

Nand Rani Vs. Civil Judge, Junior Division and ors.

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Court : Allahabad

Decided On : Feb-23-2004

Reported in : AIR2004All307

Judge : Janardan Sahai, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 22, Rule 5

Appeal No. : C.M.W.P. No. 37698 of 1999

Appellant : Nand Rani

Respondent : Civil Judge, Junior Division and ors.

Advocate for Def. : J.N. Tiwari, Adv. and ;G.L. Tripathi, S.C.

Advocate for Pet/Ap. : K.K. Arora, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Janardan Sahai, J.

1. A decree for eviction in favour of Seo Shankar Lal against Lal Behari was passed in suit No. 36 of 1964. The decree was put into execution by Sheo Shanker Lal. Sheo Shanker Lal died during the pendency of the execution

proceedings. An application was filed by the 2nd respondent Rama Devi for substitution in his place. The application was allowed by the order dated 26-4-91 of the executing Court. Lal Behari filed a revision No. 26 of 1991 against this order. The revision was dismissed on 6-4-1995, It appears that an application dated 6-11-96 was then filed by the petitioner for substituting her name in place of the deceased decree holder Sheo Shankar Lal and for striking off the name of respondent No. 2 Smt. Rama Devi. Objections were filed to this application by the 2nd respondent. The petitioner also filed another application for cross-examining the 2nd respondent, Smt. Rama Devi. Both the applications of the petitioner for substitution as well as for cross-examination were rejected by the executing Court by its order dated 3-12-97. Against this order, a revision was preferred by the petitioner, which was dismissed on 16-7-99. Both the order are under challenge in this writ petition.

2. It is submitted by Sri K.K. Arora counsel for the petitioner that the petitioner is the sister of the deceased Sheo Shanker Lal and a preferential heir to the 2nd respondent and therefore ought to have been substituted in place of the deceased decree holder. He submits that the application for substitution filed by the petitioner was an application falling under Section 47(3) of the CPC and separate suit being barred by Section 47(1), Civil Procedure Code the matter ought to have been decided after full opportunity to the parties to adduce oral evidence also and not on affidavits alone and the petitioner's application for cross-examination was therefore erroneously rejected.

3. If the determination of the heirship would affect the rights of the parties to succession and a separate suit is barred there may be some merit in the petitioner's contention that opportunity to lead oral evidence and of cross-examination ought to have been provided. In order to determine whether the application filed by the petitioner falls within the ambit of Section 47(3), Civil Procedure Code it is necessary to determine the scope of Sub-sections (1) and (3) of Section 47.'

4. Sub-section (1) of Section 47 confines the scope of the objections to questions arising between the parties to the suit relating to execution discharge or

satisfaction of the decree. In this case the judgment debtor was the first to raise an objection that the respondent No. 2 Rama Devi was not entitled to represent the deceased decree holder. However, the executing Court as I have already observed had allowed her to be substituted after contest with the judgment debtor. Against that order a revision was filed by the judgment debtor, which too was dismissed on 6-4-1995. Thus the matter between the judgment debtor and Rama Devi has become final.

5. The present proceedings have subsequently been instituted by the petitioner who claims to be the heir of the decree-holder alleging herself to be the sister of the decree-holder. The issue, therefore, which has arisen is between two persons claiming a right to represent the deceased decree holder. Neither the petitioner nor the respondent No. 2 is a party to the suit. In such a situation the dispute about the right of representation is not really between the parties or with even one of the parties to the suit but between two sets of persons claiming to represent one of the parties, namely, the plaintiff decree holder. It is a dispute about who is the legal representative. In such a situation the provisions of Section 47 are not applicable as that provision applies only to a dispute between parties to the suit. Sub-section (3) of Section 47 provides that 'where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of this section be determined by the Court.' The words of this sub-section make it clear that the determination is to be for the 'purposes of Section 47. The purpose of Section 47 is the decision of questions arising between parties to the suit or their representatives and relating to execution discharge or satisfaction of the decree. Now the question whether a person is a representative of a party when raised by the other party to the suit would be covered under Sub-section (1) of Section 47 as it would be a decision between the representative of one party on the one hand and the other party on the other hand. But where the dispute between two persons claiming to be the legal representative of one party arises on the death of that party the dispute is not one between two parties to the suit or between a representative of one party on the one hand and the other party to the suit on the other hand and hence would not be a dispute covered under the scope of Section 47(1) or of Section 47(3), Civil Procedure Code. Thus where a judgment-debtor challenges the right of a person claiming to be the representative of the decree-

holder, he is challenging the right of such person to execute the decree and a question relating to execution therefore arises between the parties to the suit but a dispute between two persons claiming to be the legal representative of the decree-holder in which the judgment-debtor is not interested would not be a dispute between the parties to the suit or with any party to the suit at all and hence would not be covered under Section 47. I am fortified in the view that I take by the Division Bench decision of this Court in *Shankar Lal v. Shyam Sunder Lal* : AIR1934 All730 .

6. However, even though such a controversy may not be covered within the scope of Section 47(1) or Sub-section (3) thereof but when a dispute between persons claiming a right to representation to the estate of a deceased party arises the question would be under what provision such a dispute is to be resolved. To such a dispute the provisions of Order 22, Rule 5 of the Civil Procedure Code would be applicable. The dispute between a transferee with his transferor who is a party in the suit may however be on a different footing because the transferor is a party to the suit and a dispute whether he represents the transferor would have to be resolved. An order determining the legal representative of the estate of the deceased under Order 22, Rule 5, Civil Procedure Code does not operate as res judicata in separate title proceedings. Reference may be made to *Mahendra Kaur v. Piara Singh* in which a large number of decisions were considered including the Full Bench decision in , *Zalim v. Tirlochan Prasad Singh*. An elaborate enquiry, therefore, need not be held under that provisions and a summary enquiry would suffice. Indeed Section 47(3), C.P.C. does not provide otherwise. Even a decision under Section 47(3) as to who is entitled to represent a party is final for the purposes of Section 47 in view of Section 47(3), Civil Procedure Code.

7. Sri J. N. Tiwari, learned counsel for the respondents relied upon a decision of the Apex Court in : AIR 1997 SC1812 , *Gangabai Gopaldas Mohata v. Fulchand* in which it has been held,

'Even a transferee pendente lite is the representative of his transferor within the meaning of Sub-section (3) of Section 47. One who claims to be a transferee by operation of law would as well be a representative and if his claim to be a

representative is disputed either by the opposite party or by the party under whom he claims, such dispute must also be resolved by the executing Court itself. The word 'representative' used in Section 47 is obviously much wider than the words 'legal representative' used in Section 50 of the Code.'

8. In paragraph 9 of this judgment it has been held that if a person approaches the execution Court claiming that he is the representative of the decree-holder's interest in the decree and the decree-holder disputes it, the execution Court has to resolve the dispute for proceeding with the execution of the decree and that the view of the learned single Judge of the High Court of Bombay that the Court has only a limited jurisdiction is, therefore, not in consonance with the wide language employed in Section 47 of the Code.

9. The situation in respect of which the observations were made by the Apex Court was different. The question there involved was as to whether the transferee was the representative of the party or not. The dispute was with a party to the suit itself. In the present case the dispute is about the legal representative of a deceased party. There is no dispute with any party to the suit. The Apex Court in that case was not deciding a dispute regarding the legal representative of a deceased decree-holder and in fact has specifically noticed the difference between the wide connotation of the word 'representative' used in Section 47 and 'legal representative' used in Section 50, Civil Procedure Code. Section 47, C.P.C. does not apply to a case where a dispute is raised between persons claiming a right to represent the estate of the deceased party. In such a situation, however, Section 50, Civil Procedure Code and Order 22, Rule 5, Civil Procedure Code would be applicable. Order 22, Rule 12 provides that Rules 3, 4 and 8 of Order 22 will not apply to execution proceedings. However, that does not mean that there can be no substitution in execution proceedings. In *Bhagwan Das v. Jugal Kishore*, AIR 1920 Allahabad 171 the Division Bench interpreted these provisions and held :

'Rule 12 distinctly shows that this rule shall not apply to execution proceedings i.e. that it is not compulsory upon a decree-holder to have the names of the heirs brought upon the record in that way on penalty of his decree abating.

It is open to him to apply under Sec. 50 of the Act for execution of his decree as against the heirs. But there is nothing in the Civil Procedure Code which lays it down that a Court cannot bring the heirs of a judgment-debtor upon the record in execution proceedings and continue with them, nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution proceeding shall abate.

10. This interpretation is fortified by the fact that Order 22, Rule 5 has not been excluded under Order 22, Rule 12. An enquiry for purposes of determining the legal heir of a deceased party can be summary. Elaborate proceedings like those in a civil suit need not be held because the determination is only for the purposes of the case being conducted and does not determine any right to succession. In the circumstances, the finding recorded in the revision that opportunity was given to the petitioner appears to be correct. The order passed by the Courts below does not suffer from any error, which may call for interference.

11. Sri J. N. Tiwari, learned counsel for the respondents drew my attention to the fact that in the revision of the judgment-debtor against the order allowing the substitution application of Rama Devi an application was filed by the petitioner to be impleaded as a party. The revisional Court has rejected the said application and that order has become final. He also submitted that the petitioner has earlier filed an application for impleadment, which was rejected and the order has become final. He relied upon : [1997]1SCR856a , R. P. A., Vallima v. Palanichami Nadar that successive applications are not maintainable. It has already been held in the impugned order passed in the revision that the order of dismissal of the application for impleadment filed by the petitioner in the earlier revision decided on 6-4-1995 has become final. Such a finality would operate only in respect of the right to represent the decree-holder in the present execution proceedings. The question as to whether the petitioner or the respondent No. 2 is heir of the decree-holder and is entitled to succeed to his property is open between the parties and this decision will not come in the way of the petitioner is raising it in a proper suit.

12. The writ petition lacks merit and is dismissed. Interim order if any, is vacated.

