

(1937) 02 AHC CK 0009
In the Allahabad High Court

Hafiz Ahmad Ali Khan and Others

APPELLANT

Vs

Anand Sarup and Others

RESPONDENT

Date of Decision : 25-02-1937

Acts Referred:

Citation : AIR 1937 All 635

Final Decision : Dismissed

Judgement

1. This is a plaintiffs' appeal and arises out of a suit in which alternative reliefs were prayed for by the plaintiffs. The plaintiffs prayed for a declaration that the property specified at the foot of the plaint was jagir and was not transferable and in the alternative prayed for a declaration

that the revenue of the property aforesaid being a pension of the plaintiffs is not transferable and that the defendants are not entitled to treat the property in suit as revenue-free grant.

2. One of the contentions raised by the defendants was that the suit was barred by Section 47, Civil P.C. The learned Subordinate Judge gave effect to this contention and dismissed the suit. He did not record findings on the other issues in the case. The plaintiffs have come up in appeal to this Court and it is contended on their behalf that the decision of the Court below is erroneous. In our judgment this contention is well founded and ought to prevail. The facts that led to the institution of the suit are briefly as follows:

In the year 1930 the defendant-respondents brought a suit for recovery of money against the plaintiffs of the present suit. During the pendency of that suit the defendant-respondents filed an application for attachment before judgment of the property which is in dispute in the present litigation. The present plaintiffs, who were defendants in that suit, preferred objections contending that the property in suit was not transferable and could not be attached. The objections purported to be objections under Clause 38, Rule 8, Civil P.C. The Court did not decide the objections during the pendency of the suit. The suit was decreed and

thereafter the Court proceeded to decide the objections preferred by the present plaintiffs under Order 38, Rule 8, Civil P.C. The objections were disallowed by the Court on 21st December 1931. The suit giving rise to the present appeal was then brought by plaintiffs-appellants on 21st December 1932, i.e., within a year from the date of the dismissal of objections under Order 38, Rule 8, Civil P.C.

3. The defendants contended in the Court below that as the plaintiffs' objections referred to above were disallowed by the Court, the present suit was barred by Section 47, Civil P.C. The learned Subordinate Judge held that objections under Order 38, Rule 8, can only be preferred by third persons and that the objections to the application for attachment before judgment filed by the present plaintiffs in the former litigation "partook of the nature of objections u/s 47" and "were to all intents and purposes objections made u/s 47, Civil P.C." He, therefore, held that the remedy of the plaintiffs against the decision of the Court rejecting their objections was by way of appeal against that decision and that a separate suit was barred. It appears that, before the suit giving rise to the present appeal was filed, the defendants had filed an application for execution of the decree that they had obtained in the former suit. The plaintiffs alleged that they were unaware of this fact when they filed the present suit and filed an application before the learned Subordinate Judge on 30th November 1933, praying that their suit may be treated as an objection u/s 47, Civil P.C. The learned Subordinate Judge refused to accede to this prayer of the plaintiffs as he was of the opinion that the decision of the Court rejecting the objections preferred by the present plaintiffs under Order 38, Rule 8, Civil P.C., had become final and could not be assailed. In our judgment the view taken by the Court below is unsustainable. It is provided by Rule 8, Order 38, that where any claim is preferred to property attached before judgment the claim must be investigated in the manner provided for by the Code for the investigation of claims to property attached in execution of a decree for the payment of money. In other words, where any objection is raised to attachment of certain property before judgment, the objection is to be investigated in accordance with the provisions of Order 21, Rule 58, Civil P.C. There is nothing in Rule 8, Order 38, to indicate that the Legislature intended to confine the operation of that Rule only to claims preferred by persons who are not parties to the suit. Any objection raised by a defendant to attachment before judgment may also be investigated and decided by the Court in accordance with the provisions of Rule 8, Order 38, Civil P.C. The decision of the Court as regards the claim preferred to property attached before judgment is however not final and can be assailed by means of a separate suit instituted within the period of limitation. The decision of a claim in accordance with Rule 8 cannot be treated as a decision u/s 47, Civil P.C., for the simple reason that Section 47 comes into play only when there is an application for execution pending before the Court; in the case before us the objections preferred by the present plaintiffs were decided by the Court long before any application for execution was filed by the present defendants. It is, therefore, clear that the objections of the present plaintiffs were not and could not be treated as objections u/s 47, Civil P.C., nor could the

decision of the Court be regarded as an adjudication of any question that is required by Section 47, Civil P.C., to be determined by the Court executing the decree. The present suit of the plaintiffs was therefore not barred by Section 47, Civil P.C.

4. It has been stated above that the present suit was filed by the plaintiffs after the defendants had applied for execution of their decree. It was open to the Court below, in view of the provisions of Section 47(2), Civil P.C., to treat the present suit as a proceeding u/s 47 and this appears to us to have been a convenient course to adopt. The present plaintiffs are entitled to have their objections as regards the liability of the property in dispute to attachment and sale in execution of the defendants' decree investigated and decided by the execution Court. Accordingly we allow this appeal, set aside the decree of the Court below and send the case back to that Court with the direction that the plaint be treated as art objection u/s 47, Civil P.C., and be referred to the Court executing the decree with a view to its decision on the merits. The respondents must pay the costs of this appeal to the plaintiff, appellants. The costs incurred by the parties in the trial Court will abide the result of the decision of the execution Court.