

Ram Singh Vs. Bherulal

Ram Singh Vs. Bherulal

SooperKanoon Citation : sooperkanoon.com/498660

Court : Madhya Pradesh

Decided On : Nov-24-1981

Reported in : AIR1982MP95

Judge : H.G. Mishra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 60(1)

Appeal No. : Misc. Appeal No. 171 of 1976

Appellant : Ram Singh

Respondent : Bherulal

Advocate for Def. : V.K. Dube, Adv.

Advocate for Pet/Ap. : D.D. Vyas, Adv.

Disposition : Appeal allowed

Judgement :

H.G. Mishra, J.

1. This is an appeal against the order passed by the Addl. District Judge on 30-6-1976, whereby the order passed by the Executing court on 25-10-1976, rejecting objection about attachability and saleability of the house in dispute, in view of the provisions placed in Section 60(1)(c) of the Code of Civil procedure, has been

affirmed.

2. Facts material for the decision of this appeal are as under: The decree-holder-respondent-herein obtained a money decree against the judgment-debtor-appellant-herein in Civil Suit No. 38B of 1971, from the Court of Civil Judge, Class II, Neemuch, He put this decree in execution, the execution case being 197 of 1972, and attached the house belonging to the judgment-debtor-appellant on 30-4-1975. Thereafter a notice under Order 21, Rule 66, C. P. C. was issued for 5-8-1975. However, the said notice was served by affixure on 25-7-1975, as per the report of the process-server dated 26-7-1975, On 5-8-1975 the Executing Court passed an order to the effect that service of notice under Order 21, Rule 66, C. P. C. has been effected on the judgment-debtor. Now, the decree-holder wants to put to auction the said house belonging to the judgment-debtor, which has already been attached. Accordingly, the Court directed issuance of a proclamation of sale for 29-9-1975 and fixed 30-9-1975 as date of hearing in the case. The judgment-debtor-appellant submitted an application on 8-8-1975, wherein it was contended that attachment has not been effected in accordance with law and that the house attached is immune from sale by virtue of the provisions placed in the proviso (c) to Section 60(1), C. P. C. as it is occupied by the judgment-debtor, who is an agriculturist and is being used for agricultural purposes. This application was opposed by the decree-holder inter alia on the ground that it is barred by the doctrine of constructive res judicata. This objection found favour with the Executing Court and by order dated 26-10-1975 the Executing court rejected the application as being barred by constructive res judicata. Aggrieved by this order the judgment-debtor preferred an appeal, which has been dismissed. Hence this appeal.

3. In this appeal it was contended by Shri D. D. Vyas, learned counsel for the judgment-debtor-appellant that the doctrine of constructive res judicata has been erroneously applied, because the judgment-debtor has right to object to the saleability of the house in dispute at any time prior to its sale. Shri V. K. Dube, learned counsel for the respondent argued in support of the impugned judgment and decree. Having heard the learned counsel for the parties. I have come to the conclusion that this appeal deserves to be allowed to the extent indicated

hereinafter.

4. In this case, as stated above, the Executing Court had ordered issuance of notice under Order 21, Rule 66. C. P. C. for settlement of terms for proclamation of sale by public auction. The notice was served by affixure, although at the relevant date, i. e. on 25-7-1975, it was reported that the judgment-debtor had gone out. However, the question of invalidity of service of the notice under Order 21, Rule 66, C. P. C. has lost significance because on 5-8-1975 the judgment-debtor along with his counsel were present in the Court and it was in their presence that the Executing Court had passed the order directing issuance of the warrant for sale, as stated above.

5. Now, the question which crops up for consideration is whether the judgment-debtor-appellant had right to submit objection against attachability and saleability of the house in question after passing of the order dated 5-8-1975 by the Executing Court. The law on the point has been laid down in *Balkrishna v. Changdeo* (AIR 1943 Nag 330), thus:

'In *Rukhmabai v. Ramchandra*, 21 Nag LR 23 : (AIR 1925 Nag 320). which was cited with approval by Bose, J., in *Mt. Laxmibai v. Sevakram* : ILR (1936) Nag 30 : (AIR 1936 Nag 123) it was held that objections to a sale must be put forward when the sale proclamation is issued and cannot be put forward after the sale. The question is purely one of procedure and the view has long been taken in this province that such objections must be raised before the sale. That is an entirely reasonable practice, and it is undesirable that a judgment-debtor should stand by and allow the sale to take place and then come forward and file an objection that he could and should have filed before the sale.' Further in *Gullilal v. Lallo* (1961 Jab LJ (SN) 114). it has been ruled on the point as under:

'It is then contended that the order of attachment having become final, it cannot be challenged in execution. It is barred by *res judicata*. This contention has no force because Section 60 provides for exemption (1) from attachment, and (2) from sale. The judgment-debtor could take the objection, for the first time when the property was sought to be sold although he did not object at the time of attachment before judgment.'

I do not see any reason not to extend and apply the aforesaid reasoning to the situation of present character. Accordingly, the learned Judges of the Courts below do not appear to have acted rightly in refusing to entertain the objection submitted by the judgment-debtor on 8-8-1975. It appears that while rejecting his objection as barred by the doctrine of *res judicata*, they acted in oblivion of the principles laid down in the cases of *Balkrishna* (*supra*) and *Gullilal* (*supra*)'.

6. The judgment-debtor-appellant has invoked the immunity under clause (c) of the proviso to Section 60(1), C. P. C. In the enacting part of Section 60(1), C. P. C. the expression used while enumerating the property liable to be proceeded against is 'liable to attachment and sale', whereas while carving out the property immune from being so proceeded within the clause (c) of the proviso to Section 60(1), the expression used is 'shall not be liable to attachment or sale'. The use of the word 'or' instead of the word 'and' in the aforesaid proviso appears to be purposeful, the object being to emphasise that the judgment-debtor will have right to object to the attachment of the particulars enumerated in clauses (a) to (p) of the proviso. If in any case right to object against attachability ceases to be exercisable, the judgment-debtor will have right to object to the saleability of the particulars by showing that it falls within the immunity conferred by the provisos. The right to object to the attachability and to the saleability appears to be independent of each other and exercisable as such. The word 'or' is normally disjunctive. The word 'and' is normally conjunctive. From the setting in which the word 'or' appears in the proviso to Section 60(1), the Legislature does not appear to have enacted a command to the Court to convert the word 'or' into 'and'. There is nothing in the language employed in Section 60(1), which would justify such conversion. Accordingly, the use of the word 'or' in the proviso instead of the word 'and', though used in the enacting part of Section 60(1), appears to be purposeful and the object which the Legislature appears to have achieved is to confer twofold rights on the judgment-debtor, as discussed above.

7. In order to resist the aforesaid conclusion Shri V. K. Dube placed reliance on the following observations made in *Nar Sinsh Datt v. Ram pratap* (AIR 1961 All 436).

'Whether 'the word 'or' between 'attachment' and 'sale' is used as a disjunctive or not appears to be immaterial.' Having regard to the object which the proviso has to achieve, the use of the word 'or' appears to be purposeful. Moreover, no reason whatsoever in support of the aforesaid proposition has been given in the case of Nar Singh Datt (supra). Accordingly, with all humility at my command. I regret my inability to concur with the view so expressed.

8. For the aforesaid reasons it has to be held that the learned Judges of the Courts below acted illegally when they rejected the application submitted by the judgment-debtor-appellant on 8-8-1975, as barred by constructive res judicata.

9. Accordingly, this appeal succeeds and is hereby allowed.' The impugned order is set aside. The case will go back to the Executing Court and the Executing Court is directed to hold an inquiry into the objection submitted by the judgment-debtor with regard to sale-ability of the house in dispute in view of the provisions placed in clause (c) of the proviso to Section 60(1), C. P. C. Having regard to the nature of controversy, I direct the parties to bear their Own costs all throughout. The parties are directed to appear before the Executing Court on 16-12-1981 and the records of the Courts below should reach there before that date.