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Court : Orissa

Decided On : May-03-1968

Reported in : AIR1968Ori183a; 34(1968)CLT863; [1969]39CompCas650(Orissa)

Judge : G.K. Misra and ;B.K. Patra, JJ.

Acts : Banking Companies Act, 1949 - Sections 45A, 45N and 45U; Orissa High Court Rules - Rule 13; Code of Civil Procedure (CPC) , 1908 - Sections 11 and 47 - Order 21, Rule 58; Evidence Act, 1872 - Sections 101 to 104

Appeal No. : A.H.O. No. 9 of 1963

Appellant : Niranjan Das and ors.

Respondent : Liquidator Puri Bank Ltd.

Advocate for Def. : U.N. Rath and ;J. Rath, Advs.

Advocate for Pet/Ap. : M. Mohanti and ;A. Mohapatra, Advs.

Disposition : Appeal dismissed

Judgement :

Patra, J.

1. This is an appeal from an order of the Hon'ble Company Judge rejecting an application made by the petitioners praying that Ex Case No 1/65 should not

proceed against them. The Official Liquids for Pun Bank Ltd which is under liquidation obtained a decree against one Krishna Chandra Das and started execution proceedings against him praying therein that the properties covered by items Nos. 1 to 13 of the schedule appended to the application be attached and sold for satisfaction of the decree. During the pendency of the proceeding Krishna died on 12-10-60, leaving behind him the petitioners as his heirs. The petitioners Nos. 1 and 2 are his sons. Petitioner No. 3 Bimala Dei is his widow and petitioner No. 4 Mukta Dei is his mother. The four petitioners were substituted as legal representatives in the Execution Case and notices under Order 21, Rule 22 C. P. C. were served on them on 21-6-61. They, however did not appeal in Court to file any objection. On 28-8-61 order was passed for issue of a writ of attachment of the properties and attachment was actually effected on 10-9-61. On 19-1-62 an application was filed in Court purporting to be on behalf of the petitioners by an Advocate who held no cower from the petitioners by praying that the execution proceeding against the latter be dropped. The Court rightly held that no action could be taken on such petition. On 22-1-62 sale proclamation was issued and on 3-4-62 the immovable properties covered by lots 1 to 13 were sold. The petitioners thereupon filed an application under Order 21, Rule 90 C. P. C. to set aside the sale and after enquiry the sale was set aside. Fresh poclamation was issued on 23-10-62 and a week later, on 29-10-62 the application giving rise to this appeal was filed by the petitioners.

It is necessary to refer at length to the averments made and the prayer contained in the petition more so, because the particular provisions of the Code under which it has been filed have not been mentioned. It is allleged that the Judgment Debtor Krishna Chandra Das never incurred these loans for his family necessities. Krishna Chandra Das had kept a concubine and hence cut off all connections with the joint family consisting of himself, his father and brothers after receiving Rs. 400/- in lieu of his share in his joint family properties. He has also abandoned his wife and children, petitioners Nos. 1 to 3 who were thereafter being maintained by Krishna's father Satrughna In the circumstances Krishna had no manner of right to any share in the joint family properties covered by items Nos. 2 to 13 of the schedule and consequently petitioners Nos. 1 to 3 also have no right or title to any share therein. So far as item No. 1 of the schedule is concerned, it is contended

that it is the stridhan property of petitioner No. 3 the wife of Krishna and mother of petitioners Nos.1 and 2. Krishna's father Satrughana died in 1961 and thereafter his widow petitioner No. 4 is living with her other three sons and is being maintained by them without herself having properties of her own. In view of the averments made above, the petitioners prayed that 'the aforesaid execution proceeding against these petitioners may please be dropped. '

2. The Puri Bank filed a counter stating that Krishna's alleged relinquishment of his share in the joint family properties after receiving Rs. 400/- from his father is not true, that he was doing contract business at Cuttack and was being financed by the joint family and that he had taken loan from the Puri Bank Ltd. for the joint family business. Hence the petitioners are liable to discharge the debt to the extent of Krishna's share in the joint family properties. It is not true as alleged in the petition that property covered by lot No.1 is the stridhan property of petitioner No. 3, Bimala Dei the wife of Krishna, but it was acquired by Krishna Benami in the name of his wife

3. As stated before, the particular provision of law under which the petitioners filed the present application has not been stated in this petition. But in the Court of the Company Judge, the enquiry proceeded on the footing that the application if one under Order 21 Rule 58 C. P. C. and the learned Judge after enquiry held that item No. 1 is not stridhan property of petitioner No. 3, but a part of the family properties and that the case that Krishna relinquished his share in the joint family properties as alleged in the petition has not been established. Under Rules framed by the High Court under the Companies Act, the period prescribed for filing a claim petition Under Order 21, Rule 58 C. P. C. is 15 days from the date of attachment. Admittedly the present application was filed long after expiry of that period. On the footing that the application filed by the petitioners was one under Order 21, Rule 58 C.P.C. objection was taken by the decree holder that the application was barred by limitation. This objection was, however', overruled by the learned Judge. But having regard to his finding on the merits of the claim, he dismissed the petition. Hence this appeal.

4. Rules under the Banking Companies Act. 1949 had been made by the High Court in exercise of the powers vested in them by Section 45-N read with Section 45-U of the Act. So far as civil proceedings are concerned Rule 13 with which we are concerned in this appeal runs as follows:--

"No claim under Rule 58 or application under Rules 90, 91 and 100 of Order 21, shall be entertained if not made within 15 days from the date of attachment or sale or delivery of property, as the case may be and no such claim or application shall ordinarily be admitted, unless the Court is satisfied that prima facie it is a fit case for admission.'

Sections 45-N and 45-U occur in Part IIIA of the Act and Section 45A which also occurs in Part IIIA runs as follows:--

'The provisions of this Part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the 'Companies Act, 1956' or the Code of Civil Procedure, 1908 (Act V of 1908) of the Code of Criminal Procedure, 1898 (Act V of 1898) or any other law for the time being in force or any instrument having effect by virtue of any such law: but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with, the provisions of this Part or rules made thereunder shall apply to all proceedings under this Part.'

It is true that Order 21. Rule 58 C. P. C. does not provide for any specific period of limitation, but even if there had been any specific period provided in the Civil P. C. it if manifest from a reading of Section 45-A of the Act that Rule 13 referred to above would prevail over any corresponding provision in Civil Procedure Code. Mr. Mohanti appearing for the appellants contends that the clause:

'no such claim or application shall ordinarily be admitted, unless the Court is satisfied that prima facie it is a fit case for admission'

vests a discretion in the Court to admit an application under Order 21, Rule 58 C. P. C. even if it is filed beyond the period of 15 days mentioned in Rule 13. We are unable to accept this contention and in our opinion no such discretion is given to

the Court. Mr. Mohanti obviously realised the untenability of the proposition advanced by him on this point and therefore submitted that the application filed by the appellants on 23-10-62 is not an application under Order 21, Rule 58 C. P. C. but is one under Section 47 C. P. C. relating to the execution of the decree against the appellants. In fact, this is only consistent with the averment made in the application at least so far as items Nos. 2 to 13 of the schedule are concerned because far from stating that any of the items Nos. 2 to 13 in his own right, it is said by them categorically that none of them has any right to any of these items of properties. It is only in respect of item No. 1 that it is contended that appellant No. 3 Bimala Dei is the owner thereof it being her stridhan property and that it is not liable for attachment and sale in execution of the decree obtained against her husband. Even in respect of this item of property if the application is treated as one under Order 21, Rule 58 C. P. C. the claim must fail as barred by limitation.

5. If this application is treated as one under Section 47 C. P. C. as Mr. Mohanti wants it to be treated, he is faced with another difficulty and that is on the ground of constructive res judicata. It is now well settled that this principle applies to execution proceeding also. In a proceeding for execution of a money decree by attachment and sale of the Judgment-Debtor's immovable properties there are 5 important stages. In the first stage a notice under Order 21, Rule 22 is issued to the person against whom execution is levied requiring him to show cause why the decree should not be executed against him. On receiving the notice the Judgment Debtor has to raise all his objections to the executability of the decree. If at this stage he fails to raise an objection which he might and ought to have raised at this stage, the court in passing the orders for execution of the decree must be deemed to have decided the objection against him. It is not necessary that the Court should in express term pass an order to the effect that the decree be executed. That order is implied in the order for issue of attachment which is the next stage. This is why all objections to the executability of the decree have to be raised in such cases before the order for issue of attachment is passed. The next stage is one when the court orders sale of the Judgment Debtor's property. Order 21, rule 64 C. P. C. provides that the executing court may order the sale of any property attached by it provided the property is liable for sale. Any objection on the ground of non-saleability of the property must be raised at that stage. If the Judgment Debtor fails

to do so the court must be deemed to have decided it against him by passing an order for sale of the property because unless it is liable to sale it cannot pass such an order. The next 2 stages are sale and confirmation of sale with which we are not concerned in this case. From the facts of this case it would be seen that the application giving rise to this appeal was not filed by the appellants till after the court ordered the sale of the properties mentioned in the schedule of the execution petition. For the reasons and in the circumstances stated above it must be held that the court had decided (a) that the execution case should proceed against the appellants; (b) that the properties attached in this case are liable for attachment and (c) that they are also liable for sale. That being the position the appellants would not be heard at this stage to say either that the execution case is not maintainable against them or that the properties attached and brought to sale should not have been attached and should not have been put up for sale. On this ground alone their application is liable to be dismissed. So far as the properties mentioned in items 2 to 13 of the schedule are concerned none of the petitioners claims to have any right or title thereto. With reference to Items 2 to 13 their case has been put forward in para 6 of the petition as follows: -

'The petitioner No. 1's grand-father was always in absolute ownership and possession of these properties in exclusion to the family of the petitioners Nos. 1 and 2 and their deceased father. On his (Satrughana's) demise, his aforesaid three sons and widowed wife (petitioner No. 4) now own and possess the same accordingly.'

Although in the passage quoted above it is stated that appellant No. 4 (petitioner No. 4 in the petition) had some interest in these properties such interest of the petitioner No. 4 was disclaimed in para 9 of the petition which runs:

'That the petitioner No. 4 lives in joint mess and property with her three sons and is maintained by them having no property of her own. She is also not liable for any debts incurred by her son, the judgment-debtor who virtually left his family 15 or 16 years ago'

In view of the averments made in the petition it appears to us that apart from the question of res judicata the appellants have no locus standi to say that items 2 to

13 of the schedule in which they themselves do not claim any interest should not be brought to sale. According to them the property is in possession of the 3 surviving sons of Satrughana but they have not appeared in court to file objection to the attachment of those properties.

6. It follows from what has been stated above that the application filed by the appellants was rightly rejected and that this appeal also must fail. But since evidence has been let in on the merits of the claim and findings have been recorded by the learned Single Judge, and the learned Advocate for the appellants also addressed us on the question of merit we would like to record our decision on those points. So far as the lot No. 1 of the schedule is concerned the case of the appellants is that it is the strindhan property of appellant No. 3 Bimala Dei. Admittedly the property stands recorded in the name of Bimala. It is the case of the respondent that this property was acquired by Krishna benami in the name his wife Bimala and that it was not given as dowry to her by her father as contended by the appellants. When the property admittedly stands in Bimala's name in the settlement and other records, the onus to prove that Bimala was not the real owner of the property but was only a benamidar, heavily on the party who contends that it is benami. The learned Judge has however laid the onus on the petitioners and after discussing the evidence let in on the petitioners' side held that it is not the property of Bimala but a part of the joint family properties of Krishna's family It is remarkable to note that not a single witness has been examined on the respondent's side to prove that this is joint family property. In the circumstances we would hold on merits that property covered by lot No. 1 of the schedule is Bimala's stridhan property.

7. The properties mentioned in items 2 to 13 are admittedly joint family properties. The case of the petitioners that Krishna relinquished his share in these properties by accepting Rs. 400/- from his father has not been satisfactorily established. Admittedly there is no deed of relinquishment. It is said that when Krishna relinquished his right in the family properties by accepting Rs 400/- from his father he had passed on a note to that effect to the latter. This note has not seen the light of day. There is evidence to show that while Krishna was living at Cuttack his sister, brothers and his own son through his first wife were living with him and that

Krishna had engaged a tutor for them. At any rate it is also not possible to believe that Krishna had relinquished his valuable right in the joint family properties by taking a paltry sum of Rs. 400/- from his father. The learned Single Judge was therefore right in coming to the conclusion that Krishna had never relinquished his share in the properties covered by Items 2 to 13

8. Having regard, however, to the view taken on the question of res judicata we hold that the appellants cannot succeed. We would accordingly dismiss this appeal with costs Hearing fee of Rs. 50.

G.K. Misra, J.

9. I agree.

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