

(1994) 10 AHC CK 0026

Allahabad High Court

Case No: First Appeal From Order No. 223 of 1994

Smt. Rukmini Jaiswal

APPELLANT

Vs

Sri Balhans Jayaswal and others

RESPONDENT

Date of Decision: Oct. 5, 1994

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 4(3)
- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9
- Criminal Procedure Code, 1973 (CrPC) - Section 125

Citation: AIR 1995 All 319

Hon'ble Judges: V.P. Goel, J; S.C. Mahapatra, J

Bench: Division Bench

Advocate: Sri Arun Gupta and Sri Sarita Singh, for the Appellant;

Final Decision: Disposed Of

Judgement

1. This is an appeal against the order refusing to set aside the abatement and substitute the appellant in place of her deceased husband who had filed a suit which has since been dismissed for non prosecution. Case of appellant is that after coming to know from tenant of the disputed house that there was a litigation in respect of the house initiated by her husband she filed the petition to continue the suit which had been dismissed for abatement. Her case is that her relationship with her husband was strained and she was residing at Allahabad. Coming to know about the illness of her husband she came to Dehradun where shortly after her husband expired. She is illiterate and aged 82 years and had no knowledge about the litigation. Accordingly she should get chance to continue the suit.

2. Defendant No. 2 who is son-in-law of appellant filed an affidavit purporting to be an objection to the application of appellant. Defendant No. 4 also filed an objection contesting the application. Thus in support of the application affidavit of the appellant was available. Considering these materials Trial Court came to the

conclusion that the appellant had knowledge about the litigation earlier and accordingly did not permit her to continue the suit by setting aside the abatement and allowing the application for substitution. This is the grievance of the appellant.

3. The suit relates to a house at Dehradun. Case of original plaintiff is that that the said house was purchased in the name of his minor son investing all his savings. His son attaining majority has executed a power of attorney in favour of husband of Defendant No. 4 and taking advantage of the power of attorney the property has been transferred in the name of Defendant No. 4 and as such the transfer is not valid.

4. While the suit was pending original plaintiff died on 30th Sept., 1985 and suit was dismissed for default on 29-7-86 as no step was taken.

5. Questions for consideration are :

(1) Whether the appellant had knowledge as is asserted by her about the pendency of the litigation.

(2) Whether on the facts as alleged in plaint, chance should be given to the plaintiff to continue the same.

6. Appellant has stated in her petition for getting a chance to contest the suit on the ground that she got knowledge of the suit from a tenant of the house. Affidavit of the tenant has not been filed in this suit to corroborate the assertion of the plaintiff. Thus except bald assertion of the appellant in the affidavit, there is no other material in support of her knowledge of the litigation. It is true that the court below has not taken this aspect of the matter into consideration and has proceeded to record a finding that plaintiff had earlier knowledge of the litigation. However, in the absence of any explanation as to why the affidavit of the tenant has not been filed that he had really intimated about the litigation to the appellant, assertion of the appellant is not sufficient to support her case. No explanation has also been given as to why the tenant has not been examined in this case even though affidavit has not been filed. Thus, we are satisfied that the appellant has not been able to prove her case that she got knowledge of the litigation from the tenant of the disputed house.

7. There is also no explanation of the appellant that the tenant had full knowledge of the details of litigation which could enable her to file the petition on the next day.

8. From the aforesaid discussions we are satisfied that plaintiff has not been able to prove her knowledge to save the limitation to file the petition for setting aside the abatement.

9. At times courts take sympathetic attitude finding that there is prima facie merit in a case. Therefore, we examined the merit of the case. We find that the appellant had strained relationship with her husband and she was residing separately at

Allahabad. She had litigation under S. 125, Cr.P.C. with her husband. Husband in such back ground filed a suit against his son that he is ostensible owner of the property though it was purchased benami in name of son who had no right to execute power of attorney to transfer the property to a third party. On assertion of plaintiff in the plaint S. 4(3) of the Benami Transaction (Prohibition) Act is not attracted. Once sub-section (3) is not attracted, the property in the name of the son belonged to him and no suit would be filed by anybody else claiming that the property was purchased benami in name of the son or that actually it is the property of the plaintiff. Thus on account of prohibition of law original plaintiff's suit has no merit. In the said circumstances giving an opportunity to an estranged wife would only have the effect of allowing a frivolous litigation to continue.

10. We are conscious that while considering the application for permitting the plaintiff to continue the suit, the merit of suit should not influence us. Therefore, before considering merit of the suit we have already found that on the merit the application of the appellant deserves to be dismissed as case of knowledge as made out by her to save limitation has not been proved. Merit being examined to consider whether any sympathy should be shown to the illiterate lady in respect of the property of her husband. We find that sympathy will also not place her on a better footing. We are satisfied that this appeal has no merit. Accordingly the same is dismissed summarily at the stage of the admission.

11. Appeal dismissed.