

Sushil Kumar Vs. Additional District and Sessions Judge, Hapur and Others

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Court : Allahabad

Decided On : Sep-20-1999

Reported in : 2000(1)AWC336

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(11), 47, 47(1) and (3), 50, 50(2) and 146 - Order 21, Rules 16 and 35; [Constitution of India](#) - Article 227; Transfer of Property Act, 1882 - Sections 52

Appeal No. : C.M.W.P. No. 39359 of 1999

Appellant : Sushil Kumar

Respondent : Additional District and Sessions Judge, Hapur and Others

Advocate for Def. : N.K. Sharma, S.C.

Advocate for Pet/Ap. : Rakesh Pandey, Adv.

Judgement :

D. K. Seth, J.

1. Original Suit No. 179 of 1989 was decreed by the learned trial court. An appeal thereout, being number 198 of 1993, was also dismissed. A review application filed before the appeal Court, being number 46 of 1994. is still pending. In the

meantime, the decree was put to execution in Execution Case No. 4 of 1996. During the pendency of the review application, the judgment debtor having died, the petitioner was brought on record, as his legal representative. The petitioner thereupon filed an objection under Section 47 of the Code of Civil Procedure, in the execution proceedings, which has since been dismissed by an order dated 7th December, 1998 passed by the learned Civil Judge (Junior Division), Garhmukteshwar. district Ghaziabad. Against the said order, a Civil Revision No. 13 of 1999 was preferred. By an order dated 18th August. 1999 passed by the learned Additional District Judge, Hapur. the said revision was dismissed. It is against these orders the present application under Article 227 of the Constitution of India has been filed.

2. Mr. Rakesh Pandey, learned counsel for the petitioner in support of the petitioner contends that the petitioner has acquired interest in the suit properly by virtue of a deed of sale executed by the judgment debtor on 23rd October, 1986, whereas the suit was filed in 1989. Therefore, the decree could not be executed against the petitioner as legal representative of the judgment debtor since the property did not come in the hands of the petitioner by reason of the death of the judgment debtor. He relied upon Section 50 of the Code, which prescribes that the decree could be executed as against the legal representative so far as the property of the judgment debtor comes into the hands of the said legal representative on account of his death. Therefore, the decree could not have been executed as against the petitioner as legal representative of the judgment debtor in respect of the property which came to their hands independently before the institution of the suit. But both the learned courts below did not address themselves with regard to the said point and had rejected the petitioner's objection on an erroneous ground and has, thereby, failed to exercise their jurisdiction. Inasmuch as the executing court has no jurisdiction in executing the decree in respect of the property that had come to the hands of the petitioner beyond the scope and meaning of Section 50 of the Code. On these grounds he assailed the said two orders.

3. Mr. N. K. Sharma, learned counsel for the opposite parties on the other hand contends that the defendant No. 1 judgment debtor in the suit had never taken this

point in the written statement. Though defendant had contended that he had transferred the suit property to the other defendants but he had never mentioned that he had transferred the property before the institution of the suit, to the present petitioner. That was not also a ground in the appeal nor was so alleged in the writ petition. Therefore, this question cannot be raised by the legal representatives. Since it was not raised so long, the same could not have been raised in the execution proceedings. As such, the Courts had not committed any error in not addressing it on the said proposition. He also contends that in order to determine the said question, the Court has to go behind the decree. According to him, the executing court cannot go behind a decree as has been held in the decision in the case of *Bhanwar Lal Bhandari v. Universal Heavy Mechanical Lifting Enterprises*, 1999(1) SCC 558. On this ground, he prays that the petition should be dismissed.

4. I have heard both the learned counsel at length.

5. It is not disputed that the petitioner in his objection, under Section 47 of the Code, filed in the execution proceedings, had pleaded that the property had come to their hand by reason of the sale deed executed by the judgment debtor on 23rd October, 1986. The sale deed was a registered one. Whether it was pleaded in review application or not is immaterial, so far as the question with regard to the objection under Section 47 of the Code is concerned. Within the scope and ambit of Section 47 of the Code, it is open to the judgment debtor to contend that the decree is not binding on the judgment debtor or that the suit property is a property which cannot be affected by reason of the decree passed in the suit or that the suit property is outside the scope and ambit of the decree.

6. Well-settled is the rule that the executing court cannot go behind the decree. However, it does not mean that it has no duty to find out the true effect of the decree. The jurisdiction of the executing court does not begin and end with merely looking at the decree as it is final. It was so held in *Bhagwan Vaja and others v. Solanki Hannji Khodaiji Mansang and another*, AIR 1972 SC 1371. The question whether certain properties are covered by the decree or not is a question which can form the subject-matter of a decision under Section 47 of the Code. Such a view was taken by the Madras High Court in *Matudanavagam Pillai v.*

Venkataswami Naidu, AIR 1968 Mad 433 ; by the Gwahati High Court in Antonioneves v. Lelani Javerbahi. AIR 1976 Gwahati and by Patna High Court in Rajendra Prosad v, Jai Prokash Pandey, AIR 1957 Pat 700.

7. However, the executing court cannot be invested with the right to determine controversial questions, which are to be the basis of the decree to be executed. The executing court is always required to see that the decree passed by the executing court is executable. In order to see whether the decree is executable, it is to be ascertained whether a decree as was passed in the suit between the parties could include the property. It can go into the question whether on the date of institution of a suit, the defendant had any right to the property or not. In the present case, the legal representatives are trying to set up a right independent of the judgment debtor on the ground that the property having been transferred before the institution of the suit by the judgment debtor, the said property could not be the subject-matter of the decree.

8. A legal representative, if sets up a right in himself seeking an adjudication of his right in the property independent of the right of his predecessor-in-interest and thus indirectly trying to avoid the decree passed, surely would amount to go behind the decree, which the executing court cannot do. Such a view was approved in Thankamma v. Manachan, 1983 Ker LT 487 and Ganapathi v. Balasubramania Gounder, AIR 1987 Mad 124.

But then the legal representative as defined in Section 2(11) of the Code means person who in law represents the estate of the deceased person including those who intermeddles with the estate of the deceased. Therefore, though such right cannot be adjudicated but yet the executing court has to see whether the legal representative represents the estate of the deceased. It is not that all the heirs of the deceased are bound by the decree. Only those legal representatives who represent the estate of the deceased are bound by the decree. The decree is executable only against such estate of the deceased judgment debtor which comes to the hands of the legal representative. Therefore, the Court has to see whether the estate of the deceased has come to the hand of the legal representative on his death or legal representatives had acquired the said property

independent of the deceased judgment debtor before the institution of the suit.

9. Executing court has no Jurisdiction to remove a third party not bound by the decree unless and until : (a) it holds that such a person is bound by the decree ; (b) it makes an order under Order XXI, Rule 35 of the Code. Even if a person may be a heir or legal representative in respect of the properties left by the deceased, yet for the purpose of the decree he may be a third party, if the acquisition of the property by such legal representative was based on a transfer before the date of institution of the suit. Representative in Section 47 of the Code has a wider meaning than the one given in Section 30. It not only means legal representative in the sense of heirs, executors or administrators but includes any representative in interests of the decree holder or the judgment debtor who is bound by the decree. Inasmuch as in Section 47. the expression is used as 'their representatives' or the representative of a party. Significantly, the expression 'representative' in this Section has not been qualified with the word 'legal' as has been used in Section 50. Therefore, even if a person may not be the legal representative of the Judgment debtor but he may be a representative of the judgment debtor and as such, the dispute raised by him has to be determined under Section 47 of the Code.

Such a view would find support from the ratio decided in the case of Abdul Aziz v. District Judge, Rampur, AIR 1994 All 167.

A combined reading of Sections 47, 50 and 2(11) of the Code would show that in a proceeding under Section 47 of the Code, it is to be seen whether the estate is represented by the representatives. In a proceeding under Section 47 of the Code, such question is to be ascertained for the purpose as to whether a decree is executable against such representative. Such determination would not amount to going behind the decree. The provision in Section 50 of the Code is required to be read in the background of Section 146, Order. XXI, Rule 16 of the Code and Section 52 of the Transfer of Property Act. Inasmuch as these provisions lay down that transferee from judgment debtor is bound by the decree and execution can be levied against him. He cannot be heard to say that he is not bound because he was not impleaded. Such a view would find support from the decision in the case

of *Taraa Moti v. Bachchu Bhai*, AIR 1982 Guj 350. Section 146 of the Code provides that save as otherwise provided in the Code or by any law for the time being in force, where any proceeding may be taken or has been made by 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.

Therefore, it is to be seen whether the legal representative of the judgment debtor had been claiming the property under him and that claim had arisen after the institution of the suit. If the property was transferred before the institution of the suit, then such legal representative would not be claiming the property under the judgment debtor unless such transfer is subject matter in the suit itself and the decree had covered the same. Unless such transfer was a cause of action for the suit, the same cannot form the subject-matter of the decree. The principle of *lis pendens* as enunciated in Section 52 of the Transfer of Property Act is attracted in respect of transfers made during the pendency of the suit. It cannot be attracted in respect of transfers made before the institution of the suit, unless such transfer forms the cause of action for the suit.

10. In the light of the above discussion, now let us examine the proposition at hand in the background of the fact and circumstances of the case.

11. So far as the objection raised by the legal representative of judgment debtor is concerned, the said ground can be raised. If such ground is so raised, in that event, it would not be going behind the decree. Inasmuch as the legal representative cannot have a better case than that of the judgment debtor. So far on the death of the judgment debtor, the property devolves on the legal representatives is concerned, the same cannot be questioned by the legal representative. The extent of such right is defined in Section 50 of the Code.

12. It is a settled proposition that the executing court cannot go behind the decree. The same view is reiterated in the decision in the case of *Bhanwar Lal Bhandari*, (supra) cited by Mr. Sharma. There is no dispute about the said question, which has since been well-settled.

13. In order to appreciate the question, that has been raised in this case, it would be beneficial for us to refer to Section 50 of the Code, which defines legal representative in respect of execution proceedings, which runs as follows :

'50. Legal Representatives.--(1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.'

14. A plain reading of the said Section indicates that on the death of the judgment debtor, if the decree has not been fully satisfied, it is open to the decree holder to apply to the executing court to proceed with the execution against the legal representatives of the deceased. But such execution against the legal representatives of the deceased is confined to the extent as has been defined in sub-section (2) of Section 50 of the Code. According to subsection (2). the decree has to be executed against such representative to the extent of the property of the deceased, which comes to his hands on such death and had not been duly disposed of.

15. In the present case, the question that has been raised in the objection to the extent that the property having been transferred by virtue of the registered sale deed executed by the judgment debtor on 23rd October, 1986, long before the institution of the suit, the defendant judgment debtor was not the owner of the property and as such the decree passed against him would be binding in respect of the property which was at his hands and could not be stretched beyond and affect the property which he had transferred before the institution of the suit, unless the cause of action for the suit relates to a transaction involving the property preceding such transfer. Thus, if it is ascertained that such property was transferred by the judgment debtor before the suit was instituted, and that the

cause of action involving the same preceds the transfer, in that event the said property cannot either form part of the property involved in the suit or it cannot pass to the legal representative on account of his death. It is only the property that passed on to the legal representative, being affected by the cause of action for the suit, on the death of the judgment debtor, which can be proceeded against for the purpose of execution of the decree. These are questions which come within the scope and ambit of Section 50 of the Code.

16. Section 47 of the Code prescribes that all questions arising between the parties to the suit in which the decree was passed on their legal 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. Sub-section (3) of Section 47 prescribes that 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.

17. Thus, Section 47 requires determination of all questions between the parties or their legal representatives relating to the execution, discharge or satisfaction of the decree in an application under Section 47 of the Code and whether a person is legal representative or not is also to be decided in the same proceedings.

18. Whether the petitioner is a legal representative of the judgment debtor in respect of the property is also a question within the meaning of sub-section (3) of Section 47 of the Code and the dispute that has been raised is also a dispute within the meaning of sub-section (1) of Section 47 of the Code. Therefore, these questions are to be determined within the scope and ambit of Section 47 of the Code as has been raised by the petitioner. The Court cannot overlook or ignore any such objection if raised by the parties, it has to advert to such question if raised in a proceeding under Section 47 of the Code, since such question cannot be raised in a separate suit. Prima facie, it appears that the property having been transferred before the institution of the suit and at that time the judgment debtor having not been the owner of the said property, the decree against him cannot bind the said property which was transferred before the suit was instituted and as such, even if the petitioner was legal representative of the deceased. It is to be

ascertained as to whether the property which the petitioner is claiming through the registered sale deed executed on 23rd October, 1986 by the judgment debtor before the institution of the suit could be a properly within the meaning of Section 50 of the Code that has come to the hands on the death of the judgment debtor in order to be a subject-matter of the execution of the decree. Therefore, the Courts below are required to determine the said question in the proceedings itself.

19. Whether these questions were raised by the judgment debtor in the suit or in the appeal or in the review application is wholly immaterial. The defendant is not supposed to defend the interest of a third party or defend the property which was no more his property. Even if the defendant has not disclosed the said facts, he might be proceeded against for nondisclosure of such facts- But that non-disclosure cannot bind a third party to the suit. If the right is claimed independent of the decree and it is not claimed that the suit properly has not passed on to the petitioner on the death of the deceased of the judgment debtor, in that event any misconduct on the part of the defendant Judgment debtor would not bind such transferee.

Thus, both the learned courts below in over-looking the said questions and ignoring the same and avoiding the decision thereon, has failed to exercise the jurisdiction vested on them which they are supposed to be determined under Section 47 of the Code in execution proceeding as soon objection is raised to the execution of the decree by the legal representative, as in the present case raising a point within the scope and ambit of Section 50 of the Code. Therefore, the impugned orders cannot be sustained and are hereby set aside. Let the executing court decide the objection after giving opportunity to the parties, in accordance with law, as early as possible.

20. The writ petition is accordingly allowed. No cost.