

(1947) 01 AHC CK 0005

Allahabad High Court

Case No: Second Appeal No. 1538 of 1945

Sheikh Qurban

APPELLANT

Vs

Dhondha Misir and
Others

RESPONDENT

Date of Decision: Jan. 13, 1947

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 57

Hon'ble Judges: Mootham, J

Bench: Single Bench

Advocate: N.D. Panth, for the Appellant; S.N. Misra, for the Respondent

Final Decision: Dismissed

Judgement

Mootham, J.

In my opinion this second appeal fails.

2. In 1932 one Baramdeo who has since died and is represented in this appeal by his sons the Appellants, obtained a money decree against Mathuni Kandu, In November, 1938, the judgments-debtor executed a mortgage of certain of his properties which included a house in favour of Sheikh Qurban, the Respondent. Later in the same month the decree-holder sought to execute his decree by the attachment of this house, and by an order of the Court dated the 22nd December, 1938, the house was attached. In January, 1939, the decree-holder for some reason which is not clear, was unable to proceed with the execution of his decree and he asked the Court for an order that his application be kept pending and the attachment on the house maintained. Upon this application the Court made the following order on the 28th January 1939

Execution application dismissed, attachment to continue, papers consigned to office.

3. Nothing further appears to have happened till the 19th September, 1940, when the judgment-debtor sold the mortgaged property to his mortgagee, the Respondent, and then in March, 1941, the decree-holder applied to the Court for the execution of his decree by the sale of the house. Despite an objection lodged by the Respondent the house was sold in April, 1942, and the sale was confirmed in the following month. The Respondent thereupon brought the suit out of which this appeal arises for a declaration that the house was not liable to be sold in execution of the decree. His suit was decreed in the trial Court and an appeal to the Court of the Additional Civil Judge of Gorakhpur by the unsuccessful decree-holder was dismissed. Both the Courts took the view that the order of the 28th January, 1939 was made under Order 21, Rule 57 of the CPC Code, and the application for execution having been dismissed, the attachment automatically came to an end.

4. It has been contended in this Court on behalf of the Appellants that the provisions of Rule 57 can have no application as it was not by reason of any default by the decree-holder that the Court was unable to proceed further with the application for execution. The grounds of the application made by the decree-holder to the Court in January, 1939, are not as I have said, clear, and it has been suggested that the decree-holder found himself unable to execute his decree on account of the provisions of the Temporary Postponement of Execution of Decrees Act, 1937. This Act is not however mentioned in the application and if its provisions were applicable the decree-holder would be in a further difficulty as the judgment-debtor's house was attached after the Act had come in force and apparently in contravention of its terms.

5. The meaning to be attached to the word "default" in Rule 57 was considered by this Court in *Dildar Husain v. Sheo Narain* (1919) 41 All. 157, in which Sir Henry Richards, C. J. said:

It really means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. I am supported in this view. I think, by the provision in the rule itself that in a fitting case the application for execution can be adjourned in which case of course the attachment could be maintained.

6. A similar view was expressed in the same case by Tudball J. My attention has been drawn to a later decision *Mohammad Mubarak Husain v. Sahu Bimal Prasad* (1922) 44 All. 274, in which it is said that this Court by implication disapproved of the view taken in *Dildar Husain's* case. In *Muhammad Mubarak Husain's* case, however the decree-holder was admittedly in default, and the Court had only to determine the effect, as between the decree-holder and judgment-debtor, of an order that the proceedings stand adjourned sine die. The present question did not therefore arise. Now, as I have said, what actually moved the decree-holder to make this application to the Court in this case has not been explained, but it is clear that he found himself unable to proceed with his application and have the property sold. I think, therefore,

that he was in default within the meaning of Rule 57 of Order 21.

7. It has further been argued that, even if the order were made under Rule 57 the Court did not intend to dismiss the application, but intended only to adjourn the proceedings to a future date, and this, it is said, must be so because the Court directed that the attachment should continue. I do not think that there is any force in this argument. Whatever have been the precise terms of the application which was made to the Court, it is clear that what the Court was asked to do was to adjourn the proceedings. It would have been a Very easy matter for the Court to have made an order to this effect, but it appears to me that it specifically declined to do so, for what it has been said is, in unambiguous term, "the execution application is dismissed".

8. In my opinion, therefore, that the view taken by the lower appellate Court is correct and this appeal must be dismissed with costs.

9. Leave to file a Letters Patent appeal is refused.