
Badri Barai Vs Bishwa Nath Bajpai and Others

Second Appeal No. 2044 of 1967

Court: Allahabad High Court

Date of Decision: May 8, 1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 21 Rule 58, Order 21 Rule 63, Order 21 Rule 92, Order 38 Rule 8, 100

Citation: AIR 1976 All 180 : (1975) AWC 315

Hon'ble Judges: Amitav Banerji, J

Bench: Single Bench

Advocate: Rama Shanker Misra and S.P. Srivastava, for the Appellant; Radhey Shyam, for the Respondent

Final Decision: Dismissed

Judgement

Amitav Banerji, J.

This is an appeal by one of the defendants in the suit. Bishwanath Bajpai plaintiff filed a suit for the declaration that the

suit plots belonged to defendant No. 3 Chhedi Barai and they are liable to be attached in execution of the decrees of the plaintiff and other

creditors against Chhedi Barai. The plaintiff also prayed for the relief of cancellation of a gift deed dated 1st March, 1954 executed by Chhedi

Barai in favour of the defendants Nos. 1 and 2.

2. Plaintiff's case was that he had filed suit No. 456 of 1964 against defendant No. 3 Chhedi Barai on the basis of a promissory note executed by

the latter. The suit plots were attached before judgment in that suit. Objections were filed by defendants Nos. 1 and 2 and the plots in suit were

released in their favour. These defendants claimed that they were the owners of the plots in dispute by means of the gift deed dated 1st March,

1954 executed in their favour by Chhedi Barai. The order releasing the suit plots in favour of defendants Nos. 1 and 2 was challenged in the suit

and it was further stated that the gift deed dated 1st March, 1954 in favour of defendants 1 and 2 was a fictitious document and it was executed to

practise fraud on creditors of defendant No. 3. It was also pleaded that Chhedi was not the bhumidhar of the plots in suit on the date of the

execution of the gift deed and as such he could not convey any rights to the defendants Nos. 1 and 2. Defence was a denial of the plaint case and it

was further pleaded that the gift deed was (not?) executed in order to defeat the claims of the creditors and the suit was barred by res judicata and

the provisions of Order 38, Rule 8 of the Civil P.C. hereinafter referred to as the Code.

3. The trial court dismissed the suit holding that the gift deed in suit was not a fictitious document and not liable to be cancelled and that the plaintiff

(defendant?) could validly transfer the plots as he was the bhumidhar thereof. The trial court also held that the suit was maintainable and the plaintiff

had a right to sue. The suit was not barred by res judicata nor by the provisions of Order 38, Rule 8 of the Code. An appeal was filed by the

plaintiff. The appeal was allowed and the judgment and decree were set aside and the plaintiff's suit for the declaration and the relief of cancellation

was decreed. The lower appellate court affirmed the finding of the trial court that the defendant No. 3 was a bhumidhar on 1st March, 1954 and

was competent to execute the gift deed but it was held that the gift deed was not acted upon and was not a genuine deed. The deed of gift was

held to be a fictitious and sham transaction.

4. A preliminary objection to the maintainability of the appeal has been taken by the learned counsel for the respondent. He has also moved an

application under Order 41, Rule 27 of the Code seeking to bring on record a certified copy of dakhnama and certified copies of two orders

passed by the executing court showing that the execution was struck off in full satisfaction. He had alleged in the above application that the suit

plots were sold in execution of the decree in suit No. 456 of 1964 and that one Prem Kumar Tiwari had purchased the property in auction sale

and that the sale had been subsequently confirmed and the execution case was struck off in full satisfaction on the 8th April, 1972. Learned counsel

for the appellant (respondent?) contended that in view of the fact that the sale in favour of Prem Kumar Tiwari had been confirmed the present

appeal had become infructuous and was not maintainable. In support of his contention he relied on the decision of Janak Raj Vs. Gurdial Singh and

Another, and particularly on a passage from the aforesaid judgment at p. 610 which reads as follows:

It does not seem ever to have been doubted that once a sale is confirmed the judgment debtor is not entitled to get back the property even if he

succeeds thereafter in having the decree against him reversed.

Learned counsel for the respondent contended that a confirmation of sale takes place under Order 21, Rule 92 of the Code. That Rule has

undergone a change introduced by the Allahabad High Court and makes the confirmation subject to Rule 58(2) of Order 21 of the Code. He

further contended that a decision under Rule 58(2) becomes final but is subject to the provisions of Rule 63 of Order 21 of the Code, The plaintiff

filed a suit under Order 21, Rule 63 of the Code and the present appeal arises out of that suit. Consequently, he contended that the matter had not

become final and the appeal could not be said to have become infructuous. Learned counsel for the respondent thereupon contended that Rule 92

as amended by this Court only refers to Rule 58(2) of Order 21 of the Code and does not make any reference to Rule 63. He also contended that

there was no order under Rule 58(2) in the present case as the order was passed under Order 38. Rule 8 of the Code and the provisions of Rule

92 had no application to Rule 8 of Order 38 of the Code.

5. Having heard the learned counsel for the parties I am satisfied that the preliminary objection has no merits. Order 21, Rule 92 of the Code as

amended by this court reads as follows:

Order 21. Rule 92(1). Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the

Court shall, subject to the provisions of Rule 58(2) make an order confirming the sale, and thereupon the sale shall become absolute.

The words ""subject to the provisions of Rule 58(2)"" were added after the word ""shall"" in Rule 92(1) by the High Court of Allahabad. It, therefore,

makes it clear that the confirmation of the sale under Rule 92 is subject to the provisions of Rule 58(2) of Order 21, Rule 58(2) has also been

amended by the High Court. The Sub-rule 58(2) as amended reads as follows:

58. Postponement of Sale (1).....

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending

the investigation of the claim or objection, or may in its discretion make an order postponing the delivery of the property after the sale pending such

investigation. And in no case shall the sale become absolute until the claim or objection has been decided.

What is significant in the present case is the last sentence of this Rule. It states in absolute terms that the sale shall not become absolute until the

claim or objection has been decided. It gives a wide discretion to the Court to postpone the sale but makes it clear that the sale shall not become

absolute until the claim or objection has been decided. Thus, any confirmation of sale under Rule 92 is subject to the provisions of Rule 58(2) of

Order 21 which in turn means that any claim or objection in respect of the sale has to be decided by the Court. The words of Rule 63 are also

explicit. It makes it clear that where a claim or objection is decided against a party he may institute a suit to establish his claims to the property in

dispute but subject to the result of the suit, if any, the order shall be conclusive. It will thus be seen that if any suit is filed under the provisions of

Rule 63 within the period of limitation then the order passed under Rule 58 shall not become final until the decision of the suit itself.

6. Therefore, reading the provisions of Rules 92, 58 and 63 of Order 21 of the Code T conclude that the confirmation of sale under Rule 92 is

subject to the decision under Rule 58 and Rule 63 of Order 21 of the Code. If there is a decision under Rule 58 then in that event it will be subject

to the decision of the suit under Rule 63, provided such a writ is filed against the order under Order 21, Rule 58 within the period of limitation

provided for The claim was decided on the 28th February, 1965 and the present suit was instituted on 3rd May, 1965. The sale took place on 7th

March, 1972 and was confirmed on 8th April, 1972. Obviously, therefore, the confirmation of the sale on 8th April, 1972 would be subject to the

decision in the suit. The suit is still pending, for the appeal is only a continuation of the suit.

7. The contention that Rule 92 refers to only 58(2) and not to Rule 63 and consequently will not be subject-matter of the final outcome of the suit

under Rule 63 of the Order 21 cannot be countenanced. If the order passed under Rule 58 does become final and is subject to the ultimate

decision under Rule 63 then the provisions of Rule 63 automatically come into play. It was not necessary to mention Rule 63 also along with Rule

58(2) in Rule 92. This contention has no substance at all. The underlying principle for introducing the amendment in Rule 92 or Rule 58(2) was to

make all such sales subject to the final outcome of a suit under Order 21, Rule 63 of the Code. If of course no suit was filed after the objections

were decided under Rule 58 or the suit was filed beyond the period of limitation the order passed under Rule 58 would become final and absolute.

In that event there would be no question of the order being then subservient to the decision of a suit, but such a situation does not arise in the

present case. As stated above, in the present case the confirmation of sale was done 7 years after the suit had already been instituted. It was during

the pendency of this second appeal in this Court that the sale was confirmed.

8. The contention is that in the present case there was no order under Rule 58 but an order under Rule 8 of Order 38 of the Code. The contention

that since Rule 92 does not refer to Order 8, Rule 38 of the Code it has no application to a decision under the latter Rule is not acceptable. The

provisions of Rules 58 to 63 of Order 21 of the Code are made applicable to the proceedings under Order 38, Rule 8, Rule 8 reads as follows:--

Order 38, Rule 8. Investigation of claim to property attached before judgment

Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the

investigation of claims to property attached in execution of a decree for the payment of money.

The provisions for the investigation of claim in execution of a decree are Rules 58 to 63 of Order 21. The procedure to be followed in the

investigation of the claim under Order 38, Rule 8 is that provided for the investigation of claims to property attached in execution of a decree. In

the case of Hafiz Ahmad Ali Khan and Others Vs. Anand Sarup and Others, a Division Bench of this Court has held "that where an objection is

raised to attachment before judgment of certain property the objection is to be investigated in accordance with the provisions of Order 21, Rule 58

of the Code. The Division Bench also held that the decision of the Court under Rule 8 of Order 38 as regards the claim preferred to property

attached before judgment is, however, not final and can be assailed by means of a separate suit instituted within the period of limitation.

In the case of Saride Pullamma Vs. Saridi Madharam (died) and Others, it was held that in a case of attachment before judgment any objection by

a third party to such, attachment was not appealable under Order 43, Rule 1 of the Code but a separate suit under Order 21, Rule 63 of the Code

was maintainable. It was further held that the order on the claim or objection being not a final one the only way in which an aggrieved party could

assail that order was by instituting a suit under Rule 63 of Order 21. It was further held that if he did not take recourse to the filing of a suit in

accordance with the provisions of law he would be precluded from attacking it in subsequent proceedings. In support of this statement of law the

Division Bench of the Andhra Pradesh relied on the decision of this Court in the case of Hafiz Ahmad Ali Khan and Others Vs. Anand Sarup and

Others, . I, therefore, conclude that the provisions of Rule 58 are attracted in a case under Order 38, Rule 8 and a decision under the latter

provision does not become final and is subject to a filing of a suit under Order 21, Rule 63 filed within the period of limitation, I further hold that the

provisions, of Rule 92 of Order 21 of the Code are applicable in the case of a decision made under Order 38, Rule 8 of the Code.

9. I am of the opinion that the decision in the case of Janak Raj Vs. Gurdial Singh and Another, will not be applicable for several reasons. Firstly,

the case arose from Punjab where the CPC has not been amended in the like manner as by this Court to the provisions of Rule 92 and Rule 58.

Secondly, the question that was being considered in that case was whether a sale must be confirmed even where the reversal of the decree takes

place before the confirmation of sale. Thirdly, the facts of that case were different from that in the present case. The principal reason why the

decision in the Supreme Court case is inapplicable to the present case is a difference in the provisions of Rule 92 and Rule 58 of Order 21 of the

Code, existing in the States of Punjab and Uttar Pradesh. Their Lordships of the Supreme Court were not considering the provisions of Rule 92

and Rule 58 as amended by this High Court The language of Rule 92 and Rule 58 is specific and makes the confirmation of sale subject to

proceedings under Rule 58 and to a suit filed under Rule 63. Consequently, the enunciation of law by the Supreme Court which has been quoted

earlier in this judgment is inapplicable.

10. For the reasons stated above I do not find any substance in the preliminary objection raised by the learned counsel for the respondent. The

preliminary objection is overruled.

11. On the merits learned counsel contended that the lower appellate Court was in error in holding that the gift deed was collusive or that it was a

sham transaction for no such case was pleaded. The finding by the court below that it was a fictitious transaction was also erroneous for there was

no evidence to show that there were any creditors against Chhedi Barai in the year 1954. In other words, the learned counsel contended that the

finding by point No. 2 formulated by the lower appellate Court was erroneous and contrary to law.

12. The trial court had framed issues Nos. 1 and 2 in the following words :

1. Whether the gift deed dated 1-3-1954 in suit is liable to be cancelled for the reasons that it has been executed in order to defraud the plaintiff?

Is the gift deed liable to be cancelled for the reasons stated in para 5 of the plaint?

2. Whether the defendants Nos. 1 and 2 are the Bhumidhars of the plots in suit?

13. It will be relevant to state here that on the 27th February, 1965 an order was passed under Rule 8 of Order 38 of the Code. It was decided

against the present plaintiff so that he had to file the present suit. In paragraph 5 of the plaint it was stated that the gift deed executed by Chhedi in

favour of defendants Nos. 1 and 2 on 1st March, 1954 was fictitious and was not binding on the plaintiff and was liable to be cancelled. Five

reasons were given. In the first place it was stated that the defendant No. 3 Chhedi was not a bhumidhar on the 1st March, 1954 and toing a

sirdar he could not execute a sale deed. Secondly, that in order to defraud the creditors (he fictitious gift deed was executed and the defendants

Nos. 1 and 2 never came in possession nor mutation of names took place on the basis of the gift deed. Thirdly, in Suit No. 878 of 1959 (All),

Kudai Misir v. Chhedi an objection had been filed by the defendants 1 and 2 but it had been decided there that the gift deed was a fictitious

document and Chhedi's possession was recognised and this decision was binding on the contesting defendants. Fourthly, Chhedi defendant No. 3

had never given possession over the suit land. Fifthly, the suit plots were liable to attachment and sale. It is true that there is nothing in this pleading

as regards collusion but it is equally true that this gift deed was being impeached on the ground that it was a fictitious document, never acted upon

and that Chhedi has never left his possession over the suit plots.

The lower appellate court was, therefore, perfectly justified to formulate the question No. 2 namely, whether the gift deed was a fictitious

document and never given effect to. The lower appellate court found that Chhedi was a bhumidhar on the day of execution of the gift deed and he

could transfer his bhumidhari plots but it held that the gift deed was a fictitious document and never acted upon. The court below has given cogent

reasons for taking this plea. In the first place it has held that defendant No. 3 Chhedi continued to be recorded in possession for more than 9 years

after the execution of the gift deed, and had been recorded in the revenue papers to be in possession even in the year 1372F. That was long after

the execution of the gift deed. If he remained in possession of the property, where was the question of gift deed having been acted upon. Chhedi

had asserted his possession over the disputed property on the 26th August, 1954. Secondly, the lower appellate court has stated that the gift deed

in dispute was challenged by Chhedi in Suit No. 5206 of 1956. Defendants Nos. 1 and 2 had filed objection to the attachment of the plots in Suit

No. 878 of 1959 of the Court of Munsif II, Deoria and this objection was decided against them. Chhedi had himself filed a suit for cancellation of

gift deed. The lower appellate court has also recorded that Chhedi had admitted the genuineness of the deed for the first time on the 15th January,

1960 and before that he was challenging the gift deed.

The court below was right in concluding that this was done in order to defeat the claim of the plot of Suit No. 878 of 1959 (All). The court below

ultimately concluded that the gift deed was not acted upon and it was not a genuine deed and that it was a fictitious and sham transaction. I see no

error in this conclusion by the lower appellate Court. If the gift deed was not meant to be acted upon and the name of Chhedi continued for a long

period of time even after the execution of the gift deed, the fact that Chhedi filed a suit for the cancellation of the gift deed are all indicative of the

fact that the gift deed was a fictitious document executed for some purpose. It was not necessary for the plaintiff to establish that Chhedi was

indebted at the time of the execution of the gift deed or that some of the creditors had filed a suit against him at that time. This was one of the

grounds taken for assailing the gift deed. If the deed itself was not a genuine transaction then no sanctity could be attached to such a deed. In my

opinion, the ultimate conclusion to be drawn is that the gift deed did not have the effect of transferring the property from Chhedi to defendants

Nos. 1 and 2 and it was, therefore, liable to be cancelled.

14. The findings arrived at by the court below are findings on the questions of fact. The conclusion arrived at by the court below is a cumulative

effect of the appraisal of the evidence on record. The findings arrived at by the court below cannot, therefore, be assailed in second appeal except

on the ground of the existence of a legal error. No such legal error has been pointed out which can be said to have vitiated the findings arrived at

by the court below. I, therefore, find no good reason to interfere with the findings arrived at by the court below.

15. No other point was argued.

16. In the result, therefore, the appeal fails and is dismissed with costs.