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(1945) 01 AHC CK 0011

Allahabad High Court

Case No: None

Sheoraj Singh and Others		APPELLANT
	Vs	
Kamley Lal and Others		RESPONDENT

Date of Decision: Jan. 4, 1945

Citation: AIR 1945 All 172 : (1945) 15 AWR 43

Hon'ble Judges: Mulla, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Mulla, J.

This is a second appeal by the judgment-debtors in an execution proceeding. It arises in the following circumstances : The respondents, Kamley Lal and others, obtained a decree on the basis of a mortgage some-time in the year 1930. Subsequent to that decree the mortgaged property was transfer, red to the appellants Sheoraj Singh and others. The respondents made an application for execution of their decree for the first time in the year 1932. The appellants were parties to that application. It was dismissed for default of prosecution. The second application for execution was then made by the respondents on 19th August 1936. The appellants were parties to this application also. The Court proceeded upon this application to send the papers of the case to the Collector for the sale of the property covered by the mortgage deed. On 5th November 1937, the Collector sent the execution papers back to the civil Court with a report that all proceedings in execution had been stayed by an order of the Board of Revenue. On receiving the papers, the learned Munsif of Tilhar, in whose Court the application for execution had been made, passed an order to the effect that in accordance with the report made by the Collector the papers of the case should for the time being be consigned to the record room. This order was passed on 9th November 1937. It must be noted here that this is the last order which is to be found on the order sheet of the

execution file. There is, however, another order, dated 27th January 1938, which is to be found in the order sheet of the original suit in which the decree under execution had been passed. This order has been initialled not by the Munsif of Tilhar but by the Civil Judge who was admittedly only in charge of the routine work of the Munsif''s Court in the latter''s absence. This order begins with a statement to the effect that the papers had been received from the Collector with a report that the decree-holder had made a default and hence the proceeding in execution had been struck off. The order then went on to say that the civil Court having considered the report of the Collector was also of the opinion that there was default on the part of the decree-holder and hence it was ordered that the application in execution should be dismissed and the papers should be consigned to the record room. It is also admitted that this order was passed behind the back of the parties, so that they could have had no knowledge of it. All proceedings in execution of decrees remained stayed under the Stay of Execution of Decrees Act (10 of 1937) for a period of three years. On 20th December 1941, the respondents made an application for the revival of the execution proceedings based upon their application in execution, dated 19th August 1936. To this application an objection was raised by the appellants to the effect that it was barred by time. This objection is based upon the order, dated 27th January 1938, which has been referred to above. The objection was allowed by the learned Civil Judge of Shahjahanpur but upon appeal by the respondents the learned District Judge set aside that order and directed the execution proceeding to proceed in accordance with the law. From this order of the learned District Judge the judgment-debtors have come up in second appeal to this Court.

2. As we have already pointed out, the objection raised by the judgment-debtors appellants that the application of 20th December 1941, made by the decree-holders-respondents for the revival of the execution proceedings is barred by time rests entirely upon the order, slated 27th January 1938, to which reference has already been made. On behalf of the appellants it is contended that this order, dated 27th January 1938, was a final order passed by the Court disposing of the application for execution, dated 19th August 1936, and hence the decree-holders'' application, dated 20th December 1941, must be deemed to be a fresh application which is clearly barred by the three years'' rule of limitation under Article 182 (5), Limitation Act. This argument prevailed with the learned Civil Judge, but it has been rejected by the learned District Judge on the ground that the order, dated 27th January 1938, was not an order consciously passed by any Court with the intention of putting an end to the execution proceedings and hence it cannot be deemed to be a final order within the meaning of Article 182 (5), Limitation Act. Learned Counsel for the appellants has relied upon the Full Bench decision of this Court in Mohammad Taqi Khan Vs. Raja Ram and Others, . It was held by the Full Bench in that case that

the question whether an execution case is still pending and has not been terminated must depend on an interpretation of the order passed by the Court and the inference to be drawn as to the Court''s intention. If the Court intends that the matter should be shelved for the time being or the record be merely consigned to the record room and be taken up later on by the Court itself suo motu or at the instance of the decree-holders, then obviously the case is still pending and is in a state of suspended animation. On being reminded that the case has not been disposed of the Court can at any later moment take it up and deal with it. On the other hand, if the execution Court has intended to finish the matter which was pending before it and to dispose it of, then it seems quite immaterial whether the Court proceeded strictly according to the procedure laid down in the Code or whether it acted irregularly or even illegally. So long as the order is not set aside on appeal or in revision, the order must be regarded as one which has disposed of the execution proceeding, and therefore, it cannot be considered that the proceeding is still pending and can be revived at any time by either of the parties.

The learned District Judge has pointed out that the observations made in the Full Bench case clearly provide that there should be an order of a Court passed with knowledge and with the intention to put an end to an execution proceeding. The learned District Judge has also referred to various circumstances in the case which lead to the conclusion that the order, dated 27th January 1938, was not such an order. We have heard learned Counsel for the appellants but we find ourselves in entire agreement with the view taken by the learned District Judge. So far as the first order, dated 9th November 1937, is concerned, there cannot be the slightest doubt that it was not a final order disposing of the execution proceeding. It was only an order that the papers of the case should for the time being be consigned to the record room. It was based upon a report made by the Collector to the effect that all proceedings in execution had been stayed in consequence of an order passed by the Board of Revenue. In these circumstances it is evident that the execution proceeding was not finally disposed of but was kept pending and could be revived upon a subsequent motion by the decree-holder applicant. The Full Bench case relied upon by learned Counsel for the appellants does not indeed touch the real question for consideration before us in this appeal. What we have to consider in the present case is : Whether the order, dated 27th January 1938, which prima facie disposed of the application for execution, was in fact an order passed by the Court with the knowledge and the intention of putting an end to the execution proceeding. We have no hesitation in holding upon a consideration of all the circumstances of the case which we have already pointed out above that the order, dated 27th January 1938, was a surreptitious order upon which the initials of the Civil Judge, who was temporarily in charge of the routine work of the Court of the Munsif of Tilhar, were obtained by means of fraud by some official of the Court. As we have pointed out, the order begins with an absolutely false statement to the effect that the Collector had made a report that there had been default in

prosecution of the application on the part of the decree-holder. Again, it has to be borne in mind that this order, which is entirely contrary to the previous order, dated 9th November 1937, is not to be found on the file of the execution case but on the file of the original suit. There is no reason at all why such an order should have found a place in the file of the original suit. There could be no presumption, having regard to these circumstances, that the Civil Judge put his initials on this order knowing the nature of the contents of this order and after having applied his mind to the question whether the execution application was to be finally disposed of or not. It was indeed an order on which his signature was obtained by means of fraud or an underhand proceeding. Now, the question is : Whether such an order can be said to be an order passed irregularly or even illegally which is still binding on the parties so long as it has not been set aside on appeal or in revision. We are of the opinion that even in order to act irregularly or illegally the Court must do so with knowledge and with a definite intention. In the present case we have found that the order was surreptitiously obtained by an official of the Court and we are satisfied that the Civil Judge who put his initials on the order never had the consciousness that he was passing an order by which the execution proceeding was being disposed of or that he ever had the intention of disposing of the proceeding. In these circumstances, which were not present in the Full Bench case upon which learned Counsel for the appellants has relied, we think that he cannot draw any support for his contention from that case. The result, therefore, is that we uphold the order passed by the learned District Judge and dismiss this appeal with costs.