

Chinnasami Vs. Natarajan

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Court : Chennai

Decided On : Feb-27-1996

Reported in : 1996(1)CTC479

Judge : Jagadeesan, J.

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

Appeal No. : C.R.P. No. 3487 of 1995

Appellant : Chinnasami

Respondent : Natarajan

Advocate for Pet/Ap. : C. Ravichandran, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Jagadeesan, J.

1. The petitioner herein is the decree holder in O.S. No. 983 of 1989. He obtained the decree against the respondent herein and filed E.P.368/91 for attachment of the house owned by the respondent. The respondent remained ex-parte in the suit as well as in the E.P when the order of attachment was made. Subsequently he

filed E.A. No. 558 of 1993 to raise the attachment, claiming that the respondent is an agriculturist and as per Section 60, C.P.C. there is a bar for attachment of the house of an agriculturist and hence the order of attachment has to be raised.

2. The petitioner herein opposed the application on the ground that notice in the attachment application was served on the respondent he has not taken any objection and the order of attachment was made. Subsequently the petitioner moved the executing court for reduction of upset price and at that time also the respondent did not take any objection. The respondent is doing milk business and he has let out a portion of the house to tenants. Hence the respondent is not entitled for the benefit of Section 60, C.P.C.

3. The lower court has allowed the application filed by the respondent and raised the order of attachment. The present revision is against the same.

4. The respondent, though served, has not chosen to appear either in person or through counsel. The respondent has filed the E.A under Section 47, C.P.C. on the ground that he is an agriculturist and as such the property cannot be attached and bring to sale.

In the application, he has stated as follows:

The respondent in his evidence in the chief examination has stated as follows:

Section 60, C.P.C. runs as follows:

'60. Property liable to attachment and sale in execution of decree-(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other salable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf;

Provided that the following particulars shall not be liable to such attachment or sale, namely:-

(a)...

(b)...

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant there to and necessary for their enjoyment) belonging to an agriculturist or a labourer or a domestic servant and occupied by him;...'

Explanation V.- For the purposes of this proviso, the expression 'agriculturist' means a person who cultivates land personally and who depends for his livelihood mainly on the income from agricultural land, whether as owner, tenant, partner or agricultural labourer....' So Explanation V to Section 60, C.P.C. makes it clear that the owner of the land or the tenant or partner or the agricultural labourer would fall within this category of 'agriculturist'.

5. In the petition the petitioner has stated that he is an agriculturist. But in his evidence he has stated that he is doing agricultural labour. It is not known as to what sort of agricultural labour he is doing. It cannot be said that every labour can be treated as agricultural labour. Moreover, the plea is so vague, as he has not specifically stated under what category he claims the benefit under the provisions of Section 60 (1)(c) C.P.C.

6. Further it is stated that the suit has been decreed ex parte. Though in the E.P notice has been served before ever the order of attachment was made, the respondent did not object for the same. If at the appropriate stage and at the earliest point of time the debtor fails to take the objection with regard to the attachment of the house or the property belongs to him in accordance with Section 60(1)(c), C.P.C, subsequently he cannot claim any exemption on the principles of constructive res judicata.

7. The counsel for the petitioner referred to a judgment reported in *Bhuskar Traders v. Minikipacha Kunhiraman*, : AIR1988 Ker227 . In it, it has been held as

follows:

'First proviso to Section 60(1) enumerates various categories of properties that are not liable to attachment or sale. When a property is attached and notice is issued to the party concerned it is for him to claim exemption under any of the categories detailed in the first proviso then and there. As the petitioner did not raise his objection at the time when he received the notice of attachment he is precluded from raising such an objection subsequently. Explanation IV to Section 11 postulates that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. As the petitioner did not raise his objection at the time when he received the notice of attachment as he 'might and ought' to have done, he is precluded by Explanation IV to Section 11 C.P.C, From raising such an objection subsequently by the rule of constructive res judicata. Even before Explanation VII was added that was the position. As Explanation VII has been added by the C.P.C (Amendment) Act of 1976 the irrefutable position is that Section 11 C.P.C applies with all vigour to execution proceedings also....

In *Mohanlal v. Benoy Kishna*, : [1953]4SCR377 , the Supreme Court held that the principle of constructive res Judicata is applicable to execution proceedings is no longer open to doubt Reference is made to *Ananda Kumar v. Sheikh Madan*, AIR 1934 Cat 472 by the Supreme Court, In the above case an application was made by a certain person for execution of a decree and no objection was raised that the decree was not maintainable. It was held that no further objection on the score of maintainability of a fresh application for execution on the part of the same applicant could be raised. Thus the indubitable position is that even before Explanation VII was added constructive res judicata applied to execution proceedings. After the insertion of Explanation VII to Section 11 it can be said with certitude that Section 11 applies to execution proceedings as well. That being the position, the failure to raise at the first opportunity the contention that the property is not liable to be attached in view of Section 60(1c) of the Code precludes him from urging it at the far end of the execution proceedings when the property is brought to sale. Defendant cannot whimsically and capriciously raise his contentions in utter disregard of the law of procedure. It is also significant to note

that the property was proclaimed for sale on 8.2.1984 and the sale was being adjourned on several occasions on the motion of the petitioner. As the petitioner's contention is barred by constructive res judicata the executing court was perfectly justified in rejecting the execution application...'

It has been clearly held in the judgment referred to above that as per Explanation IV to Section 11, C.P.C, the failure on the part of the judgment-debtor to take the objection at the earliest point of time would amount to constructive res judicata. In the case on hand also the respondent had failed to exercise his right to raise his objection at the earliest point of time. Hence after the order of attachment and at the time of sale, it is not open to the respondent to raise the objection with regard to the validity of the order of attachment.

8. Hence the civil revision petition is allowed, setting aside the order of the lower court. No costs.

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