

## RAJASTHAN HIGH COURT

Jethmal

Vs.

Mst. Sakina

Civil Misc. Appeal No. 45 of 1957  
(I.N. Modi, J.)

05.05.1960

### JUDGMENT

#### **I.N. Modi, J.**

1. This is an appeal by the defendants Jethmal and others against an order of remand passed under Order 41 Rule 23 C.P.C.

2. The material facts leading up to this appeal may be stated as follows. The defendants obtained a money decree against Sahabuddin, husband of the respondent Mst. Sakina. Sahabuddin died before-execution was taken out. The defendants decree-holders then proceeded in execution against Mst. Sakina as the legal representative of the deceased judgment-debtor, and on the 22nd March, 1955, attached a 'bara' (an open piece of land enclosed by fencing) as belonging to Sahabuddin. Mst. Sakina filed an objection against the aforesaid attachment on the ground that the bara in question had been given to her as dower by her husband, and, in support of this assertion, she produced a copy of a registered deed of dower dated the 24th July 1931. Her case was that ever since this property was given to her, she had been in possession of it in her own right and that her husband had nothing to do with it. Issues were framed, and the case was fixed for her evidence for the 3rd December, 1955. On that date, neither she nor her witnesses appeared and, therefore, the objection was dismissed. Be it noted that the 3rd December, 1955, was the first date fixed for the respondent's evidence on her objection. Thereafter, thanks to the kind of advise which she presumably received from her lawyer, she filed the suit, out of which this appeal arises, under Order 21, R. 63 C. P.C. on the 21st December, 1955, with the prayer that the bara in question which

had been attached by the defendants in execution of their decree against her deceased husband was not liable to attachment and sale in execution thereof as it was her own property by virtue of the registered deed of dower dated the 24th July, 1931.

3. The defendants mainly resisted the suit on the ground that it was not maintainable being barred by the provisions of Section 47 Civil Procedure Code. The trial court took up this plea as a preliminary issue and decided it in favour of the defendants and dismissed the Suit. It may be observed further that, although the trial court dismissed the suit, it was of the opinion that the suit could have been treated as an application under Section 47, but it refused to do so because the previous application, having been dismissed on the 3rd December, 1955, the second application regarding the same matter would in its opinion be barred by the rule of res judicata. The plaintiff respondent went in appeal to the learned District Judge, Merta who, concurred in the finding of the trial court that the suit was not maintainable by virtue of the provisions of Section 47 Civil Procedure Code. He also concurred in the trial court's view that the suit could be treated as an application under Section 47 Civil Procedure Code. The learned appellate Judge, however, held that the trial court fell into error when it came to the conclusion that this second application would be barred by the rule of res judicata inasmuch as the first application or objection had been merely dismissed for default and had not been heard and finally decided on the merits. In this view of the matter, the learned Judge allowed the appeal and remanded the case back with a direction that the respondent's plaint be treated as a proceeding under Section 47 Civil Procedure Code and that the same should be decided on the merits-according to law. The costs of the appeal were made to abide the result. Aggrieved by this decision the defendants have come up in appeal to, this Court.

4. The sole question which falls for determination in the circumstances set out above is whether a second application under Section 47 Civil Procedure Code is maintainable in law where the first had come to be dismissed for default. The contention of learned counsel for the appellants is that to such an application the provisions of Order 9, R. 9 Civil Procedure Code would be applicable by virtue of Sec. 141 of the Code, and, that that being so, the only proper remedy for the respondent was to have made an application for restoration of her objection which had been dismissed for default and that no second application would be competent. Learned counsel strenuously relies upon *Gauri v. Hinga*,<sup>1</sup> *Ram Harakh v. Banwari*

*Lal,*<sup>2</sup> and *Thandaram Marawa v. Kashi Prasad,*<sup>3</sup>

5. Now let us look at the provisions of Order 9. A perusal of the rules contained in this Order unmistakably shows that these rules pertain to the consequences of non-appearance of the parties to a suit at the first hearing. These rules would, therefore, not be attracted into application to a proceeding under Section 47 without more. To give a simple example, if a suit happens to be dismissed because of the want of appearance of the plaintiff on the first date of hearing and the defendant is present thereat then Order 9, R.8 provides that the court must make an order dismissing the suit, unless the defendant admits the claim or a part thereof in which case the court shall pass a decree to the extent of the claim admitted but dismiss the rest. Rule 9 then further goes on to provide that where a suit is thus wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, and that his only remedy is to make an application to have the dismissal set aside by adducing sufficient reason for his non-appearance, and where the court is satisfied that his non-appearance was so caused, the court is bound to make an order setting aside the dismissal upon such terms as to costs as it may think fit and proceed with the suit. Now such a state of things could hardly be held to apply to an application for execution because it is elementary that it is open to a decree-holder to make successive applications for the execution of his decree provided that they are not otherwise barred. Learned counsel for the defendants realizing the force of this position strenuously contends that although the provisions of Order 9 in terms do not apply to an application for execution or any other proceeding in execution, they would become applicable to a proceeding under Section 47 by virtue of the provisions of Section 141 Civil Procedure Code. This section lays down that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any court of civil jurisdiction.

6. Now Section 647 of the Code of 1882 which is the counter-part of Section 141 of the present Code came up for consideration before their Lordships of the Privy Council in *Thakur Prasad v. Fakir Ullah,*<sup>4</sup> and the question arose whether Order 9 was applicable to execution proceedings by virtue of Section 647. What their Lordships said was this :

"But the whole of Chapter XIX of the Code consisting of 121 sections is devoted to the procedure in executions and it would be surprising if the framers

of the Code had intended to apply another procedure, most unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in Section 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions."

This is the leading case on the subject and there is a long chain of authority since the aforesaid decision was given in favour of the view that neither O. 9 by itself nor read with Section 141 of the Code applies to proceedings in execution.

7. In *Basaratulla v. Reazuddin*,<sup>5</sup> a Division Bench of the Calcutta High Court held that there was no substantial difference between the terms of Section 647 of the Code of 1882 in its original form and Section 141 of the Code of 1908, and that the broad and general proposition might be laid down that none of the provisions of the Code were made applicable to execution proceedings by reason of the provisions of Section 141. Some earlier decisions of the Calcutta High Court, namely, *Bhuben Behari Nag v. Dharendra Nath Banerji*,<sup>6</sup> and *Bipin Behari Saha v. Abdul Bank*<sup>7</sup> which took the contrary view were held to have been wrongly decided.

8. In *Baldeo Prasad v. Sukhdeo Prasad*,<sup>8</sup> a division bench of the Allahabad High Court held that an application to have an ex parte order in execution proceedings set aside under Order 9, R. 13 was not maintainable, as Section 141 could not operate to make Order 9, R. 13 applicable to execution proceedings.

9. In *Arunachalam v. Veerappa Chettiar*,<sup>9</sup> the question again arose whether Order 9, R. 13 applied to ex parte orders made in execution proceedings even though, they fell within Section 47 of the Code. The point was referred to a special bench as there was a conflict between some of the earlier decisions of that Court. This Bench, which consisted of five learned Judges of that Court, unanimously held that Order 9, Civil Procedure Code did not apply to execution proceedings at all, and that the whole scheme of the Order was to provide for procedure in suits. With respect, if I may say so, this would also apply to proceedings in the nature of suits or original proceedings by virtue of Section 141 of the Code. Reference was made to the definition of "decree" as given in Section 2 of the Code, and it was pointed out that according to this definition the determination of any question within Section 47 specifically excluding

an order of dismissal for default was to be deemed to be a decree, but it was observed that the use of the word "deemed" only served to show that what was to be deemed as a decree was not actually or really a decree, and it was held that an ex parte order even where it amounted to a decree so called was not a decree in a suit. It was further observed that the provisions of Order 9 were not meant to apply even to appeals, which was evident from the fact that the Legislature had made analogous rule for governing cases of non-appearance of parties in appeals : vide Rules 11, 17, 18, 19 and 21 of Order 41. The learned Chief Justice at the end of the judgment which he delivered on behalf of the Court indeed observed that steps be taken to make Order 9 applicable to proceedings in execution, but that is altogether a different matter. It may also be pointed out here that certain rules under Order 9 seem to have since been made applicable to execution proceedings by the Madras High Court by an express amendment of certain provisions of the Code contained in Orders 9 and 21 of the Code, but, so far as it appears, the bar contained in Order 9, R. 9 has still not been made applicable thereto. See *Ayyalureddi v. Mallareddi*<sup>10</sup>

10. In *Kaura Lal v. Punjab National Bank*<sup>11</sup> it was held by the Lahore High Court that there was a long series of decisions in support of the proposition that Section 141 does not apply to proceedings in execution. The same view was adopted by a bench decision of the Patna High Court in *Laxmi Narayan v. Dipen Rai*<sup>12</sup>

11. A different view however seems to have prevailed in the Oudh Chief Court. In AIR 1920 Oudh 177, it was Held that the provisions of Order 9, R. 9 were applicable to an order dismissing for default an application made under Order 21, R. 90. The learned single Judge who decided this case was of the opinion that, although it was correct that their Lordships of the Privy Council in ILR 17 All 106 (PC) had laid down that the provisions of the Code relating to the restoration of suits could not be applied to applications for execution of a decree, it did not necessarily follow there from that their Lordships' observations applied to all applications made in the execution department.

This view seems to have been followed in the subsequent Oudh case in AIR 1937 Oudh 337 and it was pointed out that when orders of dismissal for default were generally excluded from the definition of "decree" under Section 2 (2) of the Code of Civil Procedure the underlying intention was that such orders of dismissal were to be set aside under Order 9, R. 9 just as much in a case under Section 47 as in the case of a regular suit. It was also held that the language of Section 141 Civil Procedure Code

was sufficiently wide to cover the case of an application under Section 47. With all respect, I find it difficult to agree with this view having regard to the observations of their Lordships of the Privy Council in ILR 17 All 106 (PC) which I have quoted in full above and in view of the very considerable preponderance of opinion in the various High Courts of our country against this view.

12. Having given my most careful consideration to the whole matter and on a review of the decided cases, the consensus of judicial opinion at this date seems to me to be entirely in favor of the view that the provisions of Order 9 cannot be held to be applicable to applications under Order 21, Rules 2, 89, 90, 91, 97 and 100.

13. The only question which then remains to consider is whether the same view should be held applicable to an application under Section 47. Having given my very careful and earnest consideration to this matter, I am of opinion that, after all is said and done, there seems to be no fundamental difference between a proceeding under any of the provisions of Order 21 mentioned above and a proceeding under Section 47, both are equally proceedings in the execution department. It may be that a proceeding under Section 47, may, under certain circumstances, be treated as a suit and vice versa; but that in my opinion does not make any vital difference to the conclusion at which I have arrived above. A proceeding under Sec, 47 until it is converted into a suit is not a suit and, continues to be an application, and that being so, the provisions of Order 9 cannot be held applicable to it even with the aid of Section 141 Civil Procedure Code. As already pointed out above, Section 141 has no application to proceedings in execution which, to my mind, clearly includes an application under Section 47 in view of the observations of the Privy Council in ILR 17.All 106 (PC).

14. For these reasons I have definitely come to the conclusion that it was not open to the respondent to have made an application for restoration of his objection which was dismissed for default by recourse to the provisions of Order 9, R. 9 read with Section 141 of the Code of Civil Procedure . It must follow from what I have stated above that the plaint in the respondent's suit which has been Ordered to be tried on the merits by the lower appellate court as a proceeding under Section 47 cannot be thrown out on the basis of the provisions of Order 9 Rule 9.

15. It is argued by learned counsel for the defendants that, if this view is accepted, it would be open to a judgment-debtor under Section 47 to file one application after

another even though each one of the previous applications may have been dismissed for default. To this objection, the short answer, in my judgment, should be that it would be always open to the court in a proper case to throw out the subsequent application on the ground that it amounts to an abuse of the process of the court. I can see nothing in law to preclude the court from saying so in an appropriate case. But the mere circumstance that such applications may otherwise be filed in succession should in my opinion be no sound reason for applying the provisions of Order 9 to such proceedings when they do not properly admit of this being done.

16. The next point which was argued by learned counsel for the defendants was that even if I came to the conclusion to which I have come above as regards the non-applicability of Order 9 to an application under Section 47, I should still quash the order of the court below directing the plaint to be treated as an application under Section 47 (which would of course be a second application) and sending it back for a trial on the merits, because the first application should be considered to have been dismissed under Order 17 Rule 3, and, therefore, it amounted to a decree and therefore no further application could be maintained in law.

I am afraid I am unable to see any substance in this contention. For one thing, the argument of learned counsel overlooks the point that, properly speaking a litigant has to proceed against an order which has been passed against him and not against another order which was not passed but which might have been passed. The first objection of the respondent which was dismissed on the 3rd December, 1955, was dismissed for default and not on the merits. Clearly enough, therefore, the second application could not be held to be barred by the rule of res judicata. Again, it may be pointed out that Order 17, broadly speaking, makes the provisions of Order 9 applicable to subsequent hearings at a suit as Order 9 in terms applies only to the first hearing thereat, and, therefore, Order 17 Rules 2 and 3 either by themselves or read with Section 141 Civil Procedure Code would not be applicable to proceedings in execution for precisely the same reasons on account of which Order 9 would not be applicable thereto. It may also be pointed out that Order 17, R. 3 would not be attracted into application at all in this case because the suit was fixed for production of the plaintiff respondent's evidence for the 3rd December, 1955, in the ordinary course of things, and not at her instance within the meaning of this rule. This plea, therefore, also fails and I unhesitatingly reject it.

17. The result is that this appeal fails and it is hereby dismissed with costs. Leave to

appeal is refused because the view which I have felt persuaded to accept has the support of a very considerable preponderance of judicial opinion in the High Courts in our country.

Appeal dismissed.

Cases Referred.

1. AIR 1920 Oudh 177
2. AIR 1937 Oudh 337
3. AIR 1948 Nag350
4. ILR 17 All 106 (PC)
5. AIR, 1926 Cal 773
6. AIR 1916 Cal 221
7. AIR 1919 Cal 50
8. AIR, 1929 All 485
9. AIR 1931 Mad656 (FB)
10. AIR 1948 Mad 337
11. AIR 1926 Lah 109
12. AIR 1950 Pat 290