

Laxman Bhat Vs. Subbanna Bhat

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Court : Karnataka

Decided On : Mar-05-1987

Reported in : AIR1988Kant40; ILR1987KAR1195; 1987(1)KarLJ358

Judge : P.A. Kulkarni, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 60(I)

Appeal No. : Civil Revn. Petn. No. 1113 of 1985

Appellant : Laxman Bhat

Respondent : Subbanna Bhat

Advocate for Def. : A. Keshava Bhat, Adv.

Advocate for Pet/Ap. : M. Gopalakrishna Shetty, Adv.

Judgement :

ORDER

1. This is a revision. by the decree holder against the order dated 9-1 1985 passed by the Munsif, Karkala, in Execution Case No. 252 of 1982 dismissing the execution.

2. The decree holder filed O.S. No. 107 of 1978 against the defendant on the foot of the mortgage and obtained a preliminary decree on 31-8-1981 and thereafter obtained a final decree. As the judgment-debtor did not pay the money due under

the mortgage decree, the decree-holder sued out the present execution for the recovery of that mortgage amount by the sale of the mortgage property.

3. The judgment debtor contended that he was an agriculturist within the meaning of S. 60(I), C. P.C. and that the property brought to sale was his only residential house with the land appurtenant to it and that therefore it was not liable to be sold.

4. The said contention raised by the judgment-debtor appealed to the executing Court and it held that as undisputedly the judgment-debtor was an agriculturist, the only house belonging to the judgment-debtor was exempt from being sold under S. 60(I)(c), C.P.C. Taking this view, it dismissed the execution. Hence the revision.

5. The learned counsel Shri Gopalkrishna Shetty submitted that there was no evidence to show that the judgment-debtor was an agriculturist. But, it appears that a concession was made before the trial Court that the judgment-debtor was an agriculturist. After having made such a concession before the executing Court, it is now not open to the decree-holder's counsel to contend that the judgment-debtor had failed to show that he was an agriculturist. Even now it is not the case of the decree-holder that the judgment debtor has got any, other avocation in life except that of agriculture. Therefore, under these circumstances, the trial Court rightly held that the judgment debtor was an agriculturist within the meaning of S. 60(I)(c), C. P. C.

6. The most important question raised by Shri Gopalkrishna Shetty is that the exemption given under S. 60(I), proviso (c), C.P.C. did, not cover the sale of mortgaged 'property. He relied for that purpose on A. Nabisa Beevi v. The Manager, Canara Bank, Nagarcoil, : AIR1984 Mad249 . The Madras High Court held that the word or found in between the word 'attachment' and the word 'sale' in the proviso (c) to S. 60(I), C.P.C. means and therefore the exemption from sale would be available only in cases where both attachment and consequent We would take place. According to the Madras High Court, in the case of a mortgage decree, there is no question of attachment at all and therefore the exemption created by the proviso (c) to S. 60(I) will not be available in the case of a mortgage

decree.-The Madras High Court has stated in para 4 on page 251 as:-

'In S. 60(I), Civil Procedure Code, the expression 'decree' is used in a general sense without being in any manner restricted. In other words, the expression used is 'a decree' meaning thereby all kinds of decrees. But, at the same time, there is an indication in S. 60(I), Civil Procedure Code, regarding the nature of the decrees contemplated therein. It is seen that such types of decrees for the execution of which an attachment of the property and sale thereof is necessary, alone are contemplated and not other kinds of decrees. The proviso to S. 60(I), Civil Procedure Code, enumerates the different kinds of properties not liable to such attachment and sale. The use of the expression 'such' in the proviso indicates that the attachment or sale from which the exemption is granted relates to execution of a decree. Though the expression used between the words 'attachment' and 'sale' is 'or' in the context, that expression has to be construed as 'and', as otherwise, the exemption granted under the several clauses of the proviso will have no meaning at all. The proviso operates in the nature of an exception and catalogues such properties and rights not liable to attachment or sale or in other words, which are neither liable to an attachment nor sale.'

Though the word 'or' is found in between the words 'attachment' and 'sale' in the proviso, it will have to be read along with the words used in S. 60(I). The chapter starts with the heading 'Attachment. Section 60(I), C.P.C. reads as

'The following property is liable to attachment and sale in execution of a decree, etc.'

Therefore S. 60(I), C.P.C. contemplates both the case of attachment as well as sale. If there is no question of attachment, then the sale under S. 60(I), C.P.C. cannot be said to be prohibited at all. When the word 'and' has been used in S. 60(I), the Legislature will have to be credited with some wisdom and thus it will have to be held that the word 'or' was intended by the Legislature to be 'and'. In the case of a mortgage decree, there is no question of attachment at all. First a preliminary decree is passed calling upon the judgment-debtor to pay the money due under the decree by a particular time and failing which it is ordered that the property should be sold. It is a decree itself that orders the sale. There is nothing

like a separate request for sale to be made in the execution that is generally done in the case of other decrees for money.,

7. In *Rewati v. Chiranjilal*, AIR 1944 Lah 29, the word 'or' found in, the proviso (c) to S. 60(I), C.P.C. has been interpreted as 'and'.

8. The Bombay High Court in *Bhagvandas v. HathibliaL* (1879) ILR 4 Bom. 25, had an occasion to deal with S. 266 of the old Code of Civil Procedure, and held that that does not prohibit the sale of property specifically mortgaged albeit that the property be materials of a house belonging to or occupied by an agriculturist. The Bombay High Court has come to the said conclusion on the simple reasoning as :

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'We are of opinion that the sale of the house, under these circumstances (namely, that the decree directed that the debt should be recovered from the mortgaged property) should be made, for we cannot suppose that it was the intention of S. 266 of Act X of 1877 to prohibit the sale of property specifically mortgaged.'

9. Even the Allahabad High Court in *Mubarak Hussain v. Ahmed* : AIR1924 All328 , held that an agriculturist can make a valid mortgage of his house in execution of, which decree the house may be sold, and that. S. 60(I), Civil Procedure Code or the proviso there under could not be pleaded in bar. Similar view has been taken by Vivian Bose, J (as he then was) in *Ramadhin v. Sheodutt*, AIR 1938 Nag 544. Similar is the view taken by the Kerala High Court in *Kochumariam v. Kshema Vilasam Co.*, : AIR1974 Ker78 . Even in Mulla's C. P.C. 14th Edition, Vol. I, on page 393, it has been stated as :-

'In execution of a decree'. The expression 'decree' in this Section refers to a money decree, and not a mortgage decree, for attachment is not necessary in mortgage decrees. The result is that the exemptions from attachment and sale contained in the proviso to this Section do not apply to a mortgage decree for sale.' -

For that purpose, the learned author Shri Mulla has relied on *Mubarak v. Ahmad*, ELR (1924) 46 All 489 : AIR 1924 All 328 (FB); *Allabaksh v. Chetram*, 11LR (1945)

Lah 373: (AIR 1945 Lah 123) (FB).

10. The learned counsel Shri Keshava Bliat referred me to *Santha Kumaii v. Suseeladevi*, : AIR 1969 AP355 . It is no doubt a judgment rendered by the Division Bench. The Andhra Pradesh High Court has tried to interpret the word, 'or' in a sense that the word. 'attachment' is used distinctively from the word 'sale'. The said decision has proceeded rather on the basis of the public policy found in the society today. The Courts are not so much concerned with the public policy that might be prevalent in the society. The Court is bound to take into consideration the public policy or morality to the extent found in the provision made by the Legislature. The Court cannot impose its own sense of morality or its view of public policy on the litigant public. What might be moral according to one may not necessarily be moral in the view of another. What might be a matter of public policy according to one may not be a matter of public policy according to another. Therefore the basis of the decision of Andhra Pradesh High Court which has mostly been moulded on the basis of public policy, with all due respect to the Judges that decided it, cannot be accepted. The law on this point has been well settled ever since 1879. The law which has held the floor for more than 100 years, cannot be allowed to be upset under the guise of public policy. The litigant public is bound to know what is the exact position of law. The public cannot be allowed to gamble in litigation by putting separate interpretations at different times in order to achieve a so called public policy. Therefore to take any other view in the matter would be upsetting the law that has held the floor for last more than one century.

11. Therefore, the order passed by the Court below will have to be set aside and it is set aside. The revision is allowed. The execution is restored to file. The Court below is directed to proceed with the execution.

12. No costs in this revision.

13. Revision allowed.