

Vithal Laxmannaik Malgavkar Vs Mahadev Raghunath Kondkar

Court: Bombay High Court

Date of Decision: Feb. 12, 1924

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 148, 47

Citation: AIR 1924 Bom 426 : 80 Ind. Cas. 249

Hon'ble Judges: Norman Macleod, C.J; Shah, J

Bench: Division Bench

Judgement

Norman Macleod, C.J.

One Lingo got a decree in Regular Suit No. 183 of 1916, whereby it was ordered that the first defendant and the

plaintiff should take possession of various properties from the other defendants. After the decree had been passed Lingo sold his interest in some

of the properties of which possession was directed to be given to him to the present appellants, Lingo thereafter made an application for execution

of his decree. His purchasers were not parties to that application. An order appears to have been made in execution under Order XXI, Rule

35(1), but the Subordinate Judge held that action ought to have been taken under Order XXI, Rule 36, which he directed should be done, and that

the possession given under Order XXI, Rule 35(1) should be set aside.

2. The appellants sought to appeal from that order to the First Class Subordinate Judge, with appellate powers, and an issue was raised whether

the appellants had any locus standi to appeal. The learned Judge held that they had not, and in my opinion he was right. A person, who is not a

party to a proceeding in the lower Court cannot appeal from the decree or order passed, unless he can prove that he has such a right under the

provisions of the Code. Reliance was placed by the appellants on Sections 47 and 148 of the Civil Procedure Code. Section 47 merely enacts that

certain questions arising between the parties to a suit in which a decree has been passed, or their representatives, and relating to the execution,

discharge or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit. That section, therefore,

does not touch the point we have to deal with.

3. Section 146 of the Code says:

Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or

against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

4. I do not think that the purchaser of property which has been directed by a decree to be given into the possession of the decree-holder can rely

on this section. There are provisions in the Code which provide for the devolution of interest in a decree, and lay down how such devolution shall

be made, and how the person on whom the interest devolves shall proceed there under. Order XXI, Rule 16 provides for the transfer by

assignment of a decree by writing or by operation of law:

5. ""Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interests of any decree-holder in the decree is

transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and

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:

Provided that, where the decree, or such interest as aforesaid, 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.

6. The only persons who can execute a decree are the persons mentioned in the rule: see Mulla's Civil Procedure Code, note at p. 561. A

purchaser of property mentioned in a decree is expressly excluded from applying for execution unless he can also prove that he is an assignee of

the decree. See also *Hansraj Pal v. Nukhraj Kunwar* A.W.N. (1907) 280 : 4 A.L.J. 769 : 80 A. 28 .

7. Now one can easily imagine what might possibly occur if the contention of the appellants was correct. In this case there were a number of

properties mentioned in the decree, to which under the decree Lingo was entitled to possession. He might have sold those properties to a number

of purchasers, with the result that there might be a number of persons entitled to execute the decree, and even if Lingo sought to execute the

decree, as he did in this case, there might be numerous applications made by his purchasers, to appeal on the ground that they were not satisfied

with the orders passed on Lingo's application. It seems to me that such a procedure is not contemplated by the Code. It is only parties to the

decree or transferees of the interest of the decree holders by assignments in writing, or by operation of law who can apply in execution. It seems to

me, therefore, that the judgment of the lower Court was right and the appeal should be dismissed with costs.

Shah, J.

8. I concur in the order proposed by my Lord the Chief Justice. It seems to me that though Lingo has sold a part of the property under the decree

to the present appellants the proper procedure provided by Order XXI, Rule 16, has not been followed in this case. Without going so far as to say

that there could be no transfer of a part of the interest of the decree-holder within the meaning of Rule 16, in the present case, on the admitted facts

it seems to me that Lingo has throughout remained on the record and the present appellants have not been treated as parties to the proceedings at

any stage. The mere fact that on Lingo's application the possession was in fact ordered to be given to the present appellants, instead of to Lingo, in

respect of the properties sold by Lingo to the present appellants, is not sufficient to make them parties to the proceedings or to constitute them

representatives of the decree-holder within the meaning of Section 47 of the Code. Section 146 of the Code, which has been relied upon by the

appellants, cannot help them, as the procedure to be followed when there is a transfer by the decree-holder is laid down in Rule 16 of Order XXI.

The appellants, therefore, cannot appeal against the order which was made as between Lingo and the present respondents, on June 13, 1922, by

the Subordinate Judge.