

SUPREME COURT OF INDIA

Barkat Ali

Vs.

Badri Narain

C.A.No.1383 of 2002

(Arijit Pasayat and P.Sathasivam,JJ.)

06.02.2008

JUDGMENT

Arijit Pasayat, J.

1. Challenge in this appeal is to the order passed by a Division Bench of the Rajasthan High Court at Jodhpur dismissing the special appeal filed under Section 18 of the Rajasthan High Court Ordinance 1949 (in short 'Ordinance') against judgment of learned Single Judge dated 16.1.1981 in SB Civil Misc. first appeal no.5/75.

2. Background facts in a nutshell are as under:

2. The respondents are legal representatives of the decree holder Badrinarain and the appellants are the legal representatives of the judgment-debtor Abdul Ghani. The said Badrinarain obtained a decree against Abdul Ghani in a mortgage suit on 11.5.1952 in which an amount of Rs.11,194.25/- was determined as payable by the said Abdul Ghani from the date of final decree. Successive execution applications were filed for recovering the said sum. First application for execution was filed on 7.10.1952 in which proceedings the decree was partially satisfied. The proceedings ended on 21.12.1956. The second execution resulted in further partial satisfaction. The said execution terminated on 25.9.1957. The third execution application which was filed on 20th May 1958 resulted in further partial satisfaction of the decree and the said proceedings ended on 6.8.1960. The present execution application for the recovery of remainder sum was filed on 30th January, 1971. The notice of the application was issued to all the appellants and another son who was reported to be dead by the process server. The appellant No.1 accepted service on behalf of appellant Nos.2 & 3, who was then minors. The notice was served on 20.4.1972 for hearing on 3.6.1972. An appearance was filed by the counsel on 3.6.1972, who sought time to file objections which was granted and the proceedings were adjourned to 5.8.1972. On 5.8.1972, again adjournment was sought which was granted and the case was adjourned to 12.8.1972. On 12.8.1972 also, the proceedings could not proceed further because the learned Presiding Judge was on leave and the case was adjourned to 16.9.1972. On 16.9.1972, the Court finding that no objections have

been filed till then by the judgment-debtors, the decree holder was directed to file expense for carrying out attachment within five days on the submission of which the warrants of attachment could be issued and the proceedings were adjourned to 21.9.1972. The attachment warrant was not issued prior to 21.9.1972. On finding that expenses for attachment has been filed, the executing Court ordered for the issuance of warrant of attachment on 21.9.1972. After issuance of warrant of attachment, the objections were filed by the appellant on 21.9.1972 pleading inter alia that the execution proceedings were barred by time and that amount for which the execution was sought was also not correctly stated. The executing Court found that since after completing preliminaries of issuing notice and finding that no objection has been filed in spite of the service under Order XXI Rule 22 of the Code of Civil Procedure, 1908 (in short 'CPC') and the Court had proceeded to next stage of execution for attaching the property under Order XXI Rules 23 and 24 of C.P.C., any objection raised subsequent thereto cannot be entertained being barred by principles of constructive res judicial. Against the dismissal of the objections dated 16.11.1972 by order dated 13.7.1974, an appeal was, preferred before the High Court which has been dismissed by the Learned Single Judge by judgment dated 16.1.1981. The Learned Single Judge found that the objections filed on 16.11.1972, after the warrant of attachment was issued, could not be entertained by the executing Court as the same was barred by principles of constructive res judicial. Ancillary issues raised by the Learned Counsel for the appellant were also found to be not sustainable and the appeal was dismissed.

3. As noted above, learned Single Judge found that the objection filed after issuance warrant of attachment could not be entertained by the executing Court as the same was barred by principles of constructive res judicial.

4. The same contention was raised before the Division Bench which did not find any substance.

5. Learned counsel for the appellant reiterated the stand taken before the learned Single Judge and the Division Bench.

6. There is no appearance on behalf of the respondent.

7. Order XXI Rule 22 CPC culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order XXI Rule 23 can only be taken if the executing Court either finds that after issuing notice, under Section XXI Rule 21 the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing Court. Sub rule (1) as well as sub rule (2) under Order XXI Rule 22, operates simultaneously on the same field. Sub rule (1) operates when no objection is filed. Then the Court proceeds and clears the way for going to the next stage of the proceedings namely attachment of the property and if the Court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled. Whether the order is made under sub rule (1) or sub rule (2), it has the effect of

determining the preliminary stage before the attachment process is set in motion. In this background, the order of the Court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same proceedings in the absence of any modification of order passed under Order XXI Rule 22 sub rule (1) or (2), he has to take recourse to get rid of the order by way of appeal. There is no dispute and it has not been agitated that the order for proceeding by the judgment under Order XXI Rule 22 amounts to a decree under Section 47 of CPC and it is appealable as a decree i.e to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order. It means that at the different stages of the execution orders passed by the executing court have attained finality unless they are set aside by way of appeal before the higher forum. Otherwise they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardized and the stage which reached the finality by dint of various orders of the Order XXI operates as res judicial for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as a decree and is appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under Order XXI Rule 22 does not amount to appeal against order at initial stage, but amounts to a decree finally determining the question. That is why no appeal against orders made under Order XXI has been provided under Order 43. In this background, where a judgment-debtor has an opportunity to raise an objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under Order XXI Rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.

8. The principles of res judicial not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage.

9. In *Arjun Singh v. Mohindra Kumar and Ors*¹ it was observed as follows:

"Scope of principle of res judicial is not confined to what is contained in Section 11 but is of more general application. Again, res judicial could be as much applicable to different stages of the same suit as to findings on issues in different suits. Where the principles of res judicial is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides, the decision being reached, as well as the specific provisions

made on matters touching such decision are some of the material and the relevant factors to be considered before the principle is held applicable."

10. In *Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and Anr*² it was observed as follows:

"The principle of res judicial applies also as between two stages in the same litigation to this extent that a court, whether the Trial Court or a Higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

11. Above being the position, the High Court was justified in dismissing the special appeal and in confirming the order of learned Single Judge. The appeal is without merit, deserves dismissal, which we direct.

Cases Referred

¹*AIR 1964 SC 0993*

²*AIR 1960 SC 0941*