

Jagat Narayan Singh - - - - - Appellant

v.

Khartar Sah and another - - - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1941

*Present at the Hearing :*

LORD ATKIN  
LORD THANKERTON  
LORD ROMER  
SIR GEORGE RANKIN  
LORD JUSTICE CLAUSON

[Delivered by SIR GEORGE RANKIN]

The appellant is the legal representative of one Madhusudan Singh, deceased. The appeal, which is brought *in forma pauperis*, arises out of proceedings to enforce a money decree dated 23rd March, 1926, obtained against Madhusudan's brother Shyam Lal by one Soshi Bhusan in the Court of the Subordinate Judge at Jamtara in the Sontal Parganas. The execution case which has given rise to this appeal was brought in the same Court on the 15th September, 1930, by the first and second respondents who had in 1929 purchased the rights of Soshi Bhusan in the decree. It is numbered Money Execution Case No. 14 of 1930. It was the second case brought to enforce the judgment of 1926, the first (Money Execution Case No. 12 of 1928) having been brought in the same Court by the original decree holder Soshi Bhusan on 22nd May, 1928. The main question raised before the Board is as to the effect to be given in the second case to certain orders passed against Madhusudan in the first.

Shyam Lal was the owner of an impartible estate known as the Jamtara estate and being involved in debt, he assigned his immovables to Madhusudan by deed dated 10th January, 1923, reserving only a maintenance allowance to himself.

The deed recited Shyam Lal's indebtedness and that he was ill and made it clear enough that the purpose of the assignment was to enable the debts to be paid off by proper management of the estate. Shyam Lal having failed to give Madhusudan possession according to the deed, Madhusudan in 1924 sued Shyam Lal in the Court of the Subordinate Judge at Asansol to enforce the deed. This suit was compromised in 1927. By the compromise decree dated 17th March, 1927, Madhusudan was declared to be the owner of the estate and a receiver was appointed to manage it, Shyam Lal being declared entitled to a monthly maintenance allowance. Madhusudan got himself recorded as proprietor. A considerable fortification was thus erected against any attack by Shyam Lal's creditors upon the Jamtara properties. Though the exact position of Madhusudan in relation to his brother is not quite clear their Lordships will not assume that he was a mere agent trustee or *benamidar*.

When the first execution application was made on 22nd March, 1928, the names of Madhusudan and the receiver were added thereto as "judgment debtors", though it does not appear from anything on the record submitted to the Board that Soshi Bhusan had at any time obtained judgment against Madhusudan. Certain portions of the Jamtara estate

having been attached in execution Madhusudan on 18th September, 1928, applied under rule 58 of Order 21 of the Code that they be released from attachment. Not content, however, with this step he followed it up on the 8th October, 1928, with an application to the like effect made under section 47 of the Code. In both proceedings his objections were that he was not a party to the decree and that there was no charge upon the Jamtara estate for the decretal debt of Shyam Lal. The learned Subordinate Judge having correctly observed that the two applications were inconsistent—the first being upon the footing that Madhusudan was a stranger to the suit in which the decree had been passed and the second on the footing that he was a “representative” of the judgment-debtor—dismissed both of them. By his order dated 29th November, 1928, he held that Madhusudan was a “representative” of Shyam Lal within the meaning of section 47 of the Code and that by virtue of section 146 the decree could be executed against him and against the receiver as representing him. The terms of section 146 are as follows:—

“ Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.”

Whether as a result of this decision or in anticipation of it or independently of it, a compromise petition was on the same day (29th November, 1928) filed in Court with the result that on the next day (30th November) the sale which had been fixed for that day was not held. Madhusudan was a party to the compromise as one of “the judgment debtors”. The terms of compromise were that Soshi Bhusan received Rs. 3000 in cash and agreed to take the balance in annual instalments of Rs. 1393 12 3. There was a further provision:—

“ If any third person as decree holder executes his decree, then this decree holder will be competent to execute his decree without waiting for payment of instalment and will be able to arrange for realisation of the entire amount due from the estate. To that the judgment debtors will not have the right to raise any objection.”

On the 30th November an order on this petition was made: “ Case struck out partly satisfied on the joint petition of the decree holder and the three judgment debtors ”. The attachment of the Jamtara estate properties thus came to an end.

The balance of the debt was not paid as agreed and the first and second respondents, having bought the decree, applied for execution on 15th September, 1930. Madhusudan and the receiver were again cited as judgment debtors in addition to Shyam Lal. Properties of the Jamtara estate were again attached and were sold on the 6th June, 1931. Madhusudan took no steps in the meanwhile, but on 6th July, 1931, he applied to have the sale set aside under rule 90 of Order 21 of the Code which provides that at the instance of any person whose interests are affected by the sale such an order may be made “ on the ground of a material irregularity or fraud in publishing or conducting ” the sale. He set out in his application eleven grounds of which the first nine alleged various irregularities as to notice and otherwise in connection with the sale. As his tenth and eleventh grounds he said that the sale was without jurisdiction and was in any view of the case liable to be set aside. After hearing a number of witnesses, the learned Subordinate Judge by his order of 12th November, 1932, held that Madhusudan’s case failed on the facts as regards all the irregularities alleged and this finding is not now disputed. He further held, however, that the sale should be set aside on the question of jurisdiction. He rejected the view that Madhusudan was the “representative” of Shyam Lal, and he did not consider that the compromise which had ended the previous execution case could be enforced in execution against Madhusudan without any decree against him having been obtained.

The High Court at Patna by the order of 14th April, 1936, which is now under appeal have reversed this decision. The learned judges (Wort A.C.J. and Dhavle J.) do not appear to have proceeded upon the

ground that a third party objecting to the sale of his property for the judgment debt of another person cannot disregard rule 58 of Order 21 and apply after the sale under rule 90 of that Order treating the case as one of irregularity in publishing or conducting the sale. They held that in the previous case the Subordinate Judge had decided that Madhusudan was the representative of the judgment debtor, and though one if not both of the learned judges considered this decision to be wrong, they held that the case before them was concluded by that decision on the principle of *res judicata*.

Their Lordships have not had the advantage of hearing any argument on the part of the respondents to this appeal, no appearance having been made on their behalf. They are somewhat unwilling in the circumstances to go beyond what is required for the proper disposal of the appeal in discussing the technical details of procedure in execution. It appears to them, however, that Madhusudan on his own case ought in the later execution proceeding as in the earlier to have made a claim under rule 58 of Order 21 if he desired to take up the attitude of a third party whose property was being wrongfully taken for another's debt. To treat this objection to the sale as a matter of irregularity in publishing or conducting the sale was not open to him, and the application under rule 90 was altogether misconceived. The only way in which any order in his favour could have been rendered competent, assuming his own case to be well founded, was by treating his application as one under rule 58. While their Lordships appreciate the force of the observation made by Dhavle J. with reference to the first execution case, that "too much importance ought not to be attached to the particular labels attached to his applications", they cannot think it right to hold that the Court should have allowed any such indulgence to Madhusudan having regard in particular to the compromise petition whereby he plainly undertook that the decretal sum should be paid and that the properties now in question should be answerable for it in his hands. It is not clear that on 6th July, 1931, a month after the sale, an application under rule 58 would have been in time. Different opinions appear to have been expressed by High Courts in India upon the question. He had, moreover, called a number of witnesses as to the publication and conduct of the sale—an inquiry which was futile on the footing that the property was not liable to be sold. He does not appear to have made any application to the High Court for leave to make a case under rule 58. But whether or not by taking appropriate steps he could have succeeded in defeating the promises made by him in the compromise petition, he was not, in their Lordships' opinion, entitled to the assistance of the Court in that behalf, and the order of the High Court confirming the sale must be maintained.

Their Lordships are not to be taken as accepting the view that Madhusudan was a "representative" of the judgment debtor, or indeed that any person bringing under rule 58 a claim to attached property as property to which he is entitled as against the judgment debtor can be refused the benefit of the procedure laid down for investigation of claims or the right to question the summary decision by a suit. Nor do their Lordships profess to have ascertained what bearing section 146 of the Code has upon such a case as the present or how it comes to be considered that the property of a "representative" of a living person against whom a money decree has been passed is answerable for the decretal debt. Further, assuming that Madhusudan in the first execution case was wrongly held to be his brother's "representative" within the meaning of section 47, their Lordships see difficulty in the view that such a decision on a question of procedure gave the decree holder a vested right to the misapplication of the Code in all future execution cases between the parties in respect of the same decree. Upon these and other matters their Lordships would have desired to hear argument for the respondents and they make every reserve as to the correctness of the views expressed in the Indian Courts upon these questions and other questions involved therewith.

They will humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council

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JAGAT NARAYAN SINGH

2.

KHARTAR SAH AND ANOTHER

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DELIVERED BY SIR GEORGE RANKIN

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