Beta, who were the maternal grandfather and grandmother of Beni Madho. Gopal had only one daughter, mother of Beni Madho, who was known as Smt. Kallo and there was no other son or daughter to them. After the death of Gopal and Mst. Bela, Mst. Kallo became the owner as an heir and after her death Beni Madho became the owner. Smt. Yashoda was not the daughter of Gopal and Bela as claimed in the written statement but was the daughter of one Shiv Tahal. Neither Smt. Yashoda nor her sons, the vendors, had any right, or were ever in possession over the disputed property and in case it was found that the disputed property belonged to Mst. Yashoda, Beni Madho had matured rights by his adverse and open possession over the disputed property. One Ram Sunder had obtained a money-decree in Suit No. 847 of 1932 from the Court of Munsif, Mirzapur against Beni Madho, The disputed house was attached in the execution of the decree aforesaid. Objections were filed by Smt. Yashoda under Order 21, Rule 58, C. P. C. which were rejected on 22nd Oct., 1932. The proceedings in Execution continued. Ram Sunder, decree-holder, purchased the house in execution of the decree against Beni Madho on 16th Nov., 1932. In the meantime Smt. Yashoda instituted Suit No, 1073 of 1932 under Order 21. Rule 63, C. P. C. That suit was also dismissed on

10th Feb., 1933 as withdrawn.

8. Additional written statements were filed by Shyam Nath and other defendants claiming the benefit of Section 51, T. P. Act and refuting the allegations in the better particulars given by the plaintiffs.

9. The trial Court framed several issues on the question and after framing the various issues decreed both the suits against the defendants. Two appeals, being Civil Appeals Nos. 89 of 1967 and No. 90 of 1967 were filed by the defendants. The appeals were decided by K. C. Singh, Addl. Civil Judge. Mirzapur by his judgment dated 27-4-1968. He reversed the finding of the trial Court. He recorded his own finding that Smt. Yashoda was the daughter of Gopal and Bela. He framed seven more issues and remanded the case to the trial Court for deciding the suits, again but directed that the finding about parentage of Smt. Yashoda would not be open any more. Against that remand order two appeals i. e. First Appeal from Orders Nos. 268 and 269 of 1968 were filed before this Court. These appeals were allowed on 18-1-1971 and the impugned orders of the remand were set aside. A question was raised before this Court about the question whether the issues that were finally decided by Sri K. C. Singh could be reconsidered at the time of fresh hearings of the appeals. This Court did not decide the matter but left it open for being considered by the lower appellate Court itself. After setting aside the remand order the appeals were heard by Sri D. P. Gupta, Civil Judge, Mirzapur. He dismissed both the appeals. On the point of parentage of Smt. Yashoda he adopted the finding of Sri K. C. Singh, his predecessor-in-office and refused to reopen the same. Accordingly he accepted that Smt, Yashoda was the daughter of Gopal and Smt. Bela. He however, held that Smt. Yashoda or her sons were never in possession.

Whatever rights Smt. Yashoda had, she lost them as a result of the litigation in execution of the decree in the year 1932 and Beni Madho had been in undisturbed possession since 1932. He held that the title of Smt Yashoda and her sons, if any, had extinguished, and the defendants' vendors i. e. sons of Smt. Yashoda had no right to sell the property to the defendants-appellants. It also refused to give the benefit of Section 51, T. P. Act to the appellants in view of the fact that Beni Madho and Durga Prasad were in possession on the date of purchase by the defendants and the defendants with a mala fide intention taking advantage of their position took forcible possession and made constructions illegally. Thus, they were not entitled to any benefit u/s 50, T. P. Act.

10. The case has been argued at great. length before this Court. The learned counsel for the appellant firstly argued that Smt. Yashoda was merely a limited owner. She inherited the property from Gopal and Smt Bela as a daughter having a widow's estate i. e. life interest. Consequently, she remained a limited owner and even on enforcement of Hindu Succession Act, 1956, she did not acquire absolute rights u/s 14 of that Act as she had been found not in possession of the property by the Court below. She expired on 17th Jan., 1964. The limitation in such a case was governed by Article 65, Explan. (b) of the Limitation Act, 1963. It

reads as under:

"(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies."

What the learned counsel meant was that on death of Smt. Yashoda, who should be deemed to be a limited owner, her sons were entitled to succeed as full owners being the next reversioners and heirs to Gopal and Smt. Bela, their maternal grandfather and grandmother. He accordingly argued that the question of adverse possession by Beni Madho could not arise during the lifetime of Smt. Yashoda and the limitation would start only on her death.

11. The second argument of the learned counsel was that any litigation in pursuance of the execution in suit against Beni Madho and attachment and sale of the property would not extinguish the rights of Smt. Yashoda. The suit filed under Order 21, Rule 63, C. P. C. was not decided on merits but it was dismissed as withdrawn. The learned counsel argued that the withdrawal of the suit by Smt. Yashoda was not a prudent act on her part and, therefore, such withdrawal or its consequence would not be binding on the next reversioners.

12. The learned counsel for the respondent raised a further question. He argued that the judgment and order of Sri K. C. Singh remanding the case to the trial Court and affirming the finding on the question of parentage of Smt. Yashoda having been set aside by this Court in the two F. A. F. Os., the entire judgment stood wiped off and the Court below was bound to give its own finding on the question of parentage of Smt. Yashoda. It should not have merely adopted the finding of Sri K. C. Singh recorded in the remand order. A technical objection has been made to this plea of the respondent by the learned counsel for the appellant. He argued that the present appeals were filed in May, 1977 i.e. after the enforcement of the Civil P. C. (Amendment) Act, 1976. The learned counsel argued that in Rule 22 of Order 41 an explanation was added to Sub-rule (1), whereby the respondent was given a right to file a cross-objection in respect of the findings as well. He argued that the amendment in the main Sub-rule (1) about challenging the finding, made it obligatory on the respondent to have filed a cross-objection, if he wanted to challenge the finding of the lower appellate Court about the parentage of Smt Yashoda.

He relied upon the proviso in Sub-rule (1) that unless such cross-objection was filed he could not do so. I am unable to accept that submission. The proviso to Sub-rule (1) of Rule 22 applies to the decrees and not to mere findings. It has however been permitted that a cross-objection could be filed against a finding as well. As the decree itself could not be challenged, the filing of any cross-objection was not obligatory. Had the respondent challenged any portion of the decree, certainly he could not do so unless he had filed a cross-objection as contemplated by Sub-rule (1). I, therefore, propose to deal with the finding relating to parentage of Mst. Yashoda.

13. Coming to the first argument of the learned counsel that Smt. Yashoda inherited only a widow's estate as a limited owner being married daughter, I do not find it possible to accept the same. In the written statement, it has been specifically mentioned that Smt. Yashoda was the absolute and full owner in possession having rights of transfer. I have reproduced the portion of para 9 of the additional pleas of the written statement in the earlier part of this judgment. To permit the appellant to argue at this stage, in the second appeal, that she was a limited owner will not be only against the pleadings of the appellant but will also be prejudicial to the other side which had no opportunity to meet the case in that light. It may further be mentioned that it was claimed that the sons of Smt. Yashoda inherited the property after her death as her heirs. In case Smt. Yashoda was treated to be a limited owner then her sons as well as Beni Madho would have been reversioners and Beni Madho too would have been entitled to a share in the property of Gopal and Smt; Bela, last full owners. Absolute title of Smt. Yashoda was deliberately claimed in order to avoid that situation. The plea was that Smt. Yashoda was full owner and no right whatever accrued to the plaintiff Beni Madho. Even in the Memorandum of Appeal filed before this Court, in para 10 it has been contended that Smt. Yashoda died in 1964, after she had become full owner of the property in 1956 when the Hindu Succession Act came into force.

It was further contended that Beni Madho was merely a licensee and had no interest in the property. After the death of Smt. Yashoda, had she been a limited owner, Beni Madho's right could not have been denied as he would also have been one of the reversioners. In the face of these pleas, this argument cannot be permitted to be raised that Smt. Yashoda was limited owner till her death in the year 1964 and the limitation to recover the property started only after that.

14. There is yet another reason for not permitting such a course. The plaintiff and Ram Lakhan, one of the sons of Smt. Yashoda, were examined as witnesses. In his statement Ram Lakhan has deposed that Beni Madho was merely a licensee and the house was given to Beni Madho on licence before him by his mother Smt. Yashoda. He inherited the property from his mother Smt. Yashoda. According to him he had ejected Beni Madho from his house a few days before the sale deed was executed by him in favour of the defendants. He at no stage admitted any right in the body of reversioners or Beni Madho. Such a contention, therefore, cannot be permitted to be raised at the second appellate stage. Even an amendment of the pleadings had not been sought. Such a plea, if permitted, would be destructive of the original claim of the defendants taken in their pleadings.

15. Coming to the second question about the effect of litigation in execution of decree against Beni Madho, it may be mentioned that the disputed house was attached in execution of the decree only against Beni Madho and none else. Neither any of the sons of Smt. Yashoda nor Smt. Yashoda were a party to the decree. The attachment was made treating the property as belonging to Beni

Madho exclusively. Objection was filed by Smt. Yashoda claiming that she was the sole owner and Beni Madho had no right or interest in the property; that objection was rejected and it was held that Beni Madho was in possession of the property and the objector Smt. Yashoda had nothing to do with it. It was mentioned in Ext. 1, the plaint of suit under Order 21, Rule 63 that Smt. Yashoda was the sole owner of the disputed property and defendant No. 2, Beni Madho had no right or interest therein. In that case (sic) to contest the case in spite of that the suit was withdrawn and subsequently the house was sold in favour of Ram Sunder and the sale was confirmed.

16. The learned counsel for the appellant advanced two main arguments on the aforesaid fact. The first was that the objections under Order 21, Rule 58 and the dismissal of suit under Order 21, Rule 63 could only mean that the objector was not in possession. It did not affect her title.

17. The second question raised by him is that the withdrawal of the suit under Order 21, Rule 63 was an imprudent act on the part of Smt. Yashoda and she was ill advised in doing so. The estate of reversioners was adversely affected by her imprudent act of withdrawal of the suit and, therefore, any decision in that case could not be binding on the reversioners.

18. So far as the first question is concerned, the learned counsel for the respondent has cited a case reported in Mt. Aziz Jahan Begam Vs. Sardar Singh and Others and Sabir Husain, . It was a Full Bench case which held that though the matter under Order 21, Rule 58 was decided merely on the question of possession or even by default, the effect under Order 21, Rule 63 was conclusive. It was held in para 11 of the aforesaid :

"The argument of learned counsel therefore that under Rule 63 the decision must be confined to the question, who was in possession on the date of the objection and the order is conclusive only to this extent that if no suit is brought within one year the party against whom the order was made cannot claim that he was in possession of the property but the question of title is not affected at all, does not appeal to me."

It was further held in para 13 of the same case:

"the words therefore "subject to the result of such suit, if any, the order shall be conclusive" must mean that if a suit was not filed then the relief which the objector could have obtained in a suit under Order 21, Rule 63 to defeat the decree-holder's claim would no longer be available to him."

The withdrawal of the suit could not place Smt. Yashoda in a position better than that as if no suit was filed. It, therefore, cannot be contended that as the objection was withdrawn, the effect would be that the suit was decreed.

19. Coming to the second question of imprudence of Smt. Yashoda in withdrawing the suit and not proceeding with it, no plea or issue was raised on that point, nor any evidence was produced by either party. The circumstances

under which the suit was withdrawn can only be guessed. Such questions cannot be decided on mere surmises or guess unless there was the pleading and issue and the respondent was given an opportunity to meet the plea. The learned counsel argued that the withdrawal must be treated to be an imprudent act on the part of Smt. Yashoda. No such presumption can be made. If the suit was not filed at all, the effect would have been the same and if the suit was decided against Smt. Yashoda and no appeal was filed against the same, the same result would follow. Under the circumstances it cannot be said that by not proceeding with the suit and if the suit was dismissed by not filing any appeal against that, Smt. Yashoda would have acted in an imprudent manner. The question is a pure; question of fact. Whether in her circumstances the lady acted with prudence or imprudence cannot be urged for the first time at the stage of the second appeal.

20. Another point raised by the learned counsel on the question was that the provisions of Order 21, Rule 58 barred only a suit and not a defence. The learned counsel argued that provisions of Rule 63 of Order 21 provided that a suit could be instituted and subject to the result of that suit the order under Rule 58 would be conclusive. According to him Smt. Yashoda was precluded from filing a suit to claim the properties but if any one else claimed the property against Smt. Yashoda, her defence could not be barred. That matter also came up for consideration in the case of Mt. Aziz Jahan Begam Vs. Sardar Singh and Others and Sabir Husain, . The Full Bench held:

"Up to this stage the parties to the proceedings are the decree-holder, the judgment-debtor and the claimant or the objector. But even between these parties the order of the Court allowing or rejecting the claim or objection has not been given the force of an order operating as *res judicata*. The reason obviously is that the investigation is expected to be summary and not a decision after a proper trial as in a regular suit. The provisions of Rule 63 are, however, essentially for the protection of the auction-purchaser against subsequent claims by fee same claimant or objector; and for the protection of the claimant or objector who has succeeded in summary proceedings of investigation, against future claims by the decree-holder or the judgment-debtor except to the limited extent of the dispute being taken to Court by a regular civil suit within the period of limitation of one year. It is clear that the rules are framed with the object that, once a claimant or objector has voluntarily chosen to submit his claim, or objection to the execution Court, the auction purchaser should not be left in uncertainty about the title to the property purchased by him for the longer period of limitation prescribed under the Limitation Act, and similarly the claimant or objector having succeeded should not be subjected to further litigation at the instance of the decree-holder or the judgment-debtor during that longer period."

When such protection is granted by the legislature, no question arises of applying the principles of "*res judicata*". This protection is granted in view of the fact that an outsider, who may not have been concerned at the earlier stages of the suit or execution proceedings and comes into the picture by purchasing the property

sold by the Court, needs some assurance of title in order to give a proper bid which he can do only if his position does not remain uncertain for a long time. The scheme of the rules is to limit the rights of once again moving the Courts to the short period of one year in such cases. The rules do not purport to take away any such right by applying the principles of "res judicata". No question of applicability of the principles of "res judicata" thus arises and there does not appear to be any unfairness in giving the order of the execution Court finality so as to prevent the claimant or objector from again putting the right purchased by the auction-purchaser in jeopardy, after having failed to do so within the time allowed by Rule 63."

21. The learned counsel for the respondent argued that by attachment and sale of the property in the decree against Beni Madho it was obvious and would act as constructive res judicata. Smt. Yashoda had no right as her rights had been negated and after the sale of the property rights, if any of Beni Madho judgment-debtor, OF Smt. Yashoda who was the objector, stood extinguished and sold in the execution sale. After sale the title passed to Ram Sunder, who was the auction purchaser. Nothing remained with Smt. Yashoda. If Ram Sunder did not proceed to take possession from judgment-debtor Beni Madho, only his remedy was barred but no rights accrued or reverted to Smt. Yashoda. The learned counsel pointed out that under the Limitation Act 1908 an application for delivery of possession to a decree-holder in pursuance of a sale could be made within three years under Article 180 of the Limitation Act. In case the period expired, no application for delivery of possession, could be made. Then the only remedy available to the auction purchaser was to institute a suit. Limitation for the suit was twelve years, under Article 138 from the date when the sale became absolute. In the instant case the sale was confirmed on 23-12-1982. Therefore whatever rights of auction purchaser Ram Sunder had in the property would stand extinguished u/s 28 of the old Limitation Act. However, by extinguishment of the rights of the auction purchaser, no rights could accrue in favour of Smt. Yashoda. If any rights could accrue, they could accrue in favour of the person who was in possession and against whom the suit was contemplated i. e. Beni Madho.

22. Now coming to the objection of the learned counsel for the respondent to the finding about Smt. Yashoda being the daughter, I find that the judgment of Sri K. C. Singh which has been adopted by the lower appellate Court was perverse. There is absolutely no evidence to prove the parentage of Smt. Yashoda. Sri K. C. Singh illegally and wrongfully held that the burden to prove that Smt. Yashoda was daughter of Shiv Tahal was on the plaintiff and he having failed to discharge the same, Smt. Yashoda should be held to be the daughter of Gopal and Smt. Bela. However, as that finding is not necessary to be gone into for the purpose of determination of the present appeal, I do not enter into that question and assuming for the sake of argument that Smt. Yashoda was a daughter of Gopal and Bela. The finding of the Courts below that Smt. Yashoda had no right and even if she had any, she lost it in the litigation in the year 1932 is affirmed. No

rights could be succeeded to or inherited by her sons as her heirs after her death in 1964. Nothing has been argued on Section 51, T. P. Act in the present appeal.

23. In the result both the appeals fail and are dismissed with costs.