Ram Adhar vs Nem Kumar on 30 January, 1952

Equivalent citations: AIR1953ALL139, AIR 1953 ALLAHABAD 139

JUDGMENT

Mushtaq Ahmad, J.

1. This is a judgment-debtor's appeal, and the only question to be decided is one of limitation.

2. The decree in question was one on a simple mortgage dated the 12th August 1926, and was passed on a compromise fixing instalments on the 4th November 1931, No instalments having been paid, the decree-holder applied for the preparation of a final decree on the 5th November 1934, the previous day being a Sunday. This application, it is conceded, was thus made on the last day of limitation and was, therefore, within time.

3. On the 5th December 1934, the court ordered that a final decree be prepared, and such a decree was prepared on the 19th February 1935.

4. On the 19th October 1938, the first application for execution was made. This was obviously after the expiry of three years from the date of the final decree and had, therefore, been made beyond time. The application having been dismissed for default, a second application, also dismissed for default, and then a third, likewise dismissed for default, were made. Finally, the fourth and last application for execution was made on the 15th February 1943. These applications for execution, barring the first, were all within time in the sense that they had been made within three years of the previous order.

5. After the said fourth application for execution had been made, the execution was transferred to the Collector under Section 65, C. P. C. A portion of the property mortgaged was then sold in execution on the 21st February 1944, the sale being confirmed on the 21st March 1944 and a sale-certificate granted on the 29th May 1944. On the 6th July 1944, an application was made by the auction-purchaser to the civil court for possession being delivered to him, and the court directed the Amin to do so by the 31st August 1944. On the 12th August 1944, objections were filed by the judgment-debtor-appellant :

> (1) that the application dated the 5th November 1934 for the preparation of a final decree was beyond time and (2) that the first application for execution dated the 19th October 1938, being time-barred, the subsequent applications including the proceedings on the 4th application for execution were all contrary to law.

On this latter objection it was pleaded that the fourth application for execution was itself time-barred.

6. It is now conceded that the day previous to the date of the application of the 5th November 1934, for the preparation of a final decree being a Sunday, that application could be taken as within time, and the only question now to be decided is whether the fourth application for execution dated the 15th February 1943 was or was not within time in view of the grounds alleged by the judgment-debtor, as already stated.

7. Both the courts below rejected the objection of the appellant in this behalf on the authority of the Full Bench case in -- 'Genda Lal v. Hazarilal', AIR 1936 All 21 (FB). The judgment-debtor relied on a later decision of a Bench of this Court in the -- 'Collector of Benares v. Jai Narain Rai', AIR 1938 All 89, but those Courts were of the opinion that this ruling had in no way modified the legal position established by the earlier Full Bench case. The rule laid down in the Full Bench case was that where an application for execution had proved fructuous in part or in whole, for instance, where a certain property had been sold in execution of the decree and the sale confirmed as if the application was not open to any objection on the score of limitation, then, even though the judgment-debtor had not raised any objection on that ground, it must be deemed that the Court at least by implication decided that the application was within time and that, therefore, a subsequent objection that the application for execution had been made beyond time was barred by the rule of constructive res judi-cata. Sulaiman C. J. when delivering the main judgment of the Full Bench, laid down the law thus :

> "Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of 'res judicata' from raising the question that that application was not within limitation."

8. Niamat Ullah J., one of the Judges of the Bench, put the same position in a somewhat more elaborate form. His Lordship said :

> "As to whether it was finally decided depends upon the manner in which the proceeding terminated. If the ultimate result of the proceeding was such as to be accountable only on the hypothesis that the question of limitation was decided in a certain manner, it may be deemed not only to have been directly and substantially in issue, but also to have been finally decided. For instance, if the question of limitation be deemed to have been a matter directly and substantially in issue, because the judgment-debtor might and ought to have raised the plea, and the application for execution results in a certain property being sold in execution of decree and the sale proceeds applied in part satisfaction of the decree, the question of limitation should be deemed not only to have been directly and substantially in issue, but should also be deemed to have been heard and finally decided, because the final order of the Court terminating the execution proceedings is reconcilable only with one

> hypothesis, namely that the application for execution was treated by the Court as one not barred by limitation."

9. We have quoted the above passage as Niamat Ullah J. was a member of the Bench deciding the later case already referred to, on which reliance was placed by the learned counsel for the appellant before us also. It will be seen from the two passages quoted above, one from the judgment of the Chief Justice and the other from that of this learned Judge that there was absolutely no divergence of opinion between them on this particular point.

10. The facts of the later case in which the learned Judges decided that the application for execution in that case was time-barred were quite different. There the sale in execution of the decree had not been confirmed, so that it could not be said that the application for execution had proved fructuous at all. Indeed the following observation of Allsop J., who delivered the judgment of the Bench, leaves no doubt that the rule laid down in the earlier Full Bench case was, of course it had to be, wholly followed in the later case. The learned Judge remarked :

> "Thus, if an application for execution is made and the final result is that the decree becomes in some measure fructuous, it must be assumed that the point of limitation has been decided, because otherwise the result would not have been reached."

11. It is thus manifest that the later ruling is not only distinguishable from the facts of the present case, but that, so far as the point now raised is concerned, there was complete unanimity between the two cases.

12. Applying the rule to the present case, we find that a portion of the property was actually sold in execution of the mortgage decree in pursuance of the fourth application for execution dated the 15th February 1943, the same being confirmed and a sale-certificate being granted therefor. No doubt, if an objection on the score of the bar of limitation had been raised by the judgment-debtor, either before the sale or at any rate before its confirmation, the objection would have been entertainable by the Court. No such objection at either of these two stages was raised, and it was only after the Amin had been directed to deliver possession to the decree-holder auction-purchaser over the property purchased by him in execution of the decree that an objection was filed by the judgment-debtor that the fourth application for execution dated the 15th February 1943 was beyond time, as the first application for execution dated the 19th October 1938 had itself been made after the expiry of the period of limitation. Under the authority of the decision of the Full Bench cited above, the courts below found themselves unable to entertain the objection, and in our opinion they were perfectly right.

13. Accordingly there is no force in this appeal which is dismissed with costs.