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(1984) 01 CAL CK 0015

Calcutta High Court

Case No: Order No''s. 533-34 of 1967

Babulal B. Marwari — APPELLANT

Vs

Naharmal Kalyani and Others — RESPONDENT

Date of Decision: Jan. 17, 1984

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 50
- Constitution of India, 1950 - Article 183

Citation: 88 CWN 924

Hon'ble Judges: Mookerjee, J; M.G. Mukherjee, J

Bench: Division Bench

Advocate: S.B. Sen and Archana Roy, for the Appellant;M.N. Ghosh and Jamini Kumar Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Mookerjee, J.

In these two appeals the common questions are whether the application filed on 9th April, 1962 by the decree holder respondent for execution of the decree dated 15th March, 1949 passed by this Court in its Ordinary Original Jurisdiction was barred by limitation and whether the execution came was maintainable against the present appellants. On 15th March, 1949 a learned Single judge of this Court had decreed Suit No. 174 of 1947 brought by Maharmal Kalyani against Radhakrishan Babulal described as a firm carrying business at village Samsi, district Malda for a sum of Rs. 9136.50P. with interest at the rate of 6% per annum. On the prayer of the decree-holder the said decree was previously transferred to Dumka for execution. Thereafter the decree was transferred to the subordinate Judge''s Court Malda for execution and the same was registered as Money Execution Case No. 5 of 1955. Gangaram, Harising, Kadar and Hariram had filed an objection under Order 21 Rule 58 of the Code against attachment of certain properties made in the said Money Execution Case No. 5 of 1955. The said claim was registered as a miscellaneous case.

On 22nd 1957 the learned Subordinate Judge, Malda had allowed the said claim case and had released the attached properties. On 8th July, 1957 the Money Execution Case No. 5 of 1955 was dismissed for default.

2. Thereupon, the decree-holder had filed under Order 21 Rule 63 of the Code O.C. Suit No. 35 of 1958 in the subordinate Judge''s Court Malda against the judgment debtors and the said claimants inter-alia for a declaration that the said order in the claim case was erroneous and was liable to be set aside upon the finding that the defendant no. 6 had 16 annas in title and possession in the properties described in the Schedule ''ka'' to the plaint. The said suit was subsequently re-numbered as P.C. Suit No. 114 of 1960 of the Additional Subordinate Judge''s Court, Malda. On the joint application made on behalf of the plaintiff and the defendants, the case was referred to arbitration by three persons. The learned Arbitrators thereafter filed their Award by which they decided that since before the plaintiffs got the decree at the time of the decree the defendants had been living in joint mess and they had been enjoying the attached properties in ejmali. The learned Arbitrators further decided that the attached properties were judgment-debtors'' ejmali properties and the same were liable for the plaintiff''s decretal dues. On 20th June, 1961 the learned Subordinate Judge, Malda had decreed the said claim suit (again re-numbered as O.C. Suit No. 35 of 1958) in terms of the said award which was directed to form part of the decree.

3. In view of the foregoing facts, we are unable to accept the submission of Mr. Sen, learned advocate for the appellant, that the present execution case filed on 20th June, 1962 was barred by limitation. Article 183 of the Limitation Act 1908 applied to the said execution case which was for enforcing a decree passed by this Court in its Ordinary Original Civil Jurisdiction. The effect of the order dated 22nd June, 1957 in Misc. Case No. 79 of 1955 was that the properties attached in previous Money execution case No. 5 of 1955 stood released and subject to the result of a suit under Order 21 Rule 63 of the Code, the said order holding that the properties were not liable to be attached was final. When in terms of the aforesaid award the O.C. Suit No. 35 of 1958 was decreed, the right of the decree-holder to enforce the decree passed in Suit No. 1874 of 1947 had revived. So long as the order dated 22nd June, 1958 passed in claim Case No. 79 of 1955 had remained in force the decree holder could not have executed the said decree passed by this Court against the attached properties and his said right had accrued only after the summary, order passed in the claim case was set aside and it was declared that the said properties were liable for the plaintiff''s decretal dues. Therefore, the second application for execution dated 9th April, 1962 was in substance in continuation of the previous execution application.

4. Regarding the effect of the decree passed in the aforesaid claim suit, the view taken by us is fully in accord with the Division Bench decision in Rudra Narain Guria. v. Pachu Maity ILR (1896) 23 Cal. 437. In the said reported case third party''s claim

against attachment having been allowed, the decree holder brought a suit which ultimately succeeded. In the meantime, the first execution case had been struck off. The Division Bench in Rudra Narain. Guria v. Pachu Maity (supra), inter alia, held that the order in the claim case had operated as a temporary bar to the execution proceedings and until the removal of that bar by the passing of the decree, the decree-holder was not in a position to proceed with the execution. The second application made subsequently to the removal of the bar should be treated as a continuation of the previous application and the execution case was not barred by limitation. We respectfully agree with the above statement of law and hold for the same reasons that the execution case filed by the respondent was not barred by limitation.

5. The learned Subordinate Judge in decreeing the O.C. Suit No. 35 of 1958 in terms of the award set aside the order in the claim case and determined that the decree-holder was entitled to enforce the decree against the attached properties. Therefore, the second application for execution constituted a "reviver" within the meaning of Article 183 schedule I of the Limitation Act, 1908.

6. The Full Bench decision in the case of Chutterpat Singh v. Rai Bahadur Saita Soomarimull 20 C.W.N. 889 does not at all assist the case of the present appellants. The Full Bench had decided, inter-alia that an application for transmission of a decree did not operate as a reviver of the said decree because such an application was hot for execution. The Full Bench in Chutterpat Singh v. Rai Bahadur Saita Soomarimull (supra), had approved the view taken by Sir Asutosh Mookherjee and Teunon JJ., in the case of Kamini Debi v. Aghore Mukherjee 11 C.L.J. 91=14 C.W.N. 357, that to constitute a reviver of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. For the foregoing reasons, we reject the contention of the appellants that the present execution case was barred by limitation.

7. We also find no substance in the second submission on behalf of the appellants that the execution was not maintainable against them. It was unnecessary to decide in the execution case whether the "judgment-debtor, Radhakrishan Babulal constituted a partnership firm or a Mitakshara joint family business. In the decree passed by this court, the defendant was described as a firm. After the decree was transferred to Subordinate Judge''s court Malda the present appellants had objected to the attachment of certain properties on the ground that the judgment debtors had no interest therein. The Arbitrators appointed by consent in the O.C. Suit No. 35 of 1958 decided that since before the plaintiffs-decree-holder obtained the aforesaid decree at the time of the said decree the defendants including the claimants (who are appellants before us) had been living in joint mess and had been enjoying the attached properties in ejmali. The learned Arbitrators, further decided that the attached properties were judgment-debtors'' ejmali properties and the attached

properties were liable for the plaintiff''s decretal dues. The decree passed in O.C. Suit No. 35 of 1958 in terms of the said award has now become final and binding upon the parties to the said suit including the present appellants. Therefore, it is no longer open to the present appellants to make any claim contrary to the aforesaid determination made in O.C. Suit No. 35 of 1958.'' In view of the said decree the attached properties must be considered as ejmali properties of the judgment debtors and the said attached properties are liable for the plaintiffs'' decretal dues. We may add that other than those who were defendants in Suit No. 1874, of 1947, who might have been joined in the execution case were not strictly judgment debtors. The appellants were in the position of unsuccessful claimants who were no longer entitled to object to the attachment of the properties in question which had been finally determined t6 be liable for the plaintiffs'' decretal dues. For the aforesaid reason, it is unnecessary to consider whether the provisions of Order 21 Rule 50 of the CPC were applicable to the present case.

8. We accordingly dismiss this appeal without any order as to costs. Let the records be sent down expeditiously.

No formal decree need be prepared.

Mukul Gopal Mukherji, J.

I agree.