

mere trespasser. The sole question is whether in the instant case Mst. Ghogan can be said to be a mere trespasser whose illegal title is being converted into lawful ownership. As I have already said above, Mst. Ghogan cannot be considered to be a mere trespasser who does not have any vestige of title. She has been in possession of the property either actually or constructively for a period of 40 years without any challenge to her right. The parties are governed by the custom and it cannot possibly be urged that she was allowed to usurp anybody's right to the possession of the property. If nothing else, she was certainly entitled to maintenance and the Court of first appeal has come to that conclusion. I cannot, therefore, hold her to be a mere trespasser and she must be held to have become full owner of the property on the commencement of the Act which she could earlier hold only as a limited heir.

(10) A feeble attempt was made to support the contention that the plaintiffs are not heirs to the estate of Ghogan in preference to defendants appellants who are collaterals of Bhoop Singh in the fourth degree. In view of my finding that Mst. Ghogan became a full owner of the property, there can be no doubt that the plaintiffs are the preferential heirs. According to section 15, property of a female Hindu dying intestate devolves, in the absence of the sons and daughters (including the children of any pre-deceased son or daughter) and the husband, upon the heirs of the husband. The plaintiffs are the sisters of Hira, deceased husband of Ghogan and they fall in category II of Class II given in the schedule of heirs.

(11) For the foregoing reasons, there is no merit in the appeal which stands dismissed. The parties are left to bear their own costs.

K. S. K.

APPELLATE CIVIL

Before H. R. Sodhi, J.

CHAMAN LAL,—Appellant

versus

MOHAN LAL,—Respondent

Execution Second Appeal No. 1567 of 1968.

October 21, 1969.

Code of Civil Procedure (V of 1908)—Sections 11, 47 and Order 21—Rule 90—Punjab Debtors' Protection Act (II of 1936)—Section 10(3)—Judgment-debtor's entire land attached in execution of decree—No objection under

section 10(3) Punjab Debtors' Protection Act filed—Attached land sold without the executing Court giving a finding regarding the land required for the maintenance of the judgment-debtor and the members of his family—Such sale—Whether void—Objection against the sale under Order 21 Rule 90 of the Code filed by the judgment-debtor dismissed—Second objection under section 47 of the Code read with section 10(3), Punjab Debtors' Protection Act filed—Such objections—Whether barred by principles of res judicata—Limitation Act (XXXVI of 1963)—Article 127—Application under sections 47 and 60 of the Code for setting aside sale—Whether governed by Article 127.

Held, that under section 10(3) of the Punjab Debtors' Protection Act, 1936, the judgment-debtor's land not exceeding 50 per cent, is not liable to attachment or sale in execution of a decree for the payment of money if the judgment-debtor requires the same for his maintenance and that of the members of his family. It has, however, to be ascertained what are the sources of his income. The sources of his income may be such which in the opinion of the Court do not justify exemption of 50 per cent. It is a matter which has to be specifically raised and decided. There is no duty cast on the Court to find out the sources of income of the judgment-debtor and not to direct attachment or sale of his property even when the objector raised no such plea. The sale in such a situation, in the absence of plea and finding cannot be held to be invalid. (Para 4)

Held, that where a judgment-debtor files an objection petition under Order 21 rule 90 of the Code of Civil Procedure and same is dismissed, another objection petition filed by him under section 47 of the Code read with section 10(3) of the Punjab Debtors' Protection Act is barred by principles of *res judicata*. It will be putting a premium on the neglect or wilful default of the judgment-debtor to permit him to raise a new objection in order to challenge the validity of the sale, when he did not choose to do so earlier, and it could have been so done. (Para 4)

Held, that an application to set aside a sale even though not under Order 21 rule 90 of the Code of Civil Procedure but under section 47 read with section 60 of the Code, will also be governed by Article 127 of the Limitation Act, 1963, whereunder a period of thirty days is prescribed to have the sale set aside. This Article lays down no distinction as to under what provision of law an application is made or at whose instance it is made. Whenever an application is in substance to set aside a sale, it has to be made within thirty days from the date of the sale.

Execution Second Appeal from the order of the Court of Shri O. P. Saini, Additional Sessions Judge, Amritsar, dated 1st June, 1968, affirming that of Shri Gurdip Lal Chopra, Sub-Judge IInd Class, Ajnala, dated 11th March, 1966, dismissing the application.

TIRATH SINGH MUNJRAL, ADVOCATE, for the appellant.

G. C. GARG, ADVOCATE, for the respondent.

JUDGMENT

H. R. SODHI, J.—This second appeal is directed against the order of the Additional District Judge, Amritsar, dated 1st of June, 1968, dismissing the appeal of the appellant judgment-debtor and affirming the order of the executing Court dismissing his objections relating to the liability of the property in question to sale. The facts, as are necessary for the decision of this appeal and are not much in controversy, may be stated in a narrow compass.

(2) Mohan Lal, respondent obtained a money decree in a sum of Rs. 1,360 against the judgment-debtor—appellant on 27th of August, 1963, and in execution thereof got one-sixth share of some land belonging to the judgment-debtor attached. The attached land was then sold and the sale confirmed by the executing Court on 10th of August, 1964. The appellant filed objections, purporting to be under Order 21 rule 90 of the Code of Civil Procedure, but the same were dismissed on 25th of February, 1965. He then again preferred another objection petition under section 47 of the Code of Civil Procedure, read with section 10(3) of the Punjab Debtors' Protection Act, 1936 (Punjab Act 2 of 1936), hereinafter called the Act, and this petition was also dismissed on 11th of March, 1966. It was held that the second objection petition was not maintainable and was barred by time. It is not disputed that the second application was made almost seven months after the confirmation of the sale. An appeal was taken to the Additional District Judge who, as already observed, concurred with the findings of the trial Court and upheld its order. Hence the present second appeal.

(3) The sole question of law that requires determination is whether, without a finding by the executing Court that having regard to the judgment-debtor's income from all sources a particular portion, not exceeding one-half, of the attached land is required for his maintenance and that of the members of his family, or not, the attached land can be sold. For facility of reference section 10(3) of the Act may be reproduced hereunder *in extenso*—

“Notwithstanding anything to the contrary contained in any other enactment for the time being in force—

(1) * * * *

(2) * * * *

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- (3) such portion of the judgment-debtor's land not exceeding fifty per centum thereof, shall not be liable to attachment or sale in the execution of a decree for the payment of money, as in the opinion of the Court, having regard to the judgment-debtor's income from all sources except such income as is dependent on the will of another person, is sufficient to provide for the maintenance of the judgment-debtor and the members of his family who are dependent on him."

It may be mentioned that clause (3) mentioned above was added by Punjab Act 44 of 1960. The executing Court did not give any finding on the question that fifty per cent of the land was required by the judgment-debtor for his maintenance and that of the members of his family and dismissed the application on the ground that it was not maintainable because of the bar of limitation and also because the matter sought to be agitated could have been raised before the sale was confirmed. Order 21, rule 90 of the Code of Civil Procedure provides that sale of immovable property in execution of a decree can be set aside at the instance of the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, on the ground of a material irregularity or fraud in publishing or conducting that sale and also if it is established that the applicant has sustained substantial injury by reason of such irregularity or fraud. There is then a proviso to this rule and it runs as under:—

"Provided further that no such sale shall be set aside on any ground which the applicant could have put forward before the sale was conducted."

The executing Court relied on this proviso and dismissed the second objection petition which was admittedly made after a long period of time, when the period of limitation was only thirty days as governed by Article 166 of the Limitation Act, 1908, which now corresponds to Article 127 of the new Limitation Act of 1963. Reliance in this connection was placed by the trial Court on a Full Bench judgment of the Lahore High Court in *Gauri v. Ude* (1) and on some observations of their Lordships of the Supreme Court in

(1) A.I.R. 1942 Lah. 153.

Merla Ramanna v. Nallaparaju (2), and the appellate Court has also taken the same view.

(4) Mr. Tirath Singh Munjral, learned counsel for the appellant-judgment-debtor, has strenuously urged before me that the sale being contrary to the provisions of section 10(3) of the Act was void and, therefore, no bar of limitation applied. The argument is that when the sale was conducted it was not even necessary for the judgment-debtor to file objections to have the sale set aside and all that was sought for was a mere declaration. He has invited my attention to a Division Bench judgment of this Court in *Vishnu Datt v. Jai Narain* (3). In that case the learned Judges were dealing with the provisions of section 60(1)(ccc) and (6) of the Code of Civil Procedure. It is enjoined by sub-section (6) of the said section 60 that "No order for attachment shall be made unless the Court is satisfied that the property sought to be attached is *not exempt from attachment or sale.*" By virtue of sub-section (3) and clause (ccc) of sub-section (1) of section 60 one main residential house and other buildings attached thereto belonging to a judgment-debtor, other than an agriculturist, and occupied by him are exempt from attachment and sale in execution of a decree. An application by the judgment-debtor, raising an objection about the attachment and sale of the property but not specifically urging that the house sought to be got released from attachment was his only residential house and thus exempt from attachment and sale, was dismissed. The order of the Court was, of course, made in the absence of the judgment-debtor who, after having filed the objections, absented himself. Sale of the attached property was then effected and the judgment-debtor then filed another application under section 47 read with section 60 of the Code of Civil Procedure, making this time a clear allegation that the property attached and sold was his sole residential house and exempt from attachment and sale under section 60. The decree-holder resisted the application on the ground that the second application was barred by the rule of *res judicata*. The learned Judges constituting the Division Bench observed on reading of section 60(1)(ccc) that the rule of *res judicata* could not deprive the judgment-debtor of his residential house. It was held by the Bench that the provisions of sub-section (6) of section 60 cast a duty on the Court not to order an attachment or

(2) A.I.R. 1956 S.C. 87.

(3) 1966 Cur. L.J. 921.

sale of any property unless it comes to a finding that the same is not exempt from such attachment or sale. It was held that since in the circumstances of that case attachment had not been made after compliance with the provisions of section 60(1)(ccc) read with section 60(6) of the Code of Civil Procedure, there was no valid attachment in the eyes of law and any sale effected in pursuance of such an attachment would also not be valid. Mr. Munjral submits that the language of clause (ccc) of sub-section (1) and sub-section (6) of section 60 of the Code of Civil Procedure is almost similar to that of section 10(3) of the Act and it should, therefore, be similarly held that the sale in the circumstances of the present case was void. I am afraid there is no substance in this contention. No doubt a judgment-debtor's land not exceeding 50 per cent, is not liable to attachment or sale in execution of a decree for the payment of money if the judgment-debtor requires the same for his maintenance, but it has to be ascertained as to what are his sources of income. It may be that his sources of income are such which in the opinion of the Court do not justify exemption even of 50 per cent of that land. It is a matter which has to be specifically raised and decided. The judgment-debtor did not in his application raise any such plea and the application was dismissed on 25th of February, 1965. After giving my careful thought to the matter, I am of the opinion that the language of section 10(3) of the Act is in no way similar to that of section 60(1)(ccc) of the Code of Civil Procedure and there is no duty cast on the Court to find out the sources of income of the objector and not to direct attachment or sale of his property even when the objector raises no such plea. The sale in such a situation, in the absence of a plea and a finding, cannot by any stretch of imagination be held to be invalid. It will be putting a premium on the neglect or wilful default of the judgment-debtor to permit him to raise the same objection over again. To allow him to raise new objections in order to challenge the validity of the sale, when he did not choose to do so earlier when he could have so done, is hit by the rule of *res judicata* and the second application must be held to be barred, both by the said rule and also by the rule of limitation. The ratio in *Gauri's case* (1), decided by the Lahore High Court is fully applicable to the circumstances of the present case. It was held there that an application to set aside a sale, even though not under Order 21, rule 90 of the Code of Civil Procedure but under section 47 read with section 60 of the Code, will also be governed by Article 166 of the Limitation Act, 1908, which is equivalent to Article 127 of the Limitation Act, 1963, whereunder a

Kulwant Singh v. Senior Superintendent of Police, etc. (Mital, J.)

period of thirty days is prescribed to have the sale set aside, Article 127 is in the following terms:—

"Description of application	Period of limitation	Time from which period begins to run
127. To set aside a sale in execution of a decree, including any such application by a judgment-debtor	Thirty days	The date of the sale."

This Article lays down no distinction as to under what provision of law an application is made or at whose instance it is made. Whenever an application is in substance to set aside a sale, it has to be made within thirty days from the date of the sale. In other words, it does not matter that the first application was under Order 21, rule 90 and the subsequent application is under section 47 of the Code. The period of limitation in either case will be the same and the Courts below rightly dismissed the second objection petition as barred by time.

(5) For the foregoing reasons, there is no merit in this appeal which stands dismissed with no order as to costs.

R. N. M.

CRIMINAL MISCELLANEOUS

Before S. C. Mital, J.

KULWANT SINGH,—Petitioner.

versus.

SENIOR SUPERINTENDENT OF POLICE AND ANOTHER,—Respondents.

Criminal Writ No. 53 of 1969.

October 23, 1969.

Code of Criminal Procedure (V of 1898)—Section 173—Challan of cognizable case submitted in Court after completion of investment—Court taking cognizance of the case—Such case—Whether can be re-investigated by Police.

Held, that under the scheme of Code of Criminal Procedure, re-investigation of a cognizable case after the submission of challan under