

(1956) 12 PAT CK 0002
In the Patna High Court
Case No : A.F.A.D. No. 1425 of 1949

Shiva Pujan Dubey and Another

APPELLANT

Vs

Baban Lal and Others

RESPONDENT

Date of Decision : 20-12-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 11, 47

Citation : AIR 1959 Patna 13

Hon'ble Judges : V. Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : A.B. Saran and Chandra Sekhar Prasad, for the Appellant; T. Nath, C.B. Sahay and Chandi Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—Two points have been pressed in this appeal:

(1) that Section 47 of the CPC has no application to the facts of the present case, and, (2) that the plaintiffs-appellants' suit is not barred by res judicata.

(2) In order to appreciate and decide the points raised in the appeal, it is necessary to know a few facts. A decree for mesne profits was obtained by the respondents on the 14th January, 1933 against the plaintiffs-appellants, their father, and others. Before the decree was put into execution, the plaintiffs, and some others, applied for setting aside the ex parte decree for mesne profits, under Order 9, Rule 13 of the Code of Civil Procedure. Meanwhile, the decree for mesne profit, was executed in Execution Case No. 159 of 1931.

The application of the plaintiffs under Order 9, Rule 13 of the CPC was allowed, and the ex parte decree for mesne profits, as against the plaintiffs also, was set aside on the ground that the plaintiffs, who were minors then, were not duly represented, and, as such, the decree against them was void. The executing court on receipt of the order, setting aside the decree under execution against the plaintiffs, ordered that the execution could not proceed against the plaintiffs,

as also against some other persons, who were parties to the proceeding under Order 9, Rule 13 of the Code of Civil Procedure.

This execution case was dismissed for default, and, thereafter, a fresh execution case No. 21 of 1933 was taken out by the defendants respondents, and, the properties in dispute, which are the shares of the plaintiffs, were also put up to sale, and purchased on the 22nd January, 1935, by the defendants-respondents. They, thereafter, applied for delivery of possession, and then the plaintiffs filed an application u/s 47 of the CPC objecting to the delivery of possession on the ground that the decree under execution against the plaintiffs having been set aside, it could not be executed against them, or their properties, and, as such the sale was not binding on them.

This objection was, however, rejected; and, the defendants, thereafter, got delivery of possession. Ultimately, an appeal was taken, against this order, to the High Court, which was heard and decided by Courtney-Terrell, C. J. and James, J., and, they dismissed the appeal of the present plaintiffs.

3. The plaintiffs, thereafter, as majors, brought the present suit, out of which the present appeal arises, for a declaration that the sale, held in Execution Case No. 21 of 1933, in respect of the properties of the plaintiffs, was a nullity, and, not binding on them, and, therefore, they inter alia sought a declaration of their title, and also asked for recovery of possession.

4. The plaintiffs' suit has been dismissed by both the courts below. The learned Subordinate Judge has dismissed the plaintiffs' suit mainly on the ground that the plaintiffs' suit was barred by the principle of res judicata. The plaintiffs, therefore, preferred the present second appeal, which has been referred to a Division Bench by Jamuar, J., for decision.

5. In support of the first contention, that Section 47 of the CPC does not apply to the facts of the present case, Mr. Awadh Bihari Saran, who appeared for the appellants, has put forward the argument that as the plaintiffs' application, no doubt, u/s 47 of the Code of Civil Procedure, was filed after the confirmation of the sale at the stage of the delivery of possession, Section 47 had no application at that stage, because the execution terminated with the sale, and with the termination of the execution, the application of Section 47 of the Code did not arise.

In support of his contention, he has relied on Abdul Gani v. Raja Ram, 1 LJ 232 : AIR 1916 Pat 216 and Tribeni Prasad Singh and Others Vs. Ramasray Prasad Chaudhari and Others, . In my opinion, none of these cases apply to the present case.

6. In the first case, the delivery of possession had taken place, but the decree-holder-auction purchaser, failed to obtain possession of some properties. He, thereafter, died and, therefore, his sons applied under Order 21, Rule 95 of the Code of Civil Procedure, for delivery of possession of the properties of which their

father had failed to obtain possession. The Court ordered delivery of possession, and, against that order, an appeal was brought to this Court.

The question, which arose for decision before the Full Bench, was, whether a question arising between the decree-holder auction-purchaser, and, a judgment-debtor, relating to delivery of possession, and an order passed under Order 21, Rule 95 of the Code of Civil Procedure, is a question relating to the execution, discharge or satisfaction of the decree within the meaning of Section 47 of the Code of Civil Procedure, so that an appeal could lie against such an order. It was held by the Full Court that an appeal does not lie in such a case.

It will, thus, be seen that in this case, unlike here, the sale was not attacked; and, the only question in controversy was about delivery of possession of the properties sold; obviously any question arising between a decree-holder-auction-purchaser and the judgment-debtor, in respect of delivery of possession, would not be a question relating to the execution, discharge or satisfaction of the decree so as to come within the purview of Section 47 of the Code of Civil Procedure.

7. In the second case also, the question which was referred to the Full Bench was, whether a suit instituted by the decree-holder-auction-purchaser, or his representative-in-interest, for recovery of possession of the properties purchased in execution of the decree is barred by the provisions of Section 47, Code of Civil Procedure, or, in other words, whether the question relating to the delivery of possession of the property purchased by the decree-holder-auction-purchaser is a question relating to the execution, discharge or satisfaction of the decree, within the meaning of Section 47 of the Code of Civil Procedure.

It was held by the Full Bench that such a question is not a question relating to the execution, discharge or satisfaction of the decree, and, therefore, a suit brought by the decree-holder auction-purchaser, or his representative-in-interest, for recovery of possession of the property purchased in execution of his decree is not barred by the provisions of Section 47, Code of Civil Procedure. It will therefore, appear that in this case also, unlike the present case, the sale was not attacked, and the only question was relating to the delivery of possession. Naturally, to such a case Section 47 of the CPC could not apply.

8. In the present case, the plaintiffs, in their application u/s 47 of the Code of Civil Procedure, attacked the sale which was held in execution of the decree for mesne profits. No doubt, the decree against the plaintiffs was discharged, but under the Explanation to Section 47, for the purposes of this section, a defendant, against whom a suit has been dismissed is a party to the suit. The result of the setting aside of the decree against the plaintiffs, therefore, was that, no doubt the suit was dismissed against them, but, by virtue of the Explanation to Section 47, they must be deemed to be parties to the suit and, therefore, the question arising between the decree-holders auction-purchasers and the plaintiffs would be a question arising between "The parties to the suit"

"within the meaning of Section 47 of the Code", and, therefore, Section 47 would apply to the plaintiffs.

9. The plaintiffs attacked the sale, and, therefore, such a question as to whether the property of the plaintiffs was liable to be sold or not, or, whether the property had been lawfully sold in discharge of the decree under execution would be a "question relating to the execution, discharge or satisfaction of the decree" within the meaning of Section 47 of the Code. In my opinion, therefore, the two conditions precedent, required by Section 47 of the Code to attract its application, were present in this case, and, therefore, the plaintiffs rightly applied u/s 47 of the Code for setting aside the sale.

10. It is now well settled that all objections to execution, sales which could be raised u/s 47 of the Code of Civil Procedure, must be raised in the execution, and, shall be determined by orders of the Court executing the decree, and not by a separate suit.

11. The above view is supported also by at least three decisions of the Judicial Committee : *Prosunno Commar Sanyal v. Kasidas Sanyal* 19 Ind App 166 (PC) (C) *Amir Chand v. Bakshi Harihar Parsad Singh* AIR 1915 PC 88 and, *Ganapathy Mudaliar v. Krishnamachariar* 45 Ind App 54: AIR 1917 PC 121.

12. Sir John Edge, in delivering the opinion of the Board in the second case, approved of the opinion of the Board in the first case to the following effect:

"It is of the utmost importance with all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 of the CPC 1882 (which corresponds to the present Section 47 of the Code of 1908)."

The view taken in the above case was reaffirmed by their Lordships of the Privy Council in the third case : *Ganapatty Mudaliar v. Krishnamachariar* (E), (supra).

13. In my judgment, therefore, Section 47 of the CPC does require that the executing Court alone must determine all questions, arising between the parties, or their representatives, and, relating to the execution, discharge or satisfaction of the decree, and authorises it even to treat the proceedings as a suit. Therefore, when a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application u/s 47, and not in a separate suit : *Merla Ramanna Vs. Nallaparaju and Others*, .

14. In circumstances similar to the present one, a Division Bench of the Oudh High Court, in AIR 1944 43 (Oudh) . held that on a liberal view of Section 47 no separate suit lies at the instance of a judgment debtor for possession of property which has been sold as non-ancestral to a stranger auction-purchaser in execution of the decree against the judgment-debtor on the ground that such property was ancestral and was beyond the jurisdiction of the civil Court to sell,

because the question whether the property is ancestral or non-ancestral is one relating to the execution of the decree and one arising between the judgment-debtor and the decree-holder who were parties to the suit in which the decree was passed. The fact that after the sale the auction-purchaser appeared on the scene cannot remove the case from the purview of Section 47 of the Code.

15. Mr. Saran, however, placed strong reliance on a Full Bench decision of the Lahore High Court in *Surindar Nath v. Rum Samp* AIR 1944 Lah 294: ILR 1944 Lah 479 in which it was held that a suit by an exonerated defendant to recover possession of his share of the property wrongfully sold in execution of the decree against a stranger auction purchaser is not barred by the provisions of Section 47 even as read with the explanation to that section. This case, however, has no application to the present case and is of no assistance to the appellants.

16. In the above case, there was a suit against three brothers, but it was dismissed against one of them. His property was sold in execution of the decree against the other two brothers. There was no objection to wrongful sale by the brother against whom the suit was dismissed. He, however, brought subsequently a suit for partition and possession of his share in the properties sold, I reproduce below in extenso the observations, which are very apposite of Mahajan, J., as he then was, in the above case :

"Whether, however, the party to the suit, against whom the suit has been dismissed, does not choose to go to the executing Court either because he has no knowledge of what is happening there or because having knowledge he feels that he should wait and see what ultimately happens then in his case it cannot be said that by not going there the question is constructively decided against him. In my view, such a person has two concurrent remedies and he can choose either of them.

If he acquires a knowledge that his property is being wrongfully taken in execution of the decree, he may choose the expeditious remedy of going to the executing court and if he chooses that remedy, Section 47 will bar his subsequent suit, for the same relief. But if either after having acquired knowledge or through ignorance he takes no steps to object to the wrongful sale of his property by the executing court, on no principle of law can his separate suit to take possession of the property wrongfully sold by the executing court be held barred.....

The auction purchaser buys the right, title and interest of the judgment debtor and no more and if he has purchased more property than was owned by the judgment debtor, a suit instituted in relation to that property by its owner is a suit of a civil nature and is maintainable u/s 9, Civil P. C. unless barred otherwise. The suit could only be held barred if Section 47 took away the jurisdiction of the ordinary civil courts and forced the owner to resort in all cases of wrongful executions to the executing court.

The object of explanation to the section seems to be to provide for cases where a

party against whom a suit had been dismissed wished to take advantage of the provisions of Section 47 but the object was not to deprive him of the regular remedy by way of suit if he chooses not to resort to the less expensive and more expeditious remedy provided by Section 47, C. P. C. It is not possible to hold that by reason of the explanation such a person is identically in the same situation as a judgment-debtor and suffers from the same disabilities as the judgment-debtor suffers from, though he does not have the benefit of the safeguards that the law provides for the judgment-debtor.

The CPC fully safeguards the interests of the judgment-debtor by furnishing him various opportunities of going to the executing court and seeing whether he is in any way being prejudiced, but in the case of a person covered by the explanation no such safeguards have been provided for by the Code and without such safeguards he cannot be treated on the same lines as the judgment-debtor. In my opinion, therefore, on the ground that Surrendra Nath was not bound to raise the question in the executing court u/s 47 he is not barred by the provisions of this section from agitating the question as to his right in the ordinary way by instituting a suit."

17. In my opinion this case does not support the appellants, because in that case the suit was for possession by partition, and the dispute was between the brothers of the judgment-debtor who was a co-defendant with them, and, with the stranger auction purchaser who was claiming under them. The contention, therefore, was between the parties and their representatives, who were arrayed in the same side, and not in opposite camp of the suit.

His Lordship, therefore, held that such a dispute between a party and his own representatives or between parties not opposed to one another in the suit is outside the ambit of Section 47. In that dispute the decree holder was no party, and he was not at all interested in the result of the litigation. In such circumstances, it was held that Section 47 of the Code was no bar to the suit of the plaintiff of that suit.

18. There is, however, another aspect of the question, the consideration of which also leads me to the conclusion that Section 47 would operate as a bar to the present suit of the plaintiff. The plaintiffs themselves chose to go to the executing court and object to the execution sale u/s 47 of the CPC and invited the executing court to decide their objections.

Having done that, and having invited the court's decision on the objections raised by them, the plaintiffs cannot now say that the findings given by the executing court on their objection u/s 47 of the Code are not binding against them. Where a person moved the court u/s 47, CPC and invited a decision on his application, it is not for him to turn round and say, because the decision has gone against him, that neither was he competent so to have moved the court, nor was it competent for the court to have dealt with the matter on being so moved. This view is supported by the decision of Biswas, J., in *Girish Chandra v.*

Purna Chandra, : AIR 1944 Cal 53 (1).

19. In my judgment, therefore, in any view of the matter, Section 47 of the Code applied to the present case, and therefore, the plaintiffs rightly moved the executing court u/s 47 of the Code, against the sale held.

20. On the question of res judicata, Mr. Saran has put forward his argument in two ways :

The first contention is that no final decision was given by the High Court or even by the Subordinate Judge who dealt with the plaintiffs' objection, in the first instance, and as such, there being no final decision, the judgment of the High Court could not operate as res judicata.

The second contention is that that decision of the High Court was of viously wrong, because when the suit was dismissed against the minors, their interest in the property could not pass, simply because their father was also sued along with them.

21. In my opinion, the first branch of his argument is not supported by the decision of the High Court in the earlier case. The High Court, on an appeal against the order of the executing court u/s 47 of the Code of Civil Procedure, decided the plaintiffs' objection, on 20th January, 1938. The Judgment of the High Court is Ext. B. in the suit. The learned Chief Justice "Courtney"-Terrell, who delivered the judgment of the Court, and with whom James, J., agreed observed .

"It is true that having been struck out from the suit and the decree against them having been set aside, the execution does not proceed against the objectors. It proceeds in execution against the fathers. But in executing the decree against the fathers, it is clear that the property of the fathers can be sold together with the shares of the sons. The execution is no longer proceeding against the sons whose names have been struck out from the decree.

It is proceeding against the fathers. But on the ground of pious obligation the shares in the property of the sons can be seized and put up to sale and the only objection which it is possible for the sons to raise is that they are not the sons of their reputed fathers or that the debts were incurred for immoral purpose. They may, if they so choose, take this course.

The only effect of their proceeding to set aside the ex parte decree and striking out their names from execution is, that they in these proceedings for executing the decree against their fathers, must if they wish to exempt their share of the property from execution, appear as objectors on that basis and raise either of the two defences which I have suggested. "

22. On the above judgment, it is absolutely clear that it was decided on the ground of "sons' pious obligation" rule, that the shares in the property of the plaintiffs could be seized and put up to sale, and therefore, the sale of the shares

of the plaintiffs was upheld by this Court. We are not concerned here with the correctness or otherwise of the above decision of this Court. The fact is that the objection of the plaintiffs which is now raised by a separate suit, was raised then by them by their application u/s 47 of the Code of Civil Procedure, and decided against them by the High Court.

23. It is now well established that a decision, even if wrong in a previous suit between the parties, is barred by *res judicata*, in a subsequent suit. Where the Court in a previous suit determined a particular point of law in a particular way a court in a new suit between the same parties with regard to the same transaction, or matter cannot try a new issue as to the point of law decided previously, even if it thinks the previous decision on that question of law to be wrong, in face of the express prohibition in Section 11 of the Code. This view was taken by the Judicial Committee in AIR 1936 46 (Privy Council) .

24. In my opinion, therefore, even if the decision be wrong it would operate as *res judicata* between the parties, and therefore, the courts have correctly taken the view that the plaintiffs suit was barred by *res judicata*.

25. With regard to the second branch of the contention of Mr. Saran, that the question of liability of the plaintiffs' shares had been wrongly decided on the previous occasion by the learned Chief Justice Courtney-Terrell and James, J., in the second appeal of the plaintiffs.

Mr. Saran has relied on *Deo narain Singh and Others Vs. Bibi Khatoon and Others*, *Panchaiti Akhara Maha Nirvani Vs. Bindeshri Prasad and Others*, in support of his contention that the decree for mesne profits having been obtained in presence of the plaintiffs and their father, the decree against the father, after the dismissal of the suit against the plaintiff could not be considered to be a decree against the father in a representative capacity and, therefore, in execution of the decree against the father the right, title and interest of the plaintiffs will not pass, and, the decree-holder cannot directly proceed against the interest of sons, and, he cannot indirectly do under "son's pious obligation" rule, what he cannot do directly.

There is no doubt that this is the correct position in law. This question has been elaborately examined by my Lord the Chief Justice, Ramaswami, J., as he then was, in the Patna case above mentioned, and the view contended for by Mr. Saran has been taken by the Division Bench, in that case, and that view is supported also by the Division Bench decision of the Allahabad High Court referred to above.

This question, however, has been decided by the learned Subordinate Judge in favour of the appellants; but he has dismissed their suit only on the ground of *res judicata*. But, as I have said before that as the objection of the plaintiffs, rightly or wrongly, was decided against them by the High Court in the proceeding u/s 47 of the Code of Civil Procedure. That decision is binding on the plaintiffs, and it must therefore, operate as *res judicata*.

26. For the reasons given above, in my opinion, the decision of the Courts below holding that the plaintiffs' suit is barred by res judicata are correct, and must be upheld.

27. In the result, the appeal fails and is dismissed with costs.

V. Ramaswami, C.J.

28. I agree.