

(1957) 04 OHC CK 0005

In the Orissa High Court

Case No : Second Appeal No. 54 of 1955

Banchhanidhi Naik

APPELLANT

Vs

Collector of Balasore

RESPONDENT

Date of Decision : 22-04-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 41 Rule 13, 11, 38, 51

Citation : AIR 1957 Ori 274 : (1957) 23 CLT 285

Hon'ble Judges : P.V.B. Rao, J

Bench : Single Bench

Advocate : P.C. Chatterji, for the Appellant; A.K. Tripathi, for A.G., for the Respondent

Final Decision : Allowed

Judgement

P.V.B. Rao, J.—This Miscellaneous Second Appeal by the judgment-debtor under a rent decree is filed against an order passed in appeal by the District Judge of Mayurbhanj confirming an order under Section 47 C. P. C. by the Rent Suit Deputy Collector, Bhadrak, in execution proceedings of the decree.

2. A rent decree was obtained in suit No. 9969 of 1941-42 on 17-4-42. The decree shows the properties on which the rent appears to have been claimed. There were subsequently appeals" against the said decree to the District Judge as well as to the High Court and the matter was finally decided on" 9-9-47. In execution of the said decree, the decree-holder, the Collector of Balasore on behalf of Lalita Dei Endowment Estate filed an execution application in Execution Case No. 927 of 1950-51 on 7-8-50 in which he prayed for realisation of the decretal dues by attachment and sale of the movable properties described in the execution application or by Sale of the immovable properties also described there in, being the properties on which the rent payable was the subject matter of the suit.

The execution petition filed in 1950 was pending till about the end of 1934 and

the pendency was mostly due to the nazarat not being able to carry out the orders of the Deputy" Collector for serving notices etc., From the order sheet of the executing court, it appears, there was a considerable delay in service of the execution notice. But subsequently about 3 1/2 years after the filing of the execution application, movable properties were attached and were kept with a zimadar, When the time for sale of those properties came, the Zimadar did not produce the moveable properties and as held by the learned District Judge, practically avoided the production of the same as a result of which the attached moveable properties could not be put to sale. Subsequently some attempts appear to have been made by the executing court for directing the zimadar to produce the properties.

But before the order for production of those properties was enforced, the decree-holder, the Collector of Balasore, on 1-10-54 filed a petition asking the Court to sell some other Immovable properties listed in that petition. It may be noted that this is not an execution petition or a petition to amend the original execution petition, but simply an application to sell the properties listed therein. These properties which are sought to be sold by the Collector of Balasore in his application dated 1-10-54, it may be noted, are not the properties for which, the rent was claimed, but some other different immovable properties belonging to the judgment debtor.

He alleged in that petition that the zimadar was not producing the properties in collusion with the Judgment-debtor. No notice of this application by the decree-holder was taken out to the judgment-debtor, but on the very day on which the application was filed, that is, on 1-10-54 the Court ordered issue of sale notice fixing 29-11-54 for sale. This order, it may be noted, is clearly an irregular order.

The properties for which the sale notice was Issued are not the properties the rent of which was the subject matter of the decree in which case the said properties may be sold without attachment as they are subject to a charge for the rent. But these properties are different properties and cannot be brought to sale without being attached In the first instance. The sale did not take place on 29-11-54 and on 15-12-54, it appears, the judgment-debtor filed an application through his pleader that he may be allowed to deposit the dues on the next day with the undertaking that the properties might be put up for sale on the adjourned day without fresh notice and the case was adjourned to 29-12-54 (or the judgment-debtor to deposit the decretal amount.

The executing court does not seem to have contemplated that between the sale notice and the sale there should be a proclamation under Order 21, Rule 66, C. P. C. Order 21, Rule 66, Clause (2) of the CPC contemplates proclamation specifying the fact, stated in that clause after notice to the decree-holder and the Judgment-debtor. This notice to enable the Court to draw up the proclamation and proclaim the properties for sale on a day fixed by the Court is the sale notice contemplated under the Civil Procedure Code.

What was done in this case is simply an issue of sale notice putting up the properties for sale on 29-11-54. This appears to be quite contrary to the provisions of the C. P. C. Thus the application by the judgment-debtor undertaking to deposit the amount, in default of which the properties can be sold, was filed when there was no proclamation for the sale of the properties required by law.

3. Subsequently the judgment-debtor, without making any deposit, filed an objection on 29-12-54 to the application filed by the decree-holder on 1-10-54 that the decree-holder was not entitled to proceed against these moveable Properties as he prayed originally for attachment, of movable and other immovable properties and in face of the fact that the moveable properties were lying attached without being brought to sale.

This objection was overruled by the executing court and the appeal against the order of the executing court was rejected by the learned-District Judge, The learned District Judge came to the conclusion that the decree-holder was entitled to proceed against other properties though there were already some movable properties attached and kept in the custody of the zimadar and that the Court had inherent power to direct sale of other immovable properties though the execution application did not contain the prayer for sale of those properties and the judgement debtor was barred by res judicata from raising the objection

4. Before going into the contentions raised by the appellant before me, I wish to point out certain irregularities and callous disregard of the orders of this Court by the Court of the Deputy Collector as these are things which cannot be ignored in the interests of the administration of justice. This Miscellaneous Second Appeal was filed on 27-9-55., The appeal was admitted on 8-12-55 and notice was ordered.

The notice was issued fixing 4-2-56 and the lower court records were called for on 4-1-56. On 10-8-56, interim stay of further proceeding was ordered. The lower Court record is noted by this office as having been received .The note was made on 5-2-56. Evidently this record must have been only the record of the lower appellate Court. In the office note of this Court dated 20-9-56 it is stated that the trial court record was not received by then and that it should be called for again.

When the District Judge received notice to send the records, he should have called for the Records Of the executing court if they were by that time already sent back and then submitted the lower Court records instead simply forwarding the appellate Court records to this Court. The service return was not received in spite of repeated reminders and I gather from the order sheet in this appeal that the notice on the respondent! In the stay matter was served on the Government Pleader, Balasore though the notice was directed to be served on the Collector of Balasore. Again a reminder was sent for the trial Court record on. 25-10-56 but in spite of that reminder also It was not sent.

Another reminder was sent on 3-11-56. As the notice in appeal matter also was not received, a reminder was sent to the District Judge on 5-11-58 and a reply was received from the District Judge of Mayurbhanj that the Collector, Balasore had been reminded by- him to send the service return direct to this Court which however was not received by this Court as per note dated 15-11-56.

The District Judge also wrote a letter informing this Court that the Rent Suit Deputy Collector had been addressed to send the trial Court record direct to this Court, but as per note in the order sheet dated 17-11-56, as it was not received, a letter, was again issued for early transmission of the same. The Advocate-General also was addressed twice to see that the service return was submitted to this Court soon. Even after all these" correspondence, as can be seen from the order sheet dated 8-1-57, the trial Court record was not observed and the service return was not received,

Reminder was again sent to the Advocate General Orissa as also to the District Judge of Mayurbhanj and finally the trial Court record was received as per note dated 21-1-57. But even then the service return was not received and again a reminder was issued to the Advocate-General, The service return was received after the notice was served on the Government pleader, Balasore. From these facts, it is seen that it took more than one year to get the records from the Deputy Collector and the service return from the Collector.

In spite of repeated reminders the Deputy Collector did not send the records. The Deputy Collector should note that it is his duty to submit the records forthwith" on receipt of letters from the appellate Court. This persistent refusal, he should also note, may entail proceedings for contempt against the officer concerned. This is not the way in which a Court subordinate to the jurisdiction of the High Court should conduct the business of the administration of justice.

There is absolutely no explanation as to why it required one year for the Deputy Collector to submit the record to this Court and why he did not even care to reply to the requisitions made by the appellate Court.

5. When the appeal came up before me for hearing on the first day, Mr. Tripathi on behalf of the learned Advocate-General prayed for time saying that the Advocate-General did not receive any Vakalat from the Collector authorising him to appear in the case. , When it was adjourn d to the next day a longer adjournment having been refused, the Vakalat was filed on 25-3-57. It was signed by the Collector on 23-3-57. I cannot comprehend why the Collector did not send the Vakalat to the Advocate General earlier.

6. Mr. P. C. Chatterji, the learned counsel for the appellant in the first instance contended that as movable properties were a attached, no execution against the immovable properties could be directed before the attached moveable properties were sold. I cannot accept this contention, as the decree-holder is entitled to proceed simultaneously against the different properties.

But it still remains to be considered whether in the interests of justices, on the facts of this particular case, the Court could have allowed the decree-holder to ask for sale of some other properties not even specified in the execution petition when the zimadar who was in the custody of the attached properties did not produce, in spite of the orders of the Court, the attached properties for sale. The Court should have, in the peculiar circumstances of this case, proceeded against the zimadar either for production of the properties or for any other relief or in the alternative it should have taken such steps as the law permitted against him.

7. Next the learned counsel contends that the new properties sought to be sold by the petition dated 1-10-54 cannot be sold as these properties are not described in this execution application filed by the decree-holder and as there is no amendment of the execution application. Mr. Chatterji contends that the execution application being not in accordance with law, the Court cannot sell the properties.

The learned District Judge seems to have agreed with this contention, but did not give effect to it on the ground that the Judgment debtor was barred by constructive res judicata in raising this contention. According to the learned District Judge, the judgment-debtor waived all the irregularities by his application dated 15-12-64 when he wanted time for payment of the decretal dues. In my opinion, this finding of the learned District Judge is not correct. The judgment-debtor filed an application through his pleader on that day that he would pay the money if time was given, failing which the properties could be sold.

There is no application by the decree-holder for amendment of the execution application by inserting the new properties to be sold.

The new properties to be sold are not described in the execution application. There is nothing on record to show that the Judgment-debtor was aware that the decree-holder wanted to sell some other properties other than those described in the execution application. Under these circumstances, I am of opinion that the doctrine of res judicata in execution application should not be extended so far as to include the non-raising of any objection with regard to the execution petition being not in accordance with law at a time when he wanted time to pay the decretal amount.

In my view, therefore, the Judgment-debtor cannot be held to have been barred by constructive res judicata in raising the objection that the properties which are now sought to be sold cannot be sold as the execution application originally filed by the decree-holder is not in accordance with law and does not contain the description of the properties to be attached and sold and the execution application was not amended by including these properties as properties to be sold.

8. I would therefore allow the appeal, set aside the orders of the Courts below and remand the matter to the executing Court with a direction that the Deputy Collector should, in the first instance, enquire about the non-production of the

attached properties from the zimadar and take proper steps concerning the same, Afterwards if the decree-holder wants to proceed against the properties described in his petition dated 1-10-54 the decree-holder should be directed to amend the execution application accordingly and then proceed with the execution. The appellant will have his costs throughout.

9. A copy of this Judgment will be sent to the Government.