

PUNJAB AND HARYANA HIGH COURT

Seth Radhe Lal

Vs

Ladli Parshad

(Falshaw, J.)

17.01.1957

JUDGMENT

Falshaw, J.

1. These three execution appeals Nos. 34-D, 76-C and 110-C of 1956 have been filed by Seth Radhey Lal in the following circumstances. Seth Mathura Parshad, who is the respondent in two of the appeals, carried on a partnership firm called Mathura Parshad and Company along with his sons Seth Radley Lal appellant and Seth Ladli Parshad who is the respondent in the other appeal. In 1950 Ladli Parshad and Radhey Lal instituted a suit against their father for dissolution of partnership and rendition of accounts. The disputes between the parties were referred to the arbitration of Raja Ram and Ram Sarup who delivered their award on the 31st of October 1951.

2. The objections filed by Ladli Parshad and Mathura Parshad to the award were ultimately dismissed and the award was made a rule of the Court on the 9th of October 1954. The partnership firm had apparently owned and been operating three factories, the Lakshmi Ice Factory at Kauria Pul, the Ganesh Ice Factory and Seth Oil Mills at Ajmeri Gate and the Imperial Ice Factory to which a bungalow is attached in New, Delhi. The arbitrators assessed the values of these properties respectively at Rs. 2,00,000/- 2,50,000/- and 4,50,000/- and allotted the Lakshmi Ice Factory to Mathura Parshad, the Ganesh Ice Factory and Seth Oil Mills to Ladli Parshad and the Imperial Ice Factory along with the bungalow to Radley Lal. In view, however, of the disparity in value between these properties it was ordered that Radhey Lal should pay Rs. 1,00,000/- to Mathura Parshad and Rs. 50,000/- to Ladli Parshad with future interest at the rate of 4 per cent per annum for the first year from the date of the award, and thereafter at 6 per cent per annum until the date of realisation, and it was provided in the award that Mathura Parshad and Ladli Parshad should have a lien on the Imperial Ice Factory and the attached bungalow in respect of the sums thus payable to them.

3. Thereafter in June 1955 Mathura Parshad and in July 1955 Ladli Parshad, filed execution applications for the sums due to them in this way under the award including interest, which they

sought to realise by the sale of the property on which these sums had been charged in the award and the decree based thereon. In both these execution applications Radhey Lal filed objections under Section 47, Civil Procedure Code, in which he alleged that the Imperial Ice Factory had been run in the period following the award by Mathura Parshad and Ladli Parshad and he therefore claimed that they were liable to render accounts to him regarding the running of the factory for the period from the 31st of October 1951 to the 9th of October 1954 when the award was made a rule of the Court. In the case of Mathura Parshad's execution application Radley Lal also raised objections that certain sums were payable to him by Mathura Parshad under the terms of the award. Both Mathura Parshad and Ladli Parshad raised the objection that the question of going into the accounts of the Imperial Ice Factory for the period following the delivery of the award of the arbitrators was not one which could be gone into under Section 47, Civil Procedure Code, by the executing Court which simply had to execute the award and decree as it stood. Mathura Parshad also raised an objection regarding the sums claimed by Radhey Lal under the award from him that the sums of money out of which these sums were to be paid to Radhey Lal had already been disposed of in making certain payments by agreement between all the three partners, and on this account he denied liability for payment.

4. In both the execution petitions the preliminary issue was framed whether the objection of the judgment-debtor lay under Section 47, Civil Procedure Code, i.e. his claim that he was entitled to rendition of accounts for the period between the making of the award and its being made a decree. In both the execution petitions this matter was decided against Radhey Lal judgment-debtor by the orders of the Court, dated the 23th of October 1955. This meant the total dismissal of the judgment-debtor's objections in Ladli Parshad's execution petition, but in Mathura Parshad's petition a number of issues were framed relating to the other points in dispute between these two, and the recording of evidence was started on those issues in which apparently the onus had been placed on Mathura Parshad and therefore he was leading his evidence to prove that he was no longer liable to make the payments claimed by Radhey Lal in terms of the award.

5. Shortly after the order of the 28th of October fresh objection petitions under Section 47, Civil Procedure Code, were filed in both the executions by Radhey Lal, who now claimed to be entitled to rendition of accounts from both Mathura Parshad and Ladli Parshad in respect of the Imperial Ice Factory on the ground that between the date of the award and the date of the decree they had remained in possession and enjoying the use of the factory in the case of Mathura Parshad as 'lienholder' and in the case of Ladli Parshad as mortgagee. The objection was also raised that the decree was not executable as it merely created a charge on the property in question and that charge would have to be enforced by a separate suit, on these objections the Court framed Issues-

1. Whether the decree is not executable for the reasons given in the objection petition?
2. Whether this objection petition is not legally maintainable?
3. Whether the trial of the issue raised in the objection petition of the judgment-debtor is barred

by Section 11, Civil Procedure Code, and also by principles' of res judicata?

4. Whether the decree-holders have been in possession of the factory in dispute from the 31st of October 1951 to the 9th of October 1954?

6. Both the decree-holders maintained that the decrees in their favour were executable against the property without any further proceedings, and objected that the judgment-debtor could not again raise the plea that he was entitled to rendition of accounts regarding the factory from the 31st of October 1951 to the 9th of October 1954 after the same claim had already been overruled on his previous objection petition. They also denied on the merits that they had been in possession of the factory during the period in question or were liable to render accounts on this score under Section 76 of the Transfer of Property Act.

7. In both the petitions the lower Court has held that the decree was executable as it stood without any further proceeding and that the further plea of the judgment-debtor for rendition of accounts on a different ground was barred by the principles of constructive res judicata. The finding was also given that the decree-holders in consequence of the award were not placed in the position of mortgagees in possession of the factory, the result being the dismissal of the judgment-debtor's objections under Section 47 in both cases. Two of the present appeals are against these orders of dismissal.

8. The third appeal relates to the remaining dispute between Radhey Lal and Mathura Parshad arising out of his first objection under Section 47, Civil Procedure Code. While the evidence of Mathura Parshad was still being recorded Radhey Lal filed an objection under Sections 47 and 151, Civil procedure Code, in which he claimed that since the Court had decided that he was not entitled to any rendition of accounts regarding the period following the date of the award, Mathura Parshad was also debarred on analogous grounds from seeking to avoid liability for the payments which he was ordered by the award to make to Radhey Lal by pleading subsequent adjustments and it was therefore prayed that the recording of evidence should be stopped and Mathura Parshad be referred to original proceedings in a civil Court with reference to the matters in dispute. This objection petition was dismissed by the lower Court on the ground that in reply to the judgment-debtor's claim for recovery of certain sums from Mathura Parshad the latter was trying to prove by evidence that in consequence of certain payments made by agreement between the parties he was no longer liable for those sums, and that this was altogether different from Radhey Lal's claim to rendition of accounts regarding the Imperial Ice Factory for the period subsequent to the award, and it was pointed out that the points being decided arose directly out of the judgment-debtor's own objections. He was told that if he did not want those matters to be decided it was open to him to withdraw the objections.

9. On behalf of Mathura Parshad it was con-tended that no appeal lay either against the order of the 14th of February 1956 dismissing Radhey Lal's second claim to rendition of account regarding the factory or against the order of the 8th of May 1956 to which I have just referred, since neither of these was a final order in the objection proceedings going on under Section 47,

Civil Procedure Code, between Radhey Lal and Mathura Parshad. In fact evidence was being recorded on the remaining issues framed in the original objection petition. It is certainly quite obvious that the second of these orders is not appealable as it is not in any sense a final order and merely left these matters pending for a subsequent final decision.

10. Regarding the second appeal it seems to me that the objection is a highly technical one and one which in the circumstances of the present case should not have been pressed, even if raised at all. There is no doubt some authority for the proposition that where only part of a petition under Section 47. Civil Procedure Code, is dealt with an appeal will not lie against that order unless and until the whole of the matter in dispute is decided. In *Mahamaya Prasad Singh v. Mt. Sukhdiya Kaur*¹ Sharfuddin and Roe JJ. of the Patna High Court held that where a judgment-debtor objected to execution on the grounds, firstly, that the decree was not capable of execution and, secondly, that there was nothing due under it, and the Court decided the first ground of objection against him no appeal lay against that decision before the second issue was gone into. Similarly in *Pandia Naicker v. Kamrajapandia Naicker*², Beasley C.J., & Bardswell J. held in a case where among other objections the judgment-debtor had raised preliminary objections that the Court had no Jurisdiction to execute the decree and the execution petition was barred by the twelve years' rule of limitation and these objections had been overruled, that there was still no order which could be the subject of an appeal.

11. In the first place it seems to me that the present case is somewhat different in that the plea which was overruled in the present case was the subject of a separate petition under Section 47, and it was a self-contained plea with no reference to the other matters in dispute, the order under appeal being final as regards that particular objection raised by the judgment-debtor, but apart from this it is not disputed by the learned counsel, who represents Ladli Parshad as well as Mathura Parshad, that a practically similar order is appealable in the case of Ladli Parshad against whom no other objections had been brought by the judgment-debtor. In these circumstances it hardly seems to me to be worth while to raise the objection in the case of Mathura Parshad since it would obviously be inconvenient and waste or time of the Court if the points arising had now to be considered In the case of Ladli Parshad and then again at some future date, after the passing of the final orders regarding the other objections raised against Mathura Parshad, in the case of Mathura Parshad. The same plea was in fact taken by the judgment-debtor against both the decree-holders and the same arguments applied in both the cases. I therefore propose to deal with the points raised simultaneously in both the appeals.

12. Although the lower Court has devoted a good deal of time to the consideration of the question in what capacity. Ladli Parshad and Mathura Parshad decree-holders were in possession of the disputed property between the date of the award and the date of the decree based thereon, this point has not been argued before me and the two points on which arguments had been addressed were whether the decree is executable as it stands or, in other words, whether the award merely had the effect of creating simple mortgage which it was necessary to enforce by

separate proceedings, and whether the decision in Radhey Lal's original objection petitions that he was not entitled to a claim to rendition of accounts for the period between the date of the award and the date of the decree operated as" constructive res Judicata and debarred him from raising the same plea in a different form in his subsequent petitions.

13. On the first of these points the first case relied on by- the learned counsel for the judgment-debtor was *Banu Mal v. Paras Ram*, AIR 1930 Lah 110 (C), in which there was a compromise decree for the payment of a certain sum by Instalments with a proviso that in default of payment of any instalment for two years the plaintiff would be entitled to take possession of certain land. On a default the decree-holder had applied to be put in possession of the land in execution proceedings, and Dalip Singh J. held that the last part of the decree was wrong and it must be taken to be merely declaratory and so the decree was not executable. This case obviously referred to something quite different from the creation of a charge. Reliance is next placed on *Abdul Gaffar Khan v. Ishtiaq Ali*³, in which it was held by a Full Bench that a charge created by a decree of Court based on an award is a charge created by operation of law and comes within Section 100 of the Transfer of Property Act. In *Rustamalli Goharalli v Aftabhuseinkhan Najaf-allikhan*⁴, Lokur J. held-

"There is no difference in principle between a charge created by a decree and one created by contract. In either case the charge is not a transfer of an interest in the property. Where therefore a particular right is charged on specific immovable property, such right cannot be enforced against a subsequent transferee for valuable consideration and without notice of the charge."

14. All that was held in the other case cited, *Kanhaiya Lal Chaube v. Jangi*, AIR 1926 All 527 (F), was that a charge similar to the one in the present case on certain property allotted in arbitration proceedings to one party for payment of a sum which he was ordered to pay to another party on account of the disparity in value of the properties was a valid charge which does not seem to take the matter very far.

15. On the other hand it is the view of the Madras, Patna and Nagpur High Courts as expressed in *V.S.V. Thangavelu Mudaliar v. G. Thirumalswami Mudaliar*, (S)⁵ *Debendra Nath v. Smt. Trinayani Dasi*⁶, *Mt. Prem Kuer v. Ram Lagan Rai*⁷. and *Ghasiram Seth V. Mt, Kundanbai*⁸, that a charge created by a decree does not come within the scope of Section 100 of the Transfer of Property Act as it is neither a charge created by the act of the parties or a charge created by operation of law.

Moreover, the cases *Brajasunder Deb v. Sarat Kumari*⁹, *Sheonandan Pandey v. Mt. Asarfi Kuer*¹⁰, *Durga Prasad v. Mt. Tulsa Kuar*¹¹, and *Jagdamba Misir v. Ram Jit Singh*¹², are all authorities for the proposition that where property has been made subject to a charge in. a decree the charged property can be brought to sale in execution of a decree and the charge need not be enforced by a separate suit. I accordingly hold that the lower Court rightly decided, that the decree is executable as it stands.

16. There remains the question whether, after the judgment-debtor had raised the plea that he was entitled to rendition of accounts from the two decree-holders in respect of the property in dispute for the period between the date of the award and the date of the decree on account of the usual occupation of the property as partners and this plea had been rejected on the ground that it could only be brought in a separate suit and not in execution proceedings, the judgment-debtor could in the subsequent petition claim the same relief on different grounds, namely that he was entitled to rendition of accounts from the decree-holders as mortgagees or charge-holders.

17. There can be no doubt that the principle of res judicata applies in execution proceedings. This was held by Mookerjee and Teunon JJ. of the Calcutta High Court in *Mazem Hossein Mondal v. Sarat Kumari Debi*¹³, and also by a Full Bench consisting of Tek Chand, Bhide and Beckett JJ. in *Gauri v. Ude*¹⁴. In which the learned Judges have held that although Section 11 does not apply to execution proceedings, the general principle of res judicata applies to such proceedings including the principles of constructive res judicata embodied in Explanation 4 to Section 11, and the principle of res judicata including the principle of constructive res judicata applies not only to matters decided in prior execution proceedings but also to matters decided in the same proceeding. To settle the matter finally the same view has also been taken by the Supreme Court in *Mobanlal v. Benoy Krishna*¹⁵,

18. As against this two decisions have been relied on on behalf of the judgment-debtor. The first of these was *Abdul Wahab v. Mustafa Khan*, AIR 1935 Lah 753 (R), in which Addison and Din Mo-hammad JJ. held that where it was found that the plaintiffs could not have raised their present ground of attack in the previous suits without creating great confusion, and the evidence which they could lead to support it would have been inconsistent with the evidence they had to adduce otherwise, the second suit was not barred by the provisions of Section 11, Civil Procedure Code.

Almost the same words were used again by Ran Mohammad J. in *Ganga Ram Trust Society, Lahore v. Sundar Lal*¹⁶. Those decisions, however, were based on the particular facts of the cases decided by them, and while there can be no quarrel with the proposition laid down, it does not seem to me to be at all applicable in the present case, in which quite obviously it was open to the judgment-debtor in his first petition under Section 47, Civil Procedure Code, to claim rendition of accounts for the period in question on the alternative grounds that the decree-holders were enjoying use and occupation of the property in dispute either as partners or as mortgagees or charge-holders. The essential basis of the claim was the same and it could not possibly have caused any confusion to have claimed the relief on these alternative grounds. In the circumstances I consider that the matter was correctly decided by the lower Court and I accordingly dismiss all the three appeals with costs.

Cases Referred.

140 Ind Cas 517: (AIR 1917 Pat 575) (A)

2AIR 1933 Mad 500(1) (B)

3AIR 1943 Oudh 354 (FB) (D)
4AIR 1943 Bom 414 (E)
5AIR 1956 Mad 67 (G)
6AIR 1945 Pat 278 (H)
7AIR 1948 Pat 199 (I)
8AIR 1940 Nag 163 (J)
938 Ind Gas 791; (AIR 1916 Pat 252) (K)
10AIR 1946 Pat 216 (L)
11AIR 1939 All 579 (M)
12AIR 1953 All 253 (N)
135 Ind Cas 89 (O)
14AIR 1942 Lah 153 (P)
151953 SCR 377: (AIR 1953 SC 65) (Q)
16AIR 1040 Lah 27 (S)