

Court No. - 6

AFR

Case :- WRIT - C No. - 1006851 of 2011

Petitioner :- Smt. Savitri Devi

Respondent :- Civil Judge Junior Division Court No. 22
Barabanki And Ors.

Counsel for Petitioner :- Ahsish Kumar Rastogi, Anurag
Shukla, Prem Chandra Chauhan, R.R. Upadhyaya

Counsel for Respondent :- Om Chandra Sahu, Piyush Kr.
Singh

Hon'ble Alok Mathur, J.

1. Heard Sri Prem Chandra Chauhan, learned counsel for the petitioner as well as Sri Om Chandra Sahu, learned counsel appearing on behalf of respondent no. 2.

2. Controversy raised in the present writ petition is with regard to the scope of provisions contained in Order 1 Rule 10 CPC as the application preferred by the petitioner for impleadment has been rejected by the Additional Civil Judge (Junior Division), Barabanki by means of order dated 25.07.2011, which order has been impugned in the present writ petition.

3. It has been submitted by learned counsel for the petitioner that respondent no. 2 had filed a suit against respondent no. 3 seeking a decree wherein the a suit for cancellation of sale deed dated 28.04.2009 was filed by him. During the pendency of the said suit respondent no. 3 had transferred the property to the petitioner by means of 'hibanama' (gift deed) dated 10.08.2009, by means of registered instrument. After execution of gift deed the petitioner had moved an application for impleadment. The said application was opposed by the respondent no. 2, stating that no transfer made during pendency of the suit would be void in terms of Section 52 of the Transfer of Property Act and consequently petitioner has not got any right to become a party in the present litigation.

4. The trial Court sustained the objections filed by respondent no. 2 and held that the petitioner claims impleadment on the basis of gift deed and the gift deed itself would be void in terms of Section 52 of the Transfer of Property Act and consequently, there is no occasion for the petitioner to be impleaded as party on the strength of a void instrument and rejected the application for impleadment.

5. Learned counsel for the petitioner has submitted that even if for the moment it is assumed that gift deed would be hit by the provisions of Section 52 of the Transfer of Property Act, it cannot be denied that the gift deed was infact executed and the petitioner has sufficient interest to become party in the present suit and consequently as to whether the gift deed was void or not, could have been established only at the conclusion of the trial. Had the said disputed question translated into a issue framed by the trial Court and after examination of evidence adduced by the parties, the said issue could have been decided. It is submitted that the application for impleadment at the very outset could not have been rejected by recording a finding that the transaction was hit by the provisions of Section 52 of the Transfer of Property Act and such a procedure followed by the trial Court is clearly arbitrary and it would have been appropriate for the trial Court to allow the application for impleadment and subsequently after doing so appropriate issue could have been framed and adjudicated after following due process.

6. It is next submitted by learned counsel for the petitioner that the trial Court should not have recorded a finding at the very inception while considering the application for impleadment that the petitioner could not become party on the strength of void instrument.

7. Learned counsel for the respondent on the other hand has opposed the writ petition. He has submitted that the gift deed was executed only on 10.08.2009 i.e. during the pendency of the suit proceedings and consequently, there is no dispute regarding the said fact and in the light of the provisions contained in Section 52 of the Transfer of Property Act, the said instrument could be deemed to be void and the petitioner does not get any right over the disputed property and there is no infirmity in the order of trial Court.

8. Heard learned counsel for the parties and perused the record.

9. The issue which arises for consideration before this Court is as to whether the petitioner has sufficient interest in the pending suit proceedings to be made party and also as to whether merely on account of the fact that gift deed was executed during the pendency of the proceedings, such an instrument can be held to be void by the trial Court while deciding the application for impleadment or such a decision could have been passed only after framing appropriate issues during the trial and after affording opportunity to the parties to adduce evidence and only then return finding in this regard.

10. Case of the petitioner is that infact it was a collusive suit filed by respondent no. 2 against respondent no. 3. The respondent no. 2 and 3 are real brother and sister while the petitioner is the daughter-in-law of the sister of respondent no. 2 and 3. After the sale deed was executed by respondent no. 2 in favour of respondent no. 3 on 28.04.2001, a valid sale deed was executed by respondent no. 3 in favour of petitioner. It was stated that the petitioner was never made aware about the suit preferred by respondent no. 2 against respondent no. 3 for cancellation of sale deed and therefore, the provisions of Section 52 of the Transfer of Property Act do not apply in the facts of the present case. In this regard various pronouncements of the Hon'ble Supreme Court are discussed herein below.

11. In the case of **Amit Kumar Shaw and Another Vs. Farida Khatoon and Another**, AIR 2005 SC 2209, it has been observed by the Apex Court that the doctrine of lis pendense applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party, but the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. Relevant paragraphs 16, 17 and 18 of the judgment on reproduction read as under:

"16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

17. In the instant case, the applications for substitution were filed by the respective appellants in the second appeals which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see bona fide in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants are absolutely necessary in order to decide the appeals on merits. Since the High Court has committed error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited. We have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as prayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation.

18. In our opinion, the presence of the appellants was absolutely necessary since the appellants are the only persons who has got subsisting right, title and interest in the suit. The appellants are at liberty to contest the matter on merits."

12. In the case of **Sri Jaggannath Mahaprabhu Vs. Pravat Chandra Chatterjee and Others**, AIR 1992 ORISSA 47, the Full Bench of Orissa High Court while considering the scope of Section 52 Transfer of Property Act has held that even if a lis pendense transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendense transferee, when a motion is made by the lis pendents transferee to be impleaded as party, the Court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits. Relevant paragraph 9 of the judgment on reproduction read as under:

"9. Though in *Basant Ram's case* (ILR (3974) Him Pra 276) (*supra*), it has been held that a lis pendens transferee is not a proper party, we are of the view that even if a lis pendens transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendens transferee, when a motion is made by the lis pendens transferee to be impleaded as a party, the court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of

suits."

13. In the case of **Thomson Press (India) Limited Vs. Nanak Builders and Investors Private Limited and Others, (2013) 3 SCC 397**, the Apex Court has considered a case where the property in question was transferred despite having notice and knowledge of injunction granted by the Court below in such pending suit. It was held that the transfer pendente lite is neither illegal nor void ab initio but remains subservient to rights eventually determined by Court in pending litigation. It was also held that the transfer in favour of purchaser pendente lite is effective in transferring title subject to certain obligations as decision of Court in a suit is binding not only on litigating parties but also on those who derive title pendente lite.

14. This Court in the case of **Purshottam Das Verma Vs. 2nd Addl. Distt. Judge, Allahabad and Others, 1991 (9) LCD 567**, has held that the effect of the provision of Section 52 Transfer of Property Act is not to wipe out a sale pendente lite altogether but to subordinate it to the rights based on the decree in the suit. It does not create any bar in the way of the transferee to proceed with the suit. The decree will have binding effect on the vendee, though not party in the suit. Execution proceeding are continuation of the suit. Relevant paragraphs 30 to 36 are reproduced herein below:

"30. Durga Prasad Nigam has brought it on record that after filing the suit he executed a sale deed in favour of Smt. Janki Pandey on 16-1-84. This fact is not disputed. The only question is whether Smt. Janki Pandey had any right to file the application on 20-5-86 for setting aside the compromise decree.

31. Section 146 of the Civil Procedure Code reads as follows.

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

32. There is no dispute that Smt. Janki Pandey never chose to proceed with the suit after the sale deed was executed in her favour. She was watching her interest and felt that it was safe in the hands of Durga Prasad Nigam but it did not debar her from coming in the picture at the time of the execution of the suit. Execution proceedings were the continuation of suit in proceeding as contemplated under Section 52 of the Transfer of Property Act.

33. Order 22 Rule 10 of the Civil Procedure Code which provides for procedure in case of assignment before final order in the suit runs as follows:

"In the case 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."

34. *It empowered her to proceed with the execution proceeding.*

35. *Accordingly, I agree with the view of the trial court that Smt. Janki Pandey had a right to file an application for setting aside the order dated 7-5-86 and the order has been rightly set aside.*

36. *No other point was pressed for consideration. The impugned orders have resulted into substantial justice between the parties. I do not find any error of law apparent on the face of record. Accordingly the writ petitions are dismissed with cost."*

15. Learned counsel for respondents, on the other hand, have relied on the judgments of the Apex Court in the case of **The Municipal Corporation of the City of Ahmedabad Vs. Chandulal Shamaldas Patel and Others, 1971 (3) SCC 821**, where the Court has held that an appeal by non-aggrieved party is not maintainable.

16. In the present case the petitioner has submitted that she was not aware of the pending litigation at the time of execution of the gift deed, and also the suit for cancellation of the sale deed is collusive. She stated that the doctrine of *lis pendens* applies only where lis is pending before the Court. Further, pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has discretion to make a party. But the transferee pendent lite can be added as a proper party, if his interest in the subject matter of the suit is substantial and not just peripheral. The transferee pendent lite to the extent he has acquired interest of the defendant, the latter having no more interest in the property may not properly defend the suit or he may collude with the plaintiff, in such circumstances, the transferee may be joined as a party.

17. Hon'ble the Supreme Court in the case of Savitri Devi Vs. District Judge, Gorakhpur, (1992) 2 SCC 577, has upheld the order passed by the trial Court for impleadment of respondent nos. 3 to 5, who had purchased the suit property without knowledge of the pending litigation, as parties. On behalf of the appellant, it was argued that respondent nos. 3 to 5 cannot be treated as necessary parties because alienation made in their favour was in violation of the injunction order passed by the Court. In support of this argument, reliance was placed on the judgment in Surjit Singh Vs. Harbans Singh (supra). This Court distinguished that the judgment by observing that in that case the assignors and the assignees had knowledge of the injunction

order passed by the Court and held that the order passed by the trial Court which was affirmed by the District Judge and the High Court does not call for interference.

18. The Apex Court in the case of Vinod Seth Vs. Devinder Bajaj, (2010) 8 SCC 1, has interpreted Section 52 of the Transfer of Property Act, 1882, and has observed as under :-

"It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit."

19. The principle underlying Section 52 of the Transfer of Property Act, 1882, is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the Court to exempt the suit property from the operation of Section 52 subject to such conditions it may impose. That means that the Court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any party to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the Transfer of Property Act, 1882, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit.

20. From the aforesaid judgments of the Apex Court as well as this Court, it clearly brings out that the discretion to make subsequent transferee as a party is discretion of the Court and the Court has to look into the fact as to whether the transferee has substantial right in the suit proceedings and the subject matter related therein. Transfer *pendente lite* is neither illegal nor *void ab initio* but remains subservient to rights eventually determined by Court in pending litigation. The transfer in favour of purchaser *pendente lite* is effective in transferring title subject to certain obligations as decision of Court in a suit is binding not only on litigating parties but also on those who derive title *pendente lite*.

21. From the aforesaid facts it is clear that entire disputed property which is subject matter of the suit has been gifted in favour of petitioner by means of registered sale deed on 10.08.2009. From the above any judgment in the suit would substantially effect the right of petitioner who claims to have received gift from the purchaser. Accordingly, there is no doubt that petitioner has substantial interest in the suit property and is a necessary party.

22. Considering the effect of Section 52 of the Transfer of Property Act on the gift deed, this Court is of the considered view that once the petitioner had been made party even effect of gift deed could have been adequately adjudicated by the trial Court by framing issue and permitting the parties to lead evidence in this regard. Such an issue could not have been decided at the preliminary stage while considering the application for impleadment filed by the petitioner under Order 1 Rule 10 CPC.

23. In the light of above, impugned order dated 25.07.2011, is set aside. The writ petition stands **allowed**.

Order Date :- 25.1.2024

A. Verma

(Alok Mathur, J.)