

APPELLATE CIVIL

Before Muni Lal Verma, J.

JAGDISH PARSHAD,—Appellant.

versus

SHRI KANHAYA LAL, ETC.,—Respondents.

Execution First Appeal No. 650 of 1974.

July 31, 1975

Code of Civil Procedure (V of 1908)—Section 60(1) (ccc)—Residential house of judgment-debtor attached before judgment—judgment-debtor in possession of the house at the time of filing execution application—Such house—Whether can be sold in execution of the decree.

Held, that section 60, Code of Civil Procedure 1908, comes into operation when a property is attached in execution of a decree and the protection given by clause (ccc) of sub-section (1) of section 60 of the Code for one residential house is available as soon as the same is attached in execution of a decree. An attachment before judgment, no doubt, continues after the passing of the decree, but such an attachment cannot be said to be attachment in execution of a decree for the obvious reason that when it is effected, there is no decree. Therefore, the date when the house is attached before the judgment is wholly irrelevant for the purpose of deciding the question of applicability of section 60. The relevant date for considering the judgment-debtor's possession of the house is the date of the filing of the execution application and if he is in possession on such date he is fully entitled to the protection afforded by clause (ccc) of sub-section (1) of section 60 of the Code and his house cannot be sold in execution of the decree. (Para 3).

Execution First Appeal from the decree of the Court of Shri Ram Nath Batra, Sub-Judge 1st Class, Rewari, dated July 27, 1974 accepting the objection petition dated April 30, 1972 and dismissing the J.D's. objection petition dated April 6, 1972, under section 60(1) (ccc) of Civil Procedure Code and it is ordered that the house in question which has already been attached be sold in auction.

G. C. Garg, Advocate, for the appellant.

H. L. Sarin, Senior Advocate (Shri M. L. Sarin, Advocate with him), for the Respondents.

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JUDGMENT

Verma, J.—(1) This appeal is by the judgment-debtor and has arisen out of execution proceedings, in the circumstances briefly stated as under :—

(2) Kanhaya Lal instituted suit for recovery of Rs. 13,475 on November 4, 1970. The house in question was attached before judgment on November 5, 1970 and the said attachment was confirmed on November 17, 1970. The suit was compromised on August 10, 1971, and a decree was recorded. The decree provided payment of Rs. 14,688.50 paise including costs through instalments and it contained a direction that the house would remain under attachment till the satisfaction of the decree.

On the failure of the appellant to pay the instalments of decretal amount, as agreed upon, Kanhaya Lal took out execution of the decree on February 16, 1972, and sought sale of the house. The appellant raised objections seeking protection under clause (ccc) of sub-section (1) of section 60, Code of Civil Procedure, stating that he was in possession of the house and it was the only residential house with him. He had also filed another objection application which is not relevant for the purposes of this case. The objection raised by the appellant were resisted by Kanhaya Lal and the following issues were settled :

- (1) Whether the objection petition is not maintainable in the present form ? OPDH.
- (2) Whether the judgment-debtor is entitled to the grant of instalments ? OPJD.
- (3) Whether the decree could be executed by arrest of judgment-debtor ? OPDH.
- (4) Whether the property is not liable to sale under section 60, Code of Civil Procedure ? OPJD.
- (5) Relief.

The executing Court decided issue Nos. 1 and 3 in favour of the appellant (judgment-debtor). Issue Nos. 2 and 4 were, however, found against him and, therefore, his objections respecting the sale of the house were dismissed. Dissatisfied with the said result, the appellant has come to this Court in appeal.

Mr. Gian Chand Garg, learned counsel for the appellant, has assailed the finding of the executing Court recorded on issue No. 4. His contentions are that the appellant was in possession of the house on February 16, 1972 when the respondent took out execution of the decree and, as such, it cannot be sold for realisation of the amount and the executing Court was in error in deciding issue No. 4 against him on the ground that he was not in possession of the house on November 5, 1970. I see merit in these contentions. The executing Court dismissed the objections of the appellant claiming exemption of the house from sale in execution of the decree on the grounds, (a) that he was not in possession of the house on November 5, 1970 when it was attached before judgment, (b) that the appellant had sold some property situate within the limits of village Hamirpur in the month of January, 1971 in favour of his sister's son and the said sale was *benami*, and (c) that specific charge had been created on the house for payment of the decretal amount. In my opinion, the aforesaid approach of the executing Court is not sound. Section 60, Code of Civil Procedure, comes into operation when a property is attached in execution of a decree and the protection given by clause (ccc) of sub-section (1) of section 60 of the Code, for one residential house is available as soon as the same is attached in execution of a decree. An attachment before judgment, no doubt, continues after the passing of the decree, but such an attachment cannot be said to be attachment in execution of the decree for the obvious reason that when it is effected, there is no decree. Therefore, the date, November 5, 1970 or November 17, 1970 when the house was attached before the judgment, is wholly irrelevant for the purpose of deciding the objections preferred by the appellant. The relevant date for considering his possession of the house is February 16, 1972 when execution application was filed. There is ample evidence available from the statements of the appellant and Babu Lal, J.D.W; 4, and copy of the report Exhibit O3/1, that Gopi Chand who was in occupation of the house as a tenant under the appellant was evicted on February 11, 1971, and its possession had been then delivered to the appellant. The appellant had been in possession of the house thereafter. There is no evidence to show that the appellant has any other house for his residence. Therefore, it is apparent that the appellant was in possession of the house on February 16, 1972, and hence he is fully entitled to the protection afforded to him by clause (ccc) of sub-section (1) of section 60, Code of Civil Procedure.

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(4) The circumstance that the appellant had sold some property to his sister's son in the month of January, 1971, and the same was considered by the executing Court as *benami* transaction, is wholly irrelevant for the purpose of deciding the protection claimed by the appellant available to him under clause (ccc) of sub-section (1) of section 60, Code of Civil Procedure.

(5) I have gone through the statement (Copy Exhibit DH 1) made by the appellant on August 10, 1971, and also the decree recorded on its basis. Neither in the said statement nor in the decree, it has been provided that the house would be specifically charged for the decretal amount. The mere fact that the appellant had stated in that statement, and it is also recited in the decree that the house would remain under attachment till payment of the decretal amount, does not create any charge for payment of the decretal amount on the house, much less that it was specifically charged for payment of the same. Therefore, proviso to clause (ccc) of sub-section (1) of section 60 of the Code, is not applicable and the executing Court was in error in construing the aforesaid statement in such a manner as to deny the protection of the abovementioned clause available to the appellant.

(6) It, thus, follows from the discussion above that the finding recorded by the executing Court on issue No. 4 is wrong, and the same is vacated. The said issue is decided in favour of the appellant. As a result of this finding, this appeal must succeed.

(7) Consequently, I allow this appeal, set aside the impugned order so far it rejected the objections of the appellant that the house was not liable to sale in execution of the decree. I allow the said objections and add for the sake of clarity that the house is not liable to sale in execution of the decree. There will be no order as to costs.

(8) The parties have been directed through their Counsel to appear before the executing Court (Subordinate Judge, First Class, Rewari) on August 30, 1975.

H. S. B.