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Court : Rajasthan

Decided On : Aug-19-1988

Reported in : 1988(2)WLN617

Judge : N.C. Sharma, J.

Appeal No. : S.B. Civil Revision Petition No. 346 of 1988

Appellant : Maina Devi

Respondent : Inder Singh and ors.

Advocate for Pet/Ap. : Mr. Sharma

Disposition : Petition dismissed

Judgement :

N.C. Sharma, J.

1. Heard, Mr. Sharma learned Counsel for the petitioner.

2. The only argument advanced by Mr Satish Sharma was that the decree in question was passed in favour of Jaswant Singh who was the predecessor-in-title of the non-petitioners. He invited my attention to Section 2(3) of the Code of Civil Procedure which defines the expression 'decree-holder' as meaning any person in whose favour a decree has been passed or an order capable of execution has

been made. On the basis of this definition of the expression 'decree-holder', it was contended that in the instant case Jaswant Singh was a decree-holder and he alone could make an application for execution of the decree. The learned Counsel referred to two decisions reported in (1) AIR 1940 Pat 472 and (2) AIR 1946 Bom 27. Both these decisions have no application what so ever to the facts of the present case. In the Patna case, on the death of Raja Prasad decree-holder, the petitioner made an application for execution stating that Raja Prasad was a benamidar' for them. Quite clearly a person who applies for execution of a decree alleging that he was 'benamidar' of the decree holder cannot be said to be a person to whom the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law and such a person does not fall within the purview of Order XXI Rule 16 CPC. In the Bombay case, an ex parte decree was passed in favour of Jeevabhai Maganlal, the father of the appellants against the firm Vanilal Manilal. In June 1928 the decree-holder died leaving behind him two sons, named Kantilal respondent No. 2 and Kirtilal the appellant, a widow and a brother's widow. In the application for execution Kantilal had described himself as a proprietor of the firm of Jeevabhai Maganlal. Through out the record of execution proceedings there was no suggestion by Kantilal that he was applying for execution as transferee of the decree. There was no specific declaration in the decree that the judgment-debt was a joint family asset and when Kirtilal applied to the court under Order 21, Rule 16, CPC he claimed to be the assignee from Kantilal. Kantilal neither applied for execution to recognise him as the transferee and, therefore, the question whether Kantilal was heir and legal representative of his father or whether he was surviving co-parcener was neither considered nor determined. As already stated that the capacity in which the appellant was executing the decree was not determined.

3. Order 21, Rule 16, CPC is quite clear. It provides, inter alia, that where a decree is 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. There is clear provision contained in Section 146 of the Code of Civil Procedure which provides that save as otherwise provided by this Code or by any law for the time being in force, where

any proceedings may be taken or application made by or against any person then the proceedings may be taken or the application may be made by or against any person claiming under him The non- petitioners are pet sons claiming under Jaswant Singh. It is not a case of transfer of decree in their favour but they are executing the decree as persons claiming under the deceased decree-holder. The provisions contained in Order 21, Rule 16, CPC do not affect the provisions of Section 146 CPC. The non petitioners were clearly entitled to file the execution application.

4. This revision has no merit in it and it is hereby dismissed in limine.

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