

Bipal Lal Vs. Dass

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Court : Himachal Pradesh

Decided On : May-04-1961

Reported in : AIR1962HP14

Judge : C.B. Capoor, J.C.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 42 - Order 21, Rule 28

Appeal No. : Civil Ex. First Appeal No. 2 of 1960

Appellant : Bipal Lal

Respondent : Dass

Advocate for Pet/Ap. : Mohinder Lal, Adv.

Disposition : Appeal dismissed

Judgement :

C.B. Capoor, J.C.

1. This appeal by the decree-holder is directed against an order of Shri N.D. Gupta, the then Additional Subordinate Judge Mandi whereby on a preliminary objection raised by the appellant it was held that the Court was competent to go into the question that the execution application was barred by the law of limitation.

2. The appellant had obtained a decree against the judgment-debtor in the Court of the Senior Subordinate Judge, Mahasu. The aforesaid decree was transferred to the District Judge, Mandi for execution who in due course transferred the case to the Additional Subordinate Judge, Mandi, for disposal.

3. An objection petition under Section 47 of Civil Procedure Code was filed by the judgment-debtor and one of the grounds of objection was that the execution application was barred by the law of limitation. On behalf of the appellant a preliminary objection was raised that the transferee Court was not competent to go into the question as to whether the execution application was filed within the prescribed period of limitation or not. That objection was overruled by the learned Additional Subordinate Judge and the correctness of that order has been challenged by this appeal.

4. The precise point that has been urged on behalf of the appellant is that the Court which had transferred the decree had recorded a certificate that a sum of Rs. 1,500/- had been paid towards the decree and the objection raised by the respondent judgment-debtor that the execution application was barred by the law of limitation was also based on the ground that no payment was made by him towards the decree and as such the Court which transferred the decree for execution should be deemed to have held that the decree was alive and that the execution application was within the prescribed period of limitation.

I required the learned counsel to read over to me the copy of the objection petition filed by the respondent and he very kindly did so and it appeared that the judgment-debtor had in one paragraph said that no payment was made by him towards the decree and in another paragraph that the execution of the decree was barred by the law of limitation. The aforesaid two paragraphs were independent of each other and it could not be said with any degree of certainty that the plea in bar was founded on the allegation that no payment was made by the judgment-debtor towards the decree.

5. On behalf of the appellant reliance has been placed upon the following rulings : *Paira Mal v. Mehr Chand*, AIR 1930 Lah 143, *Prayagdas Shankerlal v. Mt. Indirabai*, AIR 1948 Nag 189 and *Sundara Rao v. Appiah Naidu*, AIR 1954 Mys 1

(FB).

6. In the Lahore case referred to above the Court which had passed the decree had prepared a transfer certificate for a part of the decree and the question that was raised in the transferee Court and came up for decision before the High Court was as to whether a transfer certificate could be prepared in respect of a part of the decree. It was held that the executing Court was not justified in refusing to execute a part of the decree as directed in the transfer certificate. The aforesaid case is, therefore, clearly distinguishable from the facts of the instant case in which the question arising for decision is as to whether a transferee Court can go into the question if the application for execution is within the prescribed period of limitation or not.

7. In the Nagpur case it was inter alia held that the act of giving a certificate incorporating the extent of the decree or of the satisfaction is a judicial one and not merely ministerial and that a transferee Court in which execution is taken out cannot go behind the certificate. This ruling also is not applicable to the instant case inasmuch as the Court below has not gone into the question of the effect of the certificate of transfer and the only point on which it had expressed its opinion was as to whether being a transferee Court it was within its competence to entertain the plea that the execution application was barred by the law of limitation or not.

8. In the Mysore case it was held that question relating to the executability of decree such as limitation can be raised and decided in the Court which passed the decree when transfer is applied for. The aforesaid, if I may say so with respect, is a correct statement of law. The Court in which an application is made for the transfer of a decree can go into the question if the decree is alive or not but if it does not do so and such a question is raised in the Court to which the decree is transferred that Court will be competent to decide it. The aforesaid Mysore case is not an authority for the proposition that it is not within the competence of a transferee Court to decide as to whether an execution application was filed within the prescribed period of limitation or not. There is nothing in Order 21, Rule 6, Civil P. C., to indicate that it is obligatory on a Court transferring a decree to see if the

decree was alive or not. That rule enjoins upon the Court to send to the Court to which the decree is to be transferred (a) a copy of the decree, (b) a certificate setting forth either that satisfaction of that decree has not been obtained or where the decree has been executed in part the extent to which satisfaction has been obtained and (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

It is significant that according to Rule 10 of Order 21 the application for execution has to be filed in the transferee Court and the Court transferring the decree cannot possibly judge as to whether the application for execution that may be filed in the transferee Court will be within or beyond the period of limitation. Order 21, Rule 28, Civil P. C., does not prohibit the transferee Court from going into any question that may be raised before it. It merely provides that if any order relating to execution of the decree has been made either by the Court which passed the decree or a Court of appeal it shall be binding on the Court to which the decree is transferred for execution.

9. In the case of Noor Muhammad v. Mahmud Khan Fayaz Khan, AIR 1930 All 699, a decree was transferred to a Court of Small Causes for execution: after holding that the execution of the decree was within time. The aforesaid finding was, however, given behind the back of the judgment-debtor. On behalf of the decree-holder it was argued that the order of the transferor Court operated as res judicata. The contention was repelled and it was held that a decision arrived at behind the back of one of the parties cannot have the effect of res judicata. Relying upon Section 3 of the Indian Limitation Act, it was further held that the transferee Court had the jurisdiction to decide the question of limitation.

10. In the case of Raichand Amulakh v. Gandhi Manekchand Rughnath, AIR 1956 Sau 1, it was held by Shah, C. J. that the order transmitting a decree is a ministerial and not a judicial order and the transferee Court has the jurisdiction to enquire into the question of limitation and in fact it is its duty to determine whether the application for execution made to it is within limitation or not.

11. It may, therefore, be safely concluded that subject to the provisions of Order 21, Rule 28 of Civil Procedure Code it is within the province nay it is the duty of the

transferee Court to give its decision on the plea based on the law of limitation if such a plea is raised before it.

12. I, therefore, see no reason to set aside the order of the Court below. Lest there be any misunderstanding I want to make it clear that I have not and should not be understood to have expressed any opinion on the effect of the certificate recorded by the transferor Court under Order 21, Rule 6, Civil P. C., and it will be open to the Court below to express its opinion on that question if it is raised.

13. The appeal is devoid of merits and is dismissed. No order is made as to costs as the respondent neither appeared in person nor was represented by a counsel.

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