
(1966) 04 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous S.A. No. 110 of 1965

Kashiram Ajit Singh and others

APPELLANT

Vs

Metal Trading Company and another

RESPONDENT

Date of Decision : 19-04-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Madhya Pradesh Land Revenue Code, 1959 — Section 165(7)(a)

Citation : (1968) J LJ 438 : (1968) MPLJ 301

Hon'ble Judges : R.J. Bhawe, J

Bench : Single Bench

Advocate : S.N. Shukla, for the Appellant; K.K. Adhikari., for the Respondent

Final Decision : Dismissed

Judgement

R.J. Bhawe, J.

This Second Appeal is by the judgment-debtors whose objection u/s 47 of the CPC has been negated by both the lower Courts.

In execution of a money decree obtained by Respondent No. 1 against the Appellants certain fields held by the Appellants in "Bhumiswami rights were attached and sold. Respondent No. 2 is the auction-purchaser thereof. At the time of attachment or sale of the property or even up to the confirmation of the sale, no objection was raised by the Appellants that the land was not liable to be attached or sold by reason of the provisions contained in Section 165(7)(a) of the Madhya Pradesh Land Revenue Code, 1959. It appears that when the land was attached, the Code had come into force, but at the time of sale or its confirmation, that, objection was available to the Appellants. After the sale was confirmed the auction purchaser moved the Executing Court on 21-12-1965 for delivery of possession. That application was resisted on various grounds by the Appellants, but not on the ground that the sale was prohibited under the above said section. The objections preferred by the Appellant were rejected by the

Executing Court. Thereupon the Appellants for the first time filed an application purporting to be u/s 47, Code of Civil Procedure, in which objection based on Section 165(7)(a) of the Madhya Pradesh Land Revenue Code was raised. The Executing Court dismissed the application summarily, while the lower appellate Court found that the application was barred by limitation and also by the principle of constructive res judicata.

Shri Shukla, Learned Counsel for the Appellants, on the authority of the decision of the Supreme Court in *Merla Ramanna Vs. Nallaparaju and Others*, urged before me that the lower appellate Court was in error in holding that the application was barred by limitation. Their Lordships of the Supreme Court held in that case that interference with possession or dispossession itself and not sale of the property that gives a party right to file an application and time begins to run from that point of time and that where the sale is void the appropriate Article applicable is Article 181 of the Indian Limitation Act (since repealed), which is as under:

Any other/application for which no period of limitation is provided elsewhere in this Division.

Three years

When the right to apply accrues

In this view of the matter it will have to be held that when proceedings under Order 21, Rule 95, CPC -were instituted that the time started running against the Appellants and not when the Madhya Pradesh Land Revenue Code came into operation. The application appears to be within limitation. Even if this point is decided in favour of the Appellants, the bar of constructive res judicata still remains to be considered.

On this aspect of the matter on the basis of the decision of the Supreme Court in *Ahmad Hnifz Khan v. Mohammad Hatan Khan* 1963 MPLJ 660, Shri Shukla submits that the sale is without jurisdiction, and that it is not required to be set aside. By the application in question what the Appellants did was to point out to the Court that the sale affected by it was void and without jurisdiction and that the Court should retrace its steps. As no application or suit is required to set aside the sale, which is void, no objection need not be filed and the failure to raise such an objection need not result in bringing into operation the principles of constructive res judicata. Section 165(7)(a) of the Madhya Pradesh Land Revenue Code, 1959 reads as under:

(7). Notwithstanding anything contained in Sub-section (1) or in any other law for the time being in force-

(a) only that part of a holding of a Bhumiswami. shall be liable to attachment or sale in execution of any decree or order as is in excess of five acres of irrigated or ten acres of unirrigated land;

It is plain from the reading of the section that attachment or sale of the land in excess of the minimum prescribed is not prohibited. Whether the land attached or sold comes within the minimum prescribed, is a matter to be investigated into on an objection being raised. In these circumstances when in the execution any "Bhumiswami" land is attached or sold, it cannot be said that the Executing Court has no initial jurisdiction. The Executing Court before which objection based on Section 165(7)(a) of the Code is raised, may decide, though erroneously, that the land attached or sold is not covered within the minimum and that the prohibition contained in the abovesaid section is not attracted. If that decision is not challenged under the procedure prescribed, it will become final. No serious objection can be taken to this proposition. If the wrong decision thus becomes operative as a res judicata it follows as a corollary that if a party fails to raise the objection at the appropriate stage it will be debarred from raising that objection subsequently by operation of constructive res judicata.

In Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, their Lordships of the Supreme Court confirmed the following proposition of law: "If an erroneous decision on questions of law operates as res judicata between the parties to it, the correctness or otherwise of the judicial decision has no bearing upon the question whether or not it operates as res judicata. The decision between the parties that the matter is not within the competence of the Executing Court, even though erroneous, is binding on the parties". and "that the "principle of constructive res judicata" is applicable to execution proceedings is no longer open to doubt".

Prom this decision, it is clear that a decision express or implied.... even an erroneous decision...on a question of law or jurisdiction operates as res judicata.

That to execution proceedings the general principle of res judicata..... even constructive res judicata applies, is clear from the decision of the Privy Council also See Mungal Pershad Dichit v. Girija Kant Lahiri L.R. 8 I.A. 123, T.R. Arunachllam Chatti v. v. R.M. A.R. Arunachetlam L.R. 15 I.A. 171; Raja of Rumnad v. Veluiami Teyni L.R. 48 I.A. 45 and AIR 1936 46 (Privy Council) .

I have already stated above that the question as to whether the sale is affected by the provisions of Section 16L (7) (a) of the Madhya Pradesh Land Revenue Code depends on the decision of that Court. On correct decision it may turn out that no sale, could have been effected and on the authority of Ahmad Hafiz v. Mchmmad Hasankhan 1963 MPLJ 630 it may be held in those circumstances that the sale was void or without jurisdiction. On the contrary if an erroneous decision is given by a competent Court that the sale is not void, that decision shall still operate between the parties and even though the sale is in fact void, it will not be open to a challenge. The same result will follow if the principle of constructive res judicata comes into operation. This aspect of the matter was considered in great details in Venkateseshayya v. Virayya AIR 1958 A.P. 1. (F.B.) and in Baijnath Prasad Sah Vs. Ramphal Sahni and Another, . In Venkateseshyya v. Virayya AIR 1958 A.P. 1. (F.B.) the facts were that on the basis of a mortgage

decree for sale certain "Inam" lands were brought to sale and purchased by an auction-purchaser, who on his turn sold them to a third party. Thereupon the judgment-debtor brought a suit for injunction restraining permanently the auction-purchaser or his vendee from disturbing the judgment-debtor's possession on the ground that by reason of prohibition contained in Section 5 of the Madras Hereditary Village-Offices Act (3 of 1895) the "Inam" lands in question could not have been sold and the sale was null and void. The defence was that the suit was not tenable by virtue of the operation of constructive res judicata. The matter came up to the High Court when the following questions were referred for the decision of the Full Bench:

1. Whether, when service inam lands have been sold in execution of a mortgage decree without any objection being raised at any stage of the proceedings to their salability by reason of the prohibition contained in Section 5 of Madras Act III of 1895, it is open to the inamdar to treat the court-sale as null and void and recover possession of the lands from the purchaser at a court-sale or resist the claim of the purchaser to be put in possession of the lands ?

Whether Section 47 of the CPC is a bar to the maintainability of the suit?

The Chief Justice of Andhra Pradesh (Subba Rao C.J. as he then was) after considering the various authorities enunciated the following propositions:

(i) The rule of res judicata embodied in Section 11 does not exempt from its operation issues raising questions of public policy depending upon either common or statutory prohibitions. Section 11 is not exhaustive and the principle of res judicata could be applied to interlocutory orders and to execution proceedings. So too, it has been recognised by decided cases that the principles of constructive res judicata invoked to a limited extent in the case of orders made in execution.

(ii) There is an essential distinction between the question of the jurisdiction of a Court to entertain a suit and the rule of law which precludes a man from avowing the same thing in successive litigations. There is also a marked difference between inherent want of jurisdiction to entertain a matter and the irregular exercise of it. The jurisdiction of a Court depends upon the pecuniary and territorial limits laid down by law and also on the subject-matter, while the doctrine of res judicata operates on the decision of a Court in a suit or other proceeding which the Court had inherent jurisdiction to entertain.

(iii) There is no conflict between the principle of res judicata and that of prohibited alienation of particular properties on the ground of public policy. An alienation of properties prohibited by public policy or statute may be void. But the said prohibition cannot have the effect of depriving the jurisdiction of Courts to decide in a particular suit whether the alienation is void or not. Nor can it override the principles of res judicata. The former belongs to the domain of substantive law and the latter to the rule giving finality to decrees of competent Courts.

(iv) The sanctity of final judgment is as much based on public policy as prohibition against the alienation of properties annexed to certain public offices. The fundamental question in each case therefore is whether the Court has inherent jurisdiction to entertain a particular suit. A duty is cast upon a Court to raise relevant issues arising on the pleadings and give definite findings on each of the issues. The question whether a service inam is alienable raises a mixed question of fact and law which is certainly within the jurisdiction of the Court to decide. When it decides the question one way the finding will be res judicata in another suit. If the defence which ought to be raised is not raised the Court must be deemed to have decided against the contention not raised.

On these principles it was held by the Full Bench of the Andhra Pradesh High Court that the objection based on Section 5 of the Madras Hereditary Village Offices Act, 1895 should have been raised at the initial stage and not at the stage it was done, and that the orders directing the sale of property would operate as res judicata on the assumption that the objection was raised and was rejected. The case of Venkateseshayya v. Virayya AIR 1958 AP 1 (F.B.) is a complete answer to the arguments raised by Shri Shukla, that in case of a void sale the principle of res judicata cannot be attracted. I respectfully agree with the view of the Andhra Pradesh High Court and hold accordingly. The same view on facts similar to the present case, has been taken by the Full Bench of the Patna High Court in the case referred to above. I, therefore, "refrain from elaborating on the point any further.

For the reasons stated in the said two decisions, with which I respectfully agree, I hold that the lower appellate Court was right in holding that the application in question was barred by constructive res judicata.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.