

(1960) 07 KAR CK 0001

In the Karnataka High Court

Case No : Second Appeal No's. 1035 and 1036 of 1957

Satappa Shidappa Shintre and Another

APPELLANT

Vs

Hirachand Atmaram Shah

RESPONDENT

Date of Decision : 12-07-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, 47, 68

Citation : AIR 1961 Kar 54

Hon'ble Judges : M. Sadasivayya, J

Bench : Single Bench

Advocate : N.C. Mahajan, for the Appellant; B.V. Krishnaswamy, for the Respondent

Judgement

1. These two Second Appeals arises out of an order made by the Joint Civil Judge, Chikodi, on 7-7-1956 in two Execution Cases, namely, Regular Darkhast Nos. 1154 and 1155 of 1941 on the file of his Court. The orders made on that date are as follows :

"The D. A. R. Act is not in force. The property will have to be sold through Court. The contentions at Ex. 113 overruled.

ORDER

Execution to proceed. Issue sale warrant and sale proclamation."

Against these two orders in the two execution cases, appeals had been preferred to the Extra Assistant Judge at Belgaum. That learned Judge took the view that the appeals were not maintainable. But, the High Court as per its judgment in Second Appeals Nos. 540 and 541 of 1956, held that the view taken by the Assistant Judge was wrong and that the appeals were maintainable: consequently, the High Court remanded both the cases to the Assistant Judge directing him to decide the appeals, on their merits.

After remand, the Assistant Judge heard these two appeals and by his judgment

dated 25-11-1957, dismissed both these appeals. The present two Second Appeals are directed against the said judgment of the Assistant Judge. The main ground upon which the learned Assistant Judge dismissed the two appeals before him, was that on 16-1-1956, the Civil Judge had already ordered that the property should be sold through court. That order of 16-1-1956 passed by the Civil Judge, is as follows :

"ORDER : The D. A. R. Act is not in force. So the property should be sold through Court.

The property as per Ex. 103 shall be put up for sale.

Decree-holder to put in verified statement.

Issue notice under Order 21, Rule 66 to Judgment-debtor No. 1's heirs."

The lower Appellate court has taken the view that the Civil Judge had, by the abovesaid order dated 16-1-1956, held that the property had to be sold through court and that the subsequent order of 7-7-1956 was a mere repetition of the earlier order of 16-1-1956. He took the view that as the judgment-debtors had not challenged the order dated 16-1-1956, they cannot make a grievance at a later stage of the order dated 7-7-1956 which was merely a repetition of the earlier order. He held that by the application of the principles of *res judicata*, the judgment-debtors were precluded from agitating the correctness of the order dated 16-1-1956. Consequently, he dismissed both the appeals which had been preferred by the judgment-debtors.

2. The only point which arises for determination in these two appeals is as to whether the view taken by the lower appellate Court in regard to the question of *res judicata*, is correct. In so far as the order dated 7-7-1956 relates to the finding that as the D. A. R. Act is not in force, the property should be sold "through court, it is not disputed (and it cannot be disputed) that the same is a repetition of the earlier order dated 16-1-1956.

The correctness of the order dated 16-1-1956 not having been questioned by the judgment-debtors either by way of an appeal or otherwise, it cannot be denied that the same has become final as against them. The appeals by them against the subsequent order dated 7-7-1956 cannot be viewed as appeals directed against the order dated 16-1-1956. When the judgment-debtors did not seek to question the correctness of the order dated 16-1-1956, they cannot be permitted to contend later against its correctness by means of an appeal against the subsequent order dated 7-7-1956, which is merely a repetition of the earlier order.

Sri Mahajan the learned Advocate for the appellants sought to show that this order dated 16-1-1956 is not binding upon the judgment-debtors, for more reasons than one. He stated in the course of his arguments that the view taken by the Civil Judge that the property should be sold through the court because the provisions of the Dekkhan Agriculturists Relief Act were not in force, was

erroneous.

He pointed out that by virtue of certain saving provisions found in the B.A. D.R. Act, the benefits under the D. A. R. Act were still available to the judgment-debtors and that therefore the decree should have been sent to the Collector for being executed in accordance with the provisions of Section 68 of the C. P. C. read together with the III Schedule. He also pointed out that the lower Appellate Court has recognised that this view taken by the Civil Judge, is not correct.

But, as contended by Sri B. V. Krishnaswamy Rao the learned Advocate for the respondents, for the application of the bar of res judicata, it is not necessary that the decision which operates as res judicata should be a correct one. As pointed out by the Supreme Court in the case of Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, , even an erroneous decision on a question of law operates as res judicata between the parties to it and that the correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata.

Therefore, there cannot be any serious doubt that the decision of the Civil Judge of 16-1-1956, that the property should be sold through court, operates as res judicata. The mere fact that the grounds on which he reached this decision may not be correct, will not prevent the operation of that decision as res judicata. At one stage of his arguments Sri Mahajfin suggested that the judgment debtors had not at all been served with notice by the time the court passed the order dated 16-1-1956.

But, after a scrutiny of the records of the executing Court, Sri Mahajan conceded that the judgment-debtors had been represented by a Pleader, by then. Upon a scrutiny of the Roznama of the executing Court, it is found that on 24-12-1955, the Pleaders for the decree-holder as well as the judgment-debtors were present before court and that purshis marked Ex. 103 was filed by the decree-holder's pleader, giving the details of the properties which he wanted to be put up for sale.

Thereupon, the executing court directed the judgment-debtors to put forward their objections and adjourned the case to 16-1-1956. On that date namely 16-1-1956, neither the judgment-debtors nor their pleader appeared before the court. Then, the court ordered that the property should be sold through court. At no time earlier, had the judgment-debtors put forward any objection to the effect that the executing court was not competent to execute the decree.

In the objection statement Ex. 99 dated 1-10-1956, the judgment-debtors had raised objections to the effect that the original debtor (who was dead) did not have a half share in the attached properties, that the value of the attached properties was much more than what the decree-holder had stated and that it was enough to sell only some of the properties to satisfy the decree debt.

They had not raised any contention to the effect that the executing court had no jurisdiction to execute the decree. Not having raised any such objection, the

judgment-debtors would be barred by the application of the principles of constructive res judicata from raising any objection as to the jurisdiction of the Court at a subsequent stage. On this ground, the Civil Judge's order dated 7-7-1936 overruling the objections as per Ex. 113 can be justified.

3. Sri Mahajan attempted to make out that though no appeal had been preferred against the order dated 16-1-1956, it was not binding as it was according to him, a nullity. He sought to make out that by virtue of the provisions of Section 68 of the C. P. C. read together with the III schedule, there was a statutory bar against the Civil Court making any order in execution and that the execution should have been only before the Collector.

In order to properly understand this contention, it is necessary to briefly set out the history of the execution of this decree. The execution of this decree had been proceeding in the Civil Court; thereafter, the decree was sent in accordance with the provisions of Section 68 of the C. P. C. to the Collector for his taking further action in accordance with the provisions of schedule III of the C. P. C.

While the execution of the decree was so pending before the Collector, the B. A. D. R. Act came into force; thereafter, on an application having been made by the decree-holder, the records of this decree were sent by the Collector to the B. A. D. R. Court. The matter appears to have been pending for some years before the B. A. D. R. Court; thereafter, the B. A. D. R. Court found that the judgment-debtor was not a "debtor" within the meaning of the B. A. D. R. Act.

Consequently the B. A. D. R. Court sent back the decree to the Civil Court, namely, the Court of the Civil Judge at Chikodi. By then, the original decree-holder was dead; his legal representatives were brought on record and further steps in execution were taken in the court of the Civil Judge. The contention which has been urged by Sri Mahajan is, that once the decree having been sent to the Collector for execution, the Civil Court had no further jurisdiction in the matter and that, therefore, the order passed by the Civil Court on 16-1-1956 is an order made by the Civil Court without any jurisdiction and that therefore, it is a nullity.

He has placed reliance on para 11, in particular, of Schedule III of the Code of Civil Procedure, in support of the proposition that the Civil Court would, under such circumstances have no jurisdiction. He has also relied on two decisions, One of them is a decision of the High Court of Mysore reported in *Veerabhadrapa v. Sakhalchand* 37 Mys LJ 129 and the other is a decision reported in *Shahzad Singh v. Hanuman Rai* AIR 1924 All 704. It appears to me, that, on facts, both these decisions are distinguishable from the present case.

In the Mysore case above referred to, the point which arose for decision was, as to whether the validity of a sale by the Collector acting under the provisions of III Schedule of the C. P. C., could be challenged by means of a suit and as to whether Section 47 operated as a bar to such a suit. It was pointed out in the said decision that so long as the Collector could exercise any of the powers

conferred by paras 1 to 10 of the III Schedule of the C. P. C., the Civil Court had no jurisdiction to interfere.

It may be pointed out that their Lordships were considering there, the question as to whether the Civil Court had jurisdiction to interfere when the execution of the decree was pending before the Collector and the Collector could exercise the powers or perform duties under paras 1 to 10 of the III schedule. I regard to this aspect of the question this is what his Lordship the Chief Justice has stated at page 131 of the decision:

"Paragraph 11 of Schedule III inter alia provides that so long as the Collector can exercise or perform in respect of the judgment debtor's Immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money. It was not disputed that so far as these properties were concerned, at the date when in Darkhast No. 1133/39 an order for sale was made and the order transferring the proceedings to the Collector was issued, the Collector could exercise or perform in respect of the said properties any of the powers or duties conferred or imposed on him by paragraphs 1 to 10 of the said Schedule. In other words, at the material time these properties were the subject matter of the sale proceedings pending before the Collector".

It has to be particularly noted that, in that case, the proceedings were pending before the Collector and there was no impediment to his exercising and performing duties in respect of the judgment-debtor's properties, under the provisions of paras 1 to 10 of the III schedule. In the Allahabad case reported in AIR 1924 All 704, the properties had been sold by the Collector and subsequently the question arose as to whether the properties had to be ordered to be resold.

The Collector took the view that it was a matter for the Civil Court to decide as to whether a resale should take place; he also thought that it was for the Civil Court to ascertain the extent of certain income branch in respect of those properties. It was held that this view of the Collector was not right and that it was for the Collector himself to decide whether there should be a resale of the properties.

It will be noticed that in that case also, the proceedings were all pending before the Collector and, there was no impediment to the exercise of his powers under paras 1 to 10 of the III schedule of the C. P. C. But the position in the present case before me, is very much different. The proceedings were no longer pending before the Collector. The decree and the connected execution papers had all been sent by the Collector to the B. A. D. 11. Court, which subsequently sent the decree and the records of the case to the Civil Court.

Therefore, at the time when the Civil Judge passed the order dated 10-1-1956, the proceedings were not pending before the Collector and the Collector could

not have, in respect of the properties of the judgment-debtors, exercised any of the powers under paragraphs 1 to 10 of the III schedule. As the opening words in para II of the III schedule clearly indicate, it is only so long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties (conferred?) by paragraphs-1 to 10, that the Civil Court is precluded from issuing any process against such property in execution, of the decree.

In the present case, the bar under paragraph 11 to the Civil Court taking action in respect of the judgment-debtor's property, does not arise, for the reason that as the execution proceedings were no longer pending before him, the Collector could not exercise any of the powers under paragraphs 1 to 10 in respect of the properties of the judgment-debtors. Under these circumstances, the present case is clearly distinguishable, on facts, from the two decisions above referred to which have been cited by Sri Maba-jan. I find that there is no free in his contention that the Civil Judge, Chikodi, had no jurisdiction to pass the order dated 16-1-1956.

4. Even if the contention were to be accepted that it is an erroneous order, it cannot be said to be a nullity on the ground of want of jurisdiction. In respect of the matter decided by that order, it operates as *res judicata*. From this point of view, it is dear that it was not open to the judgment-debtors to agitate in their subsequent objections as per Ex. 113 that this decree could not be executed in a Civil Court. Such a contention would be clearly haired by *res judicata*, in view of the order dated 16-1-1956.

The learned Assistant Judge is, therefore, quite correct in holding that the contentions raised by the judgment-debtors in regard to the sale of their properties in the Civil Court, are barred by *res judi cata*. I find no grounds to interfere with the order made by the Lower Appellate Court; these two Second Appeals fail and they are dismissed, with (only one set of) costs. Appeals dismissed.