

Mool Chand Rastogi Trust vs Batay Krishna on 7 April, 1955

Equivalent citations: AIR1955ALL566, AIR 1955 ALLAHABAD 566

JUDGMENT

H.S. Chaturvedi, J.

1. This appeal by the decree-holder arises out of proceedings under Section 47, Civil P. C. In order to appreciate the point in controversy in the appeal, it is necessary to state the relevant facts which are not disputed.

2. On the basis of a registered mortgage deed dated 2-2-1931, executed by Lala Batey Krishna respondent, a suit was brought by the appellant. Both the mortgagor and the mortgagee referred the matter to Lala Lakshman Das for arbitration. After the receipt of the award a decree was passed on its basis on 22-1-1943. Under this decree which was founded upon the award the judgment-debtor mortgagor was to pay the decretal amount in certain instalments. It was also provided that in case the judgment-debtor failed to pay three consecutive instalments, the decree-holder would be entitled to realise the entire decretal amount by sale of the zamindari property mortgaged under the deed. The last provision was that in case the sale of the zamindari property was not found sufficient to pay off the decretal amount, the decree-holder shall be entitled to execute his decree against the person and other property of the judgment-debtor. It is not disputed that there was default in the payment of instalments which entitled the decree-holder to execute his decree in its entirety.

3. The decree-holder applied for execution on 25-7-1952 and the amount for which the execution was sought was mentioned in the application as Rs. 48,965/7/-. By this application the decree-holder prayed attachment of certain houses and other properties of the judgment-debtor, i.e., other than the mortgaged property mentioned in the decree. It was pointed out in the application that the decree-holder was not able to proceed as against the zamindari property because that property had vested in the Government and was no longer in the ownership of the judgment-debtor.

The prayer of the decree-holder was allowed and the properties were attached. Thereupon the judgment-debtor filed an objection under Section 47, C. P. C., Questioning the attachment on two main grounds:

1. That the decree-holder could not be allowed to execute his decree against property which was not mortgaged unless he first applied for a personal decree against the judgment-debtor.

2. That the decree-holder has no right to proceed against other property of the mortgagor, until and unless he has exhausted his remedy against the zamindari property mortgaged which is now substituted by the compensation money to be given by the State.

4. The learned Civil Judge allowed the objections on the ground that the decree-holder must first proceed against the compensation which the State would pay for the mortgaged property and till then he has no right to proceed against the other property of the judgment-debtor. Dissatisfied with this finding, the decree-holder has come up in appeal.

5. The first objection that the decree-holder should have applied for a personal decree is wholly untenable. It is manifest from the decree itself that it was a composite decree in which the decree-holder was first asked to proceed to realise his money by sale of the zamindari property and if such a sale did not provide sufficient funds to discharge the decretal amount, then the decree-holder was given a further right to execute that very decree as against the person and other property of the judgment-debtor. In view of the decree, it was not necessary for the decree-holder to apply for a personal decree before proceeding to attach the other properties belonging to the judgment-debtor.

6. The main question that has been argued before us is whether the decree-holder is entitled to proceed against the other property of the judgment-debtor without first exhausting his remedy as against the compensation money which may be fixed by the State for the mortgaged zamindari property. It is no longer disputed that the mortgaged zamindari property, which could be sold under the decree, no longer exists for the simple reason that that property has now vested in the Government and the judgment-debtor has no proprietary interest left in that property which could be the subject-matter of the sale.

Under the terms of the decree under execution the decree-holder was ordered to proceed first against the zamindari property of the judgment-debtor by applying for its sale. It is obvious that the decree-holder has been deprived of that remedy under the U.P. Zamindari Abolition and Land Reforms Act, 1950.

7. Learned counsel for the respondent has, however, argued that the decree-holder could not proceed against any other property of the judgment-debtor until and unless the compensation, money, which will be payable to the judgment-debtor is found insufficient to satisfy the decree. In other words, the contention is that in place of zamindari property the decree-holder will have the compensation money and as such his right to proceed against the other property of the judgment-debtor is excluded by the decree. We are unable to accept this contention.

The question that falls for determination is whether on the destruction of the mortgaged security, the decree-holder should be compelled to proceed first against the compensation money to be paid by the State for the mortgaged zamindari property which has been taken over. An answer to this question must depend upon the terms of the decree itself.

Under the decree, it was enjoined that the decree-holder shall first proceed to satisfy the decree by sale of the mortgaged zamindari property, for reasons beyond his control, the decree-holder is unable to enforce his decree by sale of the mortgaged zamindari which has vested in the State under the U.P. Zamindari Abolition and Land Reforms Act, 1950. His right to recover the decretal amount by sale of the other property as recognised under the decree becomes available to him as soon as it is found that he cannot proceed against the zamindari property.

This right to proceed against the other property of the judgment-debtor having been guaranteed to decree-holder under the decree, cannot be taken away merely because of the fact that for acquisition of zamindari property, the State would pay some compensation. It is true that under Section 73 of the Transfer of Property Act, the mortgagee is entitled to claim that compensation money on equitable grounds, and has a lien on the compensation money, nevertheless the decree-holder cannot be prevented to proceed against the other property of the judgment-debtor under the terms of the decree. What we desire to impress is that once the mortgaged property is lost to the mortgagee and he is unable to proceed to execute the decree against that property, he cannot be forced to execute his decree against the compensation money which may be paid by the State for taking away mortgaged property.

In our judgment the appellant (decree-holder) was justified in seeking to execute his decree by attachment and sale of the other property of the judgment-debtor, and the Court below was therefore not justified in dismissing the execution application.

8. The learned Civil Judge has further pointed out that under Section 6 of the U.P. Zamindari Abolition and Land Reforms Act, 'no execution proceedings can be taken against the zamindari property', and it was on that ground also that the execution application was dismissed. We are unable to affirm this order for the simple reason that the decree-holder did not apply for execution of his decree against the zamindari property.

In his execution application, he prayed for attachment of house property situate in Lucknow and therefore the only question that could rise for consideration was whether under the terms of the decree, the decree-holder could proceed against the other property of the judgment-debtor which is not zamindari property. We have already indicated that under the terms of the decree, the decree-holder could apply for realisation of his decree by seeking attachment of non-zamindari property of the judgment-debtor not mortgaged to him.

9. It is no doubt, true that the appellant, decree-holder could apply for attachment of the other property of the judgment-debtor, nevertheless the Court is not deprived of the power to adjust such equities as arise in the case. It appears to us that the decree-holder while not giving up his lien over the compensation money, still desires to proceed against the sale of the other property of the judgment-debtor. In view of the fact that the zamindari property was primarily made liable to satisfy the decreed debt, it is just and proper that the decree-holder should first proceed against the compensation money. If the compensation money is not found sufficient to satisfy the decree, then it will be open to the decree-holder to put to sale the other properties of the judgment-debtor which have been attached in execution proceedings. We, therefore, think it proper to hold that the

properties mentioned in the execution application should be allowed to remain attached but no sale will take place till it is known how much compensation has been realised by the decree-

holder. We further direct that in case the court below thinks that the properties attached in the execution application are more than sufficient to satisfy the amount that may remain due after the realisation of the compensation money, then it will be open to the court to attach only so much of the property as may be necessary. It will be open to the judgment-debtor to apply for release of any portion of the property attached in the case and the Court will decide in the light of what has been stated above.

10. We allow the appeal and set aside the order of the Court below. The execution application will be restored to its old number and the attachment already made shall continue, unless the court below, on the application of the judgment-debtor decides to release a portion of the properties. No sale will take place but the attachment will continue till the compensation money has been realised.

11. In the peculiar, circumstances of the case we order the parties to bear their own costs.