

(1955) 03 PAT CK 0008
In the Patna High Court
Case No : Second Appeal No. 1359 of 1948

Jadunandan Prasad and Others

APPELLANT

Vs

Bhagwat Mahton and Others

RESPONDENT

Date of Decision : 23-03-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, 47, 47(1), 47(2)

Citation : AIR 1955 Patna 350 : (1955) 3 BLJR 253

Hon'ble Judges : Das, C.J.; Banerji, J

Bench : Division Bench

Advocate : Lal Narain Sinha and Lakshman Saran Sinha, for the Appellant;
Mahabir Prasad, Sidheshwar Prasad Singh and Anirudh Prasad, for the
Respondent

Final Decision : Dismissed

Judgement

Das, C.J.—This is a second appeal by the plaintiffs. It has been referred to a Division Bench by a Single Judge of this Court. The principal question for determination in this second appeal is if the claim of the plaintiffs with regard to 5.55 acres of land comprised in holding No. 206, tauzi No. 8163, is barred by reason of the provisions of Section 47, Civil P. C. The learned Munsif who dealt with the suit in the first instance held that the claim was not barred. The learned Subordinate Judge on appeal held that the claim was barred; hence this second appeal by the plaintiffs.

2. The appellants had brought their suit for a declaration of their title and confirmation of possession in respect of the lands of two holdings, 5.55 acres of land comprised in holding No. 206, and 1.04 acres of land comprised in holding No. 208 in village Haspur Chak Shakoor, bearing tauzi No. 8163. The learned Munsif gave a decree to the present appellants in respect of their entire claim. The learned Subordinate Judge on appeal dismissed the claim of the appellants with regard to holding No. 206, but confirmed the decision of the learned Munsif with regard to the lands in holding No. 208. The present appeal relates to holding

No. 206 only, and, therefore, I need state only the facts so far as they relate to holding No. 206.

3. This holding was originally held by two brothers called Bhabichhan and Sukan. Sukan died in a state of jointness with Bhabichhan. Later on Bhabichhan also died, leaving as his heirs two daughters, Jhalo Kuer and Etwaro Kuer (defendants 5 and 6). He also left two daughter's sons, Baijnath and Srichand (defendants 7 and 8). Bhabichhan sold the entire area of holding No. 206 to the appellants under two sale-deeds dated 6-1-1926, and 21-6-1926. One Gursahai Mahton, the predecessor-in-interest of the principal defendants 1 to 4, purchased 3 annas proprietary interest in tauzi No. 8163 from a receiver in insolvency. He brought a rent suit No. 447 of 1936 with respect to holding No. 206 against Baijnath, defendant 7, without impleading the present appellants or defendants 5, 6 and 8. The present appellants intervened in that suit. The suit was decreed on 27-8-1937, against defendant 7 alone for arrears of rent, because the court did not accept the plea of recognition set up by the present appellants; but costs were decreed against the present appellants as well.

In execution of the decree for arrears of rent Gursahai Mahton purchased the entire holding on 24-3-1938, and dakhil-dehani was obtained on 18-7-1938. The present appellants then preferred application under Order 21, Rule 100, Civil P. C., which was allowed by the trial Court as well as by the first appellate Court. In revision, however, this Court set aside the order of the Courts below on the application filed by the appellants under Order 21, Rule 100, Civil P. C., this Court holding that the present appellants, who were judgment-debtors, had no right to prefer an application under Order 21, Rule 100, Civil P. C. The appellants contended that in spite of the delivery of possession and the adverse order of the High Court, they continued in possession.

In para 15 of their plaint, the appellants alleged that one Basudeo Narain Singh and certain other proprietors of the tauzi filed a suit for arrears of rent against some of the present appellants. Defendant 3 of the present suit filed a petition of intervention in that suit and later on the principal defendant 3 brought the plaintiffs of that rent suit into collusion and got a compromise petition filed, dated 11-2-1942, in which it was alleged that the present appellants had no connection with the holding. The present appellants filed an objection to the compromise and ultimately the rent suit (No. 3463 of 1941) was dismissed with costs against the present appellants and the question of title and possession between the appellants on one side and principal defendant 3 on the other was left open.

The appellants alleged that the aforesaid compromise petition dated 11-2-1942, had cast a cloud over their title and, therefore, the appellants brought their present suit for a declaration of their title and confirmation of possession. The appellants alleged that the Banaras Bank Limited obtained a mortgage decree against the receiver in insolvency from which Gursahai Mahton had purchased 3 annas proprietary interest, and in execution of the said mortgage decree the 3

annas milkiat interest purchased by Gursahai Mahton was sold on 22-5-1937, therefore, Gursahai Mahton had no subsisting interest as a proprietor at the time when he obtained the decree in rent suit No. 447 of 1936. The sale in execution of the decree passed in rent suit No. 447 of 1936 was, therefore, not a rent sale, because Gursahai Mahton had no interest as a landlord at that time. As the decree was executed against Baijnath alone, the sale held in execution of the decree did not affect the interest of the present appellants who had acquired their title to the holding by prior sale-deeds of the year 1926. This was the basis on which the appellants brought their suit.

4. The suit was contested by the principal defendants. They raised several pleas, including pleas of "res judicata", limitation etc. The only plea with which we are now concerned is the plea that the suit of the appellants, so far as it related to holding No. 206, was barred by the provisions of S. 47, Civil P. C.

5. I have already stated that the learned Munsif held that the suit was not barred by Section 47; but the learned Subordinate Judge held that it was so barred.

6. Therefore, the question is if the learned Subordinate Judge was right in his view that the claim of the appellants with regard to holding No. 206 was barred by the provisions of Section 47, Civil P. C. It is necessary to read only Sub-section (1) of Section 47. That sub-section is in these terms :

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

It is clear from the sub-section that two conditions are necessary for its application. The first condition is that the question which arises must arise between the parties to the suit in which the decree was passed, or their representatives; the second condition is that the question must relate to the execution, discharge or satisfaction of the decree. It is, therefore, necessary to see if these two conditions are fulfilled, with regard to the claim of the appellants in respect of holding No. 206. There can be no doubt that the present appellants were parties to rent suit No. 447 of 1936. They were impleaded as parties on their own application of intervention, and a decree was passed against defendant 7 alone for arrears of rent, but costs were awarded against the present appellants. There can, therefore, be no doubt that the present appellants were not merely parties to the suit but were also judgment-debtors so far as the costs awarded against them were concerned. They filed an application under Order 21, Rule 100, Civil P. C. That application was dismissed by this Court in revision on the ground that the appellants being judgment-debtors were not entitled to make an application under Order 21, Rule 100, Civil P. C. Therefore, there is no escape from the position that the first condition laid down in Section 47, Civil P. C., is fulfilled in the present case.

7. Now, "I come to the second condition. There is no dispute that the milkiat

interest which Gursahai Mahton had purchased from the receiver in insolvency was sold in execution of a mortgage decree obtained by the Banaras Bank Limited on 22-5-1937. This was sometime before Gursahai Mahton obtained his decree in rent suit No. 447 of 1936. Obviously, therefore, the sale held in execution of the decree passed in rent suit No. 447 of 1936 was a money sale. This position has not been disputed before us. It has also not been disputed that the decree was put in execution against Baijnath alone in execution case No. 1588 of 1937 and the entire area of holding No. 206 was sold in execution of the decree, without any objection by the present appellants. Now, the learned Munsif took the view that as the sale was a money sale and only the right, title and interest of Baijnath was sold, the question of the appellants title did not arise; and therefore the question of the appellants' title was not a question relating to the execution, discharge or satisfaction of the decree in Execution case 1588 of 1937.

The learned Munsif said that the appellants did not wish to set aside the sale; they merely wanted a declaration that their title and interest had not been affected by the sale. Such a question, according to the learned Munsif, was not a question relating to the execution, discharge or satisfaction of the decree, within the meaning of Section 47, Civil P. C. The learned Subordinate Judge, however, pointed out that Baijnath had no interest in the holding at all in 1938, the entire holding having been sold to the appellants in 1926. When, therefore, the holding was sold in execution of the decree passed in rent suit No. 447 of 1936, to which the present appellants were parties, the property of the appellants was being sold in execution of the decree, and the plea of the appellants that that property could not be sold in execution of the decree against Baijnath alone should have been raised by them u/s 47, Civil P. C., because that was really a question relating to the execution, discharge or satisfaction of the decree passed in rent suit No. 447 of 1936.

8. In my opinion, the view of the learned Subordinate Judge is correct and Section 47, Civil P. C. bars the claim of the appellants so far as it relates to holding No. 206. If Baijnath had a share or interest in the holding, then the position would have been that his interest alone would have passed under the sale. There are decisions which say that where there are several judgment-debtors under a decree and execution is taken out against some of them as regards their shares in the property, there being no question as to the execution, discharge or satisfaction of the decree as between the decree-holder and the other judgment-debtors, any objection raised by the latter to the execution will not be covered by Section 47, Civil P. C. That, however, is not the position here. The position here is that the property of the appellants was being sold in execution of a decree passed against them as well as Baijnath, but in an execution case in which Baijnath alone was made a party. The objection of the appellants is in substance an objection that their property cannot be sold in an execution against Baijnath alone; this question was certainly a question relating to the execution, discharge or satisfaction of the decree. It is, I think, well

settled that all objections to sale in execution of a decree raised between parties to the suit or their representatives on the ground that the properties are not liable to be sold in execution of the decree are matters coming within Section 47 and a separate suit in respect thereof will be barred. In the present case, the appellants knew of the execution of the decree and they complained of dispossession under Order 21, Rule 100, Civil P. C. They could have easily come u/s 47, Civil P. C. and raised the plea that their property could not be sold without making them parties to the execution case.

The decision, on which the appellants relied, in -- "Mt. Kusmi v. Sadasi Mahto AIR 1942 Pat 432 (A), was rightly distinguished by the learned subordinate Judge for the reasons given by him. That was a case of a sale in execution of a mortgage decree, and the plaintiffs challenged the sale on the ground that they had a title paramount to that of the mortgagor. It is obvious that such a question did not relate to the execution, satisfaction or discharge of the mortgage decree. The decision in -- Nirode Kali Roy Choudhury and Another Vs. Rai Harendra Nath Choudhury and Another, , is clearly in point. In that case a decree had been passed against A only in a suit against A and B, and in execution of the decree B raised an objection under Order 21, Rule 58, which was dismissed, and thereupon he brought a suit under Order 21, Rule 63, Civil P. C. It was held that the suit was barred u/s 47, Civil P. C., because although no decree was passed against B, the question whether the property under suit was liable to be attached and sold for satisfaction of the decree against A was a question relating to the satisfaction of the decree and so the dispute was within the meaning of Section 47, as B was party to the suit. That principle, in my opinion, applies to the present case, and the learned Subordinate Judge was right in his view that the claim of the appellants with regard to holding No. 206 was barred by the provisions of Section 47, Civil P. C.

9. Under Sub-section (2) of Section 47, the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees. The learned Subordinate Judge has pointed out that the suit was brought after the expiry of three years, and, therefore, after the period of limitation for an application u/s 47, Civil P. C. Therefore, the suit could not be treated as an application u/s 47, Civil P. C. The sale was held on 24-3-1938, and dakhil-dehani was obtained on 18-7-1938. The suit was brought five years after, on 21-12-1943. The learned Subordinate Judge was, therefore, right in holding that the suit could not be treated as an application u/s 47, Civil P. C. under Sub-section (2) of that section.

10. Learned counsel for the appellants has contended that the cause of action alleged by the appellants arose on 11-2-1942, much later than the close of the execution proceedings, and, therefore, Section 47 was no bar to the suit. Learned Counsel for the appellants has also contended that as the appellants were not made parties to the execution case, their right, title and interest in the

property was not affected by the sale and they were not compelled to institute any proceedings to have the sale set aside; therefore, Section 47, Civil P. C., was no bar to the suit.

I think I have already dealt with these points in the preceding paragraphs of this judgment. The real cause of action was the sale and delivery of possession in execution of the decree passed in Rent Suit 447 of 1930, and in effect the appellants were asking for setting aside the sale on the ground that Baijnath had no interest and holding No. 206, which was their property, could not be sold in execution of the decree against Baijnath. In other words, the real objection of the appellants was that their property, was not liable to be sold in execution of the decree against Baijnath; that, in my opinion, is a question relating to the execution, discharge or satisfaction of the decree passed in rent suit No. 447 of 1936, to which the appellants were parties.

11. For the reasons given above, the appeal fails and is dismissed with costs.

Banerji, J.

12. I agree.