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Court : Allahabad

Decided On : Feb-09-1961

Reported in : AIR1961All436

Judge : J.D. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 47 - Order 21, Rule 11(2); Limitation Act, 1908 - Article 181

Appeal No. : F.A.F.O. No. 17 of 1959

Appellant : Nar Singh Datt

Respondent : Ram Pratap and ors.

Advocate for Pet/Ap. : H.D. Srivastava and ;Umesh Chandra, Adv.

Disposition : Appeal allowed

Judgement :

J.D. Sharma, J.

1. This is a decree-holder's appeal against the judgment and decree of the learned Civil Judge, Gonda.

2. The decree for a sum of Rs. 1,600/- was passed against Brij Lal on the 28th August, 1948. Brij Lal died and his heirs were substituted in his place. On the 26th

September, 1948 the decree-holder applied for execution by attachment and sale of a house. On the 12th November 1948 the judgment-debtors filed an objection on the ground that the house was occupied by them as agriculturists and it was therefore exempted from attachment and sale under Section 60(1)(c) C. P. C.

The objection was finally dismissed by this Court on the 4th March 1958 and it was held that the house was not occupied by the judgment-debtors as agriculturists. On the 26th March 1958 the decree-holder made an application purporting to be under Order 21, Rule 66 (3) C. P. C. The judgment-debtors again filed an objection on the 30th April 1958 claiming exemption from sale of the house under Section 60(1)(c) C. P. C.

3. The trial court held that the objection was barred by the principle of res judicata and by limitation. In appeal the learned Civil Judge held that the objection was not barred by res judicata or limitation. The objection was accordingly allowed. This appeal is directed against that order.

4. The contention on behalf of the decree-holder is that as a similar objection to attachment and sale was dismissed finally by this Court on the 4th March 1958 the second objection was barred by res judicata. Section 60, Sub-section (1) C. P. C. mentions the property liable to attachment and sale. The Sub-section (1) (c) says that

'houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him'

shall not be liable to attachment or sale.

Whether the word 'or' between 'attachment' and 'sale' is used as a disjunctive or not appears to be immaterial. Unless a decree is on the basis of hypothecation or charge the property sought to be proceeded against in execution has to be attached otherwise attachment is not necessary and a decree-holder can ask directly for sale of the property hypothecated or charged. It is why under Order 21, Rule 11 (2) (j) (ii) a decree-holder is required to specify whether the mode of

execution is by attachment and sale or by sale without attachment of any property. In the instant case the decree-holder applied for execution by attachment and sale.

Evidently a property which is attachable is also saleable and a decision that a particular property is liable to attachment necessarily means that it is liable to sale, and so long as that decision stands it is not open to a judgment-debtor to object to sale as such an objection will be barred by the principle of *res judicata*. Of course, an objection to attachment may be made at any time so long as a sale has not taken place.

And if an objection to attachment has not been made then an objection to sale may be made up to the time the sale is confirmed. But it is not open to a judgment-debtor to object to an attachment and again to sale on the same ground. Reliance is placed upon *Mt. Araz Bibi v. Mubarak Ali Khan* : AIR1938 All85 . In that case the judgment-debtor claimed exemption from attachment and sale of a house under Section 60(1)(c) C. P. C. on the ground that it was occupied by her as an agriculturist.

Although she carried on cultivation the main source of her livelihood was the income from zamindari. Therefore the trial court and the first appellate court held that the house was not exempted from attachment and sale under Section 60(1)(c). When the matter came up for consideration in second appeal the source of income from the zamindari had disappeared, and this fact was taken into consideration in holding that the judgment-debtor was an agriculturist, entitled to the benefit of Section 60(1)(c) C. P. C. In the course of the judgment it was observed :

'Section 60 Civil P. C. declares what properties can be attached and sold in execution of a decree. The proviso makes an exception as regards a number of properties and it declares certain properties not to be liable to 'attachment or sale'. One of such; properties is the house or other building belonging to and occupied by an agriculturist. To my mind the section exempts the house of an agriculturist from both, namely attachment and sale. It will rarely happen that between the date of attachment and sale the status of the judgment-debtor undergoes such a

change as to make him an agriculturist on the date of sale, which he was not on the date of attachment.'

The case is clearly distinguishable as the change in the status of the judgment-debtor had taken place during the pendency of attachment and before the objection was finally disposed of. In the instant case the objection under Section 60(1)(c) was finally disposed of on the 4th March 1958.

5. Reference was also made to *Pokhar Singh v. Tula Ram* : AIR1935 All1016 . In that case no objection under Section 60(1)(c) C. P. C. was made until the property was brought to sale. Objection was made after the sale had taken place. The contention on behalf of the decree-holder was that objection at that stage was not maintainable. In repelling the contention it was observed :

'The fact that the legislature has thought it fit to make the specified particulars neither liable to attachment nor liable to sale is very significant. It would seem to follow *prima facie*, that, even, if by some mistake or other a wrong attachment has taken place, there is still a prohibition against the sale of such property. Admittedly the right to object to the attachment of a non-attachable property can arise after the attachment has taken place. It would seem to follow that the right to object to the sale of a non-saleable property ought also to arise after such a sale has taken place.'

That case was materially different as no objection had been made to attachment on the ground that the property was not attachable. It was therefore perfectly open to the judgment-debtor to file an objection even after sale on the ground that the property was not saleable. But, as already mentioned, if a property is attachable it is also saleable and if an objection is made on the ground that the property is not attachable and that objection is dismissed, another objection on the ground that the property is not saleable will not be maintainable so long as the previous decision stands.

6. In my judgment therefore the objection of the judgment-debtors was not maintainable.

7. It was also urged on behalf of the decree-holder that the objection was barred by limitation, Reliance in support was placed upon Gangadhar Martand v. Jagmohandas Varjivandas, AIR 1931 Born 446 in which Article 181 of the Limitation Act was held applicable to an objection under Section 47 C. P. C. With all respect it is difficult to hold that an objection under Section 47 C. P. C. can fall within the purview of Article 181 of the Limitation Act. It was observed in : AIR1935 All1016 (supra) that no limitation is prescribed for an objection under Section 47. Civil P. C. The objection was therefore not barred by limitation.

8. The appeal is allowed and the judgment and decree of the court below are set aside and the objection is dismissed with costs of all the courts.

9. Permission to file an appeal under Chapter VIII, Rule 5, Rules of Court, is granted.

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