
(1969) 08 AHC CK 0002
In the Allahabad High Court
Case No : Ex. First Appeal No. 35 of 1966

Krishna Gopal

APPELLANT

Vs

Gokul Prasad and Another

RESPONDENT

Date of Decision : 21-08-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 60, Order 21 Rule 90, 144, 145

Citation : AIR 1970 All 261 : (1969) 39 AWR 633

Hon'ble Judges : K.B. Asthana, J; Hari Swarup, J; Gyanendra Kumar, J

Bench : Full Bench

Advocate : B.R. Avasthi, for the Appellant; S.O.P. Agarwal and Ambika Prasad, for the Respondent

Final Decision : Allowed

Judgement

Hari Swarup, J.—This appeal has been filed against the order of the Civil Judge, Farrukhabad, by which he allowed the objections under Sections 47 and 151. Civil P. C. and set aside the sale and directed that the money deposited be returned to the auction purchaser.

2. The facts giving rise to the present" appeal in short are that one Ambalal Patel obtained a decree against Rarn Rakshpal and Shanta Prasad in suit No. 36 of 1957. The decree was put in execution and the execution case was numbered as 44 of 1960. In execution of the decree on 27-8-1960 a stock of foodgrains was attached by the Amin and given in the security of Gokul Prasad and Markandi on their executing a bond for the return of the property whenever required by the Court and to pay a sum of Rs. 3333 in case of default. Kishan Gopal filed objections in execution and contended that the property attached belonged to him and not to the judgment-debtor and was not liable to attachment. These objections of Krishan Gopal under Order 21, Rule 58 were enquired into by the Executing Court and a final Order under Order 21, Rule 60 was passed by the Court releasing the property in favour of Kishan Gopal, Gokul Prasad and Markandi.

The sureties, however, refused to return the goods and alleged that due to rains it had been spoiled and thrown away. On enquiry made by the Court, it came to the conclusion that the case put up by the sureties was false and that they had sold away the goods and misappropriated the proceeds. The Court on this finding directed that a formal order be prepared for recovery of Rs. 3333 along with costs from the sureties and execution for the same be proceeded u/s 145, Civil P. C. In this execution the properties of the sureties were sold on 17th of March, 1963. Gokul Prasad filed an objection under Sections 47 and 151, Civil P. C. for setting aside the sale on the ground that the order in execution of which the property had been put to sale was a nullity and the sale was, therefore, invalid. The contention was that Section 145, Civil P. C. was not applicable to the circumstances of the case and no execution could be launched for recovery of the amount from the sureties. This objection was allowed by the Executing Court and the sale was ordered to be set aside. The present appeal is against that order. It has been filed by Kishan Gopal whose properties have been attached in execution of the decree against Ram Rakshpal and Shanta Prasad.

3. There have been a number of amendments in the relevant provisions of the Civil P. C. in so far as they apply to the State of U. P. Order 21, Rule 43 provides for attachment of movable properties other than agricultural produce in possession of judgment-debtor. Rule 122 was added by the Allahabad High Court, with the result that agricultural produce also became liable to such attachment.

4. The Allahabad amendment further permitted the making of an arrangement as may be deemed convenient and economical and it did not remain necessary that the property must be secured in the custody of either the attaching officer or his subordinate. The attached property in the present case was thus entrusted by the Court to the custody of Gokul Prasad and Markandi in pursuance of these provisions. In the bond executed by these two persons it was stated that the goods which had been attached by the Amin were in their custody as sureties. They undertook to keep the goods in safe custody and to produce the same forthwith on demand, at any place which may be communicated by the Court or the Court's Amin and that in case they fail to produce the goods, the Court may recover from the person and properties of the sureties, the estimated price of the goods. The estimated price was mentioned as Rs. 3333. Gokul Prasad and Markandi thus became bound as sureties either to return the goods or to pay the value thereof.

5. Order 21 of the Civil P. C. prescribes the mode of dealing with the objections both of the judgment-debtor as well as of third parties whose property is erroneously attached in execution of a decree. Kishan Gopal, who claimed the property to be his own, filed objections under Rule 58 of Order 21, whereupon the Court proceeded to investigate the same. He was thus deemed to be a party to the suit itself for the purposes of his claim. Evidence was taken under Order 21, Rule 59 and the Court passed a final order under Order 21, Rule 60, Civil P.

C. releasing the property. The effect of this order was to let the property go back to the claimant from whose possession it was attached by the Court.

6. The property during attachment continued to remain in the custody of the Court Amin or in the custody of the "Supurdar" as contemplated by Rule 122 of Order 21, Civil P. C. In either case it continued to remain in the constructive possession of the Court. It was held in the case of Teeka and Others Vs. State of Uttar Pradesh, , that

"Whether the Amin keeps the buffaloes in his custody or entrusts them to a Sapurdar is in law the possession of the Court and so long as the attachment is not raised, the possession of the Court continues to subsist."

It is only for the sake of convenience that the Court, instead of keeping the property in its actual custody, gives it in the custody of Sapurdar pending decision of the objection either of the judgment-debtor or of a third party. If the objection of the judgment-debtor or the third party succeeds, the property is released in favour of such objector. In such a case, the Court remains responsible for handing back the property to the successful claimant, as throughout the period of attachment the property remains in the custody of the Court itself.

7. The right of the successful claimant to get back the property on an order being passed by the Court under Order 21, Rule 60 arises u/s 144, Civil P. C, and he becomes entitled to get a restitution of the property in his favour. Section 144, Civil P. C. as applicable to U. P, runs as follows:--

"144(1) Where and in so far as a decree or order is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (1)."

According to Section 144, as amended in U. P., it is no longer necessary that the variation or reversal of the order should be effected by means of an order of an appellate or revisional authority. The right to restitution arises even if the order is varied or reversed by some other process. Where the order of attachment is varied by an order passed under Order 21, Rule 60, Civil P. C., the claimant still becomes entitled to restitution u/s 144, Civil P. C. By an order of attachment the true owner of the property is deprived of his possession over the same as well as of his right to deal with it in the manner he likes, so long as the order of attachment remains in force. The result is that the property is kept off from his custody for the time being. When the order of attachment is varied or reversed

under Order 21, Rule 60, he immediately becomes entitled to get back his property by process of restitution u/s 144, Civil P. C.

8. The procedure for enforcement of the right of restitution is laid down in Section 145, Civil P. C. Section 145, as amended by the U. P. Act 24 of 1954, run as under;--

"145. Where any person has become liable as surety-

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47: Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Explanation -- For the purpose of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of Clause (b)."

9. The adding of the explanation to Section 145 makes it clear that the person in whose custody the property is left would be deemed to be a surety for the purposes of restitution of the property. In *East End Dwellings Company Ltd. v. Finsbury Borough Council* 1952 AC 109 Lord Asquith said:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and Incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This statement has been cited with approval by the Supreme Court in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, . The adding of the explanation to Section 145 makes Gokul Prasad and Markandi "sureties" within the meaning of Section 145(b). Civil P. C. and the restitution of the property or recovery of its equivalent can be enforced in execution against them. Section 145 also provides the extent and the manner in which the liability of the sureties is to be enforced.

10. We are, therefore, of the opinion that the order of the Court directing the restitution is enforceable in the same manner as a decree is enforced by execution. There is no doubt that the property was taken from the custody of the

true owner in execution of a decree and he is only claiming restitution of that property.

11. It was held by the Privy Council in the case of Raj Raghubar Singh v. Jai Indra Bahadur Singh AIR 1919 PC 55 that if the sureties have a personal liability, it can be enforced u/s 145, Civil P. C. and in other cases by the exercise of the inherent powers of the Court, In the present case there is no charge over any property and the liability of the sureties is a personal liability and therefore, it is enforceable under the provisions of Section 145, Civil P. C. The procedure which the Court is to follow is laid down in Section 145, Civil P. C. as applicable in U. P. and we are of the opinion that the liability in the present case is enforceable u/s 145, Civil P. C.

12. In Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, , it was held that an application for restitution is an application for execution of a decree. The restitution and execution are thus synonymous in their applicability for recovery of the property by the person entitled thereto. A Full Bench in Shakir Husain Vs. Chandoo Lal and Others held that

"the action of the attaching Officer in handing over the property to a surety or supurddar is within his lawful powers under Rule 122, and certainly upon his action being approved either expressly or impliedly by the Court, the surety becomes an officer of the Court But apart altogether from this there is no reason why in suitable circumstances Section 145 should not be applicable",

and that

"although a sahara would not be a surety, a supurddar, who has given an undertaking to produce the goods when ordered by the Court is a surety although the undertaking is not given to the Court directly but through the attaching officer, and by such an undertaking he becomes liable u/s 145."

We respectfully agree with the view expressed in Shakir Husain Vs. Chandoo Lal and Others .

13. The learned counsel for the Supurddar opposite parties contended that the provisions of Section 145, Civil P. C. were not applicable in the case of a restitution claimed by a third party but were applicable only in the case of restitution claimed by a judgment-debtor. We do not find any justification for this contention specially in view of the amendment made in Section 145 by the U. P. Act No. 24 of 1954. The explanation added to that section makes it clear that the provisions of Section 145 are applicable even to third party claimants. The provisions of Order 21 as held above deal with the objections both of judgment debtor and third parties. In either case the property is held by the surety after attachment for the benefit of the person entitled thereto. If the property is found to be belonging to judgment-debtor but not attachable in execution of the decree, the judgment-debtor sets the right to claim the restitution. If the property is held to be belonging to a third party and not attachable in execution

of the decree, the property is liable to be returned to the third party claimant.

14. We see no difference in the claim for restitution by a judgment-debtor or a third party, in so far as sureties are concerned. The sureties hold the property on behalf of the Court and the Court restitutes the property to the rightful claimant. It is wholly immaterial as to who has moved the Court for getting back the property from the sureties for being restituted to the rightful claimant.

15. The learned counsel for the Supurdar placed reliance on *Gulsher Khan Supardar v. Bedi Lal* (1962) ALJ. 539 for the proposition that Section 145 applies only to cases where a decree is executed and not in any other circumstances. Reliance has also been placed on the case of *Kallu Khan v. Abdullah Khan*, 18 ALJ 357 = AIR 1920 All 245 (1)) wherein it was laid down that the remedy of the aggrieved party was to file a suit for recovery of the goods or damages and not to move the Court in execution. The case of *Gulsher Khan* 1962 ALJ 539 (Supra) considered the provisions of Section 145 as they stood prior to the amendment made by Act No. 24 of 1954 and it has not taken into account the effect of the Explanation added to Section 145 by the amending Act. The observations made in the case are also in the nature of obiter dicta. There the Court had found that the bond executed by the sureties was on its own terms not enforceable. It was also held that it was not such a bond which came within the purview of Section 145, Civil P. C. The further observations made by the learned Judges that the judgment-debtor had no right to invoke the provisions of Section 145, Civil P. C. are merely obiter dicta. With great respect we do not think the view expressed in the case lays down the correct law.

16. In the case of 18 ALJ 357 : AIR 1920 All 245 (1)¹ (Supra), which in our opinion does not lay down the correct law, no reasons have been given for arriving at the above conclusion. The submission of the learned counsel that the provisions of Section 145, Civil P. C. can be Invoked only by the judgment-debtor and none else is in our opinion not correct. The amendments made in Sections 144 and 145, Civil P. C. make it abundantly clear that restitution can be claimed even in cases where the order of attachment is modified in any manner. In cases of restitution the Court only puts back a person, who has suffered the loss, in the same position in which he was prior to the passing of the Court's order by which he was deprived of his property. It is wholly immaterial who moves the Court to get back the property from the Supurdar for being restored back to the rightful claimant. Sub-sections (b) and (c) of Section 145 nowhere lay down that the restitution can be claimed only by the judgment-debtor.

17. The learned counsel for the sureties also relied on the case of *Shyam Lal and Another Vs. Firm Poonam Chand Manilal*, for the proposition that that decree-holder alone could claim the benefit of Section 145, Civil P. C. at whose instance the property was initially attached and made over to a supurdar. In the case of *Shyam Lal and Another Vs. Firm Poonam Chand Manilal*, the property had been attached in execution of one decree and handed over to a Supurdar. This very property was attached subsequently in execution of another decree. Meanwhile,

the first decree was satisfied and the order of attachment was withdrawn, so the Supurdar returned the goods to the judgment-debtor, without obtaining any order on the point from the Execution Court. The second decree-holder then applied for restitution of the property u/s 145, Civil P. C. and this Court held that the second decree-holder could not in the circumstances of the case get restitution of the property u/s 145, Civil P. C. It was observed in *Shyam Lal and Another Vs. Firm Poonam Chand Manilal*, that the provisions of Section 145 were meant for the protection of the decree-holder at whose instance the property was attached and made over to the custodian and that it was not meant for the benefit of all the persons who hold various decrees against the same judgment-debtor, inasmuch as the goods had never been left in the custody of the Supurdar at the instance of these other decree-holders.

18. *Shyam Lal and Another Vs. Firm Poonam Chand Manilal*, certainly does not lay down the law that the benefit of Section 145, Civil P. C. cannot be taken by a third party whose property had been wrongly attached and who had become entitled to claim restitution by virtue of a decision in his favour under Order 21, Rule 60, Civil P. C. In *Shyam Lal and Another Vs. Firm Poonam Chand Manilal*, the second decree-holder could not invoke the provisions of Section 145, Civil P. C. as he was not really claiming any restitution as understood in law.

19. In *Mathura Das Vs. Hari Shanker and Another*, , this Court, following the law declared in *Shakir Husain Vs. Chandoo Lal and Others* held that the liability of a Supurdar could be enforced at the instance of the judgment-debtor. The learned Judges observed thus:

"..... under Clause (b) of Section 145 of the Code each of the appellants to whom the property taken in execution of a decree had been entrusted became liable as surety for restitution of the property;as surety his liability was the same which he had himself undertaken under the supurdnama."

In the case of *Mathura Das* the Judges were of the opinion that the restitution of the attached property from the custody of the surety was also covered by the provisions of Clause (c) of Section 145 of the Code, in so far as each surety had rendered himself liable for the fulfilment of the conditions entered in the Supurdnama executed by them. It was observed that:

".....the appointment of the appellants as supurdars would be deemed to have been approved by the Court when the Amin submitted the papers relating to the attachment of the property including the Supurdnama. The appointment was on the conditions mentioned in the Supurdnama. These conditions, after the implied approval by the Court, must be taken to have been imposed by the order of the Court and that order could, therefore, be executed against the appellants in order to enforce the liability undertaken by them."

It was held in the above case that the person entitled to enforce the liability was the judgment-debtor and that liability could be enforced by an application u/s 145 of the Code or by a regular suit. We are in respectful agreement with the

view expressed by the Division Bench in the case of Mathura Das Vs. Hari Shanker and Another, that the liability of the surety is enforceable under the provision of Section 145, Civil P. C. at the instance of the person entitled to enforce that liability against the Supurdar, whether he be the judgment-debtor or a third party claimant. The rights of the judgment-debtor and the third party claimant arise on the attachment being lifted, in one case by the release of the property from execution and in the other by the acceptance of the claim of the third party and passing of an order of release by the Court under Order 21, Rule 60, Civil P. C.

20. The learned counsel for the appellant has also contended that in the instant case the order passed by the Court u/s 145, Civil P. C. had become final, as no appeal against the same was filed by the Supurdars and they had, therefore, no right to challenge the same by way of an objection to the sale. There is force in this contention. We have already held that the order passed by the Court u/s 145, Civil P. C. was a valid order and the same cannot be treated as nullity by the Supurdar, when challenging the sale in execution of that order.

21. In the result the appeal succeeds. The impugned order is set aside and the sale is ordered to be confirmed. In view of the circumstances of the case, we make no order as to costs.