

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

GHULAM HAIDAR KHAN (JUDGMENT-DEBTOR-RESPONDENT) v.

PANDIT HARSHI KESH (DECREE-HOLDER-RESPONDENT)*

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April, 5

United Provinces Encumbered Estates Act (XXV of 1934) sections 6, 7, 45 and 47—Execution of decree—Attachment of money in hand of Court of Wards—Money sent to executing court—Order passed by Collector under section 6, Encumbered Estates Act before order for payment of money to decree holder—Application by judgment-debtor for stay of payment under section 7—Money attached, if can be afterwards paid to decree-holder—Munsif executing decree also a special Judge for purposes of Encumbered Estates Act—Order rejecting application for stay—Appeal dismissed—Second appeal, if barred under sections 45 and 47.

Where a sum of money is in the hands of the Court of Wards to the credit of a judgment-debtor is attached in execution of a decree against him, no doubt the attachment is completed when the money is sent by the Court of Wards to the Court but to say that the attachment is not in force after the receipt of the money by the court is wholly incorrect. In fact, it is by the very force of the attachment that the money is in court and so long as it is not disposed of by the court by paying it over to the decree-holder or otherwise, the attachment must be deemed to be in force. If, therefore, before any order for payment of the money to the decree-holder is passed by the court, the Collector on an application under the Encumbered Estates Act passes an order under section 6, then under section 7(1) of the Act the attachment becomes null and void and consequently the money cannot be made over to the decree-holder.

The restrictions prescribed by sections 45 to 47 of the Encumbered Estates Act apply only to orders, decrees, decisions and proceedings of Special Judges under the Act and not to those of ordinary courts. Where, therefore, a judgment-debtor puts in an application in the court of the Munsif saying that he had made an application under the Encumbered Estates Act and asking the court not to pay the money received by means of the execution of the decree to the decree-holder, but the court is of opinion that section 7 of the Encumbered Estates Act does

*Execution of Decree Appeal No. 52 of 1936, against the order of Syed Abid Raza, Civil Judge of Gonda, dated the 12th of November, 1936, confirming the order of Syed Abul Qasim Zaidi, Munsif of Gonda, dated the 28th of September, 1936.

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not apply and rejects the judgment-debtor's prayer and on appeal the Civil Judge is of the same opinion as the learned Munsif and dismisses the appeal, then a second appeal is not barred by sections 45 to 47 of the Encumbered Estates Act on the ground that the Munsif who rejected the judgment-debtor's application was a Special Judge for the purposes of the Encumbered Estates Act, as the order passed in the case cannot be said to have been passed by him as a Special Judge, but is passed by him in his ordinary jurisdiction as a Munsif under section 47 of the Code of Civil Procedure.

Mr. Mohammad Ayub, for the appellant.

Messrs. L. S. Misra and Sri Ram, for the respondent.

ZIAUL HASAN, J.:—This is a judgment-debtor's appeal against an order of the learned Civil Judge of Gonda dismissing the appellant's appeal against an order of the learned Munsif of that place.

The respondent held a decree for money against the appellant and in execution of that decree he applied for attachment of a certain sum of money that was in the custody of the Court of Wards to the credit of the judgment-debtor. The order for attachment of the money was passed by the learned Munsif on the 1st of July, 1936. Certain objections were raised to the attachment of the money by the Special Manager of the Court of Wards, Gonda, but after some correspondence between the Special Manager and the court, the money was sent by the Court of Wards to the court of the Munsif on the 16th of September, 1936. On the 17th of September, 1936, the judgment-debtor made an application to the Collector under the Encumbered Estates Act of 1934 and on the 19th of September, 1936, he put in an application in the court of the Munsif saying that he had made an application under the Encumbered Estates Act and asking the court not to pay the money received from the Court of Wards to the decree-holder. This application was presumably made with a view to ask the court to give effect to the provisions of section 7 of the Encumbered Estates Act, but the court was of opinion

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that that section did not apply and rejected the judgment-debtor's prayer. The judgment-debtor appealed against this order but the learned Civil Judge who heard the appeal was of the same opinion as the learned Munsif and dismissed the appeal. Hence this second appeal by the judgment-debtor.

Ziaul Hasan,
J.

A preliminary objection to the hearing of this appeal has been raised on behalf of the respondent and reliance is placed on sections 45(2) and (5) and 47 of the Encumbered Estates Act. Section 45(2) of the Act runs as follows :

“An appeal against any decision, decree or order of a Special Judge of the second grade under this Act shall lie to the District Judge. The period of limitation for appeals under this sub-section shall be thirty days.”

Section 45(5) provides that the decision on an appeal under this section shall be final. Section 47 says :

“Except as provided in sections 45 and 46, no proceedings of the Collector or Special Judge under this Act shall be questioned in any court.”

It is argued that the learned Munsif who rejected the appellant's objection is a Special Judge of the second grade, that therefore an appeal against his order lay to the District Judge and that under sub-section (5) of section 45 the decision given by the lower appellate court on the appeal brought by the judgment-debtor is final. Section 47 of the Act is cited as showing that not even a revision lies against an order of the Special Judge except to the court, and in the circumstances, mentioned in section 46.

I have carefully considered the arguments of the learned counsel for the respondent on this point but am unable to hold that the present appeal is barred by sections 45 to 47 of the Encumbered Estates Act. No doubt the learned Munsif who rejected the judgment-debtor's application of the 19th of September, 1936, happens to be a Special Judge for the purposes of the Encumbered Estates Act but the order passed in the

present case cannot be said to have been passed by him as a Special Judge. It was clearly passed by him in his ordinary jurisdiction as a Munsif under section 47 of the Code of Civil Procedure. It appears that this order was passed by him on the 28th of September, 1936, and that on that very date, the Collector passed an order under section 6 of the Encumbered Estates Act on the judgment-debtor's application and forwarded that application to the learned Munsif under the same section; but even if the Collector had passed his order prior to the 28th of September, 1936, it would not in my opinion have made any difference simply for the reason that the order of the learned Munsif now under consideration was not passed by him in his capacity as a Special Judge under the Encumbered Estates Act. The restrictions prescribed by sections 45 to 47 of the Encumbered Estates Act apply only to orders, decrees, decisions and proceedings of Special Judges under the Act and not to those of ordinary courts. I am therefore of opinion that there is no bar to the maintainability of this second appeal.

Turning now to the merits it seems to me that the appeal is well-founded. Section 7(1) of the Encumbered Estates Act provides—

“When the Collector has passed an order under section 6 the following consequences shall ensue:

(a) all proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued . . .”

The first portion of this sub-section relating to stay of proceedings is not relevant for purposes of this case

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and it is only the second portion declaring attachments and other execution processes as null and void with which we are concerned. The crux of the question is whether when the Collector passed an order under section 6 of the Act in this case on the 28th of September, 1936, the attachment of the money made by the decree-holder was in force or not. In my opinion it certainly was. It was argued that after the money was received in court on the 16th of September, 1936, the attachment ceased to exist and was no longer in force. I cannot accede to this argument. No doubt the attachment was completed when the money was sent by the Court of Wards to the court but to say that the attachment was not in force after the receipt of the money by the court appears to me to be wholly incorrect. In fact, it was by the very force of the attachment that the money was in court and so long as it was not disposed of by the court by paying it over to the decree-holder or otherwise, the attachment must be deemed to be in force. It is not alleged that any order for payment of the money to the decree-holder had been passed by the court before the passing of the order under section 6 of the Encumbered Estates Act by the Collector on the 28th of September, 1936, and it is therefore clear to my mind that when on the 28th of September, 1936, the Collector passed his order under section 6, the attachment of the money in respect of the debt due to the decree-holder from the defendant landlord was in force. Therefore under section 7(1) of the Act that attachment became null and void and consequently the money could not be made over to the decree-holder.

The appeal is therefore decreed with costs and the orders of the lower courts set aside.

Appeal allowed.