

**(2010) 11 AHC CK 0252**

**Allahabad High Court**

**Case No:** Civil Miscellaneous Writ Petition No. 3745 of 1986

Shakuntala Devi

APPELLANT

Vs

Additional Civil Judge and Others

RESPONDENT

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**Date of Decision:** Nov. 29, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 58
- Transfer of Property Act, 1882 - Section 39, 52

**Citation:** (2011) 1 ADJ 859

**Hon'ble Judges:** S.U. Khan, J

**Bench:** Single Bench

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**Judgement**

S.U. Khan, J.

Inspite of sufficient service no one appears for contesting Respondents.

2. Heard learned Counsel for the Petitioner.

3. Respondent No. 3 Smt. Bhagwati is mother of Respondent Nos. 4 and 5, Gauri Shanker and Sheo Shanker. All these three persons have played a fraud of the highest order upon the Petitioner. Respondent Nos. 4 and 5 were recorded Bhomidhars of several agricultural plots. They sold one of their plots i.e. plot No. 648 area 2.39 acres (wrongly mentioned as plot No. 848 in para 3 and 4 of the writ petition) to the Petitioner on 5.7.1976 through registered sale deed. However, few days before the execution of the sale deed the mother had filed a suit (O.S. No. 155 of 1976) against the sons on 21.5.1976 (Lachman husband of Respondent No. 3 and father of Respondent Nos. 4 and 5 had already died) The mother claimed maintenance of Rs. 150/- per month and also sought charge upon agricultural land of the sons which consisted of 29 plots. The suit was got decreed ex parte on 7.2.1977. The complete judgment is quoted below:

Case called out. Plaintiff alongwith her learned Counsel present in person. Heard the Plaintiff and her counsel. Plaintiff examined herself as P.W. 1

Order

The suit is decreed ex parte with cost.

4. Thereafter decree was prepared on 22.8.1977 and all the agricultural plots were attached in execution thereof. Only plot in dispute which had already been sold to the Petitioner was auctioned on 23.12.1978. Before the auction Petitioner had already filed objections under Order 22 Rule 58 CPC before the executing Court/Munsif Mainpuri (case No. 201 of 1977). Just after execution of the sale deed in favour of Petitioner and prior to auction sale or even attachment plot in dispute had also been mutated in the revenue records in the name of the Petitioner on the basis of the sale deed dated 5.7.1976.

5. Trial Court through order dated 3.2.1981 rejected the objections of the Petitioner. Against the order of the trial Court dated 3.2.1981 Petitioner filed civil appeal No. 24 of 1983 Additional Civil Judge Mainpuri dismissed the appeal on 20.11.1985 hence this writ petition. Both the Courts below rejected Petitioner's objections on the ground that before selling the property Defendants of the suit should have obtained permission of the Court u/s 52 of transfer of property Act. Section 52 of Transfer of property Act is quoted below:

Transfer of property pending suit relating thereto during the pendency in any Court having authority [within the limits of India excluding the State of Jammu and Kashmir] Government or established beyond such limits] by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

6. The said section was not attracted for two reasons. Firstly, right to immovable property was not directly and specifically in question in the suit. The suit was only for recovery of money as maintenance. Secondly, the proceedings of the suit were clearly collusive.

7. Certified copy of the plaint has been placed on record. The second relief claimed in the plaint is that permanent prohibitory injunction be issued in favour of the Plaintiff against the Defendants to the effect that property mentioned at the bottom of the plaint should not be sold by the Defendants and they should not interfere in the charge of the Petitioner over the property in dispute. There could not be a charge upon the property unless there was a direction to that effect by the Court or there was some prior agreement for the same. Moreover, for payment of just Rs.

150/- per month charge on 29 agricultural plots could not be created.

8. Further, the fact that suit was decreed ex parte clearly proves collusion between the parties.

9. learned Counsel for the Petitioner states that no temporary injunction was granted in the suit.

10. In any case if property was to be auctioned then other plots could be auctioned. Accordingly, I am of the view impugned orders are patently erroneous in law, and contesting Respondents who are mother and sons have acted in an utterly dishonest manner.

11. As objections under Order 21 Rule 58 C. P.C. had already been filed in the year 1977 hence the executing Court directed that auction sale could take place but it should not be confirmed.

12. The Courts below referred to Section 39 Transfer of Property Act which is quoted below:

39. Transfer where third person is entitled to maintenance-- Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice [thereof] or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Firstly, the said section was not attracted as neither the Plaintiff had any right to receive maintenance prior to the decree nor the Petitioner was a transferee without consideration and with notice of the right. In any case under the aforesaid section transfer is not void or liable to be cancelled. The only mandate of the said section is that right to receive maintenance may be enforced against the transferee.

13. Accordingly, writ petition is allowed both the impugned orders are set aside. Auction sale dated 23.12.1978 is also set aside. Exemplary cost of Rs. 50,000/- is imposed upon the contesting Respondents.