
(1931) 01 BOM CK 0015
In the Bombay High Court
Case No : Appeal No. 32 of 1929

Gangadhar Martand Joshi	Vs	APPELLANT
Sir Jagmohandas Varjivandas		RESPONDENT

Date of Decision : 06-01-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, 47

Citation : (1931) 33 BOMLR 781

Hon'ble Judges : Madgavkar, J; Baker, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Madgavkar, J.—The three numbers belonging to the appellant judgment-debtor including a house were attached in execution by the decree-holder respondent, and notice of the attachment on the appellant was returned on July 24, 1925. The appellant objected that the decree was declaratory and the attachment improper. These points were decided against him, and the property was ordered to be sold through the Collector. After the sale he applied that the property was not liable to sale u/s 60 of the Code of Civil Procedure. Pending disposal of that objection the appellant was not dispossessed. The trial Court dismissed the application as being unduly delayed. The judgment-debtor appeals.

2. It is argued for the appellant that the trial Court appears to have had Order XXI, Rule 58, Civil Procedure Code, in its mind, whereas the appellant being the judgment-debtor and not a third party the application is governed by Section 47, Civil Procedure Code. It is contended for the respondent that the application is barred as res judicata by reason of issue No. 7 and the finding on it in the previous proceedings, and is also barred by limitation under Article 181 of the first schedule of the Indian Limitation Act.

3. Order XXI, Rule 58, Civil Procedure Code, has no application, the appellant being the judgment-debtor. The application falls u/s 47, Civil Procedure Code,

and Article 165 of the Indian Limitation Act has no application as the appellant had not been dispossessed, but rather Article 181 applies : *Rasul v. Amina* ILR (1922) 46 Bom. 1031, 24 Bom. L.R. 771. The question arises when the right to apply accrued to the appellant under Article 181. It is argued for the appellant that Section 60 exempts such property both from attachment as well as from sale, and, therefore, the right accrued not merely on attachment but also upon sale. Secondly, the principle of *res judicata* will not apply to every objection raised in execution proceedings. As observed by Fawcett J. in *Gadigappa v. Shidappa* ILR (1924) 48 Bom. 638, 26 Bom. L.R. 817 the principle should be applied with great caution.

4. On the second point, while conceding the need for caution particularly where the circumstances in one darkhast differ from the circumstances in a previous darkhast, we are of opinion that generally speaking the principle of *res judicata* applies as much to execution proceedings as to suits, and it is not open ordinarily to the parties to raise the same contention again unless they can show substantial reason for being allowed to do so. In the present case, it is not accurate to say that on the notice of attachment the judgment-debtor, appellant merely objected on general grounds that the decree was declaratory and not executable. On the contrary, an express issue No. 7 was raised on his behalf as follows: "Is the attachment levied on defendants' lands not legal and proper?" The finding was that it was legal. It was undoubtedly open to the appellant to raise the objection u/s 60 (c), Civil Procedure Code, then, which he raises now. Having raised the question of the legality and propriety of the attachment and failed to substantiate it u/s 60 (c) or other grounds, we are of opinion "that the respondent is entitled to the benefit of that finding, and the appellant is precluded from raising it afresh on the principle of *res judicata*."

5. Even on the question of limitation, the general principle is that a party must state its objections at the earliest rather than at the latest possible stage. Article 165, as stated above, has no application, the appellant not being dispossessed. Under Article 181 the right to apply accrued to the appellant from the moment the property now in question was attached, we are unable to accede to the contention that although the property was mentioned by survey numbers, the absence of the specific mention of the house misled the appellant. He ought to have known the precise property described in these survey numbers. His right to apply to remove the attachment u/s 60 (c) accrued on June 24, 1925, when the notice of attachment served on him was returned. The present application was made on January 7, 1929, more than three years from the former date. It is, therefore, in our opinion, barred under Article 181 of the first schedule of the Indian Limitation Act. It is not necessary, therefore, to remand the case to the trial Court for decision on the merits.

6. The appeal is dismissed with costs.

Baker, J.

7. I agree.