Than Mal Vs. the Income Tax Officer and ors.

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Court : Allahabad

Decided On : Dec-13-1957

Reported in : AIR1958All636

Judge : D.N. Roy and ;J.N. Takru, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 9, 47, 73, 73(3) and 115 - Order 21, Rule 52; Uttar Pradesh Land Revenue Act, 1901 - Sections 149 and 227; Income Tax Act - Sections 46(2)

Appeal No. : Civil Revn. No. 33 of 1953

Appellant : Than Mal

Respondent : The Income Tax Officer and ors.

Advocate for Def. : J. Swarup, Adv.

Advocate for Pet/Ap. : K.C. Saksena, Adv.

Disposition : Application allowed

Judgement :

D.N. Roy, J.

1. This revision has been referred by a learned single Judge of this Court to the Division Bench on account of certain important questions of law arising in it.

2. A firm styled as Sukhdayal Ram Bilas held a decree against Basdeo Sheo Karan Das. In execution of that decree certain property belonging to the judgment-debtor was put up for sale and a sum of Rs. 28,000/- was realised and a sum of Rs. 7,078-10-0 was paid towards the decree in execution of which the property was sold and a sum of RS. 1510-5-0 was rateably distributed to certain other decree-holders. A balance of Rs. 19,411-1-0 remained in deposit with the court.

That sum was attached in a number of Proceedings both before judgment and after passing of decrees. The judgment-debtor firm had been assessed to income-tax and a sum of Rs. 31,448-15-0 were due on account of the income-tax. The Income-Tax Officer of Fatehgarh by a letter dated the 14th of February, 1950 informed the Civil Judge that a recovery certificate had been issued to the Collector under Section 46 (2) of the Income-tax Act and he asked the Civil Judge that payment should be stayed in regard to the amount to various creditors of M/s Kanhaiya Lal Gajanand of Farukhabad.

The Civil Judge had difficulty in tracing out the case in which the deposit in question Was made as the letter of 14th February, 1950 did not give any particulars about it. The Civil Judge accordingly by a letter dated 18th February, 1950 asked the Income-Tax Officer to supply the necessary particulars and he further asked the Income-Tax Officer to specify the provision of law under which action is called for.

On the 20th of February. 1950 a writ of attachment was issued by an Assistant Collector of the district authorising the attachment of the amount towards payment of the income-tax dues; but the writ of attachment did not specify the authority to whom it has been issued. In fact thewrit of attachment was not filled up in several of its particulars inclusive of the particular as to whom it was issued. On the same date, that is, on the 20th of February, 1950, a letter was addressed by the Tahsildar of Farrukhabad to the Civil Judge of Fatehgarh informing him that M/s Kanhaiya Lal Gajanand had defaulted in the sum of Rs. 31,448-15-0 as income-tax for which a demand certificate under Section 46 (2) of the Indian Income-tax Act had been received and that the distress warrant, referred to above, was being sent and it was requested that attachment may be made.

After receipt of these papers the question came up before the learned Civil Judge as to whether there was any valid attachment and whether priority should be given to the Income-Tax Department for the realisation of its dues over other attaching creditors. The Civil Judge held that there was no valid attachment in the eyes of law and that no priority could be extended to the Income-Tax Department.

Aggrieved by order, the Income-Tax Department preferred an appeal before the learned District Judge of Farrukhabad. The learned District Judge differed on both the points from the trial court, allowed the appeal and directed that the income-tax dues shall have the first priority over the money held in custody of the trial court. The decree-holder, Than Mal, has come up in revision to this Court against the appellate order of the District Judge.

3. Three points have been raised before us by learned counsel for the applicant, namely:

(1) that no appeal lay to the District Judge from the order of the Civil Judge and the order passed by the District Judge was, therefore, without jurisdiction;

(2) that there was no valid attachment in the eyes of law and consequently the Income-Tax Department could not claim the amount;

(3) that the Income-Tax Department had no priority over the other attaching creditors.

4. The third point has not been seriously pressed before us by learned counsel; and, in effect, he has accepted the principle laid down in a decision of the Lahore High Court in Lala Muni Lal v. Diwan Chand, AIR 1939 Lah 488 (A), where it was stated that in view of Section 73(3) of the Code of Civil Procedure when the Government and a private individual both execute their decrees against the same judgment-debtor and seek to be satisfied out of the same fund, the rules as to rateable distribution laid down in Section 73(1) do not apply and the decree in favour of the Government has priority.

We are of opinion that when the right of the Government or the State on the one hand and the right of the subject on the other in respect of payment of a debt of equal degree compete, the Government's or the State's right prevails. That the Government or the State has precedence in respect of decreed debts, was ruled by the Courts in this country even before the enactment of any provision corresponding to Section 73(3) of the present Civil Procedure Code.

5. The first and the second points formulated above are, in our opinion, justified and they must be sustained. The order passed by the learned Civil Judge cannot be construed to be an order under the Provisions of Section 73(3) of the Code. If it were so there is abundant authority for the proposition that an order under Section 73 is not a decree and, therefore, not appealable unless all the conditions enumerated in Section 47 are present.

One of the conditions is that the question should be one which arose between the parties to the suit, that is, between the judgment-debtor and the decree-holder. So an order refusing the rateable distribution between rival decree-holders is not appealable. We may refer to Laxminarayan Devastan v. Khanderao Yeshwantrao, AIR 1954 Bom 446 (B), Balmukund Jainarayana Maheshri v. Hirasao Narayansao Bania, AIR 1943 Nag 320 (C), Varada Ramaswami v. Vumma Venkataratnam, AIR 1922 Mad 99 (D), Bilasmal Damodar Das v. Haridas, AIR 1929 Lah 645 (E). In effect Sub-section (2) of Section 73 gives a right to the aggrieved party to bring a regular suit.

The other provision of the Code which need be noticed is Order 21, Rule 52 of the Code. That order provides that where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such court or officer, requesting that such property,. ..... may be held subject to the furtherorders of the Court from which the notice is issued.

There is a proviso to that rule and it says that provided that, where such property is in the custody of a court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such court.

6. The proviso operates only after valid attachment. The proviso is intended to mean that any question of title or priority is to be determined by the Court in whose custody the property is and not by the court which made the order of attachment. The question arises that when the court, in whose custody the property is, has determined the question of priority under Order XXI, Rule 52, can the aggrieved party go in appeal against that order, or does the remedy of the aggrieved party lie by way of a regular suit.

The point is covered by authority. In Mukhi Ram v. Atma Ram, AIR 1934 Lah 478 (F), it was held that where two decree-holders are proceeding in execution against the same property and the claim for priority made by one is disallowed by the executing court, the decision does not bar a regular suit by such decree-holder for establishing his priority.

7. In Simla Banking and Industrial Co. Ltd. v. Dittu Mal Hardial, AIR 1936 Lah 521 (G), a Bench of the Lahore High Court held that where the custody Court decided that certain person is not entitled to any priority, no revision is competent even if the

decision is erroneous in law as the custody Court has jurisdiction to decide such question. It was further held that the remedy to the aggrieved party is by way of a regular suit.

In Kanji Valji v. Kalidas. Thakursay, AIR 1939 Cal 413 (H), a Bench of the Calcutta High Court held that the proviso to Order XXI, Rule 52 simply lays down that if there is any dispute on the question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in the property attached by virtue of any assignment, attachment, or otherwise, that dispute is to be determined by the Court in whose custody the money is and that the proviso does not bar a regular suit. The Bench further held that any decision in such a proceeding between the decree-holder and the third person would not be a decision under Section 47. Civil Procedure Code and, therefore a regular suit would not be barred.

8. Upon the facts of the present case we are of opinion that the order passed by the Civil Judge was an order under the provisions of Order XXI, Rule 52 of the Code. The proviso to Order XXI, Rule 52 did not, therefore, bar a regular suit. A decision which was passed in the proceedings under Order XXI, Rule 52 between the decree-holder and the third person was, therefore, not a decision under Section 47, of the Civil Procedure Code and consequently no appeal lay to the District Judge from the order of the learned Civil Judge.

It is no doubt true that the question of jurisdiction had not been raised before the learned District Judge. It is, however, settled law that consent or waiver cannot give jurisdiction where there is inherent want or absence of it. The distinction between want of inherent jurisdiction and irregular exercise or assumption of jurisdiction should be borne in mind. In the former case the decree is a nullity, in the latter the proceedings cannot be impugned in a collateral action but the error can be remedied only by a proceeding in the nature of an appeal and where there is no such remedy it concludes for ever.

It would, therefore, appear that want of inherent jurisdiction cannot be consented to or waived. The decision of the learned District Judge appears to suffer from want of inherent jurisdiction and it is, therefore, revisable by this Court.

9. In the view that we have taken above, it would be unnecessary for us to enter into the question as to whether the attachment had been properly made, but since the question has been discussed before us we would like to express ourselves briefly on the point. Under Section 46 (2) of the Indian Income-Tax Act the Income-Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from the assessee, and the Collector, on receipt of such certificate, is required to proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.

Such certificate seems to have been sent by the income-Tax Officer to the Collector at Fatehgarh. There is on the record a distress Warrant by an Assistant Collector for the attachment of the property of the assessee whose assets were held by the Civil Judge. Under Section 146 of the U. P. Land Revenue Act an arrear of revenue may be recovered by, among other methods, the attachment and sale of the moveable property of the person against whom land revenue is due.

Under Section 149 a Collector may attach and sell the moveable property of a defaulter. Under that provision of law attachment and sale ordered under the section shall have to be made according to the law in force for the time being for the attachment and sale of moveable property under the decree of a Civil Court. Under Section 227 of the Land Revenue Act an Assistant Collector, in charge of a sub-division of a district has power to attach and sell movable property of a defaulter under Section 149 of the Act.

It was in exercise of those powers that the Assistant Collector of the sub-division of Farrukhabad signed the distress warrant. The property to be attached consisted of assets held by the Civil judge. The proper procedure for the attachment of such assets should have been in terms of Order XXI, Rule 52 of the Code of Civil procedure. Under that provision the attachment of such assets were to be made by a notice to the Court or officer who holds the assets requesting that the assets may be held subject to the further orders of that court.

That procedure was not adopted. Instead, an ordinary warrant of attachment without specification of any property, sought to be attached, was signed by the Assistant Collector. That Writ of attachment did not even show as to whom it was addressed. Further, although the form of that attachment provides that the person to whom it is addressed was to make the attachment by a particular date and to report whether the order has been carried out or not by that date, the spaces as to it were all left blank in the writ of attachment.

In addition the warrant did not contain the seal of the court or the signature of the officer by whom it was issued. It is the Assistant Collector, in charge of a Sub-division only and no other officer below that rank who could make the attachment under, Section 149 read with Section 227 of the U. P. Land Revenue Act. Instead the Tahsildar of Farrukhabad sent the distress warrant for attachment of the sum which lay in Court and informed the Civil Judge that after the receipt of the order his man would go to the court to collect it from the Civil Judge's Office.

The learned Civil Judge refused to treat it as a request under Order XXI, Rule 52 of the Code of Civil Procedure, made by a proper officer. There can be no doubt whatsoever that the Assistant Collector moved in an irregular manner and the proceedings in attachment had not been taken in accordance with law.

10. In every view of the matter, we are of opinion that the order of the court below cannot be upheld.

11. We accordingly allow this application set aside the order dated the 20th of May, 1952, passed by the learned District Judge and restore that of the court of the Civil Judge.

12. The applicant shall have his costs fromthe opposite side.