

## Har Sahai And Ors. vs Jugul Kishore And Ors. on 21 March, 1950

**Equivalent citations: AIR1952ALL206, AIR 1952 ALLAHABAD 206**

ORDER

Kidwai, J.

1. Her Sahai and his brothers applied under the provisions of the Encumbered Estates Act. Among the property which the Special Judge reported, under Section 19 (2) of the Act, to be liable to attachment and sale in satisfaction of the debts of the applicant was a decree held by, them against Jugul Kishore, Ram Achari and Bam Autar, When the matter came before the Collector under Section 24, Encumbered Estates Act, Jugul Kishore applied on 8-10-1945, stating that the decree was barred by time and so should not be included in the list of the property of Bam Sahai and others. oN the same day the following order was passed : "File. No. Action to be taken on these decrees." (In the order-sheet which is also signed by the Presiding Officers the following entry is made "Digriyat be wajch hone beroon miad nilam say bari ki jayain aur uspar kisi karrawaee ki zarurat nahin hai.")

2. On 11-8-1943, the decree-holders applied for execution of their decree against Jugul Kishore and others. Upon this the judgment-debtors filed an objection, under Section 47, Civil P. C., on 28th September 1943. They pleaded: (1) That the decree was time-barred: (2) That the matter relating to limitation had been decided between the parties in the Court of Sub-Divisional Officer Manakapur in the Encumbered Estates Act proceedings: (3) That the decree sought to be executed was based on a fictitious pronote.

3. The trial Court framed the following four issues:

1. Whether the decree under execution was included in the list of properties in Encumbered Estates Act case ?

2. Is the decree-holder entitled to execute the decree in this Court ?

3.(a) Is the application within limitation ?

(b) Is the judgment-debtor estopped from raising the plea ?

(4) Has the question been decided by the Collector under Encumbered Estates Act and does that operate as res judicata ?

4. The learned trial Court found : (1) That the decrees were included in the list of property reported by the Special Judge. (2) That the decree-holders having themselves stated before the Collector that the decrees were time-barred could not now execute them : (3) The order of the Collector was not operative as res judicata : 4. That the decree-holder is not estopped.

5. The objections under Section 47, Civil P. C. were accordingly allowed and the application for execution was dismissed. The decree-holders have applied under Section 25. Provincial Small Cause Courts Act.

6. The decisions on the question of estoppel and res judicata are in favour of the applicant and it is not necessary to say anything more than that they are correct.

7. The Collector was not a Court which had power to execute the decree now sought to be executed and consequently even if he gave a decision it could not be covered by the principle of res judicata.

8. The agreement of the decree-holders to the allegation of the judgment-debtors that the decree was time-barred is not a statement or conduct which induced the judgment-debtors to alter their position in any way. The judgment-debtors alleged that the decree was time-barred and the decree holders made a gratuitous admission that it was. This did not result in the position of the judgment-debtors being altered in any way.

9. It is agreed that the property was entered in the list of the properties reported by the Special Judge under Section 19 (2), Encumbered Estates Act to be liable to be attached and sold in execution of the decree. The jurisdiction to decide this matter was that of the Special Judge and the Collector had no power to remove the property from that list. His order releasing the property, therefore, does not affect the matter and the decree will still remain the property in respect of which proceedings are taking place under the Encumbered Estates Act.

10. This does not, however, deprive the decree-holders of their right to execute the decree. There is nothing in Section 7, or any other section, of the Encumbered Estates Act which prohibits the execution of a decree in his favour by a person at whose instance proceedings are taking place under the Encumbered Estates Act, This is not a case under the Insolvency Act in which all the property vests in the Receiver in Insolvency. There is no provision of the Encumbered Estates Act which vests the property of the applicant under that Act in the Collector, or any other Officer, unless proceedings have been taken for the appointment of a Receiver, which was not done in this case. Under Section 24 the Collector got himself substituted for the decree-holder and got the decree executed: he can only sell the decree. After the sale, the vendee would be a lawful transferee of the decree and would proceed to execute it as such, until such sale, however, it is only the decree-holder that can execute the decree.

11. Thus the decree was executable on the application of the decree-holder. The lower Court has, however, not given a considered finding on the question of limitation. That question must be decided before execution case proceeds.

12. I accordingly allow this application, set aside the order of the trial Court and remand the case to the Court of the Judge of Small Causes at Gonda to dispose of it according to law.

13. Since the conduct of the decree-holders is responsible in part for the order passed by the trial Court, they will not get their costs and the parties will bear their own costs of both the Courts.