

*Before Sir Shah Muhammad Sulaiman, Chief Justice
and Mr. Justice Mulla*

1935
July, 20

POKHAR SINGH (JUDGMENT-DEBTOR) *v.* TULA RAM
(DECREE-HOLDER)*

*Civil Procedure Code, sections 47, 60; order XXI, rule 64—
Attachment and sale of property exempted by law—Objection
not raised by judgment-debtor before the sale—Objection
raised after sale but before confirmation—Whether barred
—Estoppel—Constructive res judicata.*

In execution of a money decree a house of the judgment-debtor was attached and sold; the judgment-debtor did not appear or raise any objections. After the sale, but before it was confirmed, he appeared and made an application under section 47 of the Civil Procedure Code objecting to the sale on the ground that the house was that of an agriculturist and therefore exempt by section 60 from attachment and sale:

Held, that the objection was maintainable. So long as the sale had not been confirmed it could not be said that there had been, by necessary implication, any decision, at any stage of the case, that the property was saleable, which would be conclusive as between the parties and would operate as a bar against all objections. Order XXI, rule 64 authorises the execution court to order a sale of the property, provided it is liable to sale: a mere order of sale does not necessarily decide or mean that the property is saleable. The right to object to the sale would arise after the sale had taken place. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself would not necessarily amount to an estoppel against him, as there could be no estoppel against a statutory right.

Mr. G. S. Pathak, for the appellant.

Mr. Basudeva Mukerji, for the respondent.

SULAIMAN, C.J., and MULLA, J.:—This is a judgment-debtor's appeal from an order dismissing an objection under section 47 of the Civil Procedure Code to an auction sale. In execution of a simple money decree a house of the judgment-debtor was attached some time before the 13th of December, 1931. He did not appear at all to file any objection to the attachment. Various

*First Appeal No. 495 of 1933, from a decree of Priya Charan Agarwal, Subordinate Judge of Pilibhit, dated the 31st of July, 1933.

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steps were taken and notices were issued under order XXI, rule 66 for the judgment-debtor to appear at the time of the settlement of the terms of the proclamation of sale; but he did not appear at all. Ultimately the property attached was sold on the 19th of January, 1933, and purchased by the decree-holder. Before, however, the sale could be confirmed, the judgment-debtor, on the 18th of February, 1933, filed an application under order XXI, rule 90, praying for the setting aside of the sale on the ground of certain irregularities and fraud in conducting and publishing it. Later, on the 27th of April, 1933, but before the sale could be confirmed, he filed another application under section 47 of the Civil Procedure Code objecting to the sale on the ground that the property was the house of an agriculturist and was exempt from attachment and sale under section 60 of the Civil Procedure Code. The court below has dismissed this objection summarily on the ground that it was not maintainable inasmuch as it was filed after the sale had taken place. The appeal has been preferred from this last order.

The court below has relied on the authority of the case of *Umed v. Jas Ram* (1) in support of the view that the objection was too late. In that case the learned single Judge relied on the cases of *Durga Charan Mandal v. Kali Prasanna Sarkar* (2) and *Ramchhaibar Misr v. Bechu Bhagat* (3), both of which can be easily distinguished. Indeed, in the former case, the Calcutta High Court actually held that even "the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge and satisfaction of the decree." The main ground on which the learned Judge held that the objection could not be entertained was that "In my opinion a judgment-debtor who might have raised objections prior to the sale but who

(1) (1907) I.L.R., 29 All., 612.

(2) (1899) I.L.R., 26 Cal., 727.

(3) (1885) I.L.R., 7 All., 641.

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has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable." That case was decided under the provisions of the old Civil Procedure Code (Act XIV of 1882). Under section 284 of that Code the court could order the sale of any property which had been attached, or a portion thereof. That section did not lay any particular stress on the question as to whether the property was saleable or not. It was held in some cases that such an order was appealable and was tantamount to an order against the judgment-debtor, which necessarily implied that the property was saleable. It was presumably on account of this view that the learned Judge considered that where a judgment-debtor allows an order for sale to be passed and does not appeal from such an order he should not be allowed to object to the sale at a later stage.

The scheme of the new Civil Procedure Code is not identical. Order XXI, rule 64, which corresponds to the old section 284, is differently worded and authorises the court executing a decree to order a sale of the property attached by it, or a portion thereof, only if it is *liable to sale*. Thus, where there is property not liable to sale, rule 64 would not be applicable. A further difference arises because of the fact that an order under rule 64 is no longer appealable. The right of appeal arises only when the sale has been confirmed later. It cannot, therefore, be said under the new Code of Civil Procedure that, when an order for sale was made under rule 64, the judgment-debtor had a right of appeal, of which he did not avail himself.

Section 60, which is embodied in the substantive part of the Code of Civil Procedure, provides that certain particulars "shall not be liable to attachment or sale". Among these particulars are houses and other buildings belonging to an agriculturist and occupied by him.

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It is our duty to interpret the section in such a manner as not to make any words used therein in any way superfluous. The fact that the legislature has thought it fit to make the specified particulars neither liable to attachment nor liable to sale is very significant. It would seem to follow *prima facie* that, even if by some mistake or other a wrong attachment has taken place, there is still a prohibition against the sale of such property. Admittedly the right to object to the attachment of a non-attachable property can arise after the attachment has taken place. It would seem to follow that the right to object to the sale of a non-saleable property ought also to arise after such a sale has taken place. When a sale has been confirmed and the property has become completely vested in the auction purchaser, it may be said to imply a decision that the property was saleable, which may operate as a bar against any objection raised by the judgment-debtor after the confirmation; but that argument cannot be applied to a case where there has yet been no confirmation and the sale is still subject to confirmation. It is impossible, in the latter case, to say that there has been by a necessary implication any decision, at any stage of the case, that the property was saleable, which would be conclusive as between the parties and would operate as a bar against all objections. Had an appeal been allowed from an order of sale under order XXI, rule 64, we might have been inclined to follow the ruling in the earlier case; but that is not the position now.

The objection that a certain property is not saleable is obviously not an objection which would fall within the scope of order XXI, rule 89 or rule 90, but is an objection to the execution of the decree governed by section 47, Civil Procedure Code. Under that section it is the duty of the court to decide all questions arising between the parties to the suit relating to execution, discharge or satisfaction of the decree. There is no time limit prescribed for raising such an objection; and we are unable

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to hold that, so long as the court is functioning and has not become *functus officio* after the confirmation of the sale and the satisfaction of the decree, it can be too late for the judgment-debtor to invite the attention of the court to its statutory duty under section 60 to see that a property which is not saleable should not be sold. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs but would not necessarily amount to an estoppel against him, as there should be no estoppel against a statutory right. To hold that once a sale has taken place, howsoever wrong and illegal it may be, there is a complete bar and the court has no option but to proceed to confirm the sale of a property which is non-saleable under section 60, will be nullifying the provisions of that section, which is a result that ought to be avoided.

We are, therefore, of the opinion that the court below has erred in holding that the objection of the judgment-debtor to the saleability of the property was not maintainable. We accordingly allow this appeal, and setting aside the order of the court below send the case back to that court with the direction to restore it to its original number and to dispose of it according to law.

REVISIONAL CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice
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GANGA RAM v. HABIB-ULLAH AND ANOTHER*

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Evidence Act (I of 1872), sections 126, 162—Criminal Procedure Code, section 94—Criminal court ordering a person present in court to produce a document then in his possession—Inherent jurisdiction—Whether production can be refused on the ground of privileged communication by client to lawyer—Privileged communication.

Section 94 of the Criminal Procedure Code gives power to the court to issue a summons or written order to a person to

*Criminal Reference No. 7 of 1935.