
(2012) 05 AHC CK 0319
In the Allahabad High Court
Case No : Second Appeal No. 343 of 1979

State of U.P.

APPELLANT

Vs

Smt. Bijan @ Bibi Jan and Another

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103, 80

Citation : (2012) 6 AWC 6240

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : Y.S. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

Manoj Misra, J.—List has been revised. No one appears for the respondent. I have heard the learned standing counsel for the appellant and have perused the record. The present second appeal has been filed against the judgment and decree dated 23.9.1978 passed by 4th Additional District and Sessions Judge, Farrukhabad in Civil Appeal No. 223 of 1976 arising out of Original Suit No. 362 of 1969.

2. Original Suit No. 362 of 1969 was instituted by the plaintiff-respondent, Smt. Bijan, for permanent prohibitory injunction against the defendant-appellants so as to restrain them from attaching and selling the house of the plaintiff, as detailed at the foot of the plaint, in recovery proceedings for the alleged liabilities of defendant No. 3 (Manzoor Ilahi) or late Kailash Chandra Vakil. Plaintiffs case was that the house in question was purchased by her vide sale-deed dated 30.8.1948 (Exhibit-7) from her own funds and that neither defendant No. 3 nor Kailash Chandra had any concern with the same. It was claimed that the house was not at all liable either to be attached or sold in realisation of the alleged liabilities of the defendant No. 3 in connection with any surety for the loan taken by late Sri Kailash Chandra. It was further pleaded that the house in suit could not have been given in security for securing Taqavi loan as per the Note

appended to Rule 38 of the Taqavi Rules framed under the U. P. Agriculturist Loans Act, 1885, which provided that a house property could not be accepted as security for Taqavi loan.

3. The defendant-appellants contested the suit, inter alia, by claiming that the house in question was liable to be attached and sold in connection with liabilities of the defendant No. 3 who is owner of the same and who stood as surety for payment of loan taken by Sri Kailash Chandra and had pledged the house in suit for the same. It was claimed that the sale deed in favour of the plaintiff, if any, was benami, real purchaser of the house was defendant No. 3, who was the owner in possession. It was further claimed that the suit was barred u/s 80, C.P.C. for want of valid notice.

4. The trial court came to the conclusion that the plaintiff was a mere benamidar and, as such, the security created by Manzoor Illahi (defendant No. 3) was valid. It further came to the conclusion that the Note appended to the Taqavi Rules, which created a bar for pledge of house property was brought by amendment, later, and it was not there in the earlier U. P. Taqavi Rules when the house in question was pledged on 28.3.1951. The trial court also found that the suit was barred by the provisions of Section 80, C.P.C. as the notice was not valid. Trial court further held that in the light of its finding on the other issues, the suit was barred by limitation inasmuch as the house in question was pledged on 28.3.1951 whereas the suit was instituted in the year 1969.

5. Aggrieved by the judgment and decree of the trial court, the plaintiff-respondent herein, filed Civil Appeal No. 223 of 1976.

6. The appellate court, after examining the evidence on record, with respect to-- (a) motive to enter into a benami transaction ; (b) the source of money for purchase of the property in question ; and (c) the possession of the property including the custody of the title deeds of the property--came to the conclusion that Smt. Bijan (the plaintiff) was not a mere benamidar but was the real owner of the property in question. It further noted that no evidence was led by the State to prove that Smt. Bijan was a mere benamidar of the property. While holding that the plaintiff was the owner of the property and not a mere benamidar, the Court took into consideration the fact that the plaintiff had proved that prior to her marriage to Manzoor Illahi (defendant No. 3), she was engaged in prostitution and, as such, had financial resources to buy property. It also noticed that there was evidence on record that prior to the purchase of the house in question, she had also purchased agricultural property. As the plaintiff had also produced the title deed of the property, the court below concluded that the plaintiff was the real owner in possession and not just a benamidar of the property in question. The appellate court also found that on the date of execution of the sale deed of the house there was no motive for her husband to buy the property benami in the name of her wife. On the question of validity of notice u/s 80. C.P.C., the lower appellate court after examining the notice, observed as under:

The learned D.G.C. (Civil), during the course of argument could not point out any illegality in the aforesaid notice, I, therefore, hold that the aforesaid notice is legal.

7. On the question of the bar put by the Note-1 to Rule 38 of the Taqavi Rules, the lower appellate court came to the conclusion that the bar was inserted in the year 1968 whereas the pledge was executed on 28.3.1951, hence, the bar would not be applicable.

8. With the aforesaid findings, the appellate court decreed the suit of the plaintiff-respondent and declared that the house in question was not liable for attachment in connection with the realization of Taqavi loan dues from Kailash Chand, on the basis of security (Exhibit A-1) executed by the defendant-respondent Manzoor Illahi in favour of the State of U. P.

9. Aggrieved by the judgment of the lower appellate court, the present appeal has been filed. On 20.7.1979, the appeal was admitted on the following question:

Whether the suit of the plaintiff was maintainable and whether the civil court has jurisdiction to going to the question relating to the applicability of proceedings for recovery of the loans in accordance with the provisions of Agriculturist Loans Act, and the rules framed in connection with the Taqavi loans.

10. The learned standing counsel could not point out as to how the aforesaid question would arise for consideration in the present appeal inasmuch as neither any such issue was framed before the courts below nor the pleading of any party raised any such issue. Even otherwise, when the court below came to a well considered finding that the plaintiff was the owner of the property in question and that she was not a mere Benamidar, the question of pledge/mortgage of the property by a person having no title for securing loan taken by a third person, does not bar the real owner from challenging the impending attachment and sale of the property. It is nobody's case that the plaintiff respondent was the surety or had taken the loan. Accordingly, the pledge/mortgage by Manzoor Ilahi who held no title over the property was completely void and it confers no right on the mortgagee.

11. During the course of hearing of the appeal, the learned standing counsel pointed out the findings recorded by the trial court on issue Nos. 6 and 8, which are being reproduced below:

Issue Nos. 6 and 8.--As regards these issues in view of my findings on the above issues, I find that the plaintiffs suit is barred by time and the principles of estoppel and acquiescence as well, as admittedly the house in question was pledged on 28.3.1951 and since the year 1951 till the institution of the instant suit there has been lapse of about 17 or 18 years and the plaintiff did not move for even declaration of her ownership of the house in question and rather she acquiesced the actual ownership of the defendant No. 3 Manzoor Illahi and as such she is estopped from claiming the house in question. Hence, these issues

are decided in affirmative and in favour of the defendant Nos. 1 and 2.

12. Relying on the aforesaid findings, the learned standing counsel submitted that since these findings were not specifically dealt with by the lower appellate court, the suit could not have been decreed by the lower appellate court.

13. The argument of the learned standing counsel is no doubt correct to the extent that these findings were not specifically reversed by the lower appellate court. Accordingly, in exercise of power u/s 103 of the Code of Civil Procedure, the merit of the finding on issues 6 and 8 recorded by trial court is being examined by this Court.

14. A careful examination of the finding recorded by the trial court on issue Nos. 6 and 8 gives an impression that the trial court held the suit to be barred by time as also by principle of estoppel and acquiescence, in view of its finding that the plaintiff was a mere benamidar and not the real owner. Otherwise, how could a suit be said to be barred by limitation when it is based on a cause of action which arises not on account of a void pledge/mortgage created by Manzoor Illahi, but on account of subsequent attachment or threat of attachment/sale of the property in question. The suit was instituted on third day of October, 1969. Paragraph 7 of the plaint of Original Suit No. 362 of 1969, reads as follows:

7. That the cause of action for the suit arose in the third week of January, 1969 when the plaintiff got news that the authorities concerned (the employees of defendant No. 1) were intending and threatening to proceed against the plaintiffs house in realizing the alleged liabilities by attachment and sale of the disputed house and on 7.2.1969 when the notice was served and on 24.6.1969 the date of receiving a wrong reply and on other subsequent dates within the jurisdiction of this honourable Court at Farrukhabad and this honourable Court is empowered to hear this suit.

15. From above, it is clear that the cause of action for instituting the suit arose in the year 1969 when the defendants threatened to attach and sell the disputed house. Thus, the trial court was not justified in holding that the suit was barred by limitation merely because the pledge/mortgage was created in 1951. It is to be noted that the pledge/mortgage was not at the instance of the plaintiff. She was not party to it. Accordingly, in view of the finding of the lower appellate court that the mortgage/pledge was without authority and, as such, void, there was no necessity for the plaintiff to seek for its cancellation. Further, as the lower appellate court has found the plaintiff to be owner in possession, the cause of action for filing the suit arose when there was threat of attachment and sale of the house, which was in the year 1969 and, the year, in which the suit was instituted. Thus, the suit can neither be said to be barred by limitation nor by principle of estoppel and acquiescence, the finding to the contrary recorded by the trial court are hereby set aside.

16. As regards the finding that the plaintiff was not a benamidar, but the real owner in possession, there is no serious challenge in this appeal. The lower

appellate court considered the entire evidence in this regard and came to a well considered finding that the plaintiff was the real owner in possession and not just a benamidar. For recording this finding it considered the evidence that the plaintiff had the means to acquire the property and further, there was no reason/motive for Manzoor Ilahi, her husband, to purchase the property in her name. The learned standing counsel could not point out any legal infirmity in the said finding which may give rise to a substantial question of law for consideration in this appeal. For the reasons aforesaid, the appeal, lacks merit and is hereby dismissed.