

Sabbir Ahmad and Others. Vs. Additional District Judge and Others.

Sabbir Ahmad and Others. Vs. Additional District Judge and Others.

SooperKanoon Citation : sooperkanoon.com/917913

Court : Allahabad

Decided On : Feb-04-2011

Judge : Pankaj Mithal, J.

Appeal No. : Civil Misc. Writ Petition No. 15236 of 2009

Appellant : Sabbir Ahmad and Others.

Respondent : Additional District Judge and Others.

Advocate for Def. : Sri. V.B. Upadhya

Judgement :

1. Executability of the decree of permanent prohibitory injunction drawn on the basis of a judgment and order passed by the court in exercise of power under Order VIII Rule 10 CPC as against only one of the defendants to the suit merely for not filing written statement of his defence within time fixed and allowed though the other defendant had filed his defence, is the subject matter of adjudication in the present writ petition.

Facts of the case:-

2. One Riazuddin had two sons, Nabiullaha and Habibullaha. Nabiullaha had a son Waliullaha and a daughter Khatoon Jannat Bibi. Habibullaha had one son Hamidullah. As Muslim law permits marriage between first cousins, Hamidullah married Khatoon Jannat Bibi. Hamidullah had a son Asadullah who died on

15.7.1995 leaving behind his widow Smt. Jamil Kazami and two sons Shamiullah Kazami and Faridullah Kazami though it is said that he had one more son Fasiullah Kazami. On the death of Hamidullah it is said that his wife Khatoon Jannat Bibi re-married one N.H. Naqvi and that Km. Asama and Zahira Latif are her great grand daughters.

3. The pedigree of Riyazuddin above for the sake of convenience is described hereunder:-

Riazuddin

Nabiullah Habibullah

Waliullah Khatoon Jannat Bibi Hamidullah

Asadullah

(Defendant no.1)

(Wife-Jamil Kazami)

Samiullah Faridullah Fasiullah

(Defendant no.2) (Disputed)

Ms. Asma Ms.Zahira Latif

4. The plaintiffs Km. Asma and Zahira Latif, the great grand daughters of Khatoon Jannat Bibi who are residents of USA through their common power of attorney holder N.H. Naqvi Commissioner of Income Tax (retired) on 27.01.1990 instituted original suit no. 58 of 1990 purported to be under Section 38 of the Specific Relief Act, 1963 for a decree of permanent injunction in respect of disputed property ie., a mango grove, dilapidated Kothi and some other open land with trees arraying Asadullah as defendant no. 1 and one of his sons Samiullah as defendant no. 2 along with one Ram Chandra Yadav, "bagwan" as defendant no. 3. The suit was filed basically on the allegation that the plaintiffs are owners in possession of the disputed bhoomidhari land on the basis of a "hiba" ie oral gift dated 16.8.1988

made in their favour by Khatoon Jannat Bibi in respect whereof a memorandum was also written on 23.8.1988. The defendants to the suit have no concern with the aforesaid disputed property and as such they be restrained by a decree of permanent prohibitory injunction from interfering in their peaceful possession and use of the aforesaid disputed property.

5. In the aforesaid suit an application for interim injunction paper no. 8C with affidavit 9C was also moved on behalf of the plaintiffs. Defendant no. 1 filed objections 26C with affidavit 27 C to the said application to which rejoinder affidavit 47 C was filed on behalf of the plaintiffs. The court of first instance on consideration of the material on record vide order dated 31.5.1990 disposed of the aforesaid ad-interim injunction application directing the defendants to maintain status quo with regard to the suit property till the disposal of the suit and further restrained them from interfering in the peaceful possession of the plaintiffs over it. The said injunction order attained finality as it was not assailed by any one.

6. The suit was contested by defendant no. 1 Asadullah by filing a written statement. In the written statement which was filed on 5.12.90 he denied the plaint allegations and claimed that on the death of her mother Khatoon Jannat Bibi he became the exclusive owner of the disputed property. He contended that the suit for injunction in respect of bhoomidhari land is barred by Section 331 of U.P. Z.A. & L.R., Act and is not maintainable before the civil court. The suit is also barred by Section 41(h) of the Specific Relief Act. The plaintiffs have wrongly impleaded defendant no. 2 in as much as he has no concern with the disputed property so long as defendant no. 1 who is his father is alive. Defendants no. 2 and 3 have wrongly been impleaded in the suit. It was also contended that no oral gift as alleged was ever made by Khatoon Jannat Bibi and that she had only life interest in the said property by virtue of the registered will dated 11.5.1923 executed by her father Nabi-Ullaha whereafter the property was to devolve upon the male lineal descendants of Nabiullah. Since Waliullah, the only male issue of Nabiullah had died leaving no son, the property in its entirety devolved upon defendant no. 1 exclusively.

7. No written statement was however filed either by defendant no. 2 Samiullah or defendant no. 3 Ram Chandra Yadav.

8. During the pendency of the suit plaintiffs moved application 68 C purported to be under Order VIII Rules 5 and 10 CPC for pronouncement of the judgment against defendant no. 2 who failed to file written statement within the time stipulated under Order VIII Rule 1 CPC. This application was allowed by the court of first instance vide order dated 5.8.1991 and the suit for permanent injunction was decreed against defendant no. 2 only. It however, continued as against defendant no. 1 and a date for framing issues was fixed.

9. On the basis of the written statement filed by defendant no.1 the Court on 10.10.1991 framed as many as 11 issues including the following prominent ones:-

"1. ????? ?? ?? ?????? ?? ?????????????? ????????? ??
???????? ?? ?

2. ??? ????????? ?? ????????? ????????? ?? ????????? ?????, ?????
????? ??? ?????? ?? ????????? ????????? ??.

3. ????? ??????????? ?? ????????? ??????????? ?? ????????? ??????, ?????,
????? ? ?????? ?? ????????? ????????? ???

4. ????? ??????????? ?? ??????????? ??01 ?? ????????? ??????? ??????????
????????? ????? ?? ????????? ????????? ???

5. ????? ?????? ?????? ????? ??? ?????? ??????????? ?? ?????????? ??? ???
?????? ????????? ?? ?????? ?? ?????? ?????? ?????? ?? ????????? ???

6. ????? ?????? ?????? ????? ?? ????????? ?? ?????? ?? ??? ?????? ?????? ?????
???

7. ????? ??????????? ?? ??? ??? 41 ????????? ????????? ??? ?????? ?? ??????
???"

10. Defendant no. 1 died on 15.7.1995 and his two sons Samiullaha defendant no. 2 and Faridullaha probably considering themselves to be the owners of the property by inheritance, transferred the disputed property vide sale deed dated 3.11.1997 in favour of the present petitioners Shabbir Ahmad, Subhan Ahmad and Irafn Ahmad.

11. It may be noteworthy that the original suit had remained pending against defendant no.1 without getting his heirs and legal representatives substituted despite his death on 15.7.1995. Initially an application for substitution was moved which was followed by another on 20.12.2007 with the prayer that the earlier application be treated as amended and that the name of the deceased defendant no. 1 be expunged. However, no final orders on any of the above applications were passed either way. The suit as such was dismissed on 27.4.2009 as abated.

12. In the meantime, plaintiffs on 16.12.1997 applied for execution of the alleged judgment, order and decree dated 5.8.1991 which was passed against defendant no. 2 arraying the petitioners as opposite parties and describing them to be the decree holders. This execution came to be registered as execution case no. 58 of 1997. It was prayed therein that the defendant no. 2 Shamiullaha and the petitioners be punished for flouting the decree of injunction; the sale deed dated 3.11.1997 be declared invalid; and to hold that it is not binding upon the plaintiffs.

13. In the execution petitioners were called upon to file objections which they did file under Section 47 CPC alleging that order dated 5.8.1991 is neither a judgment nor a decree. In any case, the said decree is a nullity as it has been passed without jurisdiction and can not be executed. Further, it can not be executed against the petitioners as they were not parties to the suit and the said decree was not against them. Various other objections were also taken.

14. The executing court vide judgment and order dated 19.3.2008 dismissed the execution case holding the decree to be a nullity and un-executable.

15. Aggrieved, plaintiffs preferred a revision no. 15 of 2008 which has been allowed vide judgment and order dated 21.2.2009 with the direction to the executing court to proceed with the execution treating the objections of the

petitioners under Section 47 to be not maintainable.

16. The aforesaid judgment and order of the revisional court is under challenge in the present writ petition.

17. The writ petition after exchange of necessary pleadings had come up for consideration before me by the nomination made by the Chief Justice on 9.9.2010.

18. Counsel for the parties agree for the final decision of the writ petition on merits at the stage of admission itself.

19. Submissions of the parties:-

20. I have heard Sri V.K. S. Chaudhary, Senior Advocate and Sri B. Malik, learned counsel appearing for the petitioners as well as Sri V.B. Upadhya, Senior Advocate assisted by Sri Ashutosh Srivastava, learned counsel appearing for the contesting respondents no. 2 and 3 ie., the plaintiffs.

21. Sri V.K.S. Chaudhary has submitted that the decree sought to be executed is without jurisdiction and a nullity. According to him, the suit could not have been decreed against the defendant no. 2 for non filing of written statement when defendant no. 1 was contesting the suit and had already filed a written statement denying the plaint allegations. The alleged judgment and order dated 5.8.1991 decreeing the suit against the defendant no. 2 is no judgment in the eyes of law and as such there is no valid executable decree. He further submits that the suit for prohibitory permanent injunction was not maintainable in the civil court as it involved bhoomidhari land and the plaintiffs were not its recorded tenure holders. On the death of Khatoon Jannat Bibi on 8.1.1990 defendant no. 1 had applied for mutation which was allowed on 20.10.1997. The names of the present petitioners were also mutated on 30.6.2004 after they purchased the suit property. In this way, plaintiffs never came to be recorded against the suit property. It was accordingly barred by Section 331 of the U.P. Z.A and LR Act and therefore the Court was not competent to decree the suit against defendant no. 2 without deciding the question of jurisdiction.

22. Sri V.B. Upadhyaya, Senior Counsel rebutted the aforesaid submissions made by Sri Chaudhary and submitted that the plaintiffs are the owners of the suit property by virtue of the 'hiba' ie oral gift dated 16.8.1988 made by their great grand mother Khatoon Jannat Bibi. The order of mutation dated 30.10.1997 made in favour of defendant no. 1 has been recalled on their application vide order dated 21.4.1998. The factum of oral gift is proved by the memorandum dated 23.8.1988 as well as by the affidavit of Khatoon Jannat Bibi which was filed by the plaintiffs in support of their application to recall the mutation order dated 30.10.1997. The suit no.101/115 filed by defendant no. 1 under Section 229-B of U.P. Z.A and LR Act for declaring his rights over the suit property was dismissed on 27.2.1999. The defendants as such have no right, title or interest in the disputed property. In the suit interim injunction order was passed on 31.5.1990 and finally it was decreed as against defendant no. 2 on 5.8.1991. In the execution also an interim order was passed on 16.1.1998 restraining the parties to the execution from transferring the suit property. The defendant no. 2 has made the transfer in favour of the petitioners vide sale deed dated 31.11.1997 in violation of the injunction orders and therefore the sale is void. The petitioners as such and even otherwise have no right to maintain objections to the execution of the decree passed against defendant no. 2. He further submitted that the petitioners themselves on purchase of the disputed property had filed suit no. 649 of 2004 for permanent injunction against the plaintiffs wherein initially ex-parte injunction with regard to possession was granted by the Court on 1.10.2005 but the same was set aside in Misc. Appeal vide order dated 20.4.2006. The appellate order has been affirmed, in as much as, writ petition no. 25203 of 2006 of the petitioners against the same was dismissed on 3.10.2006. Even SLP to the Supreme Court has failed. His further submission is that the plaintiffs have been dispossessed during the pendency of the proceedings in violation of the injunction orders and therefore in view of the order XXI Rule 32 CPC they are entitled to restitution of possession.

23. Points for determination:-

24. In view of the respective submissions made on behalf of the contesting parties two points for determination arise in this writ petition namely:-

i)Whether the petitioners who are subsequent purchasers of the suit property during the pendency of the execution have any right to maintain objections under Section 47 CPC against execution of the decree?; and

ii)Whether the judgment and order dated 5.8.1991 passed in purported exercise of power under Order VIII Rule 10 CPC decreeing the suit against defendant no. 2 alone is without jurisdiction and a nullity which is non-east and is inexecutable in nature?

25. Ancillary Point:-

Now before addressing the above two points, I consider it appropriate to first deal with an ancillary aspect as to whether the sale deed dated 3.11.1997 made by the defendant no. 2 Shamiullaha in favour of the petitioners is invalid or null and void as argued to be in breach of the injunction orders and within the teeth of Section 52 of the Transfer of Property Act, 1882.

26. It is true that any action taken subsequent to passing of an interim order and in disobedience of the same would be illegal and has to be treated as a nullity.

27. The suit was instituted on 27.1.1990 and an interim injunction order was passed therein on 31.5.1990 directing the parties to maintain status quo with regard to the suit property till the disposal of the suit and restraining the defendants from interfering in the possession of the plaintiffs. A perusal of the aforesaid injunction order dated 31.5.1990 does not indicate that any rider was placed upon any of the parties from alienating the suit properties. The suit for permanent injunction was decreed as against defendant no. 2 Shamiullaha, only vide judgment and order dated 5.8.1991. The said judgment and order restrains defendant no. 2 from interfering in the peaceful enjoyment of rights by the plaintiffs in respect of the disputed building, trees and other properties. Neither the said judgment and order nor the decree drawn on its basis puts any restriction on the rights of any of the parties to the suit in dealing with the disputed property or from transferring the same. Thus, the sale of the disputed property vide sale deed dated 3.11.1997 by defendant no. 2 Shamiullaha can not be said to be in violation of any injunction order.

28. The interim order dated 16.1.1998 passed in the execution proceedings do restrains the parties from making transfer of the property, but the said order was passed subsequent to the sale deed dated 3.11.1997 and would not affect the same. There was no such order of injunction in operation on the date of execution of the sale deed. As such, the aforesaid sale deed can not be held to be illegal or in violation of the above interim injunction order also.

29. Apart from the above, there was no order of injunction at any time against Faridullaha, the brother of defendant no.2 Shamiullaha as he was not a party to any of the proceedings. The sale of the property made by him jointly with defendant no. 2 on 3.11.1997 atleast to the extent of his share, if any, remains valid and can not remotely be said to be illegal or in disobedience of any of the above interim orders.

30. The reliance placed on a division bench decision of this Court 2003 (51) ALR 369 (Smt.) Savitri Devi v. Civil Judge (Sr. Division) and others to canvass that the sale deed is non est being in violation of the interim injunction order is therefore completely misplaced.

31. Undoubtedly, the properties in dispute were transferred in favour of the petitioners after the judgment, order and decree dated 5.8.1991 but before the movement of execution. It is said that the aforesaid transfer made during the pendency of the proceedings is hit by Section 52 of the Transfer of Property Act, 1882 and as such conveys no valid title to the petitioners.

Section 52 of the Transfer of Property Act provides that no property in respect whereof a suit or proceeding is pending can be transferred so as to affect the rights of any of the parties thereto except with the leave of the Court. Section 52 is quoted below:-

32. 52. 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 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.

Explanation:- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The aforesaid provision in no manner envisages that the sale made during the pendency of the litigation would be void or a nullity. It only puts an embargo upon such a sale by subjecting it to a decree passed or likely to be passed. The Apex Court in the case of **Nagubai Ammal and Others v. B. Shama Rao AIR 1956 SC 593** in paragraph 24 in respect of a sale made pendente lite observed that "the effect of Section 52 is not to wipe it out altogether but to subordinate it on the rights based on the decree of the suit."

33. It may be noted that the executing court has returned a finding that petitioners are the bonafide purchasers in good faith of the suit property and the said finding has not been reversed.

34. In view of the aforesaid facts and circumstances, the submission of Sri Upadhya that the sale deed dated 3.11.1997 is a nullity and the petitioners have no right on its basis to object to the execution of the decree has no legs to stand

and fails.

35. Point No. 1:

Now falls the first point for consideration. It is about the maintainability of the objections to the execution by the petitioners who are subsequent purchasers of the property jointly from one of the judgment debtors and his brother who was not the party to the suit and the decree.

36. In this context, it would be beneficial to refer to Section 47 C.P.C. which provides for the execution of the decree and the matters to be determined by the Executing Court. It provides that all questions regarding execution, discharge or satisfaction of the decree between parties or their representatives to the suit shall be determined by the executing court including the question as to whether a person is or is not a representative of a party.

37. Relevant portions of Section 47 C.P.C. for the sake of convenience are reproduced herein below:-

Section 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) Omitted by Act 104 of 1976 (w.e.f. 1-2-77).

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

Explanation-I

Explanation II

(a).....

(b).....

38. The aforesaid provision lays down that questions concerning execution, discharge or satisfaction of a decree between the parties to the suit or their representatives shall be decided by the executing court and it would not be necessary to institute any separate suit in this regard. Therefore, it is not only the parties to the suit but their representatives also that can raise question with regard to executability, discharge or satisfaction of a decree.

39. In addition to it, Section 146 CPC makes provision for initiation of proceeding by or against 'representatives'. It reads as under:-

146. Proceedings by or against representatives:-

" Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

40. The aforesaid provision also authorises any person claiming under a party to any proceeding to take proceeding or to make an application and to defend himself.

41. The term 'representative' as such is of a very wide connotation and includes within its ambit one who represents another as agent delegate, substitute, successor or heir. Even a solicitor, executor and administrator and at times the next of kin or the guardian of a minor or of a lunatic or idiot are also included in the term 'representative'.

42. According to Law Lexicon The Encyclopaedic Law Dictionary by P Ramanatha Aiyar 1997 Edition 'representative' is a person in whom the interest of a party to the suit has vested either by an act of the party or by an operation of law.

43. Interest of the party to the suit get vested in another party by operation of law either on account of merger or demerger of interest or insolvency, forfeiture or by

testamentary or intestate succession. On the other hand, vesting of interest of a party in another person by an act of the party takes place by transfer of interest in the property by the execution of an instrument of transfer which obviously includes a sale deed.

44. Thus, broadly, the test is to see if any portion of the interest of the decree holder or the judgment debtor vests in a person who is sought to be treated as a 'representative' by the act of the parties or by operation of law.

45. It may be noted that the term 'representative' is much wider in sense than the expression 'legal representative' as contained in Section 2 (11) read with Section 50 CPC or an 'assignee' referred to in order XXII Rule 10 CPC.

46. The definition of a 'legal representative' under Section 2(11) refers to a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. The very language employed in the aforesaid Section 2(11) of C.P.C. makes it clear that the expression 'legal representative' is used in connection with a deceased person and as such impliedly excludes from its ambit anyone who may be representing a living person.

47. The petitioners are not claiming through any deceased person and as such would not certainly be covered by the definition of a 'legal representative' as contained in Section 2(11) CPC.

48. The petitioners are not even 'assignees' of any right of the judgment debtor within the meaning of Order 22 Rule 10 C.P.C.

49. Admittedly, petitioners were not party to the injunction suit wherein a judgment and order dated 5.8.91 was passed against defendant no.2 Samiullaha restraining him from interfering in the possession of the plaintiffs over the suit property and a decree had been drawn accordingly. Even the decree does not contain the names of the petitioners. They have purchased the property from defendant no.2 Samiullaha and his brother Faridullaha subsequent to the aforesaid decree vide

sale deed dated 3.11.97. In this way, the petitioners are claiming rights in the suit property through one of the judgment debtors defendant no.2 Samiullah as well as independently from his brother Faridullah which is an act of one of the party to suit in the shape of a sale deed.

50. Thus, the question which acquires importance is whether the petitioners on the basis of the aforesaid sale deed are representatives of the judgment debtor defendant no.2 Samiullah within the meaning of Section 47 C.P.C., read with Section 146 CPC so as to entitle them to oppose the execution of the decree independent of their rights claimed through Faridullah.

51. A Division Bench of the Calcutta High Court in the case of Nishi kanta Shaha Mondal and others vs. Prem Nath Rai and others AIR 1934 Calcutta 145 held that a lessee inducted on the land by the judgment debtor is a representative of the judgment debtor within the meaning of Section 47 C.P.C.

52. Their Lordships of the Allahabad High Court in the case of Ram Autar Sahu and others vs. B. Bate Krishna and another AIR 1936 Allahabad 479 laid down that persons taking a subsequent mortgage during the pendency of the suit on the mortgagee are representatives of the said mortgagee (judgment-debtor) within the meaning of Section 47 of C.P.C. and can be impleaded as party in the execution proceedings.

53. A Full Bench of the Allahabad High Court in the case of Gulzarilal vs. Madho Ram (1904) ILR 26 Allahabad 447 (FB) held that an auction purchaser at a sale held in execution of simple money decree against a judgment debtor whose property is ordered to be sold in a mortgage suit is a representative of a judgment debtor and that the term representative used when taken in reference to the judgment debtor does not mean only his legal representative, that is his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest who so far as such interest is concerned, is bound by the decree.

54. A similar view was expressed by the Privy Council in the case of Parmeshari Din v. Ram Charan AIR 1937 PC 260 and it was held that a transferee of the

defendant pendente lite is a representative of the defendant and that being so the decree passed against such a defendant must be enforced against him in execution and not by a separate suit.

55. A Full Bench of Lahore High Court in *Bhiku Mal V. Firm Ram Chandra and Babu Lal* AIR 1946 Lahore 134 on interpretation of word 'representative' as occurring in Section 47 CPC held that a purchaser in a private sale of property under attachment from judgment debtor is a representative of the judgment debtor under Section 47 of the Civil Procedure Code. The question whether an attached property in his hands is liable to be sold in execution of decree must be determined by the executing court and a separate suit for determination of such question is barred by Section 47 C.P.C.

56. A plain reading of all the aforesaid authorities would lead to an inevitable conclusion that a subsequent purchaser of the suit property from the judgment debtor would certainly be a 'representative' of the said judgment debtor for the purposes of execution of the decree and would be covered by Section 47 C.P.C. However, to resist such a conclusion Sri V.B. Upadhyaya had relied upon certain authorities and his submission is that the petitioners have no right to raise any objection against the execution of a decree being the purchasers of the said property when the judgment debtor himself has not come forward to object the same.

57. The first case relied upon by him is the case of *Hanuman Bux vs. Deodatt and others* 1981 Allahabad Civil Journal All.C.J. 83. In the said case the execution of a decree was resisted on behalf of judgment debtor by the purchaser, who had purchased it subsequent to the attachment before judgment. The objections were rejected and the appeal was also dismissed. In execution second appeal, the argument advanced was that the purchaser was a representative of the judgment debtor and as such his objections were maintainable. The learned Single Judge dismissing the execution second appeal held that since it was not a case of assignment under Order 22 Rule 10 C.P.C., the appellant(purchaser) cannot be held to be an assignee of the judgment debtor. However, no particular reason other than that he was not a assignee was recorded to hold that the objections

were not maintainable. The Court refrained itself from deciding as to whether the subsequent purchaser from the Judgment debtor was his representative or not. In this view of the matter the aforesaid authority is not a precedent on the aspect as to whether a subsequent purchaser of the interest of the judgment debtor would be a representative or not for the purposes of Section 47 of C.P.C.

58. The other authority in this connection relied upon by Sri Upadhyay in the case of Basappa Budappa Hallvallad vs. Bhimangowda, Shiddangowda Patil AIR 1928 Bom. (65). In the aforesaid case a division bench of the Bombay High Court laid down that transferees pendente lite are not 'representatives' of the transferor within the meaning of Section 47 C.P.C. for the purposes of attacking the decree. I am afraid the aforesaid ratio of law laid down by the Division Bench of the Bombay High Court is no longer a good law. It has been overruled by the another Division Bench of the Bombay High Court itself in the case of Gopal Sattu Tippe v. Dnyanu Maruti Khade AIR 1938 Bombay 367.

59. In the case of Government of Orissa vs. Ashok Transport Agency and others (2005) (1) SCC 536, the Apex Court was considering a question relating to the recovery of a certain amount in respect whereof the suit of the plaintiff M/s Ashok Transport Agency was decreed against OMC Alloys Ltd. which during the pendency of the suit was dissolved and was taken over by the Orissa Mining Corporation Ltd. by operation of law and was subsequently transferred to the Tata Iron Steel Company. The Supreme Court dealing with the provisions of Order 22 Rule 10 C.P.C. observed that normally it is for the assignee or the transferee to come on record and to defend the suit but where the suit is allowed to proceed and decreed against the assignee, the said decree would be binding and enforceable against the assignee also and thus refused OMC permission to challenge the executability of the decree. In the said case the Apex Court was not called upon to determine whether the alleged assignee was a representative or not of the judgment debtor as contemplated by Section 47 C.P.C. In fact neither any such point of the assignee being a representative of the judgment debtor was raised or decided. Thus the aforesaid authority would not be applicable as a precedent to hold that the petitioners herein would not be the representatives of the judgment debtor entitled to file objections to the execution.

60. Reliance placed upon AIR 1969 Patna 265 Yogeshwar Prasad Singh and others vs. Jiyal Chaudhary and others, 1985 Allahabad Law Journal 281 Mahfooj Ali Khan and others vs. Additional District Judge Rampur and others, 2001 Allahabad Civil Journal 683 Jai Prakash Agarwal vs. Arjun Agarwal, 1993 (2) AWC 826 Abdul Aziz and another vs. District Judge Rampur and others, 1997 ACJ 856 Alhah Dee vs. Civil Judge, Moradabad, 1981 ARC 75 Arjun Lal and others vs. 3rd ADJ Saharanpur and others and 1981 ARC 75 Arjunlal and others v. 3rd ADJ and others is totally misplaced and is of no help to the respondents. In all the aforesaid cases their Lordships of the High Courts only laid down that a person other than judgment debtor is not entitle to file objections to a petition under Section 47 C.P.C. None of the said authorities contemplates a situation where a person happens to be a representative of a judgment debtor. It has not been laid down in any of the above authorities that a 'representative' is also not entitle to maintain the objections. Representative of a judgment debtor in fact acts on behalf of the judgment debtor and would be clearly covered under Section 47 C.P.C.

61. The last authority relied upon by Sri Upadhyay is 2008(7) SCC 144 Usha Sinha vs. Dinaram and others and it has been contended that purchaser of the property during the pendency of the litigation has no right to resist or obstruct execution of decree passed by the competent Court. A careful reading of the aforesaid authority would reveal that the Supreme Court on the principle of justice, equity and good conscious held that a transferee of a judgment debtor is presumed to be aware of the proceeding of the court below and in view of the doctrine of lis pendense enshrined under Section 52 of the Transfer of Property Act obstruction to a decree by such purchaser under Order 21 Rule 102, 97, 98 and 100 C.P.C. is not permissible. The Apex Court in the aforesaid decision again had no occasion to determine as to whether such a transferee was a representative of the judgment debtor as envisaged under Section 47 C.P.C., and is not entitle to file objections against the execution. Therefore, the aforesaid authority is also of no avail to the respondents.

62. On the contrary, in Rajkumar v. Sardari Lal and others (2004) 2 SCC 601 their Lordships of the Supreme Court construing the scope of Section 146 CPC held that a lis pendens transferee though not arrayed as a party is still a person

claiming under the transferor. It was also laid down that the provisions of Section 146 CPC are beneficial in nature and should be construed liberally and such a lis pendens transferee would be entitled to prefer an appeal as his predecessor-in-title. It was further held that he can even avail of the remedy under Order 9 Rule 13 CPC against an ex-parte decree passed against his predecessor-in-interest as he actually steps into his shoes.

63. In view of the above legal position, the petitioners can certainly be described as 'representatives' of the defendant no. 2 Shamiullah and are entitled to oppose the execution as would have been done by their predecessor-in-interest.

Section 47 (3) CPC specifically provides that the question whether a person is a representative of a party to the suit or not shall be determined by the executing court.

64. In *Shalig Ram Bhagoo Kunbi and another v. Mst. Dhruhati* AIR 1939 Nagpur 147 it has been held that a question whether a person is or is not a representative of a party to a decree must be decided by the executing court and not in a separate suit and once decided, it becomes final.

65. This Court in *Babu Lal v. Janak Dulari and another*, AIR 1926 All. 681 has held that the provisions of Section 47 makes it quite clear that the question whether or not an alleged legal representative does or does not occupy capacity so as to be bound by the decree is one which is to be decided by the execution Court, as it does not offend against a principle that an executing Court can not go behind the decree.

66. In the case of *Gangabai Gopal Das Mohata v. Fulchand and others* AIR 1997 SC 1812, the Supreme Court while considering the provisions of Section 47 CPC ruled that where someone claims to be 'representative' of decree holders interest and the same is disputed, it is for the executing court to resolve the controversy.

67. In the instant case, the petitioners were called upon by the executing court to file objections on the execution application of the plaintiffs, if so desired. Accordingly, objections about the executability of the decree were raised by the

petitioners. On the objections so filed, the executing court in its order dated 19.3.2008 recorded a clear finding that the petitioners are the representatives of the judgment debtor ie., defendant no. 2 Shamiullaha and as such are entitle to maintain objections under Section 47 CPC.

68. The executing court has determined the said issue and held the petitioners to be the representatives of the judgment debtor. The aforesaid finding of the executing court has not been up-setted by the revisional court.

69. In view of the above, the finding of the executing court that the petitioners are the representatives of the judgment debtor ie., defendant no. 2 Shamiullaha attains finality.

70. Apart from the above, the plaintiffs themselves described the petitioners as judgment debtors while moving the execution application and have attempted to execute the decree against the defendant no. 2 Shamiullaha and against the petitioners as well. The Court is conscious that by mere such description petitioners do not acquire the status of judgment debtor but the very fact that the plaintiffs want to execute the decree against the petitioners who are the subsequent purchasers of the property from the judgment debtor indicates that atleast they also treat the petitioners to be the representatives of the said judgment debtor.

71. Above all it would be necessary for the observance of principles of natural justice to accord the petitioners against whom the decree is sought to be executed an opportunity of hearing by allowing them to file of objections opposing the execution.

72. It must be kept in mind that the decree herein is that of permanent prohibitory injunction. Such a decree of injunction actually does not run with the property but with the person concerned ie., against whom it has been passed. Thus, normally such a decree cannot be implemented against a person who is not a party to the suit or against whom the decree has not been passed except in cases where any person happens to be the representative of the judgment debtor. Accordingly, if such a decree can be enforced against the petitioners as representatives of a

judgment debtor then such representatives are logically entitle to object to its execution.

73. The submission that the petitioners may be the 'representatives' of defendant no. 2 Shamiullaha (judgment-debtor) for a limited purpose of implementing the decree but can not be recognized as 'representative' of the said judgment debtor so as to enable them to file objections under Section 47 CPC is on the face of it mis-conceived and can not be accepted. Once the petitioners are held to be the 'representatives' of the judgment debtor, they would step into his shoes and would be representing him and if necessary would also be opposing the execution. No different standards can be applied to 'representative' of a judgment debtor one for the purposes of execution and the another enabling filing of objections to execution.

74. Accordingly, for all practical purposes when the decree is being sought to be executed against the petitioners, they are entitle to oppose it by filing objections as they have entered into the shoes of one of the judgment debtor.

Point No. 2

75. Sri V.K.S. Chaudhary addressing the Court in respect of second point argued that when one of the defendants to the suit had already filed a written statement, the court could not have decreed the suit against another defendant who had not filed written statement. The only option open for the court was to proceed under Order IX Rule 11 CPC. Secondly, merely for the reason that written statement was not filed by defendant no. 2 the court could not have decreed the suit against defendant no. 2 without deciding the lis between the parties which in a suit for injunction happens to be title of the parties and the possession. The alleged judgment and order dated 5.8.1991 passed against defendant no. 2 does not fulfil the requirements of a judgement as contained under Section 2(9) read with Order XX Rule 4 (2) CPC and as such there is no executable decree as contemplated by Section 20 (2) CPC. Moreover, the alleged judgment, order and decree is a nullity and non-east as the civil court lacked inherent jurisdiction to try a suit in respect of an agricultural land that too at the behest of persons who never came to be recorded in the revenue records. In reply Sri V.B. Upadhyya, learned counsel for

the respondents no. 2 and 3 contended that the court is very much invested with the power to pronounce judgment in exercise of powers under Order VIII Rule 10 CPC, in the event of failure of any of the parties to the suit to file written statement and a decree is liable to be drawn accordingly. Admittedly, defendant no. 2 Shamiullaha had not filed written statement within the time stipulated and therefore the court was well within its jurisdiction to decree the suit against him treating the averments made in the plaint to be admitted. The executing court can not go behind the decree and has to execute the same as it is. He further submits that the civil court had the jurisdiction to try the suit in question which involved properties not only agricultural in nature but also in the shape of abadi/khandhar.

76. In view of the aforesaid submissions on point no. 2, I consider it convenient to divide the aforesaid point into three parts namely;

- i) Whether under the facts and circumstances the court would have passed the decree under Order VIII Rule 10 CPC against defendant no. 2 Shamiullaha?
- ii) Whether the judgment and order dated 5.8.1991 decreeing the suit against defendant no. 2 Shamiullaha is a judgment-debtor within the meaning of Section 2(9) Order IV Rule (2) CPC and is executable? and
- iii) Whether the judgment, order and decree aforesaid is without jurisdiction and a nullity?

77. A plain reading of Order VIII Rule 1 CPC makes it clear that the defendant to the suit is supposed to file his written statement of his defence within 30 days of the service of summons upon him. The said time provided for filing written statement is extendable for a further period but not exceeding 90 days at the discretion of the Court for reasons to be recorded.

The provisions of Order VIII Rule 1 CPC are reproduced herein below:-

1. Written Statement-

"The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons"

78. The purpose of the aforesaid provision is to ensure speedy disposal of suit and to avoid delay at the behest of defendant to the suit. However, the outer period of 90 days provided in the aforesaid provision is not absolute despite the use of the word 'shall' therein and is only directory vide AIR 2005 SC 2441 Kailash v. Nankhu and others. It has been held by the Supreme Court in the case of R.N. Jadi and Brothers v. Subhash Chandra (2007) 6 SCC 420 that the aforesaid rule though couched in the language as if it is mandatory but is discretionary in nature. It has further been observed that as it is a procedural law it is only handmaid of justice and the court must always be anxious to do justice by preventing victories by way of technical knockouts. Accordingly, the court has ample power in a given case to permit the defendant in a suit to file his written statement of defence even beyond the period fixed by the aforesaid provision provided said discretion is exercised keeping in mind the sound judicial principles and one of them being to accord sufficient opportunity on merits instead of shutting doors on technicalities.

79. Rule 5 of Order VIII CPC provides that plaint allegations, if not denied or if not denied specifically and where the defendant fails to file his written statement of defence shall be taken to be admitted and it shall be lawful for the court to pronounce judgment on the facts contained in the plaint. However, the above power of making a judgment in the absence of written statement of the defendant is not absolute and it has been left to the discretion of the Court, in as much as, even the admitted facts contained in the plaint may be required to be proved by the court before proceeding to pronounce judgment.

A similar provision enabling the court to pronounce judgment against defendant on failure to file written statement of his defence within the time fixed or provided by the court is contained in Rule 10 of Order VIII CPC. Even in this rule a discretion is given to the court either to pronounce judgment in the event written statement is not filed or to make another order as may be considered fit.

80. In both the situations contemplated by Rule 5 and 10 of Order VIII CPC for pronouncing judgment, it has been provided that a decree shall follow such a judgment.

For the sake of convenience the provisions of Rule 5 and 8 of Order VIII CPC are reproduced below:-

Rule 5- Specific denial-

1. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

2. Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

3. In exercising its discretion under the provision to sub-rule (1) or under sub-rule (2), the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

4. Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such

decree shall bear the date on which the judgment was pronounced."

Rule 10- Procedure when party fails to present written statement called for by Court-

"Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up."

Rule 6 of Order XII CPC also authorizes the court to pronounce judgment on the basis of admission of the parties or to make another order as it may think fit.

81. The Order XII Rule 6 CPC read as under:-

6- Judgment on admissions-

(1)"Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub- rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

The aforesaid provision also enables the court to require even admitted facts of the plaint to be proved if so considered necessary by the court.

In line with the above provisions as contained in the Code of Civil Procedure, a reference to Section 58 of the Evidence Act, 1872 may also be relevant.

Section 58 of the Evidence Act reads as under:-

58- Facts admitted need not be proved:-

"No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings;

Provided that the Court may, in its discretion, require the fact admitted to be proved otherwise than by such admissions."

82. A combined reading of the aforesaid provisions reveal that it is not in every case that the court can proceed and pronounce judgment on the facts contained in the plaint or admitted for non filing of written statement or want of specific or vague denial. In other words, even where a plaint allegations are not specifically or impliedly denied, or there is failure on part of the defendant in filing his written statement, it is not imperative for the court to pronounce judgment treating those averments to be admitted and true.

83. There is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of plaintiff straight away because a written statement has not been filed or the plaint allegations have not been denied. These rules are only permissive in nature. They enable the court only in appropriate cases to pronounce judgment on the basis of plaint allegations and despite use of word 'shall' still leaves an option with the court either to pronounce judgment or to make such appropriate order as may be considered fit including directing the plaintiff to prove the facts stated in the plaint.

84. The basic principle that where a plaintiff comes to the court with certain allegations he must prove his case, should not be allowed to whittled down even in a case where no defendant appears or if appearing fails to file written statement or to adduce evidence. The elementary rule that the plaintiff must succeed on his own and not on account of weakness of the defendant must also be remembered.

85. In *Balraj Taneja and another v. Sunil Madan and another* (1999) 8 SCC 396 : AIR 1999 SC 3381, their Lordships of the Supreme Court while considering in depth the above very provisions of law laid down that the court is not supposed to pass judgment blindly or mechanically merely because a written statement has not been filed. In fact, the court has to be cautious and only on being satisfied that there is no fact which needs to be proved despite admission that it can proceed to pronounce judgment and not otherwise particularly where plaintiff itself indicates the existence of disputed questions of fact and the controversy is likely to remain alive.

86. A careful reading of the provisions of Order VIII Rules 1,5 and 10 CPC denotes that they only talk about a single defendant to the suit and not of several defendants. To put it differently, all persons contesting the plaintiffs claim appears to have been taken together as one defendant meaning thereby that all defendants have been put together in one docket as 'defendant'.

87. In contrast to the aforesaid provisions, Order IX CPC not only talks about a single plaintiff or a single defendant but also about more than one plaintiffs and several defendants. It provides for the procedure where one or more of several plaintiffs fail to appear and also where one or more defendants fail to attend the court.

88. Order XI Rule 11 CPC provides that in cases where there are more than one defendants and any of them fails to appear though the other appears, the suit shall proceed and it may be open for the court to make such order as may be considered fit in respect of non appearing defendant/defendants while pronouncing the judgment. The aforesaid Rule does not envisage pronouncement of judgment against the non appearing or non contesting defendant immediately. The reason is simple. There can not be multiple judgments in a single case as it may result in conflicting judgments.

In the instant case, undoubtedly a written statement of defence was not filed by the defendant no. 2 Shamiullah within the time stipulated or allowed by the court, but certainly a written statement of defence disputing the plaintiff allegations was on record on behalf of the defendant no. 1. In the circumstances, it can not be said that the averments made in the plaintiff remained un-controverted or stood admitted

to the defendants. The denial of the plaint allegations even by one of the defendants to the suit is sufficient to dispute the same requiring the said facts stated in the plaint be proved by cogent evidence. Thus, the present case despite non filing of written statement by defendant no. 2 was not a case where the plaint allegations stood admitted to enable the court to pronounce judgment treating the allegations to be admitted. In the circumstances, the proper course for the court would have been to proceed ex-parte under Order IX Rule 11 CPC as if the defendant no. 2 was not appearing and contesting or to make such other suitable order as may have been considered fit and proper in the facts and circumstances of the case.

89. It may be noted that even on pronouncement of judgment against defendant no. 2, the controversy involved in the suit would have remained alive as defendant no. 1 was contesting and in fact it had remained alive which could have resulted in a contrary decision.

90. Accordingly, in my opinion the civil court not only committed manifest error of law in decreeing the suit against defendant no. 2 Shamiullah for non filing of the written statement but also exceeded its jurisdiction in doing so. It had no authority in law to decree the suit against one of the defendants in exercise of power under Order VIII Rule 10 CPC and that too without adjudicating the controversy involved when the written statement of the other defendant was on record. Accordingly, judgment and order dated 5.8.1991 and the decree drawn on its basis is beyond the jurisdiction.

91. Now the second aspect of point no. 2 above.

The entire judgment and order dated 5.8.1991 by which the suit for permanent prohibitory injunction was decreed against defendant no. 2 Shamiullah and was allowed to continue against the other defendants is extracted below:-

"68-C application moved by the plaintiffs under Order-8 Rule -5 (2) &(3) read with Rule 10 CPC. According to the plaintiff, Samiullah son of Asad Ullah Kazmi, defendant no. 1 has been impleaded as

defendant no. 1 as he was also threatening to encroach the right of plaintiff in the disputed property. He appeared through counsel and moved application and has also filed affidavits 50-C & 57-C but he failed to file any written statement. It is clear that so many date has been given for written statement and lastly it was 29.4.91, which was fixed for written statement and for issues, but the defendant has not filed written statement and on this ground the plaintiff has moved the above application 68-C.

The learned counsel for the plaintiff has argued that he has appeared through counsel and enough time has been given to him calling upon him to file the written statement, but he failed to file written statement. The case is covered by Order-8 Rule 10 CPC. The defendant no. 2 remained absent. In view of the above, I am of the opinion that it is fit case to proceed under Order-8 Rule 10 CPC.

Accordingly, the suit of the plaintiffs is decreed under Order-8 Rule 10 CPC with cost against the defendant no. 2. The defendant no. 2 is restrained not to interfere in the peaceful right and enjoyment of the plaintiff in respect of the disputed building, trees and other properties.

Fix 9.9.1991 for issues."

Sd/- illegible

Dated: 5.8.1991 (B.L. Pandey)

Civil Judge,

Allahabad.

92. A bare perusal of the aforesaid judgment and order clearly reveals that the suit has been decreed for permanent prohibitory injunction in relation to the suit property as against defendant no. 2 Shamiullah only for the lone reason that he had not filed written statement of his defence within the time provided and allowed

by the court. No other reason for decreeing the suit is contained in the said judgment and order. It does not even contain any finding with regard to title of the plaintiffs over the suit property or to the effect that the plaintiffs are in possession thereof which may entitle them to a decree of permanent prohibitory injunction. It is cardinal that to succeed in a suit for permanent prohibitory injunction the plaintiff must either establish title/proprietary rights over the suit property or prove possession over the same. The court has not found either the title of the plaintiffs or the possession of the plaintiffs proved over the suit property. Therefore, legally and logically the suit could not have been decreed without recording findings on the above aspects. In this view of the matter the question arises as to whether the aforesaid judgment and order is actually a judgment within the meaning of Section 2 (9) CPC read with Order 20 Rule 4 (2) CPC and the decree following it is executable.

93. It is well known that the trial of a civil dispute in a court of law is intended to achieve a judicial determination of the controversy between the parties according to law and the procedure prescribed. Such judicial determination of dispute is possible only if it is supported by cogent reasons recorded by the Judge. Recording of reasons is intended to ensure that the adjudication is not based on whims and fancies but upon the legal approach. It also envisages to inform the parties of the reasons behind such an adjudication and to facilitate the appellate court to know what actually weighed in the mind of the trial judge in taking a particular decision and to ascertain that the law was correctly applied to the facts of the case. Reasons are actually the links between the materials on which the decision is based and the actual conclusion leading to adjudication. They disclose the manner in which the mind is applied to the subject matter and reveal a rational nexus between the facts considered and the conclusions reached to show that the decision arrived at is just and reasonable.

94. In the case of Swarn lata v. Herendra Kumar AIR 1969 SC 1167 a claim for money was brought. The suit on contest, was decreed vide the following judgment and order:

"There will be a decree for Rs. 15,000/- with interest on the judgment on Rs. 15,000/- at 6 per cent per annum and costs. No interim interest allowed."

95. A decree was also drawn. The appeal to the High Court was also dismissed by a very short judgment.

When the matter reached Supreme Court, it was held the trial decreed the claim without delivering judgment and the High Court being a chartered High Court and a court of appeal may not be governed by the express provisions of CPC requiring recording of reasons for the judgment but the judicial propriety required the judgment to be speaking. The Court observed:-

"The function of a judicial trial is to hear and decide a matter contested between the parties in open court in the presence of parties according to the procedure prescribed for investigation of the dispute and the rules of evidence. The conclusion of the court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure."

96. The definition of the judgment as contained in Section 2 (9) CPC provides "a judgment to mean the statement on the ground a decree or order as given by the Judge". Therefore, statement/ ground which led to passing of the decree or order are mandatory for a valid judgment.

Order XX Rule 4 (2) CPC provides that the judgments of the court shall contain (i) precise statement of the case; (ii) points for determination; (iii) the decision thereon; and (iv) reasons for such decision. A valid judgment must conform to all the aforesaid essential elements. It is on the basis of a judgment conforming to the provisions of Section 2 (9) read with Order 20 Rule 4 (2) CPC that a decree can legally be drawn as defined under Section 2 (2) CPC containing the formal expression of the decision of the court.

97. The definition of a decree as contained in Section 2 (2) CPC is as under:-

(2)"decree means 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 and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation-

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

98. The Apex Court in AIR 2009 SC 1089 S. Satnam Singh v. Surender Kaur in paragraphs 14 and 15 observed as under:-

"14. A '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. It may either be preliminary or final. It may partly be preliminary or partly be final. The court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading up to the passing of an order. The circumstances under which an order had been made would also be relevant.

15. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

(i) There must be an adjudication;

(ii) Such adjudication must have been given in a suit;

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(iv) Such determination must be of a conclusive nature; and

(iv) There must be a formal expression of such adjudication."

99. It is well settled that even a judgment passed on the basis of admission made by the defendant, it should comply with the requirements which may constitute it to be a judgment so as to bring it in conformity with the definition of the judgement as contained in Section 2 (9) CPC and as indicated in Order XX Rule 4(2) CPC. Even a judgment pronounced under Order VIII Rule 10 CPC must satisfy the requirement of a 'judgment' as defined in Section 2(9) of the Code of Civil Procedure.

In the case of Balraj Taneja (Supra), the Supreme Court observed as under:-

"Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20 Rule 4 (2) which says that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment."

100. The Supreme Court therein further went on to add:-

" Even if the definition were not contained in Section 2 (9) or the contents thereof were not indicated in Order 20 Rule 4(2) CPC, the judgment would still man the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there can not be arbitrary orders. A Judge can not merely say "suit decreed' or "suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgment is glaring and for that reason also the judgment can not be sustained."

101. On a plain reading of the judgment and order dated 5.8.1991 it would be apparent that it does not determine the rights of the parties with regard to any matter in controversy in the suit and there is no adjudication. Thus, it does not satisfy two of the basic tests enumerated above which are necessary for drawing an executable decree.

102. In view of the above, the decree drawn on its basis is not in conformity with section 2(2) CPC and as such is inexecutable.

103. The executing court is a court having jurisdiction to decide above the executability of a decree. Whether a particular decision is simply an order or a decree and if decree whether it is capable of execution are all questions to be decided by the executing court and for that purpose the executing court can take into consideration the pleadings of the parties and the manner in which the decision has been made vide AIR 1960 SC 388 Topanmal Chhotamal v. Kundomal Gangaram.

104. The executing court without going behind the decree held it to be inexecutable. I concur with the opinion expressed by the executing court as I am of the view that the judgment and order dated 5.8.1991 passed by the civil court decreeing O.S. No. 58 of 1990 for permanent prohibitory injunction as against only one of the defendants ie., defendant no. 2 Shamiullaha is not a judgment within

the meaning of Section 2 (9) read with Order 20 Rule 4 CPC and as such the decree drawn on its basis is not legally valid which is capable of execution. Therefore, the revisional court below committed an error of law in holding otherwise and in reversing the finding in this regard as recorded by the trial court.

105. There may not be two opinions that where the court lacks inherent jurisdiction in passing a decree or making an order, such a judgment, order or decree would be a nullity and void ab initio rendering it to be inexecutable. It is also settled that such an objection as to the nullity of the decree or its executability can be raised by the parties at any stage even in the execution vide AIR 1954 SC 340 Kiran Singh v. Chaman Paswan.

106. Accordingly, the revisional court committed an error of law in reversing the finding of the executing court that the decree in question is inexecutable.

107. In view of my decision on sub points no. (i) and (ii) of point no. 2 aforesaid, I need not enter into any discussion with regard to sub point no. (iii) of point no. 2 as the writ petition is liable to succeed on the aforesaid finding alone.

CONCLUSION

In the end, I conclude as under:-

- (i) The sale deed dated 31.11.1997 transferring the suit property to the petitioners is not void;
- (ii) Petitioners are 'representatives' of defendant no.2 Shamiullah (judgment debtor) within the meaning of Section 47 read with Section 146 CPC entitle to oppose the execution of the decree in question;
- (iii) The court was not competent to pass any judgment and order decreeing the suit in exercise of power under Order VIII Rule 10 CPC as against defendant no. 2 only for non-filing the written statement when the written statement of defendant no. 1 was already on record; and

(iv) The judgment and order dated 5.8.1991 is not a judgment within the meaning of Section 2 (9) read with Order 20 Rule 4(2) CPC and the decree drawn on its basis is not in conformity with Section 2 (2) CPC and is not executable.

108. I would like to add that the decree passed against defendant no. 2 Shamiullah and sought to be executed against the petitioners as well is in the nature of permanent prohibitory injunction which is executable in the manner prescribed under Order XXI Rule 32 CPC. The said decree does not run with the property in dispute but against the judgment debtor or his representative. It does not adjudicate or declare the rights of the parties in respect of the suit property which are to be decided in appropriate proceedings. In this view of the matter, parties are set at liberty to get their rights/title over the suit property adjudicated by taking recourse to whatever legal remedy is available to them in law.

109. In view of the above discussion and the conclusions, the judgment and order dated 21.2.2009 passed by the revisional court in civil revision no.15 of 2008 is quashed/set aside with liberty to the parties to get their rights in respect of the properties appropriately adjudicated, if necessary, before the appropriate forum.

110. The writ petition is allowed with no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com