
(2012) 12 AHC CK 0117
In the Allahabad High Court
Case No : First Appeal No. 513 of 1981

State of U.P.

APPELLANT

Vs

Ganga Devi

RESPONDENT

Date of Decision : 18-12-2012

Acts Referred:

Citation : (2012) 12 AHC CK 0117

Hon'ble Judges : Prakash Krishna, J

Final Decision : Dismissed

Judgement

Prakash Krishna, J.

The above appeal has been filed by one of the defendants of original suit no.9 of 1981 against the original judgment and decree dated 14.8.1991 passed by the District Judge, Fatehpur for declaration whereby the suit has been decreed in respect of property as described in Schedule A and partly decreed in respect of property described in schedule B.

The background facts may be stated in brief:

Plaintiff/respondent nos. 1 to 5 herein instituted suit no.9 of 1981 in respect of two houses shown in Schedule A & Schedule B attached to the plaint for declaration that these house are not liable to be attached and sold in recovery proceeding against defendant no.2 Hira Lal. Hira Lal and his wife Smt.Vedmati are the respondent nos.6 & 7 in the present appeal. It was pleaded that Shri Pansari Lal was the original owner in possession of the aforesaid two houses, Pansari Lal had two sons Basdeo Prasad and Sukhdev Prasad. A small pedigree which has been submitted by the learned standing is reproduced below:

Pansari Lal

It was stated that defendant no. 2 Hira Lal, s/o Sukhdeo Prasad had no right in any of the houses as Pansari Lal by his Will dated 11.1.1971 bequeathed the properties to the plaintiffs. The houses were wrongly attached by the State of

U.P against the dues of Hira Lal.

The suit was contested by the State of U.P and Hira Lal by filing separate written statements. The State of U.P came out with the case that Pansari Lal had no interest in any of the house in suit and they belong to Hira Lal exclusively. Hira Lal had obtained a loan of Rs.7000/ on 6.2.1964 and Rs.5000/ on 15.11.1965 from the Industries Department of the State Govt. against the surety of one house by mortgaging it on 4.11.1965 described in Schedule A. It was further pleaded that Hira Lal stood surety for one Surya Kumar Mishra and had mortgaged the house described in Schedule B.

The trial court on the basis of the pleadings of the parties framed as many as 9 issues, reproduced below:

1. Was Pansari Lal owner in possession of the two houses in suit?
2. Did Pansari Lal execute any deed of Will on 11.1.1971 in respect of the house of schedule I of the plaint as a result of which the plaintiffs and defendant no.3 became the sale owners of house of schedule no. 1?
3. Whether the house of Schedule no. 2 fell to the share of Sukhdeo Prasad as a result of partition by Pansari Lal and after the death of Sukhdeo Prasad, Plaintiff nos. 3, 4 and 5 and defendant no.2 have become the exclusive owners of this house in equal shares as is alleged in the plaint?
4. Were there houses in suit not liable to be given by way of security by defendant no. 2 and were they not liable to be attached and sold in connection with the debts contracted by Hira Lal?
5. Whether the suit is barred by limitation?
6. Is the suit barred also by the provisions of Order 21 Rule 58(2) of the Civil Procedure Code in view of the fact that objections have been dismissed right up to the appellate stage?
7. In the suit undervalued and the court fee paid is insufficient?
8. Was the house or schedule no.1 built in favour of Smt. Ved Vati and and the house of Schedule no. 2 in favour of the rest of the plaintiffs. If so, its effect?
9. To what relief, if any, are, the plaintiffs entitled.

The parties led evidence oral and documentary. Hira Lal and his wife who were defendant nos.2 & 3 absented themselves and did not take part in the further proceeding of the suit. Four witnesses namely Gorelal, Ramesh Kumar, Rameshwar and Sunderlal were examined by the plaintiffs. The State of U.P did not examine any witness. The trial court came to the conclusion that Pansari Lal had executed a Will dated 11.1.1971 and the said Will has been proved by Ramesh Kumar, PW3. It ultimately concluded that in view of the aforesaid Will, Hira Lal, the loanee has 1/4th share in the house described in Schedule B and has no share in described Schedule A, consequently decreed the suit in part.

Heard the learned standing counsel for the appellant and the learned counsel for the plaintiff respondents.

The learned standing counsel submits that the findings recorded by the court below under issue nos.1, 2 & 3 holding that it was Pansari Lal who was the owner of these two houses and had executed the Will dated 11.1.1971 is factually and legally incorrect. Submission is that the said Will has not been proved. It was further submitted that the suit was barred under Order 21 Rule 58 CPC, for want of notice under section 80 CPC and also under the provisions of U.P Public Money (Recovery of Dues) Act 1972.

The learned counsel for the respondents, in reply submits that the Will in question is duly proved. It is a registered document. The suit is not barred under Order 21 Rule 58 CPC or under any other statutory provision.

Considered the respective submissions of the learned counsel for the parties.

Taking the first point first with regard to the validity of Will dated 11.1.1971, the plaintiffs did produce evidence to show that the land beneath the house described in schedule A was owned by one Smt. Mehrunnisa, the Ex Zamindar. Pansari Lal took the land from the Ex Zamindar and raised the constructions. The house described in Schedule B was ancestral house of Pansari Lal. As against the evidence of the plaintiffs, the present appellant failed to produce any evidence to substantiate its pleading that the house in suit belonged to Hira Lal, the defaulter.

Except raising a plea that the house was owned by Hira Lal, there is no evidence worth the name on record to substantiate the said plea. The appellant wrongly presumed on the footing as these houses were mortgaged by Hira Lal, therefore, Hira Lal must be treated as owners of these houses. In the presence of positive evidence on record, the finding that these houses belonged to Pansari Lal as recorded by the court below is perfectly justified.

The plaintiffs came out with the case that Pansari Lal had executed a Will dated 11.1.1971 bequeathing the property in favour of the plaintiffs. The original Will was called for from Revenue Court. It was filed in Case No. 6 of 1974 (State versus Hira Lal). One Ramesh Kumar was examined as PW3 who proved the execution of the Will. In the absence of any contrary evidence, the finding by the court below holding the Will is proved is perfectly justified. Mere allegation without any evidence cannot amount proof of the claim.

Viewed as above, the findings recorded by the court below under issues no.1, 2 & 3 are hereby confirmed.

Much emphasis was laid by the learned standing counsel that the suit is barred under Order 21 Rule 58 CPC. Elaborating the argument, it was submitted that Order 21 Rule 58 was drastically amended by 1976 amendments, and after amendment, a separate suit is barred. The houses in suit were attached in the year 1975. The plaintiff respondent nos.1 & 2 filed objections against attachment on 28.10.1975 which was dismissed by the SDO, Fatehpur. The matter was

carried in revision. Two revisions being revision nos. 10 & 11 of 1979 were preferred before Commissioner, Allahabad Division, Allahabad which were dismissed by common order dated 17.4.1980. It is submitted that objections were decided after the 1976 Amendment under Order 21 Rule 58 CPC and the revisions having been dismissed, the suit giving rise to the present appeal is barred.

In reply, the learned counsel for the respondents submits that in view of the decision of this Court in Smt. Shyama Devi versus Firm Ramjas Rolling Mills AIR 1979 Allahabad 16, the suit is not barred. The trial court has held that since the objections were filed before the amendment, the suit would not be barred.

The argument of the learned counsel for the appellant proceeds on the footing that the objections were filed by the respondent nos. 1 & 2 herein under Order 21 Rule 58 CPC, which is not so. Order 21 Rule 58 CPC deals with adjudication of claims to, or objections to attachment of property. It contemplates where any objection is made to the attachment of, or any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained in Order 21 Rule 58 CPC. The attachment of property means attachment under the provisions of Civil Procedure Code. It does not contemplate any attachment made in any other proceeding. This view finds support from the words used that the Court shall proceed to adjudicate. The word "Court" means Civil Court and will not include a Revenue Court. The above interpretation is based on the plain and simple reading of Order 21 Rule 58 CPC. From the words "attachment" and "court" as used in Rule 58, it is evident that the objection filed by the respondent nos. 1 & 2 were not an objection which can be set to have been filed under Order 21 Rule 58 CPC. There was no decree in execution whereof the house in suit was attached nor there was any adjudication determining the rights of the parties by a court "as contemplated under the Civil Procedure Code". The argument of the learned standing counsel is therefore, liable to be rejected.

The view taken by the court below that Order 21 Rule 58 does not bar the suit giving rise to the present appeal is confirmed though for different reasons.

The other pleas raised by the learned standing counsel that suit is bad for want of notice under section 80 CPC or by the provisions of U.P. Public Money (Recovery of Dues) Act are concerned, have no substance. It does not appear that any such plea that notice under section 80 CPC was not given to the State Government was put forward before the trial court. There is no issue to this effect also. It is too late to urge want of notice under section 80 C.P.C.

The suit was filed for declaration and it was not at the instance of the borrower, the provisions of U.P. Public Money (Recovery of Dues) Act 1972 or of U.P.Z.A & L.R Act will not come in the way of the plaintiffs. None of these provisions bar the filing of a suit for declaration of title in respect of immovable property before civil

court.

Any other plea was not raised. There is no merit in the appeal. Appeal is dismissed. No order as to costs.