
(1946) 01 PAT CK 0022
In the Patna High Court

Province of Bihar

APPELLANT

Vs

Darbari Misser

RESPONDENT

Date of Decision : 07-01-1946

Acts Referred:

Bihar Tenancy Act, 1885 — Section 177A, 177A(a)

Citation : AIR 1946 Patna 441

Hon'ble Judges : Fazl Ali, C.J.;Agarwala, J

Bench : Full Bench

Judgement

Fazl Ali, C.J.—This is a Letters Patent appeal from the decision of Manohar Lall J. in Misc. S.A. No. 311 of 1943, arising out of an execution proceeding.

2. The facts of the present case are fully set out in the judgment of Manohar Lall J., and may also be briefly recapitulated here. The respondent took a lease from the Director of Agriculture, Bihar, some time ago for three years and, after the expiry of the lease, the appellant brought a suit to recover arrears of rent for a certain period. The suit was decreed on 26th May 1939, and the appellant applied for the execution of the decree by the arrest of the judgment-debtor. The respondent judgment-debtor objected to the execution mainly on the ground that the decree being for arrears of rent, he was not liable to be arrested u/s 177A, Bihar Tenancy Act. Section 177A provides that:

Notwithstanding any thing to the contrary contained in the Code of Civil Procedure, 1908, a decree for arrears of rent obtained against a raiyat or an under-raiyat shall not be executed-(a) by the detention in the civil prison of the judgment-debtor, or (b) by the sale of houses and other buildings with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment, belonging to the raiyat or under-raiyat and occupied by him.

3. This section also provides that any house or building and the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for

their enjoyment may be sold in the execution of a decree for arrears of rent due in respect of the site of such house or building.

4. In resisting the execution proceeding the respondent evidently relied on Clause (a) of Section 177A, and the Government Pleader, who appeared for the appellant-decree-holder, conceded that the objection of the judgment-debtor was well-founded and he could not be arrested. Ultimately, the objection of the judgment-debtor was upheld, and the appellant's application for his arrest was dismissed. In 1942 the appellant again applied for the execution of the decree and in this execution he prayed for the attachment and sale of the respondent's house.

5. The respondent resisted the application on the ground that his house could, not be attached and sold because the decree was passed for arrears of rent due in respect of other lands than the site of the house in question. The Munsif disallowed the objection holding that the decree was not a rent-decree and, therefore, Section 177A, Bihar Tenancy Act, could not be invoked by the respondent in his favour. The learned Subordinate Judge, however, took a different view on appeal and held that the decree was a rent-decree and the respondent was protected by Section 177A. Then there was a second appeal by the appellant, and the learned Single Judge of this Court came to the conclusion that though in point of law the decree under execution was not a decree for rent, yet the respondent's house could not be attached because it had been held previously, though-wrongly, that the decree was a rent-decree, and the matter was res judicata. The appellant has now preferred this appeal under the Letters Patent.

7. There are two contentions put forward by the appellant in this case. In the first place, it is contended that the decision of the Munsif in the previous execution proceeding was really based upon the admission made by the Government Pleader and, therefore, it had not the force of a decree. It was merely a consent order, and the Munsif never tried to adjudicate the question as to: whether the decree was a rent-decree or not.

8. In my opinion, this contention must fail. The respondent clearly raised the contention in the previous execution proceeding that the decree in question was a rent-decree and the order of the Munsif was passed upon the footing that the decree was a rent-decree. The mere fact that the Government Pleader admitted that the decree was a rent-decree is not material. The order of the Munsif was final and could have been appealed against. The appellant, however, did not appeal against the order.

9. It was next contended that a wrong decision on a question of law cannot operate as res judicata, and reliance was placed upon Baij Nath Goenka Pudmanand Singh (12) 39 Cal. 848. It was held in that case that a decision in a previous execution proceeding, which merely lays down what the law is and is found to be erroneous, cannot have the force of res judicata in a subsequent

proceeding for a different relief. What happened in that case was this: A certain decree-holder in a previous execution proceeding attached an allowance payable to the respondent. The attachment was contested but the case was decided against the -respondent, and the decision was not appealed against. Subsequently, in a case between the respondent and another creditor, to which the appellant was not a party, it was held that the allowance could not be attached, and that instalments could not be attached before they respectively fell due. The appellant again took out execution and the respondent again pleaded that the attachment could not be made. The plea was accepted by the Subordinate Judge, and the decree, holder preferred an appeal. In appeal it was held by the Calcutta High Court that the order made in the previous execution proceeding that the allowance was attachable was not *res judicata*. This decision was explained in one of the concluding paragraphs of the judgment in these words:

We think, therefore, that although it was decided between the parties in a previous execution proceeding that the allowance could be attached, the Subordinate Judge has no more power now than he really had then, to attach the allowance before it was due; and that the former decision cannot alter the law in this respect or give the Subordinate Judge a jurisdiction that he would not otherwise possess.

10. From these observations it would appear that what the learned judges really held was that in the first case it need not have been decided that an allowance could be attached before it was due, and if any decision was wrongly given, that was merely a wrong statement of law and could not have the force of *res judicata* in a subsequent proceeding for a different relief.

11. In the present case the question as to whether the decree was a rent-decree or not was directly put into issue in the previous proceeding. That was the foundation of the respondent's objection, and the Court in disposing of the objection had to decide one way or the other. The Government Pleader conceded that the decree was a rent-decree and, thereafter, an order was made by the Court that the respondent could not be arrested. That order could not have been passed unless the Munsif was of the view that the decree was a rent-decree.

12. The effect of the decision, therefore, was that the contention of the judgment-debtor was accepted. The order of the Munsif became final because it was not appealed against. It is conceded that in the present case, if it is held that the decree is a rent-decree, the respondent's house cannot be attached.

13. In my opinion, the matter is now *res judicata* and the Court has to treat the decree as a rent-decree because the order of the Munsif in the previous proceeding was passed upon that view.

14. The matter cannot now be investigated afresh, and in this view I would dismiss the appeal, but in the circumstances of the case make no order as to costs.

Agarwala, J.

I agree.