Baijnath Ramchander Vs Binjraj Joowarmal Batia and Co.
 In Re: Jankiprasad Poddar

Court: Bombay High Court

Date of Decision: Sept. 22, 1936

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 16

Citation: (1937) 39 BOMLR 540

Hon'ble Judges: B.J. Wadia, J

Bench: Single Bench

Judgement

B.J. Wadia, J.
This is a notice under Order XXI, Rule 16, of the Civil Procedure Code, taken out by the assignee or transferee of a

consent decree dated December 16, 1921, calling upon the plaintiff in the suit and one Chandmal Binjraj, a partner of the defendant firm, to show

cause why the decree should not be executed by the transferee under the provisions of that rule.

2. The decree was for a sum of Rs. 55,312-10-0 with further interest, payable by certain instalments. Various applications were made by the

original decree-holder for execution, and he received in all a sum of Rs. 40,475-2-0 in part satisfaction of the decree by divers payments which

have been noted on the decree. It appears that a certified copy of the decree and the necessary certificates were transmitted to Calcutta in July,

1923, for further execution, but as nothing more was realized, the attachment levied in Calcutta was with-drawn. No further satisfaction was

obtained by execution of the decree or otherwise within the jurisdiction of this Court, and a sum of Rs. 15,337-8-0" for debt and further simple

interest thereon at the rate of six per cent, per annum from December 16, 1921, till payment, still remained due and payable to original decree-

holder.

3. By an Indenture dated May 28, 1934, the plaintiff assigned all his right, title and interest in the decree to the assignee for a sum of Rs. 4,000,

and the assignee thereupon took out this notice under Order XXI, Rule 16, on October 2, 1934. The notice came up for argument before

Blackwell J. on February 27, 1935. A clerk in the service of the defendant firm put in an affidavit stating that the defendants did not admit the

assignment, that without prejudice to that contention the application for execution was not in accordance with law, and that in any event execution

of the decree was barred by limitation. It appears that the learned Judge asked what the specific points arising on the notice were, and thereupon a

set of what were called ""Issues"" was handed in to the Court. They fall under four heads, viz., (1) whether the assignment was validly executed, (2)

whether the application for execution was in compliance with the requirements of the Civil Procedure Code, (3) whether the assignee was bound

to apply for execution against the defendant firm or whether he could also apply for execution against only one of the partners of the firm, and (4)

whether the application was within the meaning of Article 183 of the Indian Limitation Act.

4. The assignment was executed by a constituted attorney of the original plaintiff on behalf of the plaintiff under a power-of-attorney executed by

the plaintiff on November 22, 1933, in favour of two persons jointly and severally. The power-of-attorney was typed in the office of the plaintiff''s

attorneys, Messrs. Patell & Ezekiel. At the end of the first clause there is an insertion in ink authorizing the constituted attorney also ""to sell the

claim under the decree to some other party at such price as my attorneys shall deem fit, and for that purpose to execute the assignment of the

decree in favour of such purchaser"". The insertion in ink has been initialed by the plaintiff, the donor of the power. The defendants did not admit at

first that the clause inserted in ink existed in the power-of-attorney at the time of its execution. Two clerks from the office of Messrs. Patell &

Ezekiel were called, one of whom deposed to the insertion of the clause in ink in his own handwriting at the instance of his masters, and the other

deposed to the execution of the power in the office of the Sub-Registrar. On hearing this evidence counsel appearing for the defendants said that

he did not wish to press the point any further.

5. The application for execution was declared by the transferee at Calcutta on September 12, 1934. It was filed in Bombay on September 20,

1934. Counsel for the defendants drew the attention of the Court to column J. in the application for execution which is headed, ""The mode in

which the assistance of the Court is required."" In that column the transferee of the consent decree prays that he may be granted leave under Order

XXI, Rule 16, of the Civil Procedure Code, to execute the consent decree in place and stead of the, original decree-holder, and that notices may

be issued under the same Order and rule to (1) Baijnath Ramchander the transferor, and (2) Chand mal Binjraj, one of the partners in the

judgment-debtors'' firm. It was contended that the application under the circumstances was one merely to recognise Jankiprasad Poddar as the

transferee of the decree, and that it was not in accordance with the requirements of Order ''XXI, Rules 16 and 11, which should be read together.

It is clear that a transferee must apply for execution of the decree, and he cannot apply merely to the Court for recognizing him as a transferee. The

question is whether his application. In re for execution is in accordance with the law. The person appearing on the face of the decree as the

decree-holder is entitled to execution unless it is shown by some other person under Order XXI, Rule 16, that he has taken the place of the

decree-holder. It is provided inter alia by Order XXI, Rule 16, that where a decree is transferred by assignment in writing, the transferee may

apply for execution of the decree to the Court which passed it. After that it goes on to say that ""the decree may be executed in the same manner

and subject to the same conditions as if the application were made by such decree-holder"". Where the decree has been transferred by assignment,

notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard

their objections, if any, to its execution. The notice is imperative. It is an indispensable condition of jurisdiction under the rule, and failure to give it

renders the proceedings in execution void as against the transferor and the judgment-debtor. On the hearing of the objections, if any, the notice is

either made absolute or discharged. If it is made absolute, the transfer is recognized as valid, and the transferee is entitled to execute the decree as

if he was the decree-holder. In other words, after the notice is made absolute he acquires the status of a decree-holder, and he can then apply for

execution as a decree-holder. u/s 233 of the old Code of 1882 it was left to the discretion of the Court to allow or refuse an application made by

the transferee, but under Order XXI, Rule 16, the transferee''s right to apply for execution does not depend on the discretion of the Court.

6. It is in the first place necessary for the transferee to apply for execution to the Court which passed the decree. An application merely to be

brought on record without asking for the execution of the decree is not an application in accordance with the law, as it is not an application for

execution of the decree. It was argued by counsel for the transferee that an application by the assignee for leave to execute the decree and for the

notice to issue was a sufficient compliance with the requirements of the rule. He said that after the notice was made absolute the decree would be

transmitted to Calcutta for execution, and an application would have to be made to the executing Court under Order XXI, Rule 11, Sub-rule (2),

specifying the mode or modes of execution in which the assistance of that Court would be required. It appears that in the Prothonotary''s Office

applications under Order XXI, Rule 16, are made in several forms, so far as column J. is concerned. For instance, in an application in suit No.

1319 of 1931, dated April 14, 1936, the words in column J. of the application were as follows;Ã¯Â¿Â½

By issue of Notice under Order XXI, Rule 16, of the CPC and then by transmission of the Decree to the Buldana Court for execution against the

defendants.

In another application in suit No. 439 of 1929 dated December 19, 1934, the 1936 words were:

By issue of the usual Notices under Order XXI, Rule 16, of the Code of Civil Procedure, upon the plaintiff and the defendant-to show-cause why

execution of decree dated June 28, 1929, transferred to the assignee by assignment mentioned in column E hereof should not be granted to him.

Transmission of a decree to another Court for execution is not a mode of execution. Such transmission is only a ministerial act, and is usually

performed by the Prothonotary and Senior Master on the Original Side. Counsel for the defendants argued that the provisions of Order XXI, Rule

11, Sub-rule (2), must be read along with Order XXI, Rule 16, and on reading the two together the application must state in column J. the mode

or modes of execution in which the applicant seeks the assistance of the Court. My attention was also drawn to an application in suit No. 4696 of

1921 in which the applicant asked for an issue of the notice under Order XXI, Rule 16, and Kania J. ordered the same to be amended by the

addition of the words ""by attachment and sale of the Immovable properties consisting of houses situate in the District of Broach belonging to the

estate of the deceased defendant and now in the hands of his heirs and representatives through the District Court at Broach."" There is no judgment

stating why such an amendment was required and ordered to be made. It ""might be that the order was made under the facts and circumstances of

the case. There is, however, no uniform practice in the office, and column J. in applications for execution under Order XXI, Rule 16 is still filled up

in various forms, though in substance the applicants ask for the issue of the usual notice under that rule.

7. Counsel for the transferee next referred to Section 39 of the Code, and argued that once a decree is transferred to another Court for execution,

the decree-holder has to follow the procedure laid down in Rule 299 of the High Court Rules, and the requirements of Order XXI, Rule 11, Sub-

rule (2), need not be complied with. He said that the transferee only stepped into the shoes of the original decree-holder, and that any application

for execution by the transferee need not also comply with the requirements of that rule. It must, however, be remembered that an application u/s 39

for transfer of a decree is not an application for execution. It is only an application for a step-in-aid of execution. But a transferee or assignee of a

decree must first apply for execution unifier Order XXI, Rule 16, and his application under the rule can only be entertained by the Court which

passed the decree. The Court to which the decree is transmitted for execution cannot entertain the same. If it did, it would be an irregularity which

might under certain circumstances be waived or acquiesced in by the judgment-debtor.

8. In my opinion the procedure to be followed in making an application under Order XXI, Rule 16, falls under two heads. The transferee must first

apply for execution of the decree to the Court which passed it, and pray that the usual notice do issue. After the objections have been heard and

the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the

application was made by a decree-holder. The transferee must then apply for execution of the decree under. Order XXI, Rule 11, specifying the

mode or modes in which the assistance; of the Court is required. If the decree is to be transmitted, the application under Rule 11 must be made to

the executing Court. Dealing with the application for execution before me, it appears that as soon as it was filed, an indorsement was made on it by

the Prothonotary that notice under Order XXI, Rule 16, should issue, and the notice was made returnable within a month after the date of the filing

of the application. The transferee prays that the notice may be made absolute, after which the decree will be transmitted to the High Court of

Calcutta for execution. Once the notice is made absolute, he will have to apply again to the executing Court at Calcutta under Order XXI, Rule 11,

and in that application he will have to specify the mode or modes in which the assistance of that Court will be required under Order XXI, Rule 11,

Sub-rule (2)(j). In an application for execution under Order XXI, Rule 16, the mode in which execution is sought need not be stated at first, for the

objections have first to be heard, and then the notice may be made absolute. In this connection the judgment of the Appeal Court in Kassum

Goolam Hoosein v. Dayabhai Amarsi ILR (1911) Bom. 58 : 13 Bom. L.R. 973 may be mentioned, though the point was not directly in issue in

that case. What is first necessary is that the notice required by the rule must be issued by the Court which passed the decree. Such a notice cannot

be issued by the Court to which the decree is sent for execution. It is only when the notice is made absolute that the transferee acquires a right to

apply for execution under Order XXI, Rule 11, Sub-rule (2). If the notice is discharged, any application under Order XXI, Rule 11, Sub-rule (2),

becomes unnecessary. In my opinion, therefore, the application for execution by the transferee is in proper form as required by Order XXI, Rule

16, and there is no reason why it should be rejected.

9. My attention was drawn to Order XXI, Rule 17, which provides that upon receiving an application for the execution of a decree as provided by

Rule 11, sujb-r. (2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been

complied with; and if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and

there or within a time to be fixed by it. It is further provided that where an application is amended, it shall be deemed to have been an application in

accordance with the law and presented on the date on which it was first presented. I have already held that for the purposes of an application

under Order XXI, Rule 16, there need be no application in the first place for the execution of the decree as provided by Order XXI, r, 11, Sub-

rule (2), and therefore there is no question here of any amendment. If, however, it is held that it is necessary that the applicant must in his

application under Order XXI, Rule 16, also state the mode or modes provided in Rule 11, Sub-rule (2) the question of allowing an amendment of

that application might arise, and since the question has been argued, I will shortly deal with the points taken in argument. Counsel for the transferee

in his closing address said that he would apply for an amendment only if the Court was against him as to the validity of the application for execution

under Order XXI, Rule 16. The decree is of December, 1921. The application for execution was filed in September, 1934, and as the last

payment certified on the decree is one of Rs. 3,000 on October 31, 1922, the application for execution is within time under Article 183 of the

Indian Limitation Act. The application being within time, the Court can in its discretion on receiving the application allow the defect, if any, to be

remedied either then and there or within a time to be fixed by it under In re Order XXI, Rule 17, Sub-rule (I). It was argued that no amendment

could now be allowed, as the execution of the decree had become barred by limitation, and there would be considerable delay also in applying for

an amendment. Counsel for the defendants relied on a Full Bench judgment of the Calcutta High Court in Asgar Ali v. Troilokya Nath Ghose ILR

(1890) 17 Cal. 631. under which it was held that Section 245 of the Code of 1882, which is substantially the same as Order XXI, Rule 17,

excludes the power of the Court to amend the application for execution after it had once been received by the Court and filed. In that case the

decree-holder asked for the sale of the Immovable property of the judgment-debtor ""as per list"". No list was attached to the application, so that

the application did not comply with the requirements of the corresponding section of the Code of 1882, and there being a material defect, no

execution could be taken out thereon. The question of limitation within which the amendment could be made was not directly in issue in that suit; it

was held that the. application was one incapable of execution, and no relief could be granted on it. It seems to me that the Calcutta High Court has

taken a very strict view of Section 245 of the Code of 1882, and the observations of the Judges should be understood only as referring to the

particular case before them. In the present Code the word ""amended"" has been altered into ""defect remedied"", and Sub-rule (2) has been added.

The High Courts of Madras and Allahabad seem to be of opinion that the Court has a discretion to allow an amendment under Sub-rule (I) of Rule

17, Order XXI, even if the application for amendment is made after the expiry of the statutory time, and the reasoning seems to be that the law

casts a duty upon the Court to notice the defects in the application before admission, and if the Court or its officer had done its duty properly, the

defects could have been remedied within time. In my opinion if the application for execution is within time, but the application for amendment is

made after the twelve years have expired, the application for amendment should not be straightaway rejected, but must be considered on its merits.

The matter being within the discretion of the Court, it would depend upon the nature of the amendment whether it should or should not be allowed

after the time limit for execution of the decree had expired. What Order XXI, Rule 17(1), requires is a substantial compliance with the

requirements of Order XXI, Rules 11 to 14. There would not be in the ordinary course any application for execution, which altogether omits to

mention the requirements of those rules. If such an application was made, it would not be received in the Prothonotary''s Office. It may happen,

however, that the application is defective, and it is. for the Court to consider whether the defect is of such a nature as could be remedied or not,

having regard to the principle laid down by the Privy Council in (1879) L.R. 6 I.A. 233 (Privy Council) ""that in execution proceedings the Court

will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is

substantially right."" The discretion of the Court must be exercised with regard to all the circumstances of the case, as the ordinary rule of procedure

is that an amendment should be allowed only if it could be allowed without prejudice to the rights of the other parties existing at the time of the

application for amendment. No amendment for instance will be allowed if there has been an undue delay in the application, or if the defect sought

to be remedied is so material as to amount to a defect not merely in form but in substance. If the amendment is allowed, it relates back to the date

of the application for execution, but the application for execution must be within time. I need not, however, pursue this point any further, as I hold

that no amendment is necessary.

10. The next point for determination is whether the assignee was bound to apply for execution against the entire defendant firm and whether

therefore the notice issued under Order XXI, Rule 16, is a proper notice. According to column I in the application the person against whom

enforcement of the decree is sought by the transferee is Chandmal Binjraj, one of the partners of the defendant firm and judgment-debtors. The

applicant has also stated in that column ""rights against other parties are reserved"". The notice is addressed to (1) Baijnath Ramchander, viz., the

original plaintiff and transferor of the decree, and (2) Chandmal Binjraj, a partner of Binjraj Joowar-mal Batia & Co., a firm. The written statement

of the firm has been declared by Chandmal Binjraj and the summons was also served upon him. It is open to> the decree-holder or the transferee

to apply for execution against any one or more of the partners of the defendant firm, as the firm is only a collective name of the individuals who are

the members of the partnership. The notice, however, calls upon the persons to whom it is addressed to show cause why the decree should not be

executed by the transferee ""against you the said defendants"". Counsel for the transferee said that the word ""defendants"" is a mistake, and the word

was allowed to remain as such through oversight, though the notice which was originally meant to be addressed to the firm was subsequently

addressed only to the particular partner of the firm. I do not think there is any objection to the execution of the decree against the particular partner

mentioned. I do not, however, understand under what rule the transferee"s rights against other partners can be reserved.

11. With regard to the point of limitation I have already held that both the applications for execution as well as the notice are in time, as the twelve

years" period contemplated by Article 183 runs from the date of the last payment of Rs. 3,000, certified by the Prothonotary and Senior Master as

of October 31, 1922.

12. In the result, the notice must be made absolute as against Chandmal Binjraj, a partner of the defendant firm.

13. September 25. I have now heard counsel on the question of costs. Ordinarily a notice under Order XXI, Rule 16, is made absolute in

chambers with out any order for costs. On this notice several points were raised which were put down in the form of what were called issues, and

the matter was adjourned into Court for argument on those issues. I have held on all the points substantially against Chandmal Binjraj, a partner of

the defendant firm, to whom this notice was directed. I, therefore, order that Chandmal Bijyjraj do pay the assignee"s costs of this notice when

taxed less such costs as the assignee would have had to incur on an ex parte application in chambers for making the notice absolute.