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Court : Madhya Pradesh

Decided On : Apr-04-1967

Reported in : AIR1972MP217; 1972MPLJ347

Judge : H.R. Krishnan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 38 and 47

Appeal No. : Misc. Appeal No. 60 of 1965

Appellant : Bherusingh

Respondent : Ramgopal

Advocate for Def. : Balwantsingh, Adv.

Advocate for Pet/Ap. : U.N. Bhachawat, Adv.

Disposition : Appeal dismissed

Judgement :

H.R. Krishnan, J.

1. This is a second appeal in execution by the judgment-debtor in a mortgage decree for a sum of the order of 2000/-. from. the concurrent judgments that the executing Court is rot competent at this stage to go behind the decree and hold it to be illegal and inoperative. The only question is whether at this stage the decree

is found to be so patently illegal for want of jurisdiction or for some other reason that the executing Court can refuse to execute it.

2. The facts of the case are simple. The appellant, who is a cultivator, borrowed money and mortgaged some of his agricultural lands. The loan not being repaid there was a suit; in the trial Court all that the debtor wanted was accommodation for payment by instalments. which was refused and a decree was made expressly described as one with a mortgage on the lands mentioned there. When it was being put into execution the judgment-debtor made out that the decree was bad as a mortgage decree because he had mortgaged his agricultural lands in contravention of the provisions of Section 72 of the Madhya Bharat Land Revenue and Tenancy Act; the mortgage having left over for him only 6 and not 15 acres of land in the manner provided in that section. The mortgage itself was dated 10-3-1959 when the Madhya Pradesh Land Revenue Code had not yet come into force. The executing Court tried to examine this and felt that there was some controversy as to whether the excess area undoubtedly in the possession of the appellant which was much more than 15 acres, was really his own property or that of a brother-in-law which he was cultivating by an arrangement. Anyway, it .felt that the case was governed by Section 165 of the Madhya Pradesh Land Revenue Code -- the provision corresponding to Section 72 of the Madhya Bharat Law -- which, however, is not quite identical in wording or effect. Accordingly it rejected the judgment-deb-tor's objection whereupon he went up in appeal which also being dismissed he has come up to this Court.

3. The basic weakness of the judgment-debtor's contention is obvious. An executing Court cannot go behind the decree except in a very special circumstance, namely, that the decree is patently illegal; that is. illegal just on the face of it. without any inquiry having to be made. If the illegality of the decree has to be established after some investigation and the weighing of pros and cons the executing Court cannot make such an inquiry. Most often this patent illegality would be one relating to jurisdiction. In fact some of the Courts have gone to the extent of holding that the only illegality that would justify an executing Court refusing to execute a decree is one both of a patent nature and relating to jurisdiction; in other words, where it is found that the Court passing the decree was

patently incompetent and without jurisdiction. Even if we extend the principle to other forms of illegality we have to find that it is patent; in other words, an illegality on the face of the decree to be established on merely seeking it and without any investigation having to be made.

4. In a case like this it is only after some investigation that we can decide whether or not the judgment-debtor was possessed of the surplus area prescribed in Section 72. There again the problem was particularly difficult because he did have sufficient excess area in his cultivation but explained it by saying it was another Darty's, which he was cultivating on an arrangement, while the decree-holder was asserting that the whole land was his. The question is not which of the two contentions is correct; it is, whether in a situation like this the decree can be described as being 'patently illegal' whether for jurisdiction or on other grounds. Certainly it cannot be and it is not proper for the executing Court in a situation like this to try to go behind the decree and investigate whether or not it is illegal. By doing so it would be arrogating to itself the powers of an appellate Court which of course it is not. Another way of looking at it is to say that by failing to raise this point during the trial the judgment-debtor is estopped on the principles of constructive res judicata.

5. Case-law is ample on the subject and the following is a fairly representative cross-section: In Pirji Safdar Ali v. The Ideal Bank Ltd.. AIR 1949 EP 94 (FB) the judgment-debtor contended that the decree was repugnant to certain provisions in the Punjab Debtor's Protection Act. It was held:

'It is a well established rule of law that the executing Court is bound to execute the decree and cannot So behind it. The only exception to this rule is that when the decree is passed by a Court which had no jurisdiction to pass it, then by reason of the inherent defect of jurisdiction in the Court passing the decree the executing Court can ignore it. The executing Court cannot, however, refuse to execute the decree, because it is against law or contravenes any provisions of any statute'.

Actually this has only re-stated the principle of a Lahore ruling reported in Ganesh Das v. Ganga Singh, AIR 1932 Lah 529:

'Where a decree orders the sale of a certain property for the realisation of a debt, the objection that the judgment-debtor is an agriculturist and that the property cannot be sold in execution proceedings by virtue of the provisions of the Act. cannot be raised for the first time in execution proceedings'.

It is of interest to note that the Punjab Land Alienation Act contains principles similar to those in Section 72 of the Madhya Bharat Law and Section 165 of the Madhya Pradesh Land Revenue Code.

6. Similar views have been expressed in Tripti Prokas Nandy v. Bises-war Lal, AIR 1932 Cal 517. There the decree-holder alleged that a mortgage of certain allowances had been effected for legal necessity but during execution the sons of the original judgment-debtor questioned it. It was held--

'So long as the decree stood the sons who were parties to it could not challenge its validity in the execution proceedings ..... The proper remedy for the sons was to prefer an appeal from the decree itself if they were dissatisfied with its terms'.

The judgment-debtor has cited two cases. In Meenakshi Ammal v. T. S. Chidamba-ram, AIR 1947 Mad 341 the position was that the decree was found to be patently illegal and so exercising what we have already described as the exceptional power the executing Court refused to execute it:

'Although an executing Court cannot go behind the decree, it will refuse to order the sale of any property where it is plain on the face of the record that its alienation is prohibited by statute or opposed to public policy'.

Similarly, in the case reported in Chinta-mani Saran Nath v. Syed Zahiruddin, AIR 1956 Pat 57 the mortgagee decree-holder sought to bring up to sale an agricultural holding, the sale of which was absolutely prohibited by a provision in the Chhota Nagpur Tenancy Act. The Court held that in such cases the direction about the sale cannot constitute res judicata because it was a direction in contravention of statute. The Court went on to explain further that where the question was whether or not a particular land constituted a raiyati holding was directly and substantially in issue and had been finally determined by the Court in

presence of parties the position was altogether different.

8. The Madras and the Patna decisions, far from invalidating the general principles set up above only strengthen them. If the decree is patently illegal the executing Court may refuse to execute it; if. on the contrary, the alleged illegality is arguable and the judgment-debtor having taken part in the earlier litigation has failed to raise it, he cannot be heard to question the legality of the decree at the stage of execution.

9. The result of the foregoing discussion is that the appeal is found to ba without substance and is accordingly dismissed. The judgment-debtor-appellant shall pay the decree-holder-respondent the costs of this appeal along with pleader's fee calculated according to rules.

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