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Court : Kolkata

Decided On : Mar-06-1973

Reported in : AIR1974Cal246

Judge : A.K. Sarkar, J.

**Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 47; ;[Limitation Act, 1963](#) -
Schedule - Article 136**

Appeal No. : Suit No. 3367 of 1951

Appellant : Ramnath Das and ors.

Respondent : Saha Chowdhury and Co. Ltd. and ors.

Advocate for Def. : Pijush Kumar Dutt, Adv. Defendant No. 6

Advocate for Pet/Ap. : P.K. Roy, Adv.

Judgement :

ORDER

A.K. Sarkar, J.

1. This is an application for execution of a decree for costs by and on behalf of the defendants Nos. 1, 2 and 3 against the defendant No. 6. The relevant portion of the said decree dated 1st May. 1959 passed by A.N. Ray, J. as his Lordship then

was, appear from certified copy annexed to the Tabular Statement affirmed on May 2, 1972 as follows:--

'And it is further ordered and decreed that the plaintiffs and the defendants Sailesh Chowdhury and Shyamapada Chowdhury do pay to the defendants Saha Chowdhury and Co. Private Ltd. Prodyot Kumar Chowdhury and Sm. Satadal Basini Chowdhury their costs of this suit including the reserved costs and costs of Commission (to be taxed by the Taxing Officer of this Court and in taxing such costs the said Taxing Officer do tax the costs of commission as of hearing including fees to two advocates) this Court doth certify that this is a fit case for engaging two advocates.'

2. Mr. P.K. Roy, Counsel appearing in support of this application contended that the plaintiffs preferred an appeal from the said decree dated 1st May, 1959. The Appeal Court consisting of his Lordship. R.S. Bachawat as he then was and his Lordship C.N. Laik dismissed the appeal on June 7, 1962. affirmed the decree of the trial Court dated 1st May, 1959 except the order for costs made therein against the plaintiffs which, was set aside.

3. The decree for costs to be taxed by the Taxing Officer of this Court against the defendants Nos. 5 and 6 remained unaffected and the instant application is for execution of the said decree against the defendant No. 6 after the costs have been taxed by the Taxing Officer of this Court as between party and party and ascertained to be the sum of Rs. 18,538/- and 56 paise and an allocatur dated 14th August, 1963 was issued, a copy whereof has been annexed to the said Tabular Statement.

4. The applicants are the defendant No. 1, Saha a Chowdhury and Co. Private Ltd., the defendant No. 2 Prodyot Kumar Chowdhury and Abani Kumar Saha, the sole executor to the estate of defendant No. 3, Sm. Satadal Basini Chowdhury, since deceased. The said defendant No. 2 Prodyot Kumar Chowdhury has filed an affidavit for self and on behalf of the other decree holders affirmed on May 2, 1972 in support of the Tabular Statement also affirmed by him on the same day.

5. Mr. Pijush Kumar Dutt, the learned Counsel appearing on behalf of the judgment-debtor, defendant No. 6 opposed the application on the following grounds:--

6. Firstly, the defendants Nos. 3, 4, 5 and 7 have since died and the deceased defendants are not represented in this application. No notice has been served upon the heirs and legal representatives of the defendant No. 5, who was also liable to pay costs under the said decree.

7. Regarding the above objection, it is settled that on death after the decree the representation of the deceased defendants is not imperative unless the decree is sought to be executed against their estate. Further, the decree herein is not against any of the defendants Nos. 3, 4, 7 and is not sought to be executed against the estate of the defendant No. 5. In *Khatu Bai v. Khatija Bai*, : AIR 1973 AP35 it is held that, where the decree for costs is joint and several the decree holder can execute it against any or all of the judgment debtors and it is not necessary to implead all the judgment-debtors as respondents to the execution petition.

8. There is therefore no merit in the first objection raised by the learned Counsel opposing this application.

9. Secondly, the maintainability of the execution application is attacked on the ground that the decree sought to be executed was passed on 1st May, 1959. Under the new [Limitation Act, 1963](#), the time for obtaining certified copy of the decree cannot be excluded for computing limitation. The decree sought to be executed on 2nd May, 1972 is clearly barred by the law of limitation being made after 12 years from the said date of the decree.

10. Before the passing of the [Limitation Act, 1963](#) the limitation of time for execution of the decrees of the Chartered High Courts were governed by Article 183 of the old Act. In *Lala Baijnath Prasad v. Narsinghdas Gujarati* under the said Article 183 of the old Limitation Act, reported in : AIR1958 Cal1 , the Court of Appeal of this Court presided over by Chief Justice Chakravarti and Justice Sarkar as their Lordships then were, was of the view 'whatever may be the

position in the other Chartered High Courts no application for the execution of decree passed on the Original Side of this Court can be made, unless it is accompanied by a certified copy of the decree. The provision in that regard contained in Rule 10 of Chapter XVII of the Original Side Rules is imperative. The paragraph 12 of the said Report inter alia contains that, the decree-holder acquires a substantive right to the benefits decreed to him as soon as the decree is passed, but the procedural right to exploit the substantive right -- which only is the present right to enforce the decree -- does not accrue to him till he is in a position to apply for execution.

11. Article 136 of the new [Limitation Act, 1963](#) which governs the present application provides time for the execution of any decree or order of any Civil Court being twelve years 'when the decree or order becomes enforceable' etc. In the instant application, no ground has been made out for exclusion of the time for obtaining the certified copy of the decree, though I am of the view that the decree of the Original Side of this Court does not become enforceable until a certified copy of the decree has been obtained annexed to the Tabular Statement under the Rules of the Original Side of this Court even under Article 136 of the new Limitation Act of 1963.

12. The objection as to maintainability of the present application for execution of the decree on the ground of limitation has been made on other reasons also.

13. The learned counsel for the defendant No. 6, the judgment debtor herein, urged before me that the appeal preferred by the plaintiffs only and not by either defendant No. 5 or No. 6 from the said decree dated 1st May, 1959 was no bar on the part of the defendants Nos. 1, 2 and 3 to proceed to execute the said decree nor there was any legal impediment to seek to execute the decree either against the defendant No. 5 or against the defendant No. 6. There was in any event no stay of the operation of the said decree under Order 41, Rule 5 (1) of the Code of Civil Procedure.

14. It is true that an appeal shall not operate as a stay of proceedings under a decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the point for

consideration in the instant application is, was the decree sought to be enforced in such a form as to render it capable in the circumstances of being enforced? The Judicial Committee in *Maharaja of Darbhanga v. Homeshyar Singh* a case under Article 182 of Schedule 1 of the Indian Limitation Act, 1908 reported in 48 Ind App 17 = (AIR 1921 PC 31) held that the said Article applied only if the decree is in such a form as to render it capable in the circumstances of being enforced. Now the question before me is whether the decree sought to be executed herein is in such of form capable of being enforced immediately.

15. It is true that normally the date of the decree under Order 20, Rule 7 of the Code of Civil Procedure shall be the day on which the judgment is pronounced but Article 136 of the new [Limitation Act, 1963](#) provides that the time for execution of any decree is twelve years 'when the decree becomes enforceable.' In this case the decree is for payment of costs to be taxed by the Taxing Officer of this Court and certain directions were also given to the said Taxing Officer in the decree itself.

16. In my view therefore, the decree so far as it related to the payment of costs to the applicants was not enforceable until the amount of costs were ascertained upon taxation and the directions contained therein to the Taxing Officer were complied with.

17. Reliance was placed on a judgment of the Madras High Court in *Adusumilli v. Parvalaneni*, ILR (1955) Mad 498 where it was held that a decree for payment of costs, to be taxed, cannot be held to be a contingent decree. Having regard to the provision in Order XX, Rule 7 of the Code of Civil Procedure that the decree shall bear date the day on which the judgment was pronounced, limitation for execution of the decree runs from the date of the judgment and not from a latter date when the decree is actually prepared and signed. The decision of the Madras High Court was based on Article 182 of the Limitation Act of 1908 which did not apply to decrees of Chartered High Court. I am not inclined to follow the said decision in the facts and circumstances of the instant case.

18. An unreported judgment of Sankar Prasad Mitra, J. as his Lordship then was dated 10-9-1965 in *Siddeswar Ghosh v. Bellarilal Mitter* was produced before me.

From a close study of the said judgment it appears to me that His Lordship after discussing the decisions in various cases was of the view that a decree for taxed costs does not become enforceable until the amount of costs have been ascertained upon taxation. The costs awarded to the applicants were taxed on 14th August, 1963.

19. The next point taken by and on behalf of the defendant No. 6 is that the premises No. 1, Raja Nabakissen Street, Calcutta-5, in respect of which the statement and sale has been asked in this application for execution does not belong to the said defendant No. 6. By a deed of Settlement dated 24th July, 1953, one Debendra Nath Chowdhury deceased, the father of defendant No. 6 settled inter alia the said premises in trust for the benefit of the said defendant No. 6 and his heirs or legal representatives. The defendant No. 6 became a trustee upon the death of the settlor with his elder brother Dr. Sailesh Chandra Chowdhury deceased, the defendant No. 5 herein. It is contended that by reason of the premises, the defendant No. 6 being only a trustee has no personal and proprietary interest in the said premises.

20. No copy of the Deed of Settlement however, was produced nor annexed to the affidavit of the deponent. A copy of the Deed of Settlement was however annexed to the affidavit in reply filed on behalf of the applicants. It appears from the said copy of the Deed of Settlement that the settlor appointed his eldest son, said Dr. Sailesh Chandra Chowdhury and his fourth son Shree Shyamapada Chowdhury the defendant No. 6 herein to be the joint trustees after his demise to hold the trust properties inter alia the said premises No. 1. Raja Nabakissen Street, Calcutta-5, upon trust to convey and transfer absolutely amongst others the house and premises No. 1. Raja Nabakissen Street. Calcutta to Shyamapada Chowdhury, the defendant No. 6 or to his heirs or legal representatives. The settlor died in 1954.

21. Therefore in my view the contention of the defendant No. 6 that he is merely a trustee is incorrect and not true. The said property belongs to the defendant No. 6.

22. In the result the contentions on behalf of the defendant No. 6. the judgment-debtor herein fail. The application for execution of the decree is not barred by Law of Limitation and there will be an order in terms of prayer (1) of column 10 of the

Tabular Statement. Each party will pay and bear his own costs. Certified for counsel.

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