

(1948) 07 BOM CK 0015
In the Bombay High Court

The Bank of Bihar, Limited

APPELLANT

Vs

Sarangdhar Singh

RESPONDENT

Date of Decision : 19-07-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1949) 51 BOMLR 936

Hon'ble Judges : Simonds, J;Madhavan Nair, J;MacDermott, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Madhavan Nair, J.—This is an appeal from the judgment and order of the High Court of Judicature at Patna dated April 20, 1942, which set aside an order passed by the Subordinate Judge, First Court, Patna, dated November 29, 1941, dismissing a petition of the respondents u/s 47 of the Code of Civil Procedure.

2. The appeal arises in an execution proceeding of the money decree passed by the Subordinate Judge, First Court, Patna, in money suit No. 5 of 1939, dated August 22, 1940.

3. The appellant before the Board is the decree-holder (plaintiff) the Bihar Bank, Limited. The respondents are defendants Nos. 1 and 2 in the suit.

4. The order passed by the Subordinate Judge in the suit was as follows:

Suit decreed against defendant No. 3 in the presence of defendants 4 to 6.... The suit is dismissed as against defendants Nos. 1 and 2 with costs....

5. In the execution of the decree which was for Rs. 15,718-7-0 with interest and costs, one-third share in certain joint family property called the Khadga Vilas Press held to belong to the third defendant was brought to sale.

6. The respondents objected to the attachment and sale on the ground that the property was joint family property.

7. The Subordinate Judge disallowed the objection, but the High Court allowed it and set aside the Subordinate Judge's order.

8. The question for determination in this appeal is whether one-third share in the press could be sold in execution of the decree obtained by the appellant against the third defendant.

9. The money suit was instituted by the appellant against the respondents—the brothers, defendant No. 3—the widow, and defendants No. 4 to 6—the daughters, of one Rai Bahadur Ram Ran Vijay Singh—who will hereinafter be referred to as the Rai Bahadur for Rs. 15,718-7-0, which was said to have been borrowed by him on an overdraft account. The Rai Bahadur carried on the business of printing and was the proprietor of a press called the Khadga Vilas Press. He died in 1936. The appellant alleged that the money was lent for carrying on a joint family business of the Rai Bahadur and his brothers.

10. The respondents (his brothers) admitted that they were joint with the Rai Bahadur, and the business was joint family business, but they denied that the money was borrowed for the joint family business or family necessity. The widow, the third defendant, alleged that her husband the Rai Bahadur was separate from his brothers and the business was a partnership business carried on by the Rai Bahadur and his brothers in partnership, but that the money was not taken for the purpose of that business.

11. The sixth issue in the case was:

Was the debt in question created by the Rai Bahadur for the purpose of his business and other family necessities as alleged by the plaintiff and was the same binding upon the defendants ?

12. The Subordinate Judge held that the Rai Bahadur died in a state of jointness, that the business was joint family business and that the appellant; failed to prove that the loan had been taken for joint family business or for family necessity. He however decided that "the debt is binding upon defendant No. 3 to the extent of the share of the Rai Bahadur in the joint properties in her hand" as "defendant No. 3 u/s 3(2) of the Act 18 of 1937 (the Hindu Women's Rights to Property Act) as amended by Act 2 of 1938 got in the joint family property the same interest as her husband had."

13. It may be stated that at the time when the execution of the decree was taken, an appeal against the decree was pending.

14. It is common ground that as the Rai Bahadur died in 1936 the Hindu Women's Property Act of 1937 as amended could not be made applicable in the case of his widow, but in view of the finding of the learned Subordinate Judge in the money suit that the Rai Bahadur's widow had one-third share in the joint properties left by her husband and the Khadga Vilas Press was a joint family property, the Subordinate Judge held that it was not open to the respondents to object to the sale of the property in the execution proceeding.

15. On appeal, the order of the Subordinate Judge was set aside by the High Court. After referring to the opinion of the Subordinate Judge who tried the money suit that the widow was entitled under the Act to the share which her husband had in the joint family property and is liable for his debts, the High Court observed as follows:

Had the Court which made the decree gone no further than its findings that the Rai Bahadur and the appellants were joint, that the business was a joint family business and that the loan was not taken for the joint family purpose there would have been no difficulty in this case; but the observations in the judgment which followed these findings have given rise to the ground on which the decree-holder and the widow resist this appeal. Those observations were unnecessary for the decision of the case and were not raised either between the decree-holder and appellants who both alleged that the family was joint and that the business belonged to the joint family, or between the widow and the appellant.

16. Their Lordships agree with the above view. The rule is well established that an execution Court cannot go behind the decree and question its correctness; but when the decree is silent, as in the present case, and gives no indication as to what property should be sold in execution, it is permissible for the Court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment-debtor. On the main issue raised in the case the property has been held to be joint family property and the suit has been dismissed as against the respondents. The question as regards the liability of the widow was not in issue either between the defendants inter se or between the decree-holder (plaintiff) and the defendants. The observations in the money suit? as pointed out by the High Court? were unnecessary for the decision of the case, and were not in issue between the parties; and further, the order of the Court does not mention that one-third share of the widow in the property should be sold. In this connection it may also be noted, as pointed out by the Subordinate Judge in, his order, that "it is conceded by both parties that the Rai Bahadur died in 1936...and Act II of 1938 could not therefore be made applicable to the widow." In the circumstances their Lordships hold that it was open to the respondents to say that the property could not be sold as it was joint family property, especially so, as the suit had been dismissed as against them.

17. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.