SHIVASHANKAR PRASAD SHAH & ORS. A

v.

BAIKUNTH NATH SINGH & ORS.

March 7, 1969

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.] B

Code of Civil Procedure—Res-Judicata—*Objection against execution proceeding, when barred.*

Bihar Land Reforms Act, ss. 3, 4 & 6—*Mortgaged Estate—Final Decree obtained—Effect of.*

After a preliminary decree was obtained by the appellants (mortgagees of an Estate including both *Bakasht* lands and other lands), the Bihar Land Reforms Act, 1950 came into force. The appellant filed petition for passing final decree. The Estate mortgaged vested in the State as a result of a notification issued under s. 3(1) of the Act, and later a final decree was passed in the mortgage suit. Thereafter the appellants applied under s. 14 of the Act and got determined the compensation to which they were entitled under the Act. But yet they filed an execution petition to execute the mortgage decree against the Bakasht land. The respondents resisted that execution by filing an application under s. 47, Civil Procedure Code contending that the execution was barred under s. 4(d) of the Act. That application was dismissed for default of the respondents. A second application raising the same ground was filed by the respondents but this, too, was dismissed for their default. A third application raising the same ground was filed by the respondents and in this, the execution court overruled the objection raised by the respondents on the grounds (i) that the objection was barred by the principles of *res judicata* and (ii) that the bar of s. 4(d) pleaded was not tenable. This decision was affirmed in appeal, but reversed in second appeal by the High Court. Dismissing the appeal this Court; C D E

HELD : (i) The objection was not barred by the principles of *res judicata*. Before a plea can be held to be barred by *res judicata* that plea must have been heard and determined by the court. Only a decision by a court could be *res judicata*, whether it be statutory under s. 11, Civil Procedure Code or constructive as a matter of public policy on which the entire doctrine rests. An execution petition having been dismissed for the default of the decree-holder though by the time that petition came to be dismissed, the judgment debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petitions filed in accordance with law. Even the dismissal for default of objections raised under s. 47, Civil Procedure Code does not operate as *res judicata* when the same objections are raised again in the course of the execution. [911 B-H] F G

Maharaja Radha Parshad Singh v. *Lal Sahab Raj & Ors.* L.R. 17 I.A. 150, *Pulvarthi Venkata Subba Rao* v. *Velluri Jagannadha Rao & Ors.* [1964] 2 S.C.R. 310, *Lakshmibai Anant Kondkar* v. *Ravji Bhikaji Kondkar*, XXXI B.L.R. 400, *Bahir Das Pal & Anr.* v. *Girish Chandra Pal*, A.I.R. 1923 Cal. 287, *Bhagwati Prasad Sah* v. *Radha Kishun Sah & Ors.* A.I.R. 1950 Pat. 354, *Jethmal & Ors.* v. *Mst. Sakina*, A.I.R. 1961 Raj. 1959 *Bishwanath Kundu* v. *Smt. Subala Dassi*, A.I.R. 1962 Cal. 272, referred to. H

A *Ramnarain* v. *Basudeo*, I.L.R. XXV Pat. 595, disapproved.

(ii) Proceedings under s. 4(d) of the Bihar Land Reforms Act, 1950 included execution proceedings and the execution could not be proceeded with. The only remedy open to the appellants was to get compensation under Chapter IV of the Act. [913 G, H]

B Reading ss. 3, 4 and 6 together, it followed that all Estates notified under s. 3 vested in the State free of all encumbrances. The *quondum* proprietors and tenure holders of those Estates lost all interests in those Estates. As proprietors they retained no interest in respect of them whatsoever. But in respect of the lands enumerated in s. 6 the State settled on them the rights of raiyats. Though in fact the vesting of the Estates and the deemed settlements of raiyat rights in respect of certain classes of lands included in the Estates took place simultaneously, in law C the two must be treated as different transactions; first there was a vesting of the Estates in the State absolutely, free of all encumbrances. Then followed the deemed settlement by the State of raiyat's rights on the *quondum* proprietors. Therefore in law it would not be correct to say that what vested in the State were only those interests not coming within s. 6. [913 C-E]

D Section 4(d) provided that "no suit shall lie in any civil court for the recovery of any money due from such proprietor (proprietor whose estate has vested in the State) or tenure holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped". Proceedings in this section undoubtedly included execution proceedings. [913 F]

E *Ramnarain* v. *Basudeo* I.L.R. XXV Pat. 595, *Raj Kishore* v. *Ram Pratap*, A.I.R. 1967 S.C. 801; [1967] 2 S.C.R. 56, *Rana Sheo Ambar Singh* v. *Allahabad Bank Ltd., Allahabad*, [1962] 2 S.C.R. 441 and *Krishna Prasad & Ors.* v. *Gauri Kumari Devi*, [1962] Supp. 3 S.C.R. 564, referred to.

Sidheshwar Prasad Singh v. *Ram Saroop Singh*, 1963 B.L.J.R. 802, majority view disapproved.

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 368 of 1966.

Appeal by special leave from the judgment and order dated February 3, 1964 of the Patna High Court in Appeal from Appellate Order No. 99 of 1963.

G *Sarjoo Prasad* and *R. C. Prasad*, for the appellants.

K. K. Sinha and *S. K. Bisaria*, for the respondents.

The Judgment of the Court was delivered by

Hegde, J. This appeal against the judgment of the Patna High H Court dated the 3rd February, 1964 in its Appellate Order No. 99 of 1963 was filed obtaining special leave from this Court. It arises from a proceeding under s. 47, Civil Procedure Code. In execution of a mortgage decree, the decree-holders sought to proceed against

Bakasht lands of the judgment debtors. The judgment debtors objected to the same on the ground that the execution was barred under s. 4(d) of the Bihar Land Reforms Act, 1950 (to be hereinafter referred to as the Act). But that objection was overruled by the executing court on two different grounds namely (1) that the objection in question is barred by the principles of *res judicata* and (2) the bar of s. 4(d) pleaded is not tenable. The decision of the execution court was affirmed in appeal but reversed in second appeal by the High Court.

The two questions that arise for decision in this appeal are (1) whether the objection as regards the executability of the decree pleaded by the judgment debtors is barred by the principles of *res judicata* and (2) whether the mortgage decree has become unexecutable in view of the provisions of the Act.

We shall now briefly set out the material facts of the case. The mortgages, the appellants in this appeal obtained a preliminary decree on June 26, 1947 on the basis of a mortgage. The property mortgaged was an Estate within the meaning of the Act. That property included both Bakasht lands as well as other lands. The Act came into force after the passing of the aforementioned preliminary decree. The decree-holders filed petition for passing a final decree on September 19, 1955. The Estate mortgaged vested in the State of Bihar on January 1, 1956 as a result of a notification issued under s. 3(1) of the Act. A final decree was passed in the mortgage suit on October 1, 1956. Thereafter the mortgagees applied under s. 14 of the Act and got determined the compensation to which they were entitled under the Act. It is said that they did not proceed any further in that proceeding but on the other hand filed on June 18, 1958 an execution petition to execute the mortgage decree against the Bakasht lands. The judgment debtors resisted that execution by filing an application under s. 47, Civil Procedure Code (Misc. Case No. 94 of 1959) on the ground that the decree cannot be executed in view of the provisions of the Act. That application was dismissed for the default of the judgment-debtors on September 12, 1959. A second application raising the same ground (Misc. Case No. 110 of 1959) was filed by the judgment debtors is barred on the principles of *res judicata* and further on July 23, 1960 for default of the judgment debtors. A third application raising the same ground of objection (Misc. Case No. 91 of 1960) was filed by the judgment debtors on September 12. 1960. That application was dismissed on January 4, 1962 after examining the contentions of the parties. Therein the execution court came to the conclusion that the objection raised by the judgment debtors is barred on the principles of *res judicata* and further that the same has no merits. This decision as mentioned earlier was affirmed by the appellate court but reversed by the High Court.

We shall first take up the contention that the objection taken

A by the judgment debtors is barried by principles of *res judicata*. Though at one stage, learned Counsel for the appellants-decree holders attempted to bring the case within Explanation 5, s. 11, Civil Procedure Code, he did not pursue that line of argument but tried to support his contention on the broader principles of *res judicata*. The real question for decision in this case is whether B the dismissal of Misc. cases Nos. 94 and 110 of 1959 for default of the judgment debtors can be said to be a final decision of the court after hearing the parties. Before a plea can be held to be barred by the principles of *res judicata*, it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the court. A dismissal of a suit for default of the plaintiff, we think, would not operate as *res judicata* against C a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the legislature to enact rule 9, Order 9, Civil Procedure Code which in specific term say that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The contention that the dismissal of a previous D suit for default of the plaintiffs operates as *res judicata* in a subsequent suit in respect of the same claim was repelled by the Judicial Committee of the Privy Council in *Maharaja Radha Parshad Singh* v. *Lal Sahab Rai and Ors.*(1). Therein the Judicial Committee observed thus :

> "None of the questions, either of fact or law, raised E by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to F consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief."

From this decision it is clear that the Judicial Committee opined that before a plea can be held to be barred by *res judicata* that plea must have been heard and determined by the court. Only a G decision by a court could be *res judicata*, whether it be statutory under s. 11, Civil Procedure Code or constructive as a matter of public policy on which the entire doctrine rests. Before an earlier decision can be considered as *res judicata* the same must have been heard and finally decided—see *Pulvarthi Venkata Subba Rao v. Velluri Jagannadha Rao, and Ors.*(2).

H The courts in India have generally taken the view that an execution petition which has been dismissed for the default of the

(1) L.R. 17 I.A. 150.

(2) [1964] 2 S.C.R. 310

decree-holder though by the time that petition came to be dismissed, the judgment debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petition filed in accordance with law—see *Lakshmibai Anant Kondkar* v. *Ravji Bhikaji Kondkar*(1). Even the dismissal for default of objections raised under s. 47, Civil Procedure Code does not operate as *res judicata* when the same objections are raised again in the course of the execution—see *Bahir Das Pal and Anr.* v. *Girish Chandra Pal*(2); *Bhagawati Prasad Sah* v. *Radha Kishun Sah and Ors.*(3); *Jethmal and Ors.* v. *Mst. Sakina*(4); *Bishwanath Kundu* v. *Sm. Subala Dassi*(5). We do not think that the decision in *Ramnarain* v. *Basudeo*(6) on which the learned Counsel for the appellant placed great deal of reliance is correctly decided. Hence we agree with the High Court that the plea of *res judicata* advanced by the appellant is unsustainable.

The next question is whether the execution is barred under the provisions of the Act. The contention of the judgment debtors is that it is so barred whereas according to the appellants as the Bakasht lands which form part of the mortgaged property had not vested in the State, the execution can proceed against those lands. Therefore we have to see whether the entire mortgaged property had vested in the State in pursuance of the notification under s. 3 or only the mortgaged property minus the Bakasht lands.

There is no dispute that the property mortgaged was an Estate within the meaning of s. 2(i) and the notification issued under s. 3 covered the entirety of the Estate. But what was urged on behalf of the appellants is that what had vested in the State was the non-bakasht lands as well as the proprietory interest in the Bakasht lands and hence the Bakasht lands do not have the protection of s. 4(d); Consequently it is not necessary for them to exclusively proceed under s. 14.

The consequences of the vesting of an Estate is set out in s. 4. Section 4(a) provides that once an Estate vests in the State the various rights in respect of that Estate enumerated therein shall also vest in the State, absolutely free from all encumbrances. Among the rights enumerated therein undoubtedly includes the right of possession. In view of s. 4(a) there is hardly any doubt that the proprietor loses all his rights in the estate in question. After setting out the various interests lost by the proprietor that section proceeds to say "such proprietor or tenure holder shall

(1) XXXI, B.L.R. 400.
(2) A.I.R. 1923 Cal. 287.
(3) A I.R. 1950 Pat. 354.
(4) A. I .1961 Raj. 59.
(5) AI.R. 1962 Cal. 272.
(6) I.L.R. XXV Pat. 595.

A cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act". In order to find out the implication of the clause extracted above we have to go to s. 6 which provides that on and from the date of vesting all lands used for agriculture or horticultural purposes which were in khas possession of an intermediary on the date of B vesting (including certain classes of land specified in that section) shall subject to the provisions of ss. 7A and B be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands, subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner.

C

Reading ss. 3, 4 and 6 together, it follows that all Estates notified under s. 3 vest in the State free of all encumbrances. The *quondum* proprietors and tenure-holders of those Estates lose all interests in those Estates. As proprietors they retain no interest in respect of them whatsoever. But in respect of the lands enu- D merated in s. 6 the State settled on them the rights of raiyats. Though in act the vesting of the Estates and the deemed settlement of raiyats rights in respect of certain classes of lands included in the Estates took place simultaneously, in law the two must be treated as different transactions; first there was a vesting of the Estates in the State absolutely, and free of all encum- E brances. Then followed the deemed settlement by the State of raiyat's rights on the *quondum* proprietors. Therefore in law it would not be correct to say that what vested in the State are only those interests not coming within s. 6.

Section 4(d) provides that "no suit shall lie in any Civil Court for the recovery of any money due from such proprietor (pro- F prietor whose estate has vested in the State) or tenure holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped". Proceedings in this section undoubtedly include execution proceedings. This is not a case where only a G part of the mortgaged property has vested in the State and as such the rule laid down by this Court in *Raj Kishore v. Ram Pratap*(1) is not attracted. As mentioned earlier the entire Estate mortgaged had vested though some interest in respect of a portion of the mortgaged property had been settled by the State on the mortgagors.

H Under the circumstances the only remedy open to the decree-holders is that provided in Chap. IV of the Act *i.e.* a claim under

(1) [1967] 2 S.C.R. 56; A.I.R. 1967 S.C. 801.

s. 14 before the Claims Officer for "determining the amount of debt legally and justly payable to each creditor in respect of his claim". The procedure to be followed in such a proceeding is prescribed in ss. 15 to 18. Provisions relating to the assessment and payment of compensation payable to the *quondum* proprietors and tenure-holders are found in Chap. V of the Act (ss. 19 to 31.) Section 24(5) provides that "in the case where the interest of a proprietor or tenure-holder is subject to a mortgage or charge, the compensation shall be first payable to the creditor holding such mortgage or charge and the balance, if any, shall be payable to the proprietor or tenure-holder concerned..." That sub-section further prescribes the maximum amount that can be paid to such a creditor.

In view of what has been stated above it follows that under the circumstances of this case it is not open to the appellants to proceed with the execution. Their only remedy is to get compensation under the Act.

Our conclusion receives strong support from some of the decisions of this Court. In *Rana Sheo Ambar Singh v. Allahabad Bank Ltd., Allahabad*(1), a question identical to the one before us, but arising under the U.P. Zamindari Abolition and Land Reforms Act, came up for consideration by this Court. One of the questions that arose for decision in that case was whether the Bhumidari right settled by the State on a previous proprietor whose estate had vested in the State was liable to be proceeded against in execution of a mortgage decree against the Estate that had vested in the State. This Court held that it was not liable to be proceeded against. Therein it was ruled that the intention of the U.P. Zamindari Abolition and Land Reforms Act was to vest the proprietory rights in the Sir and Khudkasht land and grove land in the State and resettle on intermediary not as compensation but by virtue of his cultivatory possession of lands comprised therein and on a new tenure and confer upon the intermediary a new and special right of Bhumidari, which he never had before by s. 18 of the Act. The provisions in that Act relating to vesting and settlement of Bhumidari rights are in all essential particulars similar to those in the Act relating to vesting and settlement of Bakasht lands. This Court further ruled in that case that the mortgagee could only enforce his rights against the mortgagor in the manner as provided in s. 6(h) of the U.P. Act read with s. 73 of the Transfer of Property Act and follow the compensation money under the Act.

In *Krishna Prasad and Ors.* v. *Gauri Kumari Devi*(2) the question that arose for decision by the Court was whether a mortgage decree-holder could proceed against the properties of the mortga-

(1) [1962] 2, S.C.R. 441. (2) [1962] Supp. 3 S.C.R. 564.

A gor other than those mortgaged in enforcement of the personal covenant when the property mortgaged had vested in the State under the provisions of the Act. That question was answered in the negative. In the course of the judgment Gajendragadkar, J. (as he then was) who spoke for the Court observed that there is no doubt "that the scheme of the Act postulates that where the B provisions of the Act apply, claims of the creditors have to be submitted before the Claim Officer, the claimants have to follow the procedure prescribed by the Act and cannot avail of any remedy outside the Act by instituting suit or any other proceeding in the court of ordinary civil jurisdiction." Proceeding further he observed :

C "It is in the light of this scheme of the Act that we must revert to section 4(b) and determine what its true scope and effect are. Mr. Jha contends that in construing the words of Section 4(d) it would be necessary to bear in mind the object of the Act which was merely to provide for the transference to the State of the interests of the proprietors and tenure-holders in land and of the D mortgagees and lessees of such interests. It was not the object of the Act, says Mr. Jha, to extinguish debts due by the proprietors or tenure-holders and so, it would be reasonable to confine the operation of s. 4(d) only to the claims made against the estates which have vested in the State and no others. In our opinion, this argument pro- E ceeds on an imperfect view of the aim and object of the Act. It is true that one of the objects of the Act was to provide for the transference to the State of the estates as specified. But as we have already seen, the provisions contained in section 16 in regard to the scaling down of the debts due by the proprietors and tenure- F holders clearly indicate that another object which the Act wanted to achieve was to give some redress to the debtors whose estates have been taken away from them by the notifications issued under section 3. Therefore, in construing s. 4(d), it would not be right to assume that the interests of the debtors affected by the provisions of the Act do not fall within the protection of the Act" G and again at page 578 :

"Having regard to the said scheme, it is difficult to confine the application of s. 4(d) only to execution proceedings in which the decree-holder seeks to proceed against the estate of the debtor. In fact, an execu- H tion proceeding to recover the decretal amount from the estate which has already vested in the State, would be incompetent because the said estate no longer belong to the judgment-debtor."

Summarising the effect of the aforementioned decisions this is what this Court observed in *Raj Kishore's* case(1)—a case arising under the Act : A

> "From the principles laid down by this Court in the above two decisions, it follows that where the whole of the property mortgaged is an estate, there can be no doubt that the procedure prescribed by Chapter IV has to be followed, in order that the amount due to the creditor should be determined by the claims officer and the decision of the claims officer or the Board has been made final by the Act." B

For the reasons mentioned earlier we are of the opinion that the decision of the majority of the judges in the Full Bench decision in *Sidheshwar Prasad Singh* v. *Ram Saroop Singh*(2) is not correct. The true effect of the decisions of this Court in *Rana Sheo Ambar Singh's* case(3) and *Krishna Prasad's* case(4) is as explained by Kamla Sahai, J. in that case. C

In the result this appeal fails and it is dismissed with costs.

Y.P. *Appeal dismissed*

(1) [1967]2 S.C.R. 56 A.I.R. 1967 S.C. 801. (2) 1963 B.L.J.R. 802.

(3) [1962] 2 S.C.R. 441. (4) [1962] Supp. 3 S.C.R. 564