

Sunder and ors. Vs. Sheo Dat Singh

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Court : Allahabad

Decided On : Oct-09-1936

Reported in : AIR1937All48

Appellant : Sunder and ors.

Respondent : Sheo Dat Singh

Judgement :

1. This is a judgment-debtors' appeal arising out of an execution proceeding. The property sought to be attached and sold is situated in Bundelkhand. It is an admitted fact that at the time when the mortgage decree was obtained the property was not saleable under the Bundelkhand Land Alienation Act of 1903. When an application for execution was filed the judgment-debtors, on 11th February 1927, objected that the property was not saleable. The Court upon that objection passed the following order:

The property is not saleable. In view of the ruling reported in Bishnath Singh v. Basdeo Singh A.I.R. 1925 Lah. 171, the decree for sale shall be modified. A receiver be appointed to realise the money out of the mortgaged property, subject to order about marshalling.

2. Obviously the Court held that the relief asked for by the decree-holder for the sale of the property could not be granted inasmuch as the property was not saleable, but substituted therefor a new relief for the appointment of a receiver, as

such appointment was permitted under the ruling of this Court. It cannot be doubted that the decree-holder's application for the sale of the property under the mortgage decree was disallowed and he could have preferred an appeal from that order. The order passed by an execution Court, allowing an objection is a decree within the meaning of Section 2, Civil P.C. Thereafter in 1926 the Bundelkhand Land Alienation Act was amended and a proviso was added to the old Section 16, under which under certain special circumstances the property can be sold to persons specified therein where a mortgagee has obtained or obtains a decree for sale. Accordingly the decree-holder applied afresh for the execution of the decree by sale of the mortgaged property. The Courts below allowed execution holding that the Amending Act 7 of 1929 had a retrospective effect. An appeal preferred to this Court has been dismissed by a learned single Judge.

3. The point that was argued before the learned single Judge was whether the previous order of the execution Court dated 5th September 1927 holding that the property was not saleable operated as *res judicata*. No other aspect of the question appears to have been argued before him. The learned Judge has rightly held that the previous order cannot operate as *res judicata* inasmuch as that order was tantamount to a decision that the property was not saleable under the law as it then stood, whereas the question that now arises is whether the property is saleable or not under the law as it stands now. There is however another aspect of the question, which has not been considered. The law was modified while the execution proceeding was pending, and after the judgment-debtors' objection had been allowed by the Court and the decree-holder's application for sale had been refused. The question is whether an Amending Act should affect an execution proceeding in such a way as to nullify the previous order passed *inter partes*.

4. It was laid down by their Lordships of the Privy Council in *Colonial Sugar Refining Co. Ltd. v. Irving* (1905) A.C. 369, which was re-affirmed by their Lordships in *Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner, Delhi*, that unless it was expressly so provided, a new Act cannot deprive a litigant of a substantive right which he had acquired before. A right of appeal to a particular forum was considered by their Lordships to be a substantive right and was held not to have been lost as a result of the change in the enactment. This

case was of course followed by a Full Bench of this Court in *Ram Singha v. Shankar Dayal* : AIR1928 All437 it was observed:

It is admitted that there is nothing in the new Tenancy Act expressly providing that it shall affect all pending actions, or that it shall have retrospective effect. If therefore the right of appeal was a substantive right and not a mere matter of procedure, it could not be taken away by the new Act. On the other hand, if it merely involved a question of procedure, that right may have been destroyed.

5. Following the ruling of the Privy Council, the test laid down was as to whether the right claimed was a substantive right or a mere matter of procedure. In the former case without express mention the substantive right could not be taken away by a new Act. This rule was applied by another Full Bench of this Court in a case which was much weaker than the present one see *Rak Karan Singh v. Ram Das Singh* : AIR1931 All635 . In that case it was held that if a tenant had been dispossessed before the new Tenancy Act and the cause of action had accrued before that Act came into force, then he was entitled to institute a suit in the civil Court within 12 years of his dispossession, notwithstanding the provisions in the new Act that the forum should be the revenue Court and the suit should lie within six months only.

6. The Full Bench also held that the law governing the substantive rights of the parties would be the law which was in existence at the time of the institution of the suit. The language of the proviso which has been added to Section 16 no doubt shows that it would be applicable to a case where the mortgagee has obtained or obtains a decree for sale. But the language does not expressly say that it would be applicable to execution proceedings pending at the time in which orders have already been passed in favour of the judgment-debtors. There is the general principle embodied in Clause (6), U.P. General Clauses Act, under which also without an express mention a right which has accrued or liability incurred cannot be taken away by any enactment.

7. In the present case the execution Court had actually decided that the property was not saleable and had disallowed the decree-holder's prayer to that effect. There was accordingly a decision which had become final as no appeal had been

preferred which laid down as between the parties that the property entered in the decree was not saleable and, therefore, the decree-holder was not entitled to realise his money by sale of that property. It seems to us that the right acquired by the judgment-debtor, which was a protection against him, must be regarded as a substantive right and not a mere matter of procedure and the order in his favour was, therefore, an adjudication between the parties that such right was vested in the judgment-debtor. The question was not merely whether one Act applies or the other, but the question was whether the property in dispute was saleable or not, and the decision went against the decree, holder. We do not think that in view of the pronouncements of these Full Benches, we should hold that the effect of the new enactment is to reverse that order inter partes and put an end to it and make the property available afresh to the decree-holder in spite of that order, which has become final. There are no express words in the Amending Act which would show that orders which have already been passed previously can be set aside. When the decree-holder obtained his mortgage-decree, he really did not acquire any substantive right to sell the property, because the law was against him. On the other hand, the order of the execution Court refusing execution, so far as the sale was concerned, was an order in favour of the judgment-debtor under which he acquired a substantive right. We do not think that the effect of the Amending Act is to undo what was already done by the execution Court, and to deprive the judgment-debtor of his right which he had acquired under that order which had become final. We think that it -would be consistent with the view expressed by the Full Bench of this! Court to hold that the rights acquired by the judgment-debtor under the previous order of the execution Court are not affected by the new enactment. This, of course, does not prevent the decree-holder from executing his decree by realization of profits through the receiver, if such' application can lie and is not barred by time. We accordingly allow this appeal, and setting aside the decree of the learned Judge of this Court and those of the Courts below, allow the judgment-debtor's. objection. As the question was not free from difficulty, we think that the parties should bear their own costs.