

PANDURANG JIVAJI

v.

RAMCHANDRA GANGADHAR ASHTEKAR (DEAD)
BY LRS. & ORS.

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October 29, 1981

[A.D. KOSHAL, V. BALAKRISHNA ERADI AND
R.B. MISRA, JJ.]

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Evidence—Section 114 of the Evidence Act—Adverse inference against a party for his failure to appear in the court, when can arise.

Respondent R.G. Ashtekar (since dead) filed a regular suit No. 215 of 1959 for the recovery of his dues from Kamla Pictures, Kolhapur of which Bapusaheb Narayanrao Mohite (since dead) was the sole proprietor. On an application for an order of attachment before judgment under Order 38 Rule 5 of the C.P.C. a garnishee order was issued to the appellant Apte, the mortgagee of the properties. As per the directions of the court passed on his objection he exercised his right under section 176 of the Contract Act and sold the property attached to one Madhusudan Vasudeo Bavdekar, after due notice to plaintiff Ashtekar and also after a public notice.

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The suit was decreed for Rs. 9,000 in favour of the plaintiff, who filed an application for execution and in the said proceedings Bavdekar, the purchaser, was impleaded so as to seek recovery of the properties in his hands by sale. The application was dismissed holding that the property was pledged with Apte, who validly sold it to Bavdekar and that the attachment before judgment itself was invalid. A second appeal before the High Court was rejected by the Chief Justice of Maharashtra but he granted leave to appeal under letters patent. The High Court reversed the concurrent findings of fact recorded by courts below and in view of the fact that Apte sold the property for Rs. 46,000 as against Rs. 35,000 due to him, the executing court was directed to ask Apte to deposit the excess amount of Rs. 11,000 in the executing court in the 1st instance and in case the entire amount of the decree holder was not satisfied then the executing court would call upon the heirs of Bavdekar to deposit in court the remaining amount due to Decree holder or to produce the property attached within the time allowed by the Court in the event of this failure, the execution court shall order execution against them. Hence the appeal by appellant after obtaining special leave.

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Allowing the appeal, the Court

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HELD : 1:1. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record. Absence of Apte and Bavdekar from the court would matter only when there was no evidence on the record on the point in issue.

[1026 G-H, 1025A]

1:2. On the findings of fact recorded by the two courts below, which are final and which could not be normally set aside by the second Appellate Court, the decree-holder cannot compel Apte or Bavdekar to produce the property as before the Court or the proceeds of the sale of the property as the amount due to Apte from judgment—debtor has not still been satisfied. [1026 G-H, 1027A]

The statement of the judgment-debtor, the admission of the decree-holder in cross-examination also the averments in the agreement make the position clear. [1026 A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2069 of 1970.

Appeal by special leave from the judgment and order dated the 21st January, 1970 of the Bombay High Court in Letters Patent Appeal No. 60 of 1964.

S. T. Desai and *Mrs. J. Wad* for the Appellant.

A. G. Ratnaparkhi for Respondent No. 1.

Ex-parte for Respondents No. 2 & 3.

The Judgment of the Court was delivered by

MISRA, J. The present appeal by special leave arises out of an execution proceeding and is directed against the judgment of the High Court of Bombay dated 21st of January, 1970 in Letters Patent Appeal setting aside the order of the Single Judge in Second Appeal. The appeal came up for hearing on September 24, 1981. After the conclusion of the arguments of the counsel for the parties, we allowed the appeal with costs, set aside the judgment of the High Court and restored that of the District Judge for reasons to be recorded later, in the following terms :

“This appeal is allowed with costs of this Court and the decree passed by the District Judge is restored. Reasons will follow later on.”

We now proceed to give the reasons.

Respondent No. 1, Ramachandra Gangadhar Ashtekar (since dead and represented by his legal representatives) filed a regular suit No. 215 of 1959 for the recovery of his dues from Kamla

A Pictures, Kolhapur of which Bapusaheb Narayanrao Mohite (since dead and represented by his heirs and legal representatives) was the sole proprietor. It appears that after filing the suit the plaintiff applied for attachment of the defendant's properties before judgment under Order 38, rule 5 of the Code of Civil Procedure and the following properties were attached :

B (a) Picture negative and sound negative of censored movie "Anant Fandi".

(b) Rush prints of the above movie.

C (c) Positive prints of the above movie.

(d) Raw positive films.

(e) Publicity part—posters, litho posters, photos, enlargements, photo-negatives, bookset blocks etc.

D The actual possession of the defendant's aforesaid properties was with Pandurang Jivajirao Apte, (for short Apte), the appellant, at the time of attachment.

The suit was eventually decreed for a sum of Rs. 9,000 and odd with interest and costs of the suit. The said attachment was continued by the decree.

E The decree holder sought to execute the decree by the sale of the property attached. As stated earlier, the property was in possession of Apte, the appellant. The decree-holder, therefore, prayed that Apte should be called upon to produce the property in Court and the same should be sold.

G Notice was issued to Apte, the garnishee, who appeared and filed a written statement. He took up the plea that property had already been pledged with him by the judgment-debtor for his debt and that the attachment levied at the instance of the decree-holder was subject to his encumbrance on the property. He also alleged that he had raised this contention in the suit itself at the time of attachment before judgment and he was allowed by the Court to sell the property pledged with him. Accordingly, he exercised his right under section 176 of the Indian Contract Act and sold the property to one Madhusudan Vasudeo Bavdekar (for short Bavdekar) after due notice to the judgment-debtor as also after a public notice.

H But the proceeds of the same were not sufficient even to satisfy his

own debt. Under the circumstances he was not in a position to produce the property in Court.

In view of the stand taken by the appellant, Apte, the decree-holder filed an application for impleading Bavdekar, the purchaser, as a party to the execution proceedings. The application for impleadment was allowed and Bavdekar was impleaded as judgment-debtor No. 2. No amendment claiming any relief against him was, however, actually incorporated in the application for execution. Bavdekar in his turn also filed a written statement alleging that the property was pledged with Apte who had sold it to him. He was a *bona fide* purchaser for value without notice and the purchases being effected in pursuance of the consent decree passed in Bombay City Civil Court in suit No. 1047 of 1959, transfer in his favour was valid in law. He was, therefore, not liable in any way for the claim of the decree-holder.

The executing court came to the conclusion that the attachment before judgment of the property in dispute was invalid and that the property being pledged by the judgment-debtor with the garnishee, Apte, and he having sold it under section 176 of the Indian Contract Act with the permission of the Court, the same could not be made available to the decree-holder for satisfying his debt. As the only prayer in the application for execution was for the sale of the property in question, the executing court disposed of the application as unsatisfied on the ground that the property was not available for satisfaction of the decretal debt of the decree-holder. The decree-holder feeling aggrieved by the order went up in appeal. The District Judge affirmed the order of the executing court holding that the pledge of the property in dispute by the judgment-debtor in favour of the garnishee was proved, that the garnishee Apte sold the property to Bavdekar and that the attachment of the property before judgment was invalid.

The decree-holder undaunted by the failures, filed a second appeal in the High Court. The appeal was summarily rejected on 4th of May, 1963 by the Chief Justice. He, however, granted leave to appeal under Letters Patent. The High Court reversed the concurrent finding of fact recorded by the two courts below on making a fresh appraisal of evidence and came to the following conclusions ;

- (1) Apte and Bavdekar had failed to establish that the attachment in question was invalid.

A (2) They also failed to establish the genuineness of the sale alleged by them.

(3) They also failed to establish that the sale proceeds did not exceed the amount due to appellant Apte from the judgment debtor.

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(4) From the own admission of Apte the attached property was sold for Rs. 46,000 while the charge on the attached property in favour of Apte was only for Rs. 35,000 and, therefore, it was open to the executing court to direct Apte to produce in the Court the amount exceeding Rs. 35,000, viz., Rs. 11,000.

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On these findings the appeal was allowed by the High Court and the judgments of the two courts below were set aside and the case was sent back to the executing court with the directions that (1) Apte shall deposit in the executing court Rs. 11,000 on or before 1st of March, 1970, (2) that in case the entire amount due to the decree-holder was not satisfied out of this amount of Rs. 11,000, the executing court shall direct the heirs of Bavdekar to deposit in the executing court the remaining amount due the decree-holder or to produce in that court the property attached within a reasonable time to be fixed by the executing court, and (3) that if Apte and Bavdekar failed to carry out the above direction, the executing court shall order execution against them for the amount indicated above. Apte has now come to this Court to challenge the judgment of the High Court in the Letters Patent Appeal.

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The first contention raised on behalf of the appellant is that the High Court had no jurisdiction to reverse the concurrent finding of fact. This contention was raised before the High Court in Letters Patent appeal as well but the same was over-ruled on the ground that the courts below had approached the case from an erroneous view of law in as much as they failed to raise the necessary presumption against Apte and Bavdekar on account of their failure to appear before the court.

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In our opinion the question of drawing an adverse inference against Apte and Bavdekar on account of their absence from the court would arise only when there was no other evidence on the

record on the point in issue. The first appellate court had relied upon the admission of the decree-holder himself and normally there could be no better proof than the admission of a party. The High Court, however, has observed in its judgment that the decree-holder has made no admission in his evidence which would justify refusal to draw adverse inference for the failure of Apte and Bavdekar to step into the witness box.

We have examined the record which was placed before us by the counsel for the appellant and the examination of the record indicates that the observation made by the High Court that the decree-holder has made no such admission is not quite correct. We may first refer to the deposition of the decree-holder himself. In the cross-examination he admitted :

"There is an agreement executed between me and judgment-debtor No. 1 on 29-12-58. I admit all its contents....Judgment-debtor No. 1 had told me that there is lien of Apte on the prints and on that basis our agreement was entered into. It is true that there is an agreement between us that I am to be paid my dues only after dues of other persons including Apte are satisfied....It was agreed between me and Mohite that I was to be given to the film after dues of Apte were satisfied."

In face of this clear admission of the decree-holder it does not lie in his mouth to say that no amount of Apte was due from the judgment-debtor or that the agreement between Apte and the judgment debtor was a collusive affair. Apart from the admission of the decree-holder referred to above, the judgment-debtor also stated as follows :

"I had given full idea to decree-holder about Apte's lien. There is reference to it in our agreement. Decree-holder is to get amount only after Apte's dues and the debt of other persons is satisfied. Apte's debt could not be satisfied. I had taken cash amount of Rs. 32,012 from Apte. I have signed the documents at Exhs. 47/1, 47/4 and 47/7 to 47/13. His dues had come to Rs 39,500-56.... I had told about it to decree-holder. Apte's full dues are not even now satisfied by sale of the picture to Bavdekar

A for Rs. 46,000. The picture was to remain in possession of Apte till all his dues were satisfied by me."

B In view of the statement of the judgment-debtor and the admission of the decree-holder, there is not the slightest doubt that the dues of Apte had not been cleared off by the sale of the property in question to Bavdekar. The High Court was not justified in ignoring the statement of the judgment-debtor on the wrong assumption that there was no admission by the decree holder.

C In the agreement dated December 29, 1958 between the decree-holder and the judgment debtor, Ext. 58, there is a clear reference to the amounts due to Apte from the judgment-debtor and the decree-holder had full knowledge of the dues of Apte. Apart from the dues of Apte there were other dues also to be paid by the judgment-debtor. If according to the judgment-debtor himself the amount of Rs. 46,000 which was due to Apte, had not been cleared off even by the sale of the property to Bavdekar the decree-holder could not proceed against the property in the hands of Bavdekar. The attachment of the property at the instance of the decree-holder was only subject to the lien of Apte and unless the entire amount due to Apte was cleared off the decree-holder could not proceed against the property in the hands of the purchaser, Bavdekar. Therefore, the conclusion drawn by the two courts below that the amount of Rs. 46,000 and odd was due to Apte from the judgment debtor and the same had not been cleared off even by the sale of the property under attachment, was based on the materials on the record viz., the admission of the decree-holder, the admission of the judgment-debtor and from various letters and receipts Ext. 47/1 to Ext. 47/13. All these documents have been lost sight of by the High Court which has indeed exceeded its jurisdiction in reversing the finding on the assumption that the courts below had approached the case with a wrong view of law in not drawing an adverse inference against Apte and Bavdekar on their failure to appear in court when the question of loan due to Apte from the judgment-debtor and the sale of the properties for Rs. 46,000 has been amply proved by the evidence on the record. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record.

H On the findings of fact recorded by the two courts below, which are final and which could not be normally set aside by the second Appellate Court, the decree-holder cannot compel Apte or

Bavdekar to produce the property before the Court or the proceeds of the sale of the property as the amount due to Apte from judgment-debtor has not still been satisfied.

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For the foregoing discussion the judgment of the High Court cannot be sustained.

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S.R.

Appeal allowed.