

Arvind Kumar Vs. Uma Shanker and ors.

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Court : Allahabad

Decided On : Apr-17-2009

Reported in : 2009(3)AWC3102

Judge : Poonam Srivastav, J.

Appellant : Arvind Kumar

Respondent : Uma Shanker and ors.

Disposition : Appeal dismissed

Judgement :

Poonam Srivastav, J.

1. On the request of the learned Counsel for the appellant, record of the lower court was summoned by this Court vide order dated 2.3.1989. Record of the lower court is available. Learned Counsels for the respective parties have agreed to argue the appeal finally at the stage of admission itself. The appeal is listed under Order XLI, Rule 11, C.P.C. but I proceed to hear the appeal finally.

2. Heard learned Counsels for the respective parties.

3. The instant case has a very long chequered history. The contesting defendant/respondent is a decree-holder and auction purchaser of the property in dispute consequent to execution proceeding in Original Suit No. 144 of 1967,

against one Kamal Chand, respondent No. 2. This was a simple money decree. In Execution Case No. 9 of, 1969, the shop in question was auctioned in favour of respondent No. 1, Kamal Chand, respondent No. 2, claimed the property to be his exclusive property pursuant to the family partition dated 29.9.1966 but the said property was attached on 3.5.1968, for satisfaction of the decree. The auction sale dated 29.10.1969 was confirmed by the court below on 3.2.1970 and the sale certificate was prepared. Paper No. 6/1C relates to delivery of possession and is part of the record in Misc. Case No. 161 of 1970.

4. The appellant, Arvind Kumar, filed an objection under Order XXI, Rule 96, C.P.C. in Misc. Case No. 161 of 1970 on 6.7.1970. The objection of the appellant was that he is a tenant of the property in question w.e.f. 15.6.1968 by virtue of a registered rent deed. This rent deed dated 15.6.1968 was brought on record but the learned Munsif recorded a finding that the appellant is in possession on the basis of the said rent deed, which was subsequent to the attachment of the property made on 3.5.1968. The learned Munsif in his judgment and order dated 27.11.1971 held that execution of the rent deed is hit by Section 64 of C.P.C.

5. The appellant, Arvind Kumar, filed an appeal against the order dated 27.11.1971, which was also dismissed on 24.11.1972.

6. The appellant did not challenge the orders passed in misc. cases in the execution proceedings, but instead preferred to institute a suit for injunction numbered as Original Suit No. 409 of 1972 in the Court of Additional Munsif V, Bareilly. The basis of injunction was that shop in question originally belonged to Pt. Mathura Prasad. After his death, his sons Ram Niwas and Kamal Chand and daughters Maya Devi and Sakuna Devi inherited the property being his heirs. The property came in possession of Ram Niwas, who executed a rent deed on 15.2.1966 in favour of the appellant at the rate of Rs. 20 per month. Subsequently, the disputed shop fell in the share of Kamal Chand, defendant/respondent No. 2 consequent to a family settlement and, therefore, another registered rent deed was executed on 15.6.1968. The claim of the appellant is that he is a tenant since the year 1966, i.e., much before attachment, therefore, Section 64, C.P.C. will have no effect whatsoever on his right and the plaintiff/appellant could not be

evicted otherwise than in accordance with law.

7. Certain other facts regarding settlement of the share between heirs of Pt. Late Mathura Prasad was also pleaded, which is not subject-matter of the present dispute. The trial court framed a number of issues. The trial court disbelieved receipts adduced in evidence by the plaintiff that he was in possession of the disputed shop. The two receipts allegedly issued by Nagar Palika were not worthy of reliance. However, the trial court recorded a finding that the plaintiff/ appellant has not been able to establish his tenancy w.e.f. 15.2.1966 but on the contrary he is a tenant w.e.f. 15.6.1968. Certain doubts were also expressed that on the date of attachment the stamps were not properly punched or it was insufficiently stamped. It may be pointed out that no such objection was ever raised 'regarding insufficiency of the court fee at the time when attachment took place. The attachment was made on 3.5.1968 through the Court in execution proceedings. These questions, if in dispute were between defendants/respondents, decree-holders and proforma respondent Kamal Chand, judgment debtor. However, this will not nullify attachment. At the maximum, it could be said that it is an irregularity. The matter of court fee or stamp cannot be raised by a person who claims to be a tenant subsequent to the auction of the property in execution of another decree and consequent attachment.

8. The trial court decreed the suit on the basis of a clear and unequivocal finding that the plaintiff/ appellant is a tenant since 15.6.1968 and the attachment was not a valid attachment. The attachment memo and other documents are 271C, 44C, 104C. The copy of memo of attachment Ex. A-22, Ex. A-I, Ex. A-7 and Ex. A-4 were brought on record but the trial court was of the view that attachment was improper. The copy issued is without payment of copying fee and stamp of Rs. 2 only is affixed. The attachment was held to be invalid.

9. Defendant/respondent No. 1, Uma Shanker, filed a regular Civil Appeal No. 227 of 1982, against the aforesaid decree in the court of Additional District Judge VII, Bareilly. The lower appellate court discarded the finding of the trial court regarding the validity of attachment memo. However, the finding that the plaintiff was in possession w.e.f. 15.6.1968 was confirmed and allowed the appeal with cost vide

judgment and decree dated 30.1.1989 holding that the rent deed dated 15.6.1968 is hit by Section 64, C.P.C. It was also concluded that rent deed dated 15.6.1968 was only with a view to circumvent the attachment. The judgment and decree of the lower appellate court is challenged in the instant appeal.

10. Learned Counsel for the appellant proposes to advance argument on three substantial questions of law, which are quoted hereinbelow:

1. Whether the court below was . justified in holding that the lease in favour of the plaintiff was hit by provisions of Section 64 of C.P.C. without reversing the finding of the trial court that the order of attachment was not given effect to, as prescribed by Order XXI, Rule 54 (2) ?

2. Whether view of the court below that the plaintiff has admitted in the plaint regarding the due attachment of the property in dispute is incorrect inasmuch as no such admission has been made by the plaintiff in the plaint ?

3. Whether in view of the provisions of Order XXI, Rule 96, C.P.C, the plaintiff was only entitled to symbolic possession of the property in dispute as admittedly the plaintiff was in possession of the property in dispute on the basis of the valid lease in his favour ?

11. The only substantial question of law that has to be decided in the instant appeal is whether the court below was justified in holding that lease in favour of the plaintiff was hit by provision of Section 64, C.P.C. and also that the plaintiff has admitted in the plaint attachment of the property on 3.5.1968.

12. For ready perusal, Section 64, C.P.C. is quoted hereinbelow:

64. Private alienation of property after attachment to be void.-[(1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

[(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.]

Explanation. - For the purposes of this Section, claims enforceable under an attachment include claims for the ratable distribution of assets.

13. I have perused the judgment of the lower appellate court. The lower appellate court while giving his finding on issue No. 6, which relates to the attachment of the disputed property, has recorded a clear finding that the possession of the disputed property by the appellant on the basis of the rent deed dated 15.6.1968 is illegal and the bar of Section 64, C.P.C. is attracted.

14. Argument advanced on behalf of the appellant is that the attachment was not proved in accordance with law by adducing valid and cogent evidence. Copy of attachment stands nullified for want of affixation of the copy of the attachment and, therefore, attachment was irregular. This was discarded by the trial court and, therefore, the judgment under challenge suffers on material and substantial question of law. Argument of the counsel for the appellant that the lower appellate court while recording a finding of reversal regarding bar of Section 64, C.P.C. has not recorded any finding, is without any basis. Substantial questions of law raised in support of the appellant's contention is apparently flimsy and by no stretch of imagination can constitute a question of law, what to say a substantial question of law. Admittedly, appellant Arvind Kumar, had filed an objection in the misc. case during execution proceedings and after dismissal of his objection under Order XXI, Rule 96, C.P.C, an appeal was preferred, which was also dismissed. This fact has been unequivocally admitted by the appellants. Assertion that finding recorded by the lower appellate court is against the pleading, is not sustainable. I cannot lose sight of the fact that Kamal Chand executed a rent deed only with a view to frustrate the decree and contesting respondent is a decree-holder since approximately 50 years.

15. I have gone through the entire record of the case and also perused the plaint. The plaintiff has accepted the fact that decree against Kamal Chand was put to execution and during the said proceedings, objection under Order XXI, Rule 96

was preferred by the appellant. It is apparent that assertions in paragraph Nos. 4, 5 and 8 of the plaint, speak about the execution proceedings and also dismissal of his objection under Order XXI, Rule 96 of C.P.C. Admittedly, the trial court recorded a finding that the appellant is a tenant w.e.f. 15.6.1968 and this finding was confirmed by the lower appellate court. Admittedly, the attachment was made on 3.5.1968 and thus at least one and half month before 15.6.1968, which is the date accepted by both the Courts.

16. In fact, after rejection of objection under Order XXI, Rule 96, C.P.C, there cannot be an iota of doubt that possession on the basis of subsequent rent deed by the judgment-debtor is only to frustrate the attachment made on 3.5.1968 and is squarely hit by Section 64, C.P.C. It is apparent that the appellant is not entitled to occupy the shop and resist the respondents from taking actual possession in the garb of the fact that he cannot be evicted otherwise than in accordance with law and since no suit was filed by the contesting respondents for his eviction, he is entitled to continue in occupation of the shop in question. The plaintiff/ appellant, Arvind Kumar, has nowhere alleged that the attachment was not effected but on the contrary, he has admitted the attachment of the shop in dispute. Since there is a clear and unequivocal assertion that he had filed an objection under Order XXI, Rule 96, C.P.C, therefore, he cannot take advantage by saying that he has not admitted this fact in his plaint.

17. The Apex Court in the case of Vinod Kumar Arora v. Smt. Surjit Kaur : AIR 1987 SC 2179, held as follows:

The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propounded a new and different case (Paragraph 11).

It is stated that plaintiff-appellant admitted. attachment of the shop in dispute in his plaint. (Paragraph Nos. 4 and 5).

18. Here the fact of the attachment is not denied either by the plaintiff or by the defendant hence, any argument to the contrary has no force.

19. Therefore, I conclude that the attachment is admitted by both the parties. Since there is only one attachment dated 3.5.1968, no other attachment can be professed by the appellant. Both the Courts have given a concurrent finding of fact that the appellant, Arvind Kumar, is a tenant since 15.6.1968. Theory of partition of occupation of Kamal Chand as sole owner is not denied by the plaintiff in the plaint. Admittedly, Kamal Chand, is the judgment-debtor and it is obvious that the rent deed was executed only to 'circumvent the attachment so that decree-holders/defendants-respondents could not reap benefit of the decree.

20. The Apex Court in the case of Om Prakash Garg v. Ganga Sahai and Ors. : AIR 1988 SC 108, held that while property was under attachment, any lease created in contravention of Section 64, C.P.C. is invalid.

21. This Court in the case of Smt. Sushila and Ors. v. Smt. Kamla Devi and Ors. 1985 All LJ 1271, held as follows:

Section 64, C.P.C. and Order XXI, Rule 54.-Attachment-It is not essential that copy of order be affixed on the Court house. Omission is at most minor irregularity.

As against purchaser for value in good faith the attachment becomes operative when the order passed therefor is proclaimed on the spot and a copy thereof is affixed on the property; in view of the 1st Part of Sub-rule (3) of Rule 54 it is not essential that a copy of the order be affixed on the Court house; and, the omission to affix copy of the order on the Court house constitutes in any event a minor irregularity, which has to be ignored, including for purposes of giving effect to Section 64 of the Code.

Where there was a valid attachment made purchase made by private persons is rendered void.

The object behind Section 64 is to prevent fraud on decree-holders and to secure in fact the rights of the attaching creditor against the attached property by prohibiting private alienation pending attachment. Attachment creates no charge or lien upon the attached property. It only confers a right on the decree holder to have attached property kept in custodia legis for being dealt with by the Court in

accordance with law. It merely prevents and avoids private alienation it does not confer any title on the attaching creditors. A private transfer by sale despite attachment made of the property is void as against the decree-holder in whose favour the attachment is directed or a person acquiring title to property by auction sale in execution subsequent to the attachment.

22. The Apex Court depreciated the liberal construction and generous application of provisions of Section 100, C.P.C. Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference under Section 100, C.P.C. For ready reference, extract of paragraph No. 7 of the case of *Veerayee Ammal v. Seenii Ammal* : (2002) 1 SCC 134 : 2002 (1) AWC 97 (SC), is quoted below:

7. ...We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some Judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in *Paras Nath Thakur v. Mohani Dasi*, held : AIR p. 1205 para 3.

It is well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the Courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned Counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two Courts of fact.

23. Similar view has been expressed in a number of other decisions by the Apex Court in the cases of *Thiagarajan and Ors. v. Sri Venugopalaswamy B. Koil and Ors.* : JT 2004 (5) SC 54 : 2004 (3) AWC 1988 (SC); *Rajeshwari v. Puran Indoria* : (2005) 7 SCC 60 : 2005 (4) AWC 3869C (SC); *Gurdev Kaur and Ors. v. Kaki and Ors.* 2006 All CJ 1481(SC) ; 2006 (3) AWC 2373 (SC) and *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors.* : (1999) 3 SCC 722 : 1999 (2) AWC

1608 (SC).

24. The Apex Court in the recent case of Santosh Hazari v. Purshottam Tiwari : (2001) 3 SCC 179 : 2001 (1) AWC 824 (SC), ruled that a point of law which admits of no two opinions may be proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not? The same view has been expressed by the Apex Court in the case of Govinda Raju v. Mariamman : (2005) 2 SCC 500 : 2005 (1) AWC 787 (SC).

25. On a careful consideration of the entire matter, I think that the appellant has no case. The judgments under challenge cannot be interfered in this appeal in exercise of jurisdiction under Section 100, C.P.C. The two judgments do not suffer from any error and no substantial question of law arises. The instant second appeal fails and is dismissed with cost.

26. The appellant is liable to hand over vacant possession to the decree-holder/defendants-respondents and also pay the entire rent, which shall be calculated by the court below alongwith interest.

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