

Trimbak Narhar Vs. Gopal Narayan

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Court : Mumbai

Decided On : Jul-17-1946

Reported in : AIR1947Bom480; (1947)49BOMLR333

Judge : Sen and Gajendragadkar, JJ.

Appeal No. : Civil Application No. 48 of 1946

Appellant : Trimbak Narhar

Respondent : Gopal Narayan

Disposition : Application dismissed

Judgement :

Gajendragadkar, J.

1. This application has been made by the appellants in second appeal No. 439 of 1943 praying that the heirs of the deceased respondent No. 1 should be brought on the record and that the delay, if any, in making the present application should be excused. The appeal under which the application has been made has been preferred by three appellants who were original defendants and it arises in the execution of a decree passed against them. There were four respondents to the appeal. Out of them respondent No. 1 died on April 11, 1945. The present application to bring the heirs of the deceased respondent on the record has been

made on December 22, 1945. Prima facie this application would be beyond time since under Article 177 of the Indian Limitation Act applications to bring the legal representatives of the deceased respondent have to be made within 90 days from the date of the death of the respondent concerned. Mr. Desai has, however, contended that the provisions of O. XXII, relating to the abatement of suits, do not apply to appeals in execution proceedings and there would thus be no question of applying Article 177 to the application made by him. In other words Mr. Desai's contention is that the appeals arising in execution proceedings are proceedings in execution and under O. XXII r. 12, provisions as to abatement contained in Rules 3 and 4 of the said Order cannot apply to them. There is no reported decision of this Court on the point raised by Mr. Desai; that is why the matter has been referred to a Division Bench by Mr. Justice Bavdekar.

2. Thus the short question which arises for decision in this application is whether the words 'proceedings in execution of a decree' used in Rule 12 of O. XXII should be deemed to include appeals arising from orders passed in such proceedings. Mr. Desai argues that appeals filed against such orders are continuation of the proceedings from which they arise and should, in law, partake of the same character as the original proceedings. Rule 12 of O. XXII provides that nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. At one stage the question as to whether the procedure laid down in reference to the suits applies to execution proceedings had given rise to difference of judicial opinion. But the doubt in the matter has now been set at rest by the scheme of the present Code of Civil Procedure and by a decision of the Privy Council in *Thakur Prasad v. Fakir-Ullah*. I.L.R.(1894) All. 100 Dealing with this question as under the earlier Code Lord Hobhouse observed (p. 111) :

But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable.

The scheme of the present Code makes it clear that the procedure laid down with regard to suits does not always or necessarily apply to proceedings in execution.

In this view of the matter the provisions of Rule 12 of O. XXII merely recognise and give effect to this principle by saying that the provisions contained in Rules 3, 4 and 8 do not apply to proceedings in execution.

3. It would, however, be material to consider the procedure laid down by the Code in regard to proceedings in execution and appeals arising from such proceedings. The procedure as to execution of decrees is dealt with in Part II and O. XXI of the Code of Civil Procedure. The procedure as to appeals is dealt with in Part VII and O. XLI to XLV of the Code. It is to be noticed that in dealing with appeals the provisions of the Code of Civil Procedure make no distinction between appeals arising from decrees and those arising from orders passed in execution. In fact, Section 2 defines a decree as including the determination of any question within Section 47 and in that sense an appeal against an order made under Section 47 may well be regarded as similar to an appeal against a decree. Section 108 of the Code of Civil Procedure leads to the same inference. It provides that the provisions of Part VII, relating to appeals from original decrees, shall, so far as may be, apply to appeals from appellate decrees and from orders made under the Code. It is thus clear that under the Code the procedure with regard to suits is distinct from that with regard to proceedings in execution,, but no such distinction is made while laying down the procedure as to appeals. All appeals are dealt with together without making any distinction as to appeals arising from decrees passed in suits and appeals arising from orders in execution. It is true that Rules 3, 4 and 8 of O. XXII in terms apply to suits, but in effect all the rules of the said Order are made applicable to appeals under Rule 11 of O. XXII; the said rule provides that in the application of the said Order to appeals the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent and the word 'suit' an appeal. Prima facie this rule refers to all appeals in general, and in view of the fact that in dealing with the appeals the Code makes no distinction as between appeals of one kind and another, it would appear that the effect of Rule 11 is that all the provisions of O XXII including Rules 3, 4 and 8 would apply as much to appeals arising from decrees as to appeals arising from orders made in execution proceedings. Rule 12 of the said Order, however, proceeds to lay down that nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. If the words 'proceedings in execution' can reasonably be regarded as

including appeals arising in such proceedings, Rule 11 may have to be read subject to Rule 12. It may in one sense be true that appeals arising from orders made in proceedings in execution are a continuation of those proceedings; but that cannot, in our opinion, be regarded as sufficient ground for treating such appeals as proceedings in execution properly so called, since the appellate Court is not really concerned with the proceedings in execution as such. In such appeals the appellate Court is merely concerned with the propriety, legality or correctness of the orders under appeal. That being so, we think the provisions of Rule 12 must be held to apply to proceedings in execution properly so called, that is to say the execution proceedings in the original Court which is concerned with executing decrees, and the said provisions cannot be extended to appeals arising from such proceedings. To such appeals the provisions of Rule 11 apply with the result that they are subject to all the provisions of O. XXII including Rules 3, 4 and 8. Besides, on principle exclusion of the operation of the provisions of Rules 3, 4 and 8 to proceedings in execution can be easily appreciated. For executing a decree several applications can be filed by a decree-holder one after the other, save and except for the bar of res judicata and limitation. In such a case the application of the rules as to abatement to such proceedings could hardly be justified. The position with regard to appeals is, however, not the same. As against a final order passed in execution proceedings there can be only one appeal. That being so, it is not at all surprising that the provisions of Rules 3, 4 and 8 are made inapplicable to proceedings in execution though they apply to appeals arising from orders in proceedings in execution. Incidentally it may be mentioned that it has been the consistent practice of this Court to treat appeals in execution proceedings as being subject to the provisions of Rules 3 and 4 of O. XXII. This question has been the subject matter of judicial decisions in all the High Courts of this country and it appears that except for the Patna High Court all the other High Courts have taken the view that appeals in execution proceedings do not fall within the provisions of O. XXII, Rule 12, and that to such appeals the rules as to abatement contained in Rules 3 and 4 of the said order apply: *Rajah of Kalahasti v. Jagannadha Rayanimgar* I.L.R.(1832) Mad. 1006 *Sundayee Ammal v. Krishnan Chetti* I.L.R. (1928) Mad. 858 *Cheda Lal v. Aijaz Hussani* I.L.R.(1936) Lah. 80 dissenting from *Mir Khan v. Sharfu* A.I.R[1923] . Lah. 560 *Babu Jagdish Bahadur v. Mahadeo*

Prasad (1940) I.L.R. 15 Luck. 580 Mt. Aman Khatun v. Abdul Basool A.I.R.[1938] Sin 239 Shree Madhorao Narayanrao Ghatate v. Yadorao [1939] Nag. 119 Chhanga Mal v. Ram Dularey Lel I.L.R.(1983) All. 509 Baksh Ali v. Sarat Chandra : AIR1919 Cal1053 . Even as regards the Patna decision Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh I.L.R(1929) Pat. 372. it may be pointed out that the question was considered by a Full Bench. Kulwant Sahay and Macpherson JJ. held that Rule 12 of O. XXII applies to appeals arising from orders passed in execution proceedings, with the result that Rules 3 and 4 of the said Order do not apply to such appeals. Das J., however, took a contrary view and held that the appeals arising in execution proceedings cannot properly be regarded as proceedings in execution, and that the rules of abatement contained in Rules 3 and 4 of O. XXII could not apply to such appeals. Kulwant Sahay J. delivering the judgment of the majority view observed that no decided case had been brought to his notice and: that he was not aware of any in which it had been held that Rules 3 and 4 of O. XXII apply to appeals in proceedings relating to the execution of a decree. It, however, appears that the decision in Sundayee Ammal v. Krishnan Chetti, in which the Madras High Court had indicated preference for the view that rr. 3 and 4 of O. XXII could not apply to execution appeals, had been cited in the arguments. Subsequent to this decision of the Patna High Court this question has been considered by all the other High Courts in this country and as I have said above all of them have accepted the view of Das J. Thus there is a clear consensus of judicial opinion in favour of the view that the provisions as to abatement contained in Rules 3 and 4 of O. XXII apply to appeals arising in execution proceedings. That being so, it must be held that the application made by Mr. Desai is subject to the provisions of the Indian Limitation Act, Article 177, and that if the delay made by him in making the present application is not excused, the appeal will abate as regards the deceased respondent. Mr. Desai has contended that there are sufficient grounds for excusing the delay made by his client in Making the present application. The application undoubtedly has been made more than five months after the death of the respondent. Mr. Desai, however, contended that it was not satisfactorily shown that his client, appellant No. 1, knew about the death of respondent No. 1, and he argued that once the respondents were served it was not the duty of the appellants to be on the look out as to the whereabouts of

the respondents all the time. The affidavit of the legal representatives of the deceased respondent, however, clearly shows that the death of the deceased respondent was known to appellants Nos. 2 and 3, in any event. It also appears that all the three appellants are brothers and it is very unlikely that if appellants Nos. 2 and 3 knew about the death of respondent No. 1 immediately after the event that appellant No. 1 would not know about it for five long months. Besides it was also the duty of appellants Nos. 2 and 3 to have applied to bring the heirs of the deceased respondent on the record in time, That being so, we think the petitioner has shown no satisfactory or sufficient reason why the delay made by him in making the present application should be excused. The application is, therefore, dismissed with costs.

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