

(1960) 01 MP CK 0019

Madhya Pradesh High Court (Indore Bench)

Case No: Miscellaneous Appeal No. 55 of 1958

Manohar Bhima Sirvi and

Another

APPELLANT

Vs

Gangaram Varmaji Tamoli

RESPONDENT

Date of Decision: Jan. 4, 1960

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47

Citation: AIR 1960 MP 232 : (1960) JLJ 961 : (1960) 5 MPLJ 756

Hon'ble Judges: H.R. Krishnan, J

Bench: Single Bench

Advocate: Chafekar, for the Appellant;

Final Decision: Dismissed

Judgement

H.R. Krishnan, J.

This is an appeal by the legal representatives of one Bhima from the order of the first appellate court, allowing the appeal of the opposite party. That was from the order of the executing court allowing Bhima's representatives to execute the decree in a suit, passed by the first appellate court (District Judge, Mandleshwar) on the finding that the High Court's second appellate decree was not binding on these applicants, as the second appeal itself had abated as against Bhima, their predecessor in interest. The first appellate court's decision on this was that it could be considered only by the High Court before whom, it was alleged, that the appeal had abated, and not by the executing court which is competent only to execute the decree made finally in that litigation.

The relevant facts, which are complicated, can be summarised thus: Many years ago, one Ghisa Sirvi purchased certain lands, the identity of which is not in dispute, in a court-auction for a sum of Rs. 2025/-. He died leaving three sons, namely Sarat, Jiwa and Bhima and the widow, Navlibai. One Gangaram Tamoli brought a possessory

suit against them and recovered possession of the property, his own allegation being that though Ghisa was the nominal purchaser with the sale certificate in his name, he was only a benamidar for Gangaram and it was Gangaram that continued in possession till dispossessed by the heirs of Ghisa. Any way, after the decision of the possessory suit, the heirs of Ghisa brought a regular title suit for a declaration of their title to the suit lands and restoration of possession (C. O. S. No. 28 of 1.944 before the Munsiff Burwaha).

This suit was decreed in favour of the plaintiffs on 21-3-1946 and they obtained delivery of possession forthwith. Gangaram in his turn, filed an appeal (C. R. A. No. 101 of 1946 before the District Judge Mandleshwar). The appeal was allowed in part in the sense that the declaration and possession in favour of the plaintiffs was now made conditional to their repayment to Gangaram a sum of Rs. 2025/- which the first appellate court had found had been contributed by him to the auction purchase by Ghisa. From this again, both the parties went to the High Court in second appeal.

The plaintiffs, that is, the heirs of Ghisa (including Bhima) filed the second appeal (No. 9 of 1948, which was subsequently renumbered as 47 of 1948 in the Madhya Bharat High Court) and Gangaram a cross-objection, the longer claiming that the condition of payment of Rs. 2025/- should be cancelled, and the latter that he should be allowed to keep the property and the suit should be dismissed in toto.

The appeal and the cross-objection came up for hearing on 4-10-1948, and again on 22-10-1948 and were ultimately disposed of by the High Court on 25-10-1948 allowing the cross objection and dismissing the appeal of the plaintiff and ordering the dismissal of the suit in toto. There was a prayer by the appellants, that is, the plaintiffs' counsel for a rehearing and the entire matter was reheard and ultimately disposed of on 31-3-1949 with the same results, that is, the total dismissal of the suit.

In 1949, the appellants in this miscellaneous appeal, namely, the son and the widow of Bhima, filed an application before the Munsif Burwaha for the execution, not of the High Court's decree of 31-3-1949, but of the first appellate Court's decree of 15-11-1947 allowing the suit of Bhima, his brothers and his mother on condition of payment of Rs. 2025/- to Gangaram. This apparently extra ordinary step was justified by them on the ground that while the second appeal was pending before the High Court and even before the hearing had begun, Bhima was dead on 28-9-1948 and had not been substituted either as an appellant in the main appeal or as a respondent in the cross-objection.

They contended therefore, that the second appeal had abated, and wholly abated as the interest of the plaintiffs throughout was joint and non-apportionable. Since the second appeal had abated, their theory was that the High Court's decree was null and thus the first appellate court's (District Judge's) decree being in force was to be executed. The executing court accepted this contention and by its order dated

17-12-1951 allowed the application of the present appellants and held that the second appellate court's decree was not binding on them. The practical effect is that they would be entitled to deposit Rs. 2025/- and get the lands.

From this order, Gangaram filed an appeal which was numbered C. R. A. No. 108 of 1952 in the district judge's Court, Mandleshwar. After some time, he died and his appeal was pursued by his daughter and legal representative. Now the District judge has held that whatever the merits of the contentions raised by Bhirna's heirs, the trial or the executing court had no jurisdiction to consider them. As far as that court was concerned, the High Court's decree was there, and it is only for the High Court to decide whether or not its decree has become void and inoperative in view of abatement, in other words, whether the appeal had abated at all and again, if it had abated, whether it abated in its entirety or only in part. So it allowed the appeal.

From the decision, the heirs of Bhima, that is Manohar and his mother, have come up in second appeal with the contention that after all, it was a controversy between on the one hand, the legal representatives of a party to the suit in which the decree was passed, and on the other, the legal representatives of another party to the same suit. Therefore, it had to be decided by the court executing the decree, that is to say, the original trial court and not by any other court.

The opposite party, namely, Gangaram's legal representative urges that this is really not a matter relating to the execution, discharge or satisfaction of a decree, about the identity of which there is no controversy. On the contrary, the question is whether the first appellate decree or the second appellate decree is now in force, and whether the latter is legally non-existent or inoperative on account of abatement.

The appellants have ever since 1949, taken a position of apparent simplicity. The second appellate decree passed by the High Court dismissing in toto the suit of Bhima and his brothers is not operative. The interest of Bhima and of his brothers was joint and inseparable; abatement against one was abatement of the entire proceedings. This revives the decree of the first appellate court which they are entitled to execute. But they failed to note that this is not a dispute relating merely to the execution, discharge or satisfaction of a decree, but something going deeper, namely, as to which decree whether of the first appellate or second appellate court is existent today. They have, in fact, confounded between two positions that are radically different.

The first is, when there is a decree, the identity and existence of which is beyond controversy, and there is a dispute between the parties to the suit, as to its execution, discharge or satisfaction; then undoubtedly, Section 47 CPC applies. The second position is, where ostensibly there is one decree (in the instant case, that of the second appellate court) which has necessarily washed out the earlier decree of the first appellate court and a party seeks to establish that in the eyes of law this is

nul est, and the earlier first appellate decree is automatically revived. Whatever the merits of the contention the point is, in the second case, the dispute is in regard to the identity and existence of the decree itself. So, Section 47 does not come in here.

The appellants have cited a number of rulings in which it has been laid down, firstly, that a decree passed against a dead man is a nullity, and secondly, that a matter arising between the parties to the suit in regard to execution, discharge or satisfaction of a decree should be disposed of by the executing court u/s 47; for example, [Shivaji Sayaji Gaokar Vs. Vithal Narayan Mirashi and Others](#), and [Kaharjannessa v. Saradindu](#) AIR 1935 Cal. 130 lay down the proposition that a decree against a dead person is a nullity and if the decree is sought to be executed against the legal representatives, they are entitled to point out that the decree is not executable against them as it was passed against a dead person.

Deciding this question is fully within the competency of the executing court. Similarly in the case reported in [Bhagirath Prasad Kamalia Vs. Sm. Jamuna Devi and Another](#), the executability of such a decree was challenged by the legal representatives. In these and the other cases relied upon by the appellants, the legal representatives were being pursued by the decree-holder in execution of a decree about whose identity and existence, he at any rate, was not in doubt, and the judgment-debtors retorted that for such and such reasons, it was not executable against them. These cases have no application to the position such as we find here; the legal representatives trying to execute one decree and the other party arguing that it does not exist, an has been washed out by a later decree of a superior Court,

Whichever contention is correct, the point is this is not a matter coming u/s 47. The respondent for his part, has cited the rulings reported in [Abdul Aziz v. Lakhmi Chandra](#) AIR 1923 Cal. 676; [Muktaram v. Gomasta Mahato](#) AIR 1928 Cal. 54; and [Himangshu Bhusan Kar and Others Vs. Manindra Mohan Saha](#), . These relate to the position arising when one of the several plaintiffs or defendants happens to die and the question of abatement and substitution arises. These have, according to these rulings, to be decided by the court itself in which the case is pending. Except by way of laying down the very general principles, these rulings also have no direct bearing on the present controversy, the kind of which does not often arise.

Here, it has arisen because the legal representatives of Bhima have chosen what appeared to them a short cut to take advantage of the first appellate court's decree which was more favourable to them, than the decree of dismissal of the suit passed by the second appellate court, without getting the High Court to hold that in view of the death of one, of the three appellants in the second appeal and respondents in the cross objection, the entire proceedings had abated. Till then, We cannot say that the second appeal has really abated and then proceed to apply the consequences.

In the result, the present appeal is dismissed and the judgment of the first appellate court is upheld. It is entirely for the appellants in decide whether after this lapse of

time, they should move the High Court for a decision in regard to the position created in, 1948, when during the pendency of the second appeal No. 47 of 1948, Bhima died on 28-9-1948.

Costs of this appeal payable by the appellants to the respondent.