

Smt. Prem Kumari and anr. Vs. Smt. Uma Devi and anr.

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Court : Allahabad

Decided On : Nov-11-2005

Reported in : 2006(2)AWC1612

Judge : Vineet Saran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 21, Rule 66;
[Constitution of India](#) - Article 226

Appeal No. : C.M.W.P. No. 14754 of 2004

Appellant : Smt. Prem Kumari and anr.

Respondent : Smt. Uma Devi and anr.

Advocate for Def. : V.M. Zaidi and ;H.K. Yadav, Advs.

Advocate for Pet/Ap. : Sanjay Kumar Singh, Adv.

Disposition : Petition dismissed

Judgement :

Vineet Saran, J.

1. On the basis of an agreement to sell dated 11.11.1983 having been executed by Badri Narain Pathak, in favour of Badri Prasad Dhawan, for selling his 1/3rd share of the house in question for a consideration of Rs. 40,000, for which an

advance of Rs. 22,000 had been paid, said Badri Prasad Dhawan filed Original Suit No. 13 of 1984 in the court of Civil Judge, Varanasi on 9.1.1984. The property in question was attached by the order passed by the Civil Judge. Immediately thereafter on 1.3.1984, Petitioner No. 1 Smt. Prem Kumari, who is wife of Badri Narain Pathak, filed Original Suit No. 544 of 1984, praying for a decree of specific performance against her husband Badri Narain Pathak for executing the sale deed of the property in question in pursuance of an alleged agreement to sell 1/3rd of his share of the house in question having been executed on 3.3.1981 for a consideration of Rs. 10,000 out of which Rs. 3,000 had been paid in advance. The said Badri Narain Pathak contested Original Suit No. 13 of 1984 filed by Badri Prasad Dhawan. However, he did not contest the subsequent Original Suit No. 544 of 1984, filed by his wife, which was allowed to be decreed ex parte on 29.7.1985 by a very short order. In pursuance thereof, Badri Narain Pathak, without raising any objections or even without there being any execution case filed, executed the sale deed on 28.1.1987, in favour of his wife Smt. Prem Kumari, Petitioner No. 1.

2. In Original Suit No. 13 of 1984 filed by Badri Prasad Dhawan against Badri Narain Pathak, the petitioner No. 1 Smt. Prem Kumari was arrayed as defendant No. 8. The said suit, which was for recovery of Rs. 22,000 along with interest, was decreed on 7.1.1987, i.e., three weeks prior to the execution of the sale deed by Badri Narain Pathak in favour of his wife Smt. Prem Kumari, petitioner No. 1. Immediately thereafter Badri Prasad Dhawan filed Execution Case No. 1 of 1987 against Badri Narain Pathak.

3. On 3.3.1987, petitioner No. 1 Smt. Prem Kumari filed objections under Section 47, C.P.C. in the Execution Case No. 1 of 1987. The said objections were registered as Misc. Case No. 17 of 1987. On 6.5.1989, two separate orders had been passed. The first order which was passed in Misc. Case No. 17 of 1987 arising out of Execution Case No. 1 of 1987, reads as under:

Case called out. Only counsel for O.P. is present. None present on behalf of the applicant to press application 4C, which consequently rejected.

4. The other order was passed in the main Execution Case No. 1 of 1987, itself in which the attached property was directed to be auctioned. The said order reads as under:

Case called out. Learned Counsel for D.H. is present. None present for O.P. Seen Ameen report dated. 6.2.1987 for attachment. Let the writ be issued to Amin for auction of the attached property. Steps be taken within a week. Amin will submit his report on 7.7.1989.

5. Thereafter on 8.1.1990, the decree holder moved an application before the executing court for participating in the auction proceedings which was allowed by order dated 9.1.1990. Then on 12.1.1990 the auction of the attached property was held and the property was finalised in favour of the decree holder, who was the highest bidder, which was for Rs. 42,000. The Amin submitted the auction report before the Executing Court on 15.1.1990.

6. Immediately, on the next date, on 16.1.1990, petitioner No. 1 Smt. Prem Kumari moved an application (paper No. 23/C) for recall of the order dated 6.5.1989, passed in Misc. Case No. 17 of 1987 arising out of Execution Case No. 1 of 1987. An application for condonation of delay in moving the recall application supported by an affidavit was also filed. By order dated 18.8.1990, the executing court allowed the application (paper No. 23/C) and recalled its order dated 6.5.1989 passed in Misc. Case No. 17 of 1987 arising out of Execution Case No. 1 of 1987.

7. On 3.1.1993, the judgment-debtor Badri Narain Pathak expired and in his place his wife Smt. Prem Kumari and his daughter Smt. Vimla Devi were substituted, who are both petitioners in this writ petition. On 26.8.1993, the decree-holder Badri Prasad Dhawan also died and in his place his wife Smt. Uma Devi and son Deepak Kumar Dhawan were substituted, who have been arrayed as respondents in this writ petition.

8. It is noteworthy that the application (paper No. 23/C) for recall of the order dated 6.5.1989 had been filed by Smt. Prem Kumari, petitioner No. 1 alone, in her individual capacity and not as the heir of the judgment-debtor Badri Narain Pathak. After the recall of the said order, the objections of the petitioner No. 1 filed under

Section 47, C.P.C., which were registered as Misc. Case No. 17 of 1987, were then rejected by the executing court on merits, vide its order dated 21.9.2002. Challenging the said order, the petitioner No. 1 filed Civil Revision No. 819 of 2002 in the High Court, which was dismissed by this Court by judgment and order dated 20.12.2002. The said order has become final.

9. However, in the meantime, after the rejection of the said objections, the heirs of decree-holder Badri Prasad Dhawan filed an application for confirmation of the auction proceedings and recovery of Rs. 28,000. The petitioner No. 1 then filed an application/objection on 9.10.2002 praying that in view of the fact that the order dated 6.5.1989 had already been recalled on 18.8.1990, fresh auction proceedings should be initiated, as the auction proceedings already held would be a nullity in the eyes of law. The petitioner No. 1 also moved another application for rejecting the application dated 26.9.2002 filed by the heirs of decree-holder for confirmation of the auction proceedings. By the impugned order dated 21.11.2002, the executing court rejected the applications of the petitioner No. 1 and confirmed the auction. The petitioners then filed an appeal against the aforesaid order of the executing court, which was also dismissed by the appellate court on 9.12.2003. Aggrieved by the aforesaid orders dated 21.11.2002 and 9.12.2003 passed by the executing court and the appellate court, the petitioners have filed this writ petition.

10. I have heard Sri Sanjai Kumar Singh, learned Counsel for the petitioners, at length as well as Sri H. K. Yadav, learned Counsel appearing for the respondents and have perused the record. Counter and rejoinder-affidavits have been, exchanged and with the consent of the learned Counsel for the parties, this writ petition is being disposed of at the admission stage itself.

11. The contention of the petitioners is that since the order dated 6.5.1989 had been recalled by the executing court on 18.8.1990, the auction, as had been directed by the said order, could not have taken place and consequently the confirmation of the said auction could also not have been made. He has strenuously tried to canvass before this Court that by the order dated 18.8.1990, both the orders passed by the executing court on 6.5.1989--one in Misc. Case No. 17 of 1987 arising out of Execution Case No. 1 of 1987, and the other in Execution

Case No. 1 of 1987--had been recalled. However, on perusal of the application dated 16.1.1990 filed by the petitioner No. 1 for recall of the order dated 6.5.1989 (Annexure-2B to the writ petition), it is clear that the prayer made in the said application was for the recall of the order dated 6.5.1989 passed in Misc. Case No. 17 of 1987. Since the said Misc. Case No. 17 of 1987 arose out of the proceedings in Execution Case No. 1 of 1987, hence in the heading for the description of the case, mention of the Execution Case No. 1 of 1987 had also been made. However, what is to be seen is the prayer made in the said application, which was only for recalling the order dated 6.5.1989 passed in Misc. Case No. 17 of 1987. Merely because the mention of Execution Case No. 1 of 1987 had been made in the heading of the application, it would not mean that the order dated 6.5.1989, passed in the main Execution Case No. 1 of 1987 was also sought to be recalled. The mention of the Execution Case No. 1 of 1987 in the heading of the application was necessary because Misc. Case No. 17 of 1987 was arising out of the proceedings in the said execution case. Further on a plain reading of the order dated 18.8.1990 passed on the said application it is clear that it is only the order dated 6.5.1989 passed in Misc. Case No. 17 of 1987 which had been recalled and not the order dated 6.5.1989 passed in Execution Case No. 1 of 1987, which related to a direction for auctioning the attached property. It was Misc. Case No. 17 of 1987, which was with regard to the objection of the petitioner No. 1 under Section 47, C.P.C. in which separate order dated 6.5.1989 had been passed, which had been recalled. The said objection had been subsequently dismissed on merits by the executing court on 21.9.2002. It was only thereafter that the decree holder filed an application on 26.9.2002 for confirmation of the auction. Undisputedly, on 20.12.2002 this Court has dismissed Civil Revision No. 819 of 2002 filed against the order dated 21.9.2002. Thus the entire basis of the arguments of the learned Counsel for the petitioners that since the order passed in the main Execution Case No. 1 of 1987 had been recalled and thus fresh auction ought to have taken place, does not have force. I have also perused the detailed orders dated 21.11.2002 passed by the executing court, as well as the order dated 9.12.2003 passed by the appellate court, which are impugned in this writ petition, whereby the applications of the petitioner No. 1 filed on 9.10.2002 and 21.10.2002 have been rejected and the auction sale has been confirmed. Upon careful perusal

of the same, I do not find any illegality or irregularity with the said orders. The sole ground, which has been argued by the learned Counsel for the petitioners, also does not have force, as has already been dealt above. Thus, this writ petition is liable to be dismissed.

12. The petitioners have also raised other technical grounds regarding procedural aspects but a perusal of the appeal filed before: the appellate court, a copy of which has been tiled as Annexure-9 to the writ petition, would go to show that such technical grounds with regard to the procedural aspect such as non compliance of Order XXI, Rule 66, C.P.C. etc. had not been raised before the appellate authority and thus the same are not required to be considered by this Court specially in writ jurisdiction,

13. Although, in my view, the petitioners have failed to make out a case for interference on merits, but even assuming that they had some case on merits, then too, for this Court to interfere under Article 226 of the [Constitution of India](#), which is a discretionary jurisdiction, it would be necessary for the petitioners to show that equity is also in their favour. In the present case equity is totally against the petitioners. The petitioner No. 1 is contesting this case in dual capacity-one as the purchaser of the property in pursuance of the agreement dated 3.3.1981 which was executed by her husband late Badri Narain Pathak in her favour and secondly in her capacity as the heir and legal representative of her late husband Badri Narain Pathak. Earlier the objections had been filed only by the petitioner No. 1 but subsequently the appeal was filed by the other heir of Badri Narain Pathak also, who is his daughter, petitioner No. 2. If the submission of the petitioners is accepted that the other property, which is jointly inherited by both the petitioners, could alone have been auctioned and not the one which was attached and has now been auctioned, then it is not understood as to why the petitioner No. 2, who was one of the co-owners of the other property, has voluntarily come forward to offer the said property for execution just to protect the interest of the petitioner No. 1, who is her mother. The earlier alleged agreement to sell was between the wife and her husband, in pursuance of which the husband Badri Narain Pathak executed the sale deed on 28.1.1987 in favour of his wife petitioner No. 1, merely a few days after the suit filed by Badri Prasad Dhawan had been decreed against

the husband (Badri Narain Pathak). It clearly appears that the petitioner No. 1 and her husband late Badri Narain Pathak had joined hands only to avoid the execution of the decree in favour of Badri Prasad Dhawan, so that said Badri Prasad Dhawan, from whom the husband of the petitioner No. 1 had taken advance, may not be able to recover it. Admittedly, the petitioner No. 1 was arrayed as a defendant in Original Suit No. 13 of 1984 filed by Badri Prasad Dhawan. Thus in my view, besides on merits, equity is also totally against the petitioners, and accordingly, for this reason also, this Court should refrain from interfering with the orders impugned in this writ petition.

14. This writ petition is, accordingly, dismissed. No order as to cost.

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