Mannu Lal vs Hanuman Singh on 28 August, 1950

Equivalent citations: AIR1951ALL398, AIR 1951 ALLAHABAD 398

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Agarwala, J.

1. This is a decree-holder's appeal against a decree of the learned Civil Judge of Fatehpur allowing the judgment-debtor's objection that the appellant's application for execution was barred by time. The matter came up before one of us, who, in view of some conflict of opinion upon the point to be decided in the case, referred it to a Bench, The facts briefly stated are as follows :

2. A decree for money was passed in favour of the appellant on 27-6-1930. The appellant filed an application for execution on 3-7 1933. This was within time as it was filed immediately on the re-opening of the Court after the summer vacation. This application was dismissed on 28 7-1933. The second execution application was filed on 25-7-1936. This was dismissed on 27-8-1936. Then the present application for execution was filed on 19-9 1942. It is conceded by both the parties that unless the question of limitation is barred by res judicata it must be held that this application was beyond time even after excluding time by virtue of the Temporary Postponement of Execution of Decrees Act, X [10] of 1937. The circumstances in which the doctrine of res judtcata is claimed to apply to the facts of the case arose in the following manner. Upon this application being presented a notice was issued to the judgment-debtor under Order 21, Rule 22, Civil P. C., to show cause why the execution should not proceed. The judgment-debtor did not appear and the Court ordered on 22-12 1942 that execution may proceed. Some property was attached during the course of the execution proceedings. The Amin's report dated 1-3.1943 shows that the property had been attached. A sale proclamation was issued by the civil Court and then the execution case was transferred to the collector. Daring the pendency of the proceedings in the Collector's Court, Ram Lal Singh judgment-debtor died. The Collector sent the papers of the case back to the civil Court in order that legal representatives of the judgment-debtor may be brought on the record. On 88-7-1945, Hanuman Singh respondent was brought on the record as the legal representative of the deceased judgment-debtor. On 9-10-1945, Hanuman Singh filed an objection to the execution proceedings in the civil Court stating that the execution was barred by time. This objection was dismissed by the Munsif Hanuman Singh then appealed to the lower appellate Court which held that the objection was well founded and dismissed the execution application. Against this decree, the decree-holder has come up in appeal to this Court and the point urged on his behalf is that the plea of the judgment debtor that the execution application was barred by time was itself barred by the doctrine

of res judicata by virtue of the order dated 22-12-1942 and should not be allowed to be raised.

3. On behalf of the respondent reliance has been placed upon a Full Bench decision of this Court reported in Genda Lal v. Hazari Lal 1935 A. L. J. 1189 : (A. I. R. (23) 1986 ALL. 21 P. B.). In this case Sir Shah Sulaiman laid down five propositions. The fifth one is relevant and may be quoted.

> "Where no objection is taken but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of "res judicata from raising the question of limitation later."

The full facts of the Pull Bench case were almost similar to the facts of the case before us. There an application for execution was made more than three years after the date of the decree and it was stated in the application that a payment had been made by the judgment-debtor within three years before the date of the application. The prayer in the execution application was for the arrest of the judgment-debtor. The Court issued a notice to the judgment-debtor under Order 21, Rule 22, Civil P. C. calling upon him to show cause why he should not be arrested. The judgment-debtor did not appear and an order was passed to the effect that the judgment-debtor had been served with the notice and as he did not take any objection on the score of limitation, the application would be deemed to be within time and the application was, therefore, registered and execution proceeded. A warrant was issued and the judgment-debtor was brought before the Court under arrest and, when he pleaded that he had never made any payment and that the execution application was barred by time, it was held that the fact that in proceedings under Order 21, Rule 22 the Court had passed an order that the execution proceedings may proceed did not amount to a decision which would be binding upon the judgment-debtor. The reason given was that the application for execution had not till then fructified. Niamat Ullah J., who delivered a separate, but concurring judgment, observed that unless some portion of the decree had been satisfied, it could not be said that an interlocutory ex parte order amounted to res judicata. Sir Shah Sulaiman referred t o a Privy Council decision reported in Mungal Pershad Dichit v. Grija Kant Lahiri, 8 Cal. 51 : (8 I. A. 123), and distinguished it on the ground that the facts of the case were different. We have read the judgment of the Privy Council and we have a feeling that the Privy Council decided that case upon a wider ground, namely, that where an execution Court had jurisdiction to decide a matter and it did decide it, whether ex parte or on contest, that decision unless reversed on appeal or other proceedings was binding on the party during the subsequent stages of the execution proceedings The basis of the decision in the Privy Council case was not fructification of the decree, but the fact that a decision had been given at one stage of the proceedings which had not been set aside on appeal or otherwise. We have been referred to several cases in which a view similar to that expressed in the Privy Council case has been expressed, both in this Court before the Full Bench decision and in other Courts in India.

4. This Full Bench decision was followed by a Division Bench of this Court, in Collector of Banaras v. Jai Narain Rai, 1937 A. L. J. 1349 : (A. I. R. (25) 1988 ALL. 89), and the same view was taken in an Oudh case: Peoples Bank of Northern India Ltd. v. Aijaz Ali, A. I. R. (29) 1949 Oudh 219 : (17 Luck 449).

5. Learned counsel for the appellant has, however, relied upon a later decision of this Court in Nizamuddin v. Ikramul Haq, I. L R. (1946) ALL. 843: (A. I. R. (34) 1947 ALL 143), In that case the decision of the Full Bench was discussed. The facts of that case were that a decree on the basis of a compromise was passed incorporating the following term :

> "The plaintiff and defendant 1 will execute a deed of exchange and get it registered within a month. In case any of the parties fails to do so, it will be open to the other party to file an application far compulsory registration of the deed of compromise or the deed of exchange; or a suit for the specific performance of the contract to execute and complete the deed of exchange with the terms mentioned above may be filed. No party will have any objection thereto."

The decree-holder put in an execution application praying that the deed of exchange may be executed and completed in accordance with the compromise decree. Several execution applications were made by the decree-holder, but the execution proceedings were struck off for one reason or another. But at one stage the heirs of the judgment-debtor and of the decree-holder were duly brought on the record by ex parts orders. When the last execution application was made, the judgment-debtor objected that the decree was incapable of execution and a suit for specific performance should have been filed by the decree-holder. The quest on was whether the ex parte orders bringing the heirs of the judgment-debtors and of the decree holder operated as res judicata.

6. It was urged before the Bench which decided that case that the principle of res judicata applied to execution proceedings only in cases where some money had been realised or some other kind of satisfaction had been obtained in the course of those proceedings. The Bench rejected this argument and observed that the application of the principle of res judicata depended upon the existence of a decree or order and had no relation to the gathering of the fruits of such a decree or order. The Bench referred to the observations of Sir Shah Sulaiman in the Pull Bench case and observed that in the case before them (the Bench) since the orders bringing the heirs of the judgment-debtor and the decree-holder on the record could be said to give some benefit to the decree-holder, the plea that the decree was incapable of execution was barred by res judicata. They then quoted a portion of the judgment of Niamat Ullah J. and observed that:

> 'If the observation made by Niamat Ullah J. is open to the interpretation that the realisation of money or partial satisfaction of the decree is a necessary condition precedent to the application of the principle of res judicata, we, with great respect, are unable to follow this view, as in our opinion, it is opposed to the view taken by the majority in the Pull Bench case."

7. Whatever might be said about the order bringing the heirs of the decree-holder on the record, it is difficult to see that an order bringing the heirs of the judgment debtor on the record, can be said to be one 'fructifying' a decree within the meaning of the Pull Bench decision. Nor can the mere attachment of property in execution proceedings be said to be such fructification. It will be remembered that in the Pall Bench case the judgment-debtor had been arrested. We think that, if we are to follow the Pull Bench decision, as we legally must, we cannot distinguish the present case

from the facts of the Pull Bench upon any reasonable ground of distinction. We must, therefore, hold, however, reluctantly that the judgment-debtor's plea is not barred by the principle of res judioata.

8. Accordingly we hold that there is no force in this appeal and we dismiss it with costs.