
(1963) 05 P&H CK 0062

In the Punjab And Haryana At Chandigarh

Case No : Execution First Appeal No. 394 of 1961

Bhagwan Dass and others

APPELLANT

Vs

Santokh Singh and others

RESPONDENT

Date of Decision : 15-05-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 136, 60, 60(1)(ccc)

Citation : (1963) 05 P&H CK 0062

Hon'ble Judges : P.D. Sharma, J

Bench : Single Bench

Advocate : H.L. Sarin, for the Appellant; B.R. Tuli, for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

P.D. Sharma, J.—This first appeal from the order of the learned Subordinate Judge 1st Class, Ludhiana, setting aside attachment of a house belonging to the judgment-debtor and dismissing the execution application, has arisen out of the following circumstances:-

Bhagwan Dass and others instituted a suit for the recovery of certain amount against Santokh Singh and two others in the Court of learned Civil Judge, Nasik, and in the course a house belonging to Santokh Singh situate at Ludhiana was attached before judgment on 27th February, 1956, as provided in Order 38, Rule 5, CPC Code, The suit was decreed to the extent of Rs. 91,626/2/6 with proportionate costs on 12th February, 1957. The decree-holders obtained a transfer certificate for execution of the decree in the Civil Court at Ludhiana and applied for execution thereof on 19th April, 1966. Santokh Singh in response to the notice issued by the executing Court appeared before it and filed objection petition to the effect that attachment of the house was not effected according to law and that it was his only one residential house and thus exempt from attachment u/s 60(1)(ccc), CPC Code. He put in another petition on 17th March, 1961, pleading that the warrant of attachment before judgment of his house was

addressed to the bailiff of the Court at Ludhiana and was not addressed to any competent Court as required by law and that being so, the attachment of his house was invalid.

2. The decree-holders maintained that the objection petitions could not be entertained by the transferee Court and that it would be wrong to say that the house was the only residential house of the objector and that the judgment-debtor was barred from raising this objection.

3. The following issues were framed:

(1) Whether the judgment-debtor can take an objection in the transferee Court regarding the order of attachment before judgment passed by the trial Court at Nasik ?

(2) If issue No. 1 is proved, whether the attachment of the property of the judgment-debtor before judgment was without jurisdiction and invalid ?

(3) Whether the application can not proceed without the plan of the attached property ?

(4) Whether the attached property is exempt from attachment and is liable to be released ?

(5) Whether the judgment-debtor is barred from taking the objection regarding the exemption of the house ?

(6) Whether the warrant, copy of which is Exhibit DH. 3, was sent to District Judge, Ludhiana ? If not, what is its effect ?

The executing Court decided issues Nos. 1, 2, 4 and 6 in favour of the judgment debtor-objector and issue No. 3 against him. Issue No. 5 was found against the decree holders. The objection petition was accepted and the house released from attachment.

4. The learned Counsel for the decree-holders in his arguments mainly challenged findings of the lower court on issues Nos. 2, 4 and 6. It is common ground that the warrant of attachment before judgment issued under Order 38, Rule 5. CPC (Copy Exhibit DH. 3) was addressed to the bailiff of the Court at Ludhiana and not to the District Judge, Ludhiana, as required by Section 136 of the CPC Code. The bailiff before executing the warrant obtained orders of the Senior Subordinate Judge, Ludhiana. The trial Judge relying on (i) Rameshwar dayal Ramswaroop v. Bheemsen Dulichand A. I. R. 1951 MP 82(2), (ii) Sachindra Kumar Bose v. Raj Kumari Usha Prova De A. I. R. 1949 Cal. 690 and Firm Surajbali Ram Harakh Vs. Mohar Ali and Others, came to the conclusion that the attachment of the house was invalid and could not be sustained in law. The learned Counsel for the Appellants in support of his contentions referred me to the case, Marriamma Mathew v. Ittoop Poulo Counter A. I. R. 1962 TC 159 (F. B.), which laid down:

When an order of attachment before judgment of properties situated within the jurisdiction of one Court is made by another court, the provisions in Section 136 to send the order of attachment to the District Court within the local limits of whose jurisdiction the properties sought to be attached are situated, is only a procedural one and so long as the court effecting the attachment has jurisdiction over the subject-matter of attachment non-compliance with the provisions in Section 136 can only amount to an irregularity.

The three cases on which the trial Judge based his conclusions have been considered in Mariamma Mathew's case A. I. R. 1962 TC 159 (F. B.) and not followed. The learned Counsel for the Appellants also relied on the case, AIR 1943 129 (Lahore) where it was held:

The question as to whether certain proceedings are void for want of jurisdiction when the objection is raised at a late stage depends on whether it is a case of inherent lack of jurisdiction, or of the irregular exercise of it, if the former, the proceedings are coram no judge and must be set aside even though the objection had been raised after the lapse of some years. If the latter, the objection must be taken to have been waived and cannot be entertained at that stage.

It was a case where the Senior Subordinate Judge in District A instead of sending the certificate to the District Judge of another District D, sent it direct to a Subordinate Judge in that District for execution of the decree. If the certificate had been sent to the District Judge of D, he, in normal course, would have transferred it for execution to the Subordinate Judge who was competent to deal with suits and execution applications of this class and value. The irregularity was condoned as of form and not of substance, The same view was taken in the case, Inderdeo Prosad Rai Vs. Deonarayan Mahton, . Both these Lahore and Patna cases were cited with approval in Mariamma Mathew's case A. I. R. 1962 TC 159 (F. B.). I may like to mention here that the wordings of Section 136, Civil Procedure Code, which provides procedure for attachment of property outside district and Order 21, Rule 5, CPC Code, which prescribes the mode of transfer of decree for execution in a different district, are identical. I am in respectful agreement with the law enunciated in the Mariamma Mathew's case A. I. R. 1962 TC 159 (F. B.), and that being so, it is held that attachment of the house in dispute is valid.

5. The learned executing Court while dealing with issue No 4 considered whether the house was in occupation of the judgment-debtor-objector in 1956 when it was attached before judgment under Order 38, Rule 5, CPC Code. This was wrong. He should have taken the condition prevailing when the decree holders sought execution of their decree in his Court in 1960. In Mst. Naraini v. Shrimali Durga Devi (1959) 61 P. L. R. 219, it was laid down that:-

An attachment before judgment is not an attachment in execution of a decree. Hence the provisions of Section 60 of the CPC do not apply to such an

attachment. When a decree is passed and an application for its execution is made, the attachment before judgment immediately turns into attachment in execution of the decree and no fresh proceedings are necessary for attachment of the same property.

The finding of the Court below on issue No. 4 thus cannot be main-tained. The learned Counsel for both the parties agreed that the material on the record was not enough to determine with any amount of certainty whether the judgment debtor was in occupation of the house or not in 1960. The parties did not fully comprehend the scope of enquiry under this issue. It was suggested that the case should be remanded to the Court below for fresh decision after determining issue No. 4 in the light of the above observations and taking into consideration the conclusion of this Court on issues Nos. 2 and 6.

6. For the above reasons, the appeal is accepted and order dated 19th August, 1961, of the executing Court by which it released the house from attachment and consigned the execution application to the record room as unsatisfied is set aside. The case is remanded to the Court below for fresh decision as indicated above. The parties should be given an opportunity to produce fresh evidence on issue No. 4.

7. The parties have been directed to appear before the executing Court on 4th June, 1963.