
Channappa Girimallappa Jolad Vs Shankardas Vishnudas Darbar

First Appeal No. 320 of 1939

Court: Bombay High Court

Date of Decision: Jan. 23, 1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 34 Rule 5, 48

Citation: AIR 1942 Bom 282 : (1942) 44 BOMLR 656

Hon'ble Judges: Sen, J; John Beaumont, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Sen, J.

The main question in this appeal, which arises out of execution proceedings, is whether the darkhast is barred u/s 48 of the Civil Procedure Code. The appellant is the original judgment-debtor, and the respondents are the decree-holders. The facts leading up to the darkhast

are somewhat complicated, and the material facts may be stated as follows.

2. The decree-holders, whose father was the mortgagee of a mortgage dated September 30, 1905, obtained a decree in terms of a compromise

on July 30, 1918, under which it was declared that the defendants were to pay Rs. 13,000 to the plaintiff by annual installments of Rs. 1,200, that

if the defendants failed to make payment in time of any installment, such installment was to bear interest, and that if the defendants failed to make

payments in time of any two installments, the plaintiff should be entitled to recover the whole amount due. Some installments were paid thereafter.

The mortgagor was one Muchkhandappa who died in 1911, and his widow Baslingawa adopted Girimallappa who died in 1916. Girimallappa's

widow Irawa adopted the appellant in 1920. In 1923 the decree-holders filed darkhast; No. 320 of 1923. It was thrown out as no final decree

had been passed. Accordingly, on November 17, 1923, the decree-holders applied for the decree being made final. On October 11, 1924, a

decree was passed for Rs. 6,951-6-4 and interest on Rs. 1,200 at nine per cent, per annum from the date of the application to the date of

payment. This decree did not allow any installments. On March 27, 1926, Irawa brought a suit against the present appellant for setting aside his

adoption. The suit was dismissed. Before that, on June 29, 1925, the decree-holders had filed darkhast No. 188 of 1925 seeking to recover in all

Rs. 7,163-11-11, and on September 17, 1926, there was a private sale by Irawa of the entire property mortgaged to the decree-holders. To this

sale the appellant was not a party. The order passed in darkhast No. 188 of 1925 was:

As the parties have amicably settled, the sale proceedings were returned without being auctioned. Hence the decree having been fully satisfied and

costs having been received the darkhast is disposed of.

3. In 1925 one Venkatesh Raghvendra Jorapur of Bagalkot, Manager of the Bagalkot Bank, obtained a decree against Irawa and got sold by

auction a survey number out of the mortgaged property ; and in the said auction sale one Ramchandra Swamirao Jorapur purchased the same and

obtained possession thereof. The present decree-holders filed Suit No. 337 of 1928 for possession of the said property in the Bagalkot Court. It

was held that the said Irawa had sold the said property and the other properties with a view to defraud the creditors of the estate. The present

decree-holders preferred an appeal to the District Court wherein the decree of the trial Court was confirmed. A Second Appeal No. 675 of 1931

to the High Court was dismissed on March 1, 1933.

4. On November 3, 1933, a suit was filed by the appellant, being Suit No. 545 of 1933, for possession of the property sold by Irawa and for a

declaration that the decrees obtained by seven creditors, including the two present decree-holders, were not binding on him and also for an

injunction against those creditors restraining them from executing their decrees. It was held that the plaintiff was entitled to possession of the

properties in the hands of defendants Nos. 4 to 8, including the present decree-holders, and that the decree obtained by the respondents was

binding on the plaintiff though the private sale by Irawa was not binding, and it was ordered that defendants Nos. 6 and 7 (that is the present

respondents) ""were relegated to their position under their decree, so far as it was not satisfied, the same only being binding on the plaintiff."" The

declaration and the injunction sought against defendants Nos. 6 and 7 regarding their decree so far as it had remained unsatisfied was refused. The

present respondents thereupon appealed to the High Court but the appeal was dismissed. During the pendency of this appeal they filed darkhast

No. 250 of 1936, and the darkhast was disposed of on the ground that the appeal to the High Court had not been decided, and there was an

order as to costs.

5. On January 17, 1938, the present darkhast No. 58 of 1938 was filed. In it the decree-holders claimed interest on the whole amount of Rs.

6,951 from the date of the application for the final decree, namely November 17, 1923. The judgment-debtor opposed the darkhast and pleaded

the bar of limitation on three grounds, the first being that the preliminary decree was not made final within three years as required by Order

XXXIV, Rule 5, Civil Procedure Code, and was therefore not executable. No argument has been addressed to us based on this ground. The

second ground, which has also not been argued before us, was that the sale in favour of the decree-holders by Irawa having been declared null and

void in Second Appeal No. 675 of 1931, the darkhast ought to have been filed within three years of that, and that the darkhast not having been so

filed was barred. The last ground, on which the present appellant has based his case before us, is that the present darkhast has been filed after the

expiry of twelve years from the date of the final decree, namely October 11, 1924. The learned trial Judge, however, came to the conclusion that

there was no force in any of these contentions in view of the decree in Suit No. 545 of 1933 which according to him ""set aside the alienation and

restored the award decree."" He held that all the previous rights of the decree-holders were revived by this order and that therefore the decree-

holders would be entitled to claim the unsatisfied amount irrespective of the present contentions of the defendant. The order of the trial Court in

Suit No. 545 of 1933 was passed on October 25, 1935, and thereafter the present decree-holders filed darkhast No. 250 of 1936, and that was

disposed of on April 17, 1937. The present darkhast was filed on January 17, 1938. The learned trial Judge held that the last darkhast was in time.

6. The darkhast No. 188 of 1925 was disposed of on November 29, 1926. The question arises whether in view of the decision in the suit of 1933

it can be said that the darkhast was not terminated and that it was either kept pending or became revived. The sale by Irawa was a private sale,

and Mr. Jahagirdar has argued that at least in the case of a private sale which formed the basis of the satisfaction of a decree, when that private

sale was subsequently found to be void that cannot affect the order of the executing Court disposing of the darkhast, and that it could not be held

that the darkhast either remained pending or was automatically revived. In Suit No. 545 of 1933 all that the Court said was: ""The present decree-

holders are relegated to their position under the decree so far as it is not satisfied, the same only being binding on the plaintiff."" It meant that the

decree-holders were free to execute their decree as if it had not been satisfied, but it cannot be said to have created a fresh starting point of

limitation or to have reopened the darkhast of 1925. On that date the bar of Section 48 of the CPC certainly did not exist. The Court did not make

any pronouncement on the darkhast of 1925; that darkhast was not before it, and there has been no application by the decree-holders since the

date of this decision that the order passed on the darkhast of 1925 should be vacated on the ground that the sale by Irawa has been found to be

void.

7. Mr. Datar has referred us to a decision of the Patna High Court in *Radha Kishun Lal v. Kashi Lal* (1923) ILR 2 Pat. 829. There the decree-

holder purchased a certain property in execution of his decree, and subsequently a third person sued the auction-purchaser and the judgment-

debtor for a declaration of his title to the property and for possession, and obtained a decree. It was held that the effect of the decree in favour of

the third person was to set aside the execution sale and revive the decretal debt, and that no formal order setting aside the sale was necessary. On

facts this case can be distinguished from the present case, because there a sale ordered by the Court had become abortive and that was the reason

for holding that the order passed on the darkhast became ineffective.

8. Mr. Jahagirdar, on the other hand, has relied on a decision of the Allahabad High Court in *Ziladar Singh Vs. Brij Lal Singh*, The facts in that

case appear to be on all fours with those in the present case. In a suit for sale on a mortgage deed executed by the last male owner the final decree

for sale was passed against his widow who died later. Then the decree-holder applied for execution of his decree by sale of the property against

one Ratan Singh, alleging him to be the reversionary heir of the widow's husband, who was in possession of the entire property. During the

pendency of the execution proceedings Ratan Singh executed a mortgage deed in favour of the decree-holder, who therefore did not proceed with

the execution and got the execution struck off on his own statement. Subsequently, on three other reversioners bringing a suit for possession of

their half share in the property against the decree-holder and also against Ratan Singh, that suit was decreed. The decree-holder having been thus

deprived of half the property which had been mortgaged to him applied for the execution of his decree by sale of the mortgaged property not only

against Ratan Singh but also against the three reversioners. His contention was that a fresh right to apply for execution accrued on the date on

which the suit of the three reversioners had been decided. It was held that in such a case the original execution proceedings started by the decree-

holder had come to an end and were no longer pending, and that they could not be revived. Sulaiman C.J. said (page 514):--

It seems to me that there can be no question of a revival of a previous proceeding, unless that proceeding has not terminated and is still in a state of

suspended animation. Where the Court did not intend to dispose of the matter finally, but either shelved it or sent it to the accord room or put it off

because of some injunction or stay order, intending to take it up again when the obstacles were removed, the application would still be pending and

not finally disposed of ; but where the Court on a statement made by the decree-holder himself has deliberately dismissed the application in full

satisfaction of the decree, it cannot be suggested that the Court intended to keep alive the matter or that the application for execution, in spite of its

dismissal, is still pending in that Court and can be revived at any time.

9. We think, with respect, that these remarks apply to the facts of this case. It was certainly not the intention of the Court which disposed of the

application in 1925 to keep that matter pending. The language of the order clearly shows this, and also shows the ground on which that order was

based. That order was not made conditional on the sale by Irawa not being found to be illegal or inoperative. We think that in such circumstances

the intention of the Court must be given effect to, and it cannot be held that, because the order passed in the darkhast becomes inoperative for

some reason or other, those proceedings can be regarded as pending or can be revived.

10. Mr. Datar has contended that in case this point is decided against him, it should be held that the present darkhast is a continuation of the

proceedings under darkhast No. 250 of 1936, which was filed on March 26, 1936. He says that as the appeal in the High Court had not been

decided, the intention of the Court was merely to keep the matter pending, and that the words ""disposed of"" really meant that the proceedings

were adjourned sine die. The present application, however, is not an application for the revival of darkhast No. 250 of 1936, and prima facie it

seems to us impossible to hold that the intention of the Court was to keep that darkhast pending. The application was no doubt regarded as

premature, but there being an order as to costs it appears that the Court disposed of "that application finally. Besides, the Court was not in a

position to know how the appeal in the High Court would be disposed of, and a different kind of darkhast might be necessitated after that appeal

had been decided. We think that we cannot, properly speaking, deal with the present application as if it was an application for the continuation of

darkhast No. 250 of 1936, and even if we could deal with it in that manner, there does not seem to be any substance in Mr. Datar's contention.

11. The appeal is allowed, and the darkhast dismissed, with costs throughout.

Beaumont, C.J.

I agree. The only real point on this appeal is whether the darkhast of 1925 can be treated as subsisting, and be revived.

The present darkhast, being dated January 17, 1938, is clearly barred by s. 48 of the Civil Procedure Code, if it be regarded as a fresh application

to execute the decree of October 11, 1924. Therefore, the only way in which the decree-holders can succeed is by treating the darkhast of 1925

as still subsisting. Now, on that darkhast an order was made on November 29, 1926, stating that the decree had been fully satisfied, and costs

received and the order is: ""The darkhast is disposed of."" In my opinion, that clearly means that the darkhast is dismissed. It is the common type of

case in which a decree to be executed is compromised out of Court, and the compromise being recorded under Order XXI, Rule 2, Civil

Procedure Code, the execution Court disposes of the darkhast by dismissal. In my opinion, in such a case the order finally disposes of the

darkhast, and the fact that the compromise out of Court is subsequently held to be, in whole or in part, invalid is irrelevant. The execution Court is

not concerned in any way, where parties are sui juris, with the nature of the compromise. It takes no responsibility for the compromise being a legal

one. If the respondents were to succeed on this appeal, it would really mean that in every case in which a darkhast is dismissed on the terms of a

compromise out of Court, the dismissal is conditional on the compromise proving effective, and if the compromise proved ineffective, in whole or in

part, the darkhast must be treated as restored. In my opinion, that would be a very dangerous principle to lay down. I entirely agree with the

reasoning of the learned Chief Justice of Allahabad in Ziladar Singh Vs. Brij Lal Singh ; Ziladar Singh Vs. Brij Lal Singh .

2. Appeal allowed.