N. Krishnaih Setty vs Gopalakrishna & Ors on 3 September, 1974

Equivalent citations: 1974 AIR 1911, 1975 SCR (2) 975, AIR 1974 SUPREME COURT 1911, 1974 2 SCC 624 1975 (1) SCR 970, 1975 (1) SCR 970, 1975 (1) SCR 970 1974 2 SCC 624, 1974 2 SCC 624

Author: A. Alagiriswami

Bench: A. Alagiriswami, P. Jaganmohan Reddy, M. Hameedullah Beg

PETITIONER:
N. KRISHNAIH SETTY

Vs.

RESPONDENT:
GOPALAKRISHNA & ORS.

DATE OF JUDGMENT03/09/1974

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
REDDY, P. JAGANMOHAN
BEG, M. HAMEEDULLAH

CITATION:
1974 AIR 1911 1975 SCR (2) 975
1974 SCC (2) 624

ACT:
Mysore Agriculturists' Relief Act, 1928 s. 14--Scope of. Code of Civil Procedure (Act 5 of 1908), s. 11--Applicability.

HEADNOTE:
Under s.14(1) of the Mysore Agriculturists Relief Act 1928 no agricultural land belonging to an agriculturalist shall be attached or sold in execution of any decree or order unless it has been specifically mortgaged for the payment of the debt to which such decree or order relates,
The appellant filed a suit on a promissory note executed by the father of the respondents. There was an attachment before judgment, and after decree was passed, the properties

belonging to the family were sold in execution. The respondents were born thereafter. They filed a suit contending that the sale of the properties in execution of the appellant's decree was void ab initio under the Act. The trial Court decreed the suit but the first appellate court allowed the appeal on the ground that as the respondents were not born on the date of the sale they could not challenge its validity. The High Court restored the judgment of the trial court.

Dismissing the appeal to this Court.

HELD ; (1) The attachment before judgment was not valid and therefore the sale in pursuance of that attachment was void. The suit filed by the appellant was not on the foot of a mortgage and therefore the sale in execution of the appellant's decree is against the provisions of s. 14(1). The contention that s. 14(2) does no more than lay down the same procedure as 0. 38, C.P.C., and therefore the attachment is valid, is not correct. Section 14(2) permits an attachment only in execution of a decree. [972 B--E]

(2) The respondents were entitled to file the suit questioning the sale. A void sale held in execution of a decree confers no title on the auction purchaser. Therefore the joint family to which the properties belonged did not lose their title, but continued to be owners, and the respondents got a right to the property as soon as they were born by right of birth. [972 E-G]

(3) The suit was not barred by res judicata because : (a) to the earlier suits referred to the respondents were not made parties; and (b) those suits were filed in the Munsiff's court and were therefore not decided by a court of competent jurisdiction as the present Suit was filed in the Subordinate judge's court. The respondents were also not representatives of their father as contemplated in S. 11 , C.P.C. [972 H-973 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1748 of 1967. From the Judgment and order dated the 6th January 1961 of the Mysore High Court at Bangalore in. Second Appeal No. 129 of 1956.

S. C. Malik A. S. K. Rao arid M. R. K. Pillai for the appellant.

K. Rajendra Chaudhuy, for the respondents Nos. 1-8. The Judgment of the Court was delivered by ALAGIRISWAMI, J. This is, an appeal by certificate against the judgment of the High Court of Mysore in a second appeal. it,-arises out of a suit filed by respondents 1 and 2 (who,will hereafter be referred to as plaintiffs) for a declaration that the sale held in execution of the decree obtained by the appellant (who was the 9th defendant in the, suit) in O. S. No. 31 of 1937-38 against their father and other members of their family was void ab initio. O. S. No. 31 of 1937-38 had been filed by the

present appellant on, the basis of a promissory note executed as already mentioned by the father of the plaintiffs and other members of that family. In execution all the sixteen items of property belonging to the family were sold. The sale was in pursuance of an attachment before the judgment made on 25th September- 1937. The suit was subsequently decreed. In the suit the only plea taken was that the defendants-were agriculturists entitled to the benefit of the Mysore: Agriculturists Relief Act 1928. The plaintiffs filed the suit for a mere declaration because they continued in possession of the properties which had been sold in execution and purchased by defendants 10 and, 11 in the suit and subsequently purchased by the appellant. The Trial Court decreed the suit. It should be mentioned that the suit was filed on 14-5-1952. The plaintiffs were born respectively in. the years 1944 and 1950. On appeal the District Judge hold that the sale was void but allowed the appeal on the ground that the plaintiffs were not born on the date of the sale. A Division Bench I of the Mysore High Court allowed the Second Appeal and restored the judgment of the Trial. Court. The main question for decision as to whether the execution sale was void ab initio depends on the interpretation to be placed on s. 14.of the Mysore Agriculturists' Relief Act which roads as follows:.

> "14. (1) Except- as otherwise provided in subsections (2), (3), and (4) no agricultural land belonging to an agriculturist shall be attached or sold in execution of any decree or order passed after this Act comes into force, unless it has been specifically mortgaged for the payment of the debt to which such decree or order relates and the security still subsists, For the purposes of any such attachment or sale as aforesaid standing crops shall be deemed to be movable property. (2) The Court may at the time of passing a decree for money directing payment by instalments or at any time during the course of execution of such decree direct the judgment debtor for sufficient cause to furnish security for the amount of the decree and if he fails to furnish the security required order the attachment of any agricultural land belonging to the judgment- debtor.
>
> (3) The procedure in respect of attachments ordered under subsection (2) shall be as far as may be in accordance with the procedure relating to attachment before judgment under Order XXXVIII of the Code of Civil Procedure 1908.
>
> (4) No agricultural land ordered to be attached under sub- section (2) shall be sold in pursuance of such attachment unless the judgement debtor is in arrears in respect of two or more instalments under the decree.

We are, in agreement with the view taken by the Courts below and the High Court that the attachment before judgement made in this case was not a valid one and therefore the sale in pursuance of that attachment was void.We are unable to accept the argument on behalf of the appellant that s, 14 does no more than lay down the same procedure as Order 38 of the Code of Civil Procedure and therefore the attachment was valid. Sub-s. (1) of s. 14 lays down that no agricultural land belonging to an agriculturist shall be attached or sold in execution of any decree or order unless it has been specifically mortgaged for the payment of the debt to which such decree or order relates. The suit :filed by the appellant O.S. No. 31 of 1937-38 was not on the foot of a mortgage and therefore the sale effected in execution of the decree obtained by the appellant is clearly against the

provisions of sub-s. (1). Sub-section (2) permits an attachment only in execution of a decree and, therefore, there is no substance in the argument on behalf of the appellant that the attachment effected before judgment at the instance of the appellant is similar to an, attachment before judgment tinder Order 38 of the Code of Civil Procedure.

We are in agreement with the learned Judges of the High Court that the view taken by the District Judge that as the plaintiffs were not born on the date of the sale they cannot challenge its validity is wrong. A void sale, as we have already held the sale in execution of the decree obtained by the appellant in this case to be, confers no title on the auction purchaser and, therefore, the joint family to which the properties belonged continued to be the owners of that property and did not lose their title there to. The plaintiffs got a right to the property as soon as they were born, not by way of succession but by right of birth. Therefore, plaintiffs were certainly entitled to file a suit questioning the sale.

The only other argument on behalf of the appellant, which was advanced before the High Court and rejected by it and- was also put forward before us, was that the plaintiffs' suit was barred by constructive res judicata. It appears that the appellant filed a suit O.S. No. 535 of 1944-45 for partition of items 1-15 against defendants 1 and 2 and the widow and son of another of the original judgment-debtors, as also defendants 3 and 4. To that suit the plaintiffs were not parties. Plaintiff No. 2 was not even born then. There Was another suit, O.S. No. 47 of 1942-43 filed by the 11th defendant in respect of item 16.To that suit also the plaintiffs were not parties. As neither plaintiff was born at the time of O.S. No. 47 of 1942-43, they having been born on 22-9-1944 and 19-9-1950, and the second plaintiff was not born at the time O.S. No. 535 of 1944-45 was filed, and the first plaintiff though born Was not made a party there can be no question of res judicata as against them. They are not representatives of their father as contemplated in s. 11 of the Code of Civil Procedure. It also appears that the earlier suits were filed before the Munsiff's Court and were,. therefore, not decided by a court of competent jurisdiction as the present suit has been filed in the Subordinate Judge's Court. We are, therefore, satisfied that the appellant cannot succeed in his plea of res judicata. The appeal is, therefore, dismissed. The appellant will pay the costs of respondents 1 and 2.

V.P.S Appeal dismissed..