

(1911) 02 AHC CK 0019

Allahabad High Court

Case No: None

L. Payne and Co.

APPELLANT

Vs

Brahmdeo and Another

RESPONDENT

Date of Decision: Feb. 1, 1911

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 53

Citation: 9 Ind. Cas. 800

Hon'ble Judges: Tudball, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Tudball, J.

This appeal arises out of an application for execution of a decree. The appellant company obtained a decree on the 13th of May 1908 against one Hafiz Karim Bakhsh. This was a simple money-decree Hafiz Karim Bakhsh had on the 19th August 1904 obtained a decree for sale upon a mortgage against the respondents Bharamdeo and Bachcha Rai. On the 24th: of August 1907 he obtained an order absolute and then died. On the 5th of April 1909 an application for execution of that decree was made in due form in the name of Musammat Kariman Bibi, the widow of Hafiz Karim Bakhsh She filed no succession certificate and the Court called upon her to offer proof of heirship and demanded the necessary fees. Default was made and the application was ordered to be returned to her. It was not, however, returned but remained on the record. After this, the appellant company attached that decree in execution of its own decree against Hafiz Karim Bakhsh and proceeded to put the mortgage-decree into execution in the manner provided by Order XXI, Rule 53. Objections were filed by the respondents who raised the following pleas: (1) that the execution of the decree was barred by time, (2) that the former application for execution was irregular and had been dismissed for default, and, therefore, did not save limitation. Both the Courts below have ruled that the application of the 5th of

April 1909 was not an application made in accordance with law because it was presented by a person who had, in the absence of a succession certificate, no locus standi, and it cannot, therefore, be regarded as a proper application to save limitation, and it was simply null and void. It was on this ground alone that the lower Courts have rejected the application for execution of the decree, and on appeal it is urged that both the lower Courts have erred, and that in view of the ruling of this Court in *Mangal Khan v. Salim Ullah Khan* 16 A. 26 it is quite clear that the decisions of the lower Courts cannot be upheld. Granting that the application was made by Musammat Kariman, and that she was the widow of Hafiz Karim Bakhsh and as such his heir, the absence of a succession certificate or other proof of heirship on the date on which that application was filed would not make that application one which was not in accordance with law. It might, no doubt, be necessary for the heir of a decree-holder to produce a succession certificate or to meet the demand of the Court when asked to produce evidence of his heirship. But his application made in the form and in the manner in which the application of 5th April 1909 was made would be one made strictly in accordance with law. On behalf of the respondents it is, however, urged before me that there is nothing to show that this application of 5th April 1909 was made by Musammat Kariman Bibi, or even that Musammat Kariman Bibi is heir to Karim Bakhsh, and as such entitled to apply for execution of the decree. This argument raises a pure question of fact. In my opinion, the grounds of objections filed to the execution of the decree now here raise this question at all. The first plea was merely One of limitation. The second plea was that the former application for execution was an irregular one and had been dismissed for default. No evidence was offered nor was an issue raised on the point and I cannot in second appeal allow a question to be raised which is a pure question of fact and which was not raised in the Court below, and on which no issue was framed and no evidence taken. If the objectors had wished to do so they could have taken this plea clearly and openly in the lower Court which would have gone into evidence upon the matter.

2. The next point raised on behalf of the respondents is that on the date on which the appellant company obtained its decree i.e., on the 13th of May 1908, the company could under the law as was understood in these provinces [vide *Delhi and London Bank Ltd. v. Partab Singh* 28 A. 771 : III L.L.J. 585 (F.B.); A.W.N. (1906) 237 : 1 M.L.T. 247] only attach and put to sale the decree which Hafiz Karim Baksh had obtained against the present respondents, that on that date the appellant company had no right whatsoever to attach and put into execution the aforesaid decree, that the present CPC came into effect from the first of January 1909, that the appellants' right as to the method of executing their decree was a substantive right which could not be altered or affected by the new Act, and, therefore, the appellant cannot take advantage of the new law and has no right whatsoever to put into execution the present decree. It is urged that the appellants had a vested right under their decree to attach and sell the decree of 19th August 1904, and that that vested right cannot

be altered or increased by subsequent legislation which has no retrospective effect. In my opinion this contention is not a sound one. The appellant-company had under their decree merely a right to recover their debt from the estate of their judgment-debtor in any of the various methods laid down by the law. One of those methods was by the attachment and sale of the present decree. The new Civil Procedure Code, if anything, merely altered the method in which the money was to be recovered. The decree-holder had no vested right in the procedure laid down by law for the execution of his decree. In my opinion the matter was one of procedure and not of substantive right. It is quite clear to me that the appellant-company are entitled to put this decree into execution and that the application for execution is not barred by limitation. The application of 5th April 1909 was one made in accordance with law and did save time. I, therefore, admit the appeal and set aside the orders of the Courts below. The application for execution will be restored to its original number in the Court of first instance, and the Court will proceed to execute it in accordance with law. The appellants will have their costs in all Courts including in this Court fees on the higher scale.