
(1932) 11 BOM CK 0011

Bombay High Court

Case No: O.C.J. Suit No. 593 of 1931

Narayandas Sunderlal
Rathi

APPELLANT

Vs

Tejmal Mohanlal

RESPONDENT

Date of Decision: Nov. 29, 1932

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 16, 146

Citation: (1933) 35 BOMLR 1162

Hon'ble Judges: Mirza, J

Bench: Single Bench

Judgement

Mirza, J.

On October 14, 1931, a decree was made in the above suit in favour of the plaintiffs for Rs. 6,590-11-0 with interest at six per cent, per annum from October 14, 1931, till payment and the costs of the suit. By a deed of transfer dated February 29, 1932, the plaintiffs assigned to the applicant their right, title and interest under the decree in respect of Rs. 6,590-11-0 and interest without assigning to the applicant the plaintiffs' further right, title and interest under the decree in respect of the payment of costs when taxed. The applicant has now applied under the provisions of Order XXI, Rule 16, of the Code of Civil Procedure, calling upon the plaintiffs and the defendants to show cause, if any, they have, why the decree dated October 14 1931, in favour of the plaintiffs and transferred by them to the applicant should not be executed by the applicant against defendants Nos. 1, 2 and 5. Defendants Nos. 1 and 2 contend that the decree which has been assigned cannot be executed as it is only partially assigned to the applicant.

2. Order XXI, Rule 16, provides that where a decree is transferred by assignment in writing, as here, 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. There is no provision in

this rule for a decree being partially transferred by assignment. Where a decree is passed jointly in favour of two or more persons, the rule provides that the interest of any decree-holder in the decree may be transferred by assignment. In the present case there was no joint decree in this sense. The decree is in favour jointly of two plaintiffs, plaintiff No. 1 being the father and plaintiff No. 2 his minor son, the two being, coparceners of a joint and undivided Hindu family which trades under the name and style of Shaligram and Narayandas at Bombay. Plaintiff No. 1, as manager of the joint family, has assigned to the applicant the interest of both plaintiffs in the decree except as to costs awarded under the decree. Order XXI, Rule 15, regulates the procedure regarding execution of decrees passed jointly in favour of more persons than one. In such cases unless the decree imposes a contrary condition one or more of such joint decree-holders may apply for the execution of the whole decree for the benefit of all the joint decree-holders. Such is not the case here. The application here is for the execution of the decree restricted to the interest transferred by assignment to the applicant.

3. Counsel have not found any reported case of our High Court on the point which has now arisen. The practice of the English Courts is governed by Order XLII, Rule 23, Clause (a), of the Supreme Court Rules. This rule provides inter alia that where change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or Judge for leave to issue execution accordingly. In applications made on behalf of transferees of decrees by assignments the English Courts have held that the transfer should be of the whole decree and not merely of a part of it. In *Forster v. Baker* [1910] 2 K.B. 636 a judgment-creditor had assigned part of the judgment for valuable consideration; the assignee applied for leave to issue execution. The original Court and the Court of Appeal concurred in holding that the assignee was not entitled to such leave : the original Court on the ground that there cannot be an absolute assignment within Section 25, Sub-section (6) of the Judicature Act, 1873, of a definite part of an existing debt or other legal chose in action; and the Court of Appeal on the ground that as the original judgment-creditor could only issue a single execution upon his judgment and could not split up the judgment debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment-debt a right which he did not himself possess. Vaughan Williams L.J., in delivering the judgment of the Appeal Court, observed (p. 641) :-

A judgment creditor could not before the coming into operation of the Judicature Act, 1873, have issued a series of small executions" upon his judgment making in the whole the total amount of the judgment debt ; he had only one judgment, and upon that judgment he could issue only one execution ; he has only the same right now. And if a judgment creditor assigned part of his judgment debt, he could not then, and cannot now, give to his assignee any better right than he had himself. The result is, therefore, that the assignee of part of a judgment debt is not in a position to issue execution upon it, which is what the plaintiff in the issue wishes to do in the present case.

This case was followed by the Court of Appeal in *Rothschild v. Fisher* [1920] 2 K.B. 243 See the observations of Lord Sterndale M.R. at p. 252 of his judgment and of Scrutton L.J. at p. 255.

4. A similar point came up for decision before the Calcutta High Court in *Kishore Chand Bhakat v. Gisborne & Co.* ILR (1889) Cal. 341 in construing the corresponding Section 232 of the Code of Civil Procedure, 1882. The Division Bench there held that there was no legislative prohibition to the transfer of a portion of a decree ; and that provided the whole decree was executed and the rights of all parties interested were cared for, there was no objection to the transferee being allowed to carry on the execution proceedings. They dissented from an earlier decision in *Seetaput Roy v. Syud Ali Hossein* (1875) 24 W.R. 11 The attention of the learned Judges does not appear to have been called to the English practice and the only case which was cited before them was that of *Seetaput Roy v. Syud Ali Hossein*. With great respect I am unable to agree with this decision.

5. The same point came up next before the Allahabad High Court in *Ram Chandra Naik Kalia v. Abdul Hakim* ILR (1913) All. 204 The head-note there is :-

Held that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree-holder cannot transfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded.

Mr. Engineer on behalf of the applicant has questioned the accuracy of the head-note and has called my attention to the judgment. From the judgment it appears that the lower Court had refused leave to the transferee of a part of a decree to execute the same inter alia on the ground that the transferee was not entitled in law to apply as a transferee of a part of the decree for execution of that portion only. Mr. Engineer has relied upon the following remarks appearing in the judgment (p. 206) :-

As regards the second point, assuming that there is nothing in law to prevent the transfer of a portion of the decree, and assuming that the transferee can apply for the execution of the whole decree, in the present case the transferee is not entitled to apply for execution of a part of the decree, as the original decree-holder herself could not have done so. The decree appears to us to be one and indivisible, for recovery of the dower plus the costs incurred in the suit.

I am unable to agree with Mr. Engineer that the head-note in this case does not correctly represent the judgment of the Divisional Bench. This case was followed by the Lahore High Court in the case of *Ahmad Shah v. Faujdar Khan* (1919) II L.L.J. 1

6. The Madras High Court has taken a view on this subject somewhat similar to that of the Calcutta High Court. In *Muthiah Chettiar v. Govinddoss Krishnadoss* ILR (1921) Mad. 919 the Madras High Court has held that u/s 146 of the CPC it would be permissible to recognise the validity of the transfer of a part of the decree and allow execution thereof by the transferee, and that Order XXI, Rule 16, is no bar to the application of that section.

They held that such transferee is like a joint decree-holder and can, under Order XXI, Rule 15, protect his rights either by executing the decree himself or by joining or by intervening in the execution by his transferors. Wallis C.J., in construing Section 146 of the Civil Procedure Code, observes (p. 923) :-

The section should, I think, have a beneficial interpretation, and be read as supplementing the rules, and, as a part transferee is a person claiming under a decree-holder, I think it sufficiently authorises applications in execution by such a part transferee. Further, Section 232 of the old Code, which was held to authorise such an application, is reproduced in Order XXI, Rule 16, and the fact that the case of the interest of any decree-holder being transferred is now expressly provided for in the rule does not, in my opinion, show that part transfers are not covered by the rule, and still less that the rule prohibits an application by a part transferee of the decree so as to make Section 146 inapplicable.

Spencer J. at p. 927 of his judgment observes :-

I can see no objection to the assignee of a portion of a decree being allowed to come in and execute it on behalf of himself and his co-decree-holder under Order XXI, Rule 16, of the Code of Civil Procedure, provided that the Court imposes under Rule 15 such terms for the conduct of the execution proceedings as may be necessary for the protection of the interests of others, such as a direction for payment into Court of sums realised under the decree.

Kumaraswami Sastri J. at p. 932 of his judgment observes:-

Section 146 of the Code is very general, and provides that where proceedings may be taken or applications made by or against any person then the proceedings may be taken or the application may be made by or against any person claiming under him. Order XXI, Rule 15, provides for applications for execution by one or more joint decree-holders in a case where a decree has been passed jointly in favour of one or more persons. Rule 16 provides for the interest of any decree-holder in the decree being transferred and empowers the Court to execute the decree on the application of the transferee in the same manner and subject to the same conditions as if the application was made by such decree-holder.

If assignment of part of a decree is valid, I do not see why the assignee should not apply to be allowed to execute the decree jointly with the decree-holder interested in the remainder on the analogy of a joint decree-holder applying for execution under Rule 15. The words of Section 146, which are very general, do not prohibit this and so long as there is nothing in Order XXI, Rules 15 and 16, cutting down the right, Section 151 will empower the Court to grant relief by applying principles analogous to Rules 15 and 16 and give him relief, even assuming that the rules would not in terms apply. Where rights are conferred by the sections of the Code and no provision is made for a particular set of

facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of Section 151 is to give such power to Courts and to prevent a failure of justice. In cases of transfer of part of a decree pending execution, I think the proper course is to allow the transferee to be brought on record in execution proceedings and to treat further proceedings as if it was a joint petition by the transferor and transferee.

7. With great respect I am unable to agree with the decision in *Muthiah Chettiar v. Govinddoss Krishnadoss* ILR (1921) Mad. 919. In my judgment Section 146 of the CPC can have no application here. There can be no question that the transferee of the decree has the same rights as the decree-holder himself. The reason why the transferee cannot be permitted to execute a part of the decree only is this, that the decree-holder himself would not be so permitted. A decree for purposes of execution must be regarded as a whole and indivisible : when it is sought to execute it it must be executed as a whole and not split up into parts. Even in the case of a joint decree the joint decree-holder is required under the provisions of Order XXI, Rule 15, to apply for the execution of the whole decree on behalf of himself and his joint decree-holders. A part assignee, in my judgment, cannot be regarded as a joint decree-holder.

8. Mr. Engineer sought to draw a distinction between the transfer of a decree and an application by the transferee for leave to execute the decree. He urged that the present application is not for leave to execute the decree, but is one for the assignee being brought on the record in substitution of the transferor. This argument, in my judgment, is not correct. After the decree is made the suit is at an end, and no transferee by assignment of the decree is entitled to be brought on the record of the suit in substitution of the decree-holder. He can proceed in execution only under Order XXI, Rule 16. The present application is clearly one in execution. It is taken out in Form No. 23 appended to the High Court Rules (see p. 246). The corresponding form in the CPC is Form No. 7 in Appendix E. The latter form also provides that cause is to be shown by the judgment-debtor why execution should not be granted to the transferee by assignment of the decree.

9. In my judgment the applicant is not entitled to execute the decree as the transferee by assignment of a part of the decree herein. The notice must be discharged with costs.
Counsel certified.