

(1997) 02 AHC CK 0127

Allahabad High Court

Case No: C.M.W.P. No. 6085 of 1997

Jagbir Singh

APPELLANT

Vs

With Additional District and
Sessions Judge and Others

RESPONDENT

Date of Decision: Feb. 28, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2(2), 47
- Transfer of Property Act, 1882 - Section 52
- Uttar Pradesh Co-operative Land Development Bank Act, 1964 - Section 22, 47

Citation: (1998) RD 160

Hon'ble Judges: D.K. Seth, J

Bench: Single Bench

Advocate: V. M. Zaidi, for the Appellant; S.C. and Shashi Nandan, for the Respondent

Final Decision: Dismissed

Judgement

D.K. Seth, J.

The suit between the two private persons were instituted in the year 1973 and was decreed in 1973. It was affirmed on appeal in 1979. The second appeal was decided in 1992. The decree was sought to be executed. Sri V.M. Zaldi, learned Counsel for the Petitioner states that SLP is pending but very fairly concedes that no stay order has been obtained. In the execution an application u/s 47 of the Act was filed claiming that the suit property is mortgaged with the Land Development Bank. Therefore, the decree is inexecutable in view of the provisions contained in the U.P. Cooperative Land Development Banks Act, 1984 (hereinafter referred to as the said Act).

2. Sri Ashok Singh, learned Counsel, holding brief of Sri Shashi Nandan, learned Counsel appearing on behalf of the Respondents submits that in the application u/s 47 it has not been disclosed as to on which date the alleged mortgage was created

in favour of the Land Development Bank. He points out from the order passed in the revision against the order rejecting application u/s 47 of the Act that the alleged mortgage was created some times in 1992 and that it was not mortgaged u/s 22 of the said Act. According to him, both the courts below have found against the Petitioner. Therefore, this Court should not interfere with the same.

3. In reply thereto Sri Zaidi, learned Counsel for the Petitioner contends that in view of the provisions contained in Section 22 of the said Act, the doctrine of lis pendens as contained in Section 52 of the Transfer of Property Act, 1882 would not be applicable because of the non-obstante clause with which Section 22, begins. He further contends that though no date was mentioned as to when such mortgage was created in the application u/s 47 of the Code of Civil Procedure, but the said fact was disclosed in para 10 of the writ petition wherein he has pointed out that the loan was obtained from the Bank in the year 1976 and 1992. However, he very fairly concedes that this fact of obtaining loan from the Bank in the year 1976 was not disclosed in the suit, though the suit was decreed in 1978 or in any of the two successive appeals and was raised for the first time in the application u/s 47 of the aforesaid Act.

4. I have heard Sri V.M. Zaidi, counsel for the Petitioner and Sri Ashok Singh, counsel for the opposite party at length.

5. In the present case the suit was admittedly instituted in 1973. It is alleged by the Petitioner in paragraph 10 of the writ petition that the Petitioner had mortgaged the property with the Co-operative Land Development Bank (hereinafter referred to as the said Bank) and took loan from the said Bank in the year 1976 and in the year 1992. The suit was decreed in 1978. The first appeal was decided in 1979 and the second appeal in 1992. Admittedly the fact of the alleged mortgage etc. was not brought on record either in the suit or in any of the appeals. For the first time it was pleaded in the application u/s 47 of the CPC and that too without any particulars at all which, however, was sought to be mended in the writ petition and then again very feebly and vaguely.

6. It appears that there was no material before the learned court below, on the basis of application u/s 47 as to the date on which such interest was created in favour of the Bank. The Petitioner has not come up with proper particulars in order to make out a proper case in the application u/s 47. He has neither disclosed the date of taking loan and creation of mortgage nor has disclosed any documents in support thereof. Unless proper case is made out, the court is not called upon to decide the same. The learned Counsel for the Petitioner has not been able to point out as to whether any document in regard to creation of such interest was produced before the executing court or not. Though, however, he relies on the statement made in para 12 of the writ petition to the extent that the finding of the revisional court that there was no deed of mortgage executed, is incorrect but he has not spelt out anything in the writ petition that any such deed of mortgage was created or

executed nor he furnished any such particulars thereof nor copy of the same is annexed with the writ petition. In absence of all these materials, it is not possible to go into these questions at this stage of raising objection u/s 47 of the Code.

7. Be that as it may, the question now raised is, in effect, a defence which ought to have been raised in the suit itself. It is alleged in Para 10 of the writ petition that the first mortgage was created in the year 1976 before the decree was passed. Therefore, the same is a defence in the suit itself. A defence which has not been raised, which could have been raised, shall be deemed to have been raised and decided by reason of principles of constructive res judicata. The same cannot remain open to be agitated at the time of execution. A defence in the suit cannot be a ground of application u/s 47 inasmuch as it would have the effect of reversing the decree. Such question cannot be gone into by the executing court on the established principle that the executing court cannot go behind the decree. Such question is no more open to be decided in execution proceeding.

8. Section 47 of the CPC provides as follows:

47. Questions to be determined by the Court executing decree. -- (1) All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section be determined by the court.

9. The scope of "all questions" referred to in Section 47 is limited "to the execution, discharge or satisfaction of the decree" if raised. The expression party" includes the purchaser of property in execution. The question whether one is a representative of one or the other of the party is also a question so included. It further includes the question of delivery of such property to such purchaser or his representative.

10. Executing court cannot go behind the decree is a well-settled principles of law. The executing court is not invested with the right to determine controversial questions which are the basis of the decree to be executed. It cannot go into such question and act as a trial court.

11. The power of the executing court travels only to the extent of interpreting the decree or to identify the propriety. Even for the purpose of identifying the property or interpreting the decree, it cannot take additional evidence. It was so held in the case of Lalmani v. Shiv Shanker AIR 1980 Pat 134, and Bisheshwar Bhartia v. Udiasthree (1994) CLJ 297 (Ori), when a new right is claimed, which requires adjudication of a right in the property and thus indirectly seeking to avoid the

decree passed, Is in effect an adjudication leading to go behind the decree. In the case of Sarwan Lal v. Kanti Prasad AIR 1986 All 1. it was held that the objection to executability of decree which boils down to challenging the maintainability of suit cannot be taken before the executing Court. A mixed question of law and fact cannot be raised for the first time in execution case Bhawarao v. Savitribai AIR 1991 Bom 55 at page 59. Objection tending to show that the decree is erroneous cannot be raised u/s 47, CPC In Manful Hussain v. Kiran Rano (1993) 2 CLJ 456 . In [Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,](#) , the Apex Court held that the general rule is that an executing court cannot go behind the decree. It must take the decree as it is and must proceed to execute it. It cannot entertain an objection that the decree is incorrect In law or facts. In Addison Pains v. Sant Bux AIR 1976 Del 137, it was held that Section 47 does not entitle the court to investigate into the question of validity of the decree when on the face of it, there is nothing illegal in it.

12. Such an objection as in the present case, which was never taken either in the written statement or at any stage of the suit or appeal, goes to the root of the decree itself, namely, if such objection is allowed, in that event the decree has to be altered. The same would amount to questioning the validity of the decree altogether on new facts raised for the first time requiring adjudication of a new right in the property and that too in favour of a stranger in the lis, and who also does not come forward himself, seeking to avoid execution, it would amount to going behind the decree. It would mean entertaining objection that the decree is incorrect in law or fact. It is not an objection relating to the interpretation of the decree. It is not a case of identifying the property. It Is a case of investigation of the title of a third party to the property since adjudicated between the parties in the suit. It would be questioning the validity of the decree opening a new front of defence to the passing of the decree; a defence never raised.

13. A question which could have been raised as a defence in the suit cannot be raised after the decree is passed. Decree is defined in Section 2(2) of the Code of Civil Procedure, to mean," the formal expression of an adjudication which, so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit...." Once it is so determined and expressed formally in decree, setting up of a new case or right for investigation in execution thereof would amount to going behind the decree. The objection raised in the present case cannot be decided without taking fresh evidence which is otherwise impermissible La execution.

14. In the facts and circumstances of the case, therefore, the objection raised does not come within the scope of Section 47, CPC The finding of the learned court's below, therefore, cannot be said to suffer from any infirmity, illegality or Irregularity or illegal exercise of Jurisdiction.

15. The question whether Section 52 of the Transfer of Property Act would be attracted in the present case is not necessary to be gone into, in view of the

observations made above.

16. In view of the facts and circumstances of the case, I do not find any reason to interfere with the order impugned. The writ petition is dismissed. There will, however, be no order as to costs.