

(1948) 10 AHC CK 0009
In the Allahabad High Court

Lala Lakshmi Nath Seth

APPELLANT

Vs

Pt. Kanhaiya Lal Shukla

RESPONDENT

Date of Decision : 18-10-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Encumbered Estates Act, 1934 — Section 4

Citation : AIR 1949 All 333

Hon'ble Judges : Ghulam Hasan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ghulam Hasan, J.—This is the defendant's appeal who was unsuccessful in both the Courts below. The facts are briefly these:

2. On 27th February 1935, Lala Lakshmi Nath Seth, who will be referred to hereafter as Seth, obtained a decree for underproprietary rent against a large number of persons including Pandit Kanhaiya Lal Shukla, Ram Bakhsh and Ganga Ram. Seth is the superior proprietor of village Targaon in respect of which the decree for underproprietary rent was obtained. On 23rd November 1935, Ram Bakhsh and others applied u/s 4, Encumbered Estates Act. The application was in due course forwarded to the Special Judge, where Seth put forward his claim as one of the creditors. The application was, however, dismissed by the Sub Divisional Officer] on 26th May 1938, on the ground that all the] members of the joint Hindu family had not joined and also on account of certain other technical defects. This order was upheld right up to the Board of Revenue on 19th October 1938. The Special Judge before whom the proceedings were pending also dismissed the application on 26th July 1938, and this order was upheld by the late Chief Court of Avadh on 3rd December 1941. In the meantime on 26th February 1938 Seth applied for the sale of underproprietary rights in execution of his decree. The sale was held and the property was purchased by Seth himself on 20th September 1939. The sale was confirmed on 4th September 1940,

possession being delivered to the auction-purchaser on 29th June 1942.

3. It may also be mentioned that after the U.P. Encumbered Estates (Amendment) Act, 1939 (No. XI [11] of 1939) was passed by the U.P. Legislature, Rani Bakhsh applied for amendment under the provisions of that Act to the Sub-Divisional Officer. His application was allowed on 27th August 1940, and was sent in due course to the Special Judge u/s 6. So far as the record in this Court is concerned, the last order in those proceedings is of 20th January 1943, and the date for further proceedings is fixed for 16th April 1943.

4. On 22nd December 1942, Pandit Kanhaiya Lal Shukla, instituted the suit out of which the present appeal arises for a declaration against Seth that the sale of the property in execution of the decree obtained by Seth against him is null and void.

5. The material defence with which I am concerned in the appeal was embodied in three issues. Issue 1 related to the plea whether Seth could realise the entire decretal amount without getting the amount due from the plaintiff apportioned by the Special Judge under the provision of Section 9 (5), Encumbered Estates Act. Issues 2 and 3 were to the effect whether the suit was barred by res judicata and by Section 47, Civil P.C. All the issues were decided by the trial Court in favour of the plaintiff and the suit was decreed. That decree was upheld in appeal by the learned Additional Civil Judge.

6. In second appeal before me it has been contended on behalf of the defendant that the view taken by the Courts below that Section 7, Encumbered Estates Act, bars proceedings not only against the debtor applicant but also against the non applicant, is not correct and that the defendant was not bound to get the apportionment made in proceedings before the Special Judge. I am of opinion that this contention has no substance. There is abundant authority in favour of the view taken by the Courts below. In Babu Ram and Others Vs. Manohar Lal it was held by the learned Judges that where there is a joint decree and therefore a joint debt, the execution of that decree must be stayed, even if one of the judgment-debtors applies u/s 7 until the Special Judge has determined the amount required to be determined by Section 9 (5). This decision was followed by a Full Bench of the Allahabad High Court in Ramdeo Vs. Sri Sadaitan Pande and Others, where it was held that under the amended Act the creditor wanting to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encumbered Estates Act, must wait until the amount due by the joint debtor who had not made an application under the Encumbered Estates Act had been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the judgment-debtor. He cannot file a separate suit for that. This view was based upon the amendment of Section 9 (5) (b) in which the word "decreed" was substituted by the word "determined" and Sub-clause c) was added as follows:

(c). Where no suit has been instituted or where no application for execution of a joint decree has been made in any other Court in respect of such joint debt or

joint decree the creditor may on application to any Court having jurisdiction to entertain such suit, or execute such decree, obtain a decree, or get the decree executed against non-applicant joint debtors, for the amount so determined, subject to the payment of the court-fee payable on such execution application, or on a plaint in a suit for the amount determined by the Special Judge.

7. A Bench of the late Chief Court of Avadh to which I was a member in *Har Charan Lal v. Sukha Nand and Anr.* AIR 1942 Oudh 248 also took the same view. In that case it was also held that the bar u/s 7 applies equally to the property of non applicants. This view was followed in *Jagdish Prasad v. Pran Kumar* at p. 104 of the same Volume AIR 1942 Oudh 254.

8. A Full Bench of the Allahabad High Court in the *Punjab National Bank Ltd. Vs. Vishwa Nath Khanna and Others*, held that the power given to the Court to determine and apportion the debt u/s 9 (5) is not restricted to a case where the decree or debt imposes joint liability but applies also to a case where the decree or debt imposes a joint as well as a several liability upon the debtors. The decision in *Firm Narain Das Balkishan Das Vs. Munshi Muniruddin*, upon which strong reliance was placed on behalf of the defendant-appellant did not, in the opinion of the Full Bench, touch the question of joint and several liability of the debt except incidentally. They, however, expressed their opinion that if that decision was construed to lay down that in a proceeding u/s 9 (5) (a) the joint and several liability of the landlord could not be determined and apportioned, then they were not prepared to agree with that decision.

9. The judicial decisions upon the point appear to me to point in one direction only and that is that Section 7 applies both to the case of an applicant debtor as well as to the non-applicant and that unless the creditor has had the liability of the joint-debtors determined by the Special Judge, it is not open to him to recover the debt in separate proceedings.

10. It has been contended that the amendment made on 27th August 1940 under Act XI [11] of 1939 can at best relate back to the original application made in the year 1935 but it cannot be held to extend to the order u/s 6 of the Act. Sub-section (5) of Section 4, which was added by the Amending Act, is as follows:

(5) If an objection is taken before the Collector or Special Judge that the application is defective and such an objection is upheld, the Collector or Special Judges as the case may be, shall at the request of the landlord amend the application in accordance with the provisions of the Code of Civil Procedure, 1908, relating to the amendment of plaints, and shall proceed with the case.

It is obvious that the amendment is to be made under Order 6, Rule 17, Civil P.C. The amendment thus made must be taken to relate back to the date of the original application under the Encumbered Estates Act. It is contended that though the amendment dates back to the original application, it could not have the effect of reviving the order u/s 6, Encumbered Estates Act, which was no

longer existing. The effect of that amendment, however, is not merely to confine it to the application but to all subsequent proceedings following thereon including the order u/s 6. Once the original application is revived, it must be taken that the proceedings continued till the year 1943, when so far as the record of the present case goes, the order made on 20th January 1943, for publication of notices and the case was fixed for further proceedings on 16th April 1943. The exe-proceedings which started in 1938 and continued till 1942 while the order u/s 6 of the Act was in force must be taken to be with jurisdiction in view of the provisions of Section 7 the Act.

11. Exhibit A4, an application made by Pandit Kanhaiya Lal on 29th April 1938, in the Encumbered Estates Act case of Ganga Ram v. Unao Commercial Bank before the Special Judge, second grade, was referred to as showing that apportionment had already been effected as contemplated by Section 9. This is, however, not so. It appears that in the aforesaid case Pandit Kanhaiya Lal was a creditor. The matter was referred to the Commissioner who had apportioned the debt but this had not been done by the Special Judge. Exhibit A4, therefore, does not advance the appellant's case.

12. Reference is made to Section 79, Land Revenue Act, as showing that no agreement made by the co-sharers that the rent recorded by the Settlement Officer shall be paid by one of them can affect the joint and special responsibility of all co-sharers for the rent. There is no question of the under proprietor's liability being affected by any agreement in the present case. We find here that no proceedings can be taken by virtue of the statutory prohibition contained in the Encumbered Estates Act.

13. Lastly it was argued that the respondent did not raise this objection in the execution proceedings and he is, therefore, barred by the principle of res judicata. There could be no bar of res judicata unless the proceedings out of which it arises were taken in a Court of competent jurisdiction. As the execution proceedings were without jurisdiction any orders passed during the course of those proceedings have no legal effect and do not stand in the way of the respondent. Section 47, Civil P.C., is inapplicable for the same reason.

14. The result is that the appeal fails and is dismissed with costs.