

Kedar Ram Vs. Additional District Judge li and ors.

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Court : Allahabad

Decided On : Sep-26-2003

Reported in : AIR2004All197

Judge : Ashok Bhushan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 146 - Order 21, Rule 1

Appeal No. : C.M.W.P. No. 3940 of 1991

Appellant : Kedar Ram

Respondent : Additional District Judge li and ors.

Advocate for Def. : L.P. Singh, Adv. and ;O.P. Singh, S.C.

Advocate for Pet/Ap. : V.K.S. Chaudhary and ;V.V. Misra, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Ashok Bhushan, J.

1. Heard Sri V.K.S. Chaudhary, learned Senior Advocate appearing for the petitioner and Sri L.P. Singh, the learned counsel appearing for the respondent Nos. 3 to 6.

2. By this writ petition the petitioner has prayed for quashing the order dated 18-12-1990 passed by the II Additional District Judge, Ballia in Miscellaneous Appeal No. 252 of 1988 and the order dated 24-12-1985 passed by the Munsif, Ballia on Miscellaneous Application filed in Execution case o. 58 of 1967.

3. Facts in brief which emerge from the pleadings of the parties are;-----

Original suit No. 481 of 1953 was filed by Baldeo against Puranwasi Ram for possession of Khandahar situated in Mohalla Gorayasthan Rasra Town, Pargana Lakhneshwar. District Ballia. The suit was decreed by the learned Munsif vide its judgment dated 11-12-1954. Baldeo died leaving behind his two sons Gauri Shanker and Vishwa Nath as his heirs. Gauri Shanker and Vishwa Nath sold the said Khandahar in favour of Durbal Ram by sale deed dated 30-4-1958. Against the judgment and decree dated 11-12-1954 an appeal was filed by Puranwasi Ram which was dismissed by the District Judge, Ballia on 25-8-1958. Second Appeal against the judgment and decree dated 25-8-1958 passed by the District Judge, Ballia was filed in this Court being Second Appeal No. 3131 of 1958 (Puranwasi Ram v. Gauri Shanker and Vishwa Nath) which was dismissed by this Court vide its judgment and decree dated 17-1-1966. Durbal Ram did not file any application in the First or Second Appeal to be substituted in place of Gauri Shanker and Vishwa Nath on the basis of the sale deed dated 30-4-1958. An Execution Application was filed by Gauri Shanker and Vishwa Nath for executing the decree passed in Original suit No. 481 of 1953 which was dismissed in default on 3-8-1966. On 4-4-1967 Gauri Shanker and Vishwa Nath filed second Execution Application which was registered as Execution Case No. 58 of 1967. A suit was filed by the Zamindar against Gauri Shanker and Vishwa Nath which was dismissed. The Execution case No. 58 of 1967 which was stayed for some time was ultimately consigned. Durbal Ram on 27-5-1978 filed an application under Order XXI Rule 16 C. PC. in Execution case No. 58 of 1967 praying that Durbal Ram be substituted in place of Gauri Shanker and Vishwa Nath as Decree holder and execution proceedings be proceeded through Durbal Ram. The said application was objected and was dismissed by the learned Munsif on 23-1-1982. Again an application was filed by Durbal Ram on 25-1-1982 for amendment of his application under Order XXI Rule 16 Code of Civil Procedure by addition of word

'Sections 144 and 146 of Code of Civil Procedure'. This amendment application was dismissed on 26-2-1982. A Civil Revision No. 52 of 1982 was filed against the order which was also dismissed on 22-11-1982. Learned Munsif ultimately considered the application filed by Durbal Ram under Order XXI Rule 16 Code of Civil Procedure and allowed the application of Durbal Ram on 24th December, 1985 and amended the execution application as prayed. The date was fixed for further proceedings in the execution application. An appeal was filed by the petitioner against the order of the learned Munsif dated 24-12-1985. The said appeal was dismissed by the Additional District Judge by the order dated 18-12-1990. This writ petition has been filed by the petitioner challenging the aforesaid orders dated 24-12-1985 passed by the Munsif and the order dated 18-12-1990 passed by the II Additional District Judge.

4. Sri V.K.S. Chaudhary, learned Senior Advocate, challenging the impugned orders raised following submissions in support of the writ petition :--

1. Durbal Ram purchaser-in-interest of the respondent Nos. 3 to 6 was not entitled to file an application under Order XXI Rule 16 Code of Civil Procedure in view of the fact that he was not assignee of the decree. The Execution Application filed by Gauri Shanker and Vishwa Nath had already been dismissed. Durbal Ram could not be allowed to revive the Execution Application filed by decree holders. Reliance has been placed on the judgment of the Apex Court in AIR 1955 SC 376 Jugalkishor Saraf v. Raw Cotton Co. Ltd.

2. Durbal Ram being purchaser of suit property by the deed dated 30-4-1958 could have filed an application for execution under Section 146 Code of Civil Procedure and they having been failed to file an application of execution within the limit, they had no right to maintain an application under Order XXI Rule 16 Code of Civil Procedure.

5. Sri L.P. Singh Learned counsel appearing for the respondents refuting the submissions of the counsel for the petitioner contended that the application filed by Durbal Ram was fully maintainable and the Courts below have taken correct view of the matter. He further contended that in suit filed by the Zamindar being suit No. 161 of 1966 execution of decree was stayed during pendency of the suit and

appeal. Reliance was placed by the learned counsel for the respondents on a case reported in : [1980]2SCR469 Dhani Ram Gupta v. Lala Sri Ram,

6. I have considered the submissions of counsel for both the parties and perused the record.

7. The question which needs consideration in the present case is as to whether application filed by Durbal Ram on 27-5-1978 for permitting him to be substituted in the Execution Application filed by Gauri Shanker and Vishwa Nath being Execution Case No. 58 of 1967 was maintainable and whether the Courts below have rightly allowed the said application. Order XXI Rule 16 Code of Civil Procedure as amended by the Act No. 104 of 1976 is as quoted below:--

'16. Application for execution by transferee of decree,----- Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court (which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

(Explanation,-----

Nothing in this rule shall affect the provisions of Section 146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.)'

8. Rule 16 as quoted above provides that where the interest of any decree holder in the decree is transferred by assignment in writing or by operation of law the transferee may apply for execution of the decree, two conditions which are necessary for applicability of Rule 16 is transfer of decree by assignment in writing or by operation of law. In the present case there is no transfer by assignment of decree in favour of Durbal Ram rather the case of Durbal Ram was that the property is dispute was sold by sale deed dated 30-4-1958 by Gauri Shanker and Vishwa Nath. Transfer of suit property is no akin to transfer of decree by assignment, Judgment of the Apex Court in Jugalkishore Sarafs case (AIR 1955 SC 376) (supra) has laid down that the transfer in writing of a property without in terms transferring the decree passed or to be passed in the suit in relation to that property does not entitle the transferee to apply for execution of the decree as a transferee of the decree by an assignment in writing within the meaning of Order XXI Rule 16. Following was laid down by the Apex Court in paragraph 8 of the judgment :--

'Section 8, T. P. Act, does not operate to pass any future property, for that section passes all interest which the transferor can 'then' i.e., at the date of the transfer, pass. There was thus no agreement for transfer and much less a transfer of a future decree by this document. All that was done by the transferors by that document was to transfer only the properties mentioned in Clause 1 together with all legal incidents and remedies. The properties so transferred included book debts. A book debt which was made the subject matter of the pending suit did not, for that reason, cease to be a book debt and, therefore, it was also transferred but no decree to be passed in respect of that book debt was in terms transferred. In such a situation there was no room or scope for the application of the equitable principle at all. The transfer in writing of a property which is the subject matter of a suit without in terms transferring the decree passed or to be passed in the suit in relation to that property does not entitle the transferee to apply for execution of the decree as a transferee of the decree of an assignment in writing within the meaning of Order 21, Rule 16. See--'Hansraj Pal v. Mukhrajji' 30 All. 28 (F) and--'Vithal v. Mahadeva', AIR 1924 Bom 426 (g). In my judgment the decree was not transferred or agreed to be transferred to the respondent company by the document under consideration and the latter cannot claim to be transferees of the

decree by an assignment in writing as contemplated by Order 21 Rule 16'.

9. The Apex Court in the above case while considering the provisions of Order XXI Rule 16 Code of Civil Procedure has also considered the provisions of Section 146 and following was observed in paragraph 59 of the aforesaid judgment.

'Order 21 Rule 16 provides for execution of a decree at the instance of a transferee by assignment in writing or by operation of law and enables such transferee to apply for execution of the decree to the Court which passed it. If a transferee of a decree can avail himself of that provision by establishing that he is such a transferee he must only avail himself of that provision. But if he fails to establish his title as a transferee by assignment in writing or by operation of law within the meaning of Order 21, Rule 16, Civil Procedure Code there is nothing in the provisions of Order 21, Rule 16 which prohibits him from availing himself of Section 146 if the provisions of that Section can be availed of by him. That is the only meaning of the expression 'save as otherwise provided by this Code.'

If a person does not fall within the four corners of the provision of Order 21, Rule 16, Civil P. C. that provision certainly does not apply to him and the words 'save as otherwise provided in this Code' contained in Section 146 would not come in the way of his availing himself of Section 146 because Order 21, Rule 16 cannot then be construed as an 'otherwise provision' contained in the Code, I am therefore of the opinion that if the Respondents could not avail themselves of Order 21, Rule 16, Civil P. C. they could certainly under the circumstances of the present case take the execution proceedings and make the application for execution of the decree passed by the city Civil Court in favour of Habib and Sons under Section 146, Civil P. C.'

10. Durbal Ram purchaser-in-interest of respondent Nos. 3 to 6 not being assignee of the decree and there being no case that the decree was transferred by operation of law, application of Durbal Ram under Order 21, Rule 16 Code of Civil Procedure was not maintainable and there was no right in Durbal Ram to prosecute the application under Order 21, Rule 16 of the Code of Civil Procedure.

11. It was open to Durbal Ram who claimed to be transferee of the property to file an application for execution of decree under Section 146 of Code of Civil Procedure. It has already been laid down by the Apex Court in Jugalkishore's case (AIR 1955 SC 376) (supra) that even if a transferee is not treated to be transferee of decree by assignment it is open to him to make an application under Section 146 Code of Civil Procedure, no application was filed by Durbal Ram under Section 146. One more aspect of the matter is relevant to note that the Original suit No. 481 of 1953 was decreed by the learned Munsif on 11-12-1954. First Appeal was dismissed on 25-8-1958 and the Second Appeal was dismissed by this Court on 17-1-1966. The limitation for filing execution application started running after dismissal of the Second Appeal by this Court on 17-1-1966. In case law of limitation permitted Durbal Ram to file a fresh application under Section 146 Code of Civil Procedure for execution of the decree there was no impediment in filing fresh application for execution. The application which was filed by the petitioner Durbal Ram under Order 21, Rule 16 of the Code of Civil Procedure praying for substitution of the name of Durbal Ram as decree holder in Execution case No. 58 of 1967 was beyond 12 years from the dismissal of the Second Appeal by this Court. Durbal Ram never filed any Application under Section 146 of Code of Civil Procedure for executing the decree and after 12 years of judgment of the Second Appeal (On 17-1-1966) filed an application under Order 21, Rule 16 of the Code of Civil Procedure for substituting his name in Execution Case No. 58 of 1967 as decree holder. Both the courts below have committed error in allowing the application of Durbal Ram under Order 21, Rule 16 of the Code of Civil Procedure. When Durbal Ram was not entitled to file an application under Order 21, Rule 16 of the Code of Civil Procedure he had no right to pray for revival of an execution application filed by the original decree holder. The application of Durbal Ram praying for maintaining his application by adding Section 146 Code of Civil Procedure also in his application has been rejected by the learned Munsif on 26-2-1982 which judgment was confirmed by the revisional Court on 22-11-1982.

12. The judgment relied by the counsel for the respondents of the Apex Court in Dhani Ram Gupta v. Lala Sri Ram : [1980]2SCR469 is not applicable in the present case. In the above case the Apex Court held that the decree was transferred by deed of assignment. The decree was assigned in favour of the

appellant of that case by decree holder and on that basis an application for execution was filed by the assignee of decree under Order 21, Rule 16 of the Code of Civil Procedure. Following was laid down by the Apex Court in paragraph 4 of the judgment :--

'4. We are unable to read Order 21, Rule 16 as furnishing any foundation for the basic assumption of the learned counsel for the respondent that property in a decree does not pass to the transferee under the assignment until the transfer is recognised by the Court. Property in a decree must pass to the transferee under a deed of assignment when the parties to the deed of assignment intend such property to pass. It does not depend on the Court's recognition of the transfer. Order 21, Rule 16 neither expressly nor by implication provides that assignment of a decree does not take effect until recognised by the Court. It is true that while Order 21, Rule 16 enables a transferee to apply for execution of the decree, the first proviso to Order 21, Rule 16 en- joins that notice of such application shall be given to the transferor and the judgment debtor and that the decree shall not be executed until the Court has heard their objections, if any, to its execution. It is one thing to say that the decree may not be executed by the transferee until the objections of the transferor and the judgment debtor are heard, it is an altogether different thing to say that the assignment is of no consequence until the objections are heard and decided. The transfer as between the original decree holder and the transferee is effected by the deed of assignment.'

13. Learned Munsif allowed the application of Durbal Ram with the observation that Durbal Ram acquired same right of execution of decree which was held by the decree holder. Learned Munsif lost sight of the fact that the application was required to be filed by Durbal Ram under Section 146 Code of Civil Procedure for execution of the decree which right he had, but he could not have been allowed to prosecute the application which was filed by the original decree holder.

14. The Appellate Court also without adverting to the question as to whether Durbal Ram could have maintained the application under Order 21, Rule 16 of the Code of Civil Procedure observed that same proceedings are permissible by transferee which were permissible to the decree holder. The Appellate Court has

noted the explanation appended to Rule 16 of Order 21 and observed that the provision of Section 146 of the Code of Civil Procedure will not be affected. The Appellate Court observed that the heirs of Durbal Ram had every right to get the decree executed under Section 146 of the Code of Civil Procedure. There cannot be any dispute with the proposition that the transferee had every right to file application under Section 146 Code of Civil Procedure but the fact of the matter in the present case is that no application under Section 146 C. P. C. has been filed by Durbal Ram for execution of the decree. The application if filed under Section 146 C. P. C. in question was moved by Durbal Ram on 27-5-1978 which was admittedly beyond 12 years after dismissal of the Second Appeal by this Court i.e. on 17-1-1966. Due to this reason Durbal Ram did not file application under Section 146 C. P. C. since execution of the decree at the instance of Durbal Ram under Section 146 C. P. C. could have been dismissed as barred by time. Limitation of execution of the decree in accordance with Article 136 of the Limitation Act, 1963 is 12 years from the date of decree to become enforceable. After the dismissal of the Second Appeal by this Court on 17-1-1966 decree became enforceable and the twelve years period came to an end on 16-1-1978. This was the reason that Durbal Ram did not choose to file application under Section 146 C. P. C. The application of Durbal Ram if filed on 27-5-1978 under Section 146 C. P. C. was liable to be dismissed as barred by time. In this view of the matter the transferee cannot be held entitled to move an application under Order XXI Rule 16 since by permitting him to do so will be permitting Durbal Ram to do a thing which was barred by time. As observed above, Durbal Ram had no right to move application under Order 21, Rule 16, C. P. C. for execution of the decree hence the application out of which the present writ petition has arisen being not maintainable was liable to be rejected. Both the Courts below have committed error in not advertng to this aspect of the matter and have allowed the application of Durbal Ram filed under Order 21 Rule 16 C. P. C. to revive execution application filed by the decree holder which was already consigned.

15. In view of the aforesaid the judgment and orders of the Courts below cannot be sustained and are liable to be set aside. The writ petition is allowed. The judgment and order dated 24-12-1985 passed by the learned Munsif and the judgment and order dated 18-12-1990 passed by the 2nd Additional District Judge,

Ballia are set aside. Parties shall bear their own costs.

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