

Shanker Vs. Sukhai and ors.

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Court : Allahabad

Decided On : Aug-25-1975

Reported in : AIR1976All229

Judge : Chandra Prakash, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47

Appeal No. : Exe. Second Appeal No. 2320 of 1966

Appellant : Shanker

Respondent : Sukhai and ors.

Advocate for Def. : Ajit Ranjit Man Singh, Adv.

Advocate for Pet/Ap. : Keshava Pd. Singh, Adv.

Disposition : Appeal dismissed

Judgement :

Chandra Prakash, J.

1. This is a second appeal against the order dated 30-7-1966 passed by II Additional District Judge Varanasi, dismissing the appellant's appeal after confirming the order of the executing court.

2. The facts leading to this appeal may be narrated as follows:--

The respondent decree-holder obtained a decree against the judgment-debtor appellant for the recovery of Rs. 1,200/- on the basis of a mortgage executed by the judgment-debtor appellant in favour of the respondent in respect of two plots in dispute detailed in the plaint. In the original suit the appellant took plea that the plots in dispute were not saleable and could not be mortgaged. This plea was overruled and a decree under Order 34, Rule 4, Civil Procedure Code was passed. Eventually a decree under Order 34 Rule 5 was also passed. The respondent decree-holder put the decree in execution and sought an auction sale of the two disputed plots.

3. The judgment debtor appellant took an objection under Section 47, C. P. C. on the ground that the plots in dispute were sirdari plots of the objector appellant and they could not be sold. The executing court after taking evidence of the parties came to the conclusion that it was not established that the disputed plots were sirdari plots. It further held that the applicants took a similar objection in the original trial and it was overruled and that decision operates as *res judicata*. Without entering into the merits of the case whether the disputed plots were sirdari of the appellant I am of opinion that the appeal is liable to be dismissed on the other ground namely that the defendant took this plea in the trial court and it was overruled. It is not disputed that in the trial court the appellant took this plea that the plots in dispute could not be mortgaged and they could not be sold and this plea was overruled. Since the objector appellant did not file any appeal the order of the trial court has become final and it cannot be reagitated in the execution proceedings. My attention was drawn to the ruling reported in *N. Adinarayana Chetty v. A. Chengiah Chetty* : AIR1937 Mad918 . That ruling is distinguishable on facts because in the case similar objection like the present before me was taken in proceedings under Order 34, Rule 5, Civil Procedure Code and that was allowed. In the present case this objection was taken and it has been overruled, with the result that decision has become final and it cannot be reagitated during execution proceedings. The appeal fails and is therefore dismissed. Since nobody has appeared on behalf of the respondent no order as to costs.