Vallabhdas Narandas Vs Kantilal G. Parekh

Court: Bombay High Court

Date of Decision: Dec. 12, 1945

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 151

Citation: AIR 1947 Bom 430

Hon'ble Judges: Kania, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Kania, J.
The parties have come before the Court on the hearing of a notice under Order 21, Rule 22. The facts leading to these

proceedings are these: There were cotton dealings between the applicant and the respondent. Disputes between them were referred to arbitration

and on 23-3-1928, an award was made. That was filed on 19th April 1928. An application for execution was made and a notice under Order 21,

Rule 37 was issued on 20th May 1928. When that notice came for hearing on 30th August 1928, a consent order was taken. The respondent

agreed to pay the amount by monthly instalments of Rs. 200. It must be remembered that at the time of these proceedings the old Arbitration Act

was in force. Under that an award could be executed as if it were a decree, without a decree being passed in terms of the award. On 22nd July

1933, a second application for execution was filed which also appears to have been for the arrest of the debtor. Notice under Order 21, Rule 22

was dispensed with, and on 25th July 1933, a warrant was ordered to issue. That remained unexecuted. The applicant filed the present application

for execution on 29th June 1945. He has filled in the necessary particulars in the different columns as required by Order 21, Rule 11. In the last

column headed ""the mode in which assistance of the Court is required"" it is written as follows: ""By the issue of a, notice under Order 21, Rule 22,

Civil P. C, against the respondent herein."" In col. (f), where the applicant has to state the dates and nature of previous applications and the result

thereof, he has set out the dates of the two previous applications and the fact that the warrant last issued was not executed. This application when

lodged in the office was taken on file, and on 29th June 1945, the Prothonotary, under the powers vested in him by the High Court Rules, directed

that notice under Order 21, Rule 22 should issue. That notice was issued on 28th July 1945, and has now come for hearing.

2. On behalf of the applicant, it is contended that the notice must be made absolute. He made his application for execution on 29th June 1945,

which is within 12 years of the date of the last order, and therefore the application is in time. On behalf of the respondent, it is contended that the

application for execution made on 29th June 1945 is not a proper application within the meaning of Order 21, Rule 11 and, therefore, the same

must be rejected. If so, no notice can be issued under Order 21, Rule 22. It is contended on behalf of the respondent that the proceedings under

Order 21, Rule 22 follow an application for execution, and it is not open to a decree-holder to write in the last column which provides for the

mode of execution ""By the issue of a notice under Order 21, Rule 22."" It is argued that the issue of such a notice is not a mode in which assistance

of the Court can be required. On behalf of the applicant, on the other hand, it is con-tended that when the judgment-debtor has no property and it

is apprehended that under the amended law of arrest he will not be detained in prison, the only procedure by which the decree can be kept alive is

by obtaining an order under Order 21, Rule 22. That will result in the revival of the decree, and under Article 183, Limitation Act the decree will

not become time barred if an application for execution is made within 12 years after the date of revival. Two questions arise on this application: (1)

whether an application for execution, in the last column of which is written ""By the issue of a notice under Order 21, Rule 22, against the judgment-

debtor,"" is a proper application for execution within the meaning of Order 21, Rule 11; and (2) whether the issue of a notice under Order 21, Rule

22, is a mode in which the Court renders assistance to the decree-holder.

3. My attention has been drawn to two judgments in this connection. One is my own judgment in 45 Bom. L.R. 400 In that case the specific

question came to be discussed before me. On behalf of the creditors, it was contended that they did not know of any property which the debtor

owned and which they could attach. They further stated that they had no materials on which they could press the Court to order the arrest and

detention in prison of the judgment, debtor. Under the circumstances, they had no remedy except to apply to the Court to revive the decree in the

hope that if the judgment-debtor acquired property thereafter the decree could be executed against him. On an enquiry made in the office of the

Prothonotary it was reported to me that the statement in the last column, that a notice be issued under Order 21, Rule 22, was one of the normal

statements. On the facts of that case, and on that report I held that there was nothing irregular in that application and the same should be

considered a proper application for execution under Order 21, Rule 11. At that time my attention was not drawn to the judgment of the Appeal

Court in 40 Bom. L.R. 676In that case the applicant had obtained a decree in the Court of the First Class Subordinate Judge at Ahmedabad. The

decree was against three defendants of whom the then respondent was one. When a notice under Order 21, Rule 22, was issued against the

respondent, he contended that the decree was time-barred. The applicant relied on the fact that on 25th July 1934, he bad applied for execution of

the decree to the Ahmedabad Court and an order was made on that date transferring the decree to the Bombay High Court for execution. It was

argued that the application for the transfer of the decree to Bombay was a step-in-aid, and afforded a fresh starting point for the period of

limitation. It must be noticed that the whole discussion there was in respect of Article 182, Limitation Act. That portion of the discussion is not

material in the present case. The application for execution contained in col. (j) the following: ""By attachment under Order 21, Rule 54, Civil P.C.

and issuing notice under Order 21, Rule 22, of the said Code."" The notice came for hearing in Chambers before Engineer J., and he considered the

words used in the last column in two parts: (1) by attachment under Order 21, Rule 54; and (2) by issuing notice under Order 21, Rule 22. It was

observed that the first part was not in order as it did not give particulars of the property sought to be attached. As regards the second part, viz.,

issuing notice under Order 21, Rule 22 of the Code, the learned Judge was of the opinion that it was not one of the modes in which the assistance

of the Court could be rendered within the meaning of Order 21, Rule 11. The matter went in appeal. Beaumont C.J., in dealing with the

application, observed as follows (p. 681):

All that appears in col. (J) the heading of which is "mode in which assistance of the Court is required," are the words, "By attachment under Order

21, Rule 54, Civil P. C, and issuing notice under Order 21, Rule 22 of the said Code." Without anything more to go upon it would have been

impossible for the Court to execute the decree.

4. In the Appeal Court, the question whether the application would have been in proper form, if the last column contained only ""by issuing notice

under Order 21, Rule 22"" does not appear to be specifically discussed. It appears however to have been assumed that it would not have been so,

because there would have been otherwise no necessity to permit an amendment by inserting the particulars of the property sought to be attached.

5. The question whether the issue of a notice under Order 21, Rule 22, is the proper phrase to be used in col. (j) has to be decided on the wording

of Order 21, Rule 11(2)(j), which provides as follows:

(j) the mode in which the assistance of the Court is required, whether (i) by the delivery of any property specifically decreed; (ii) by the attachment

and sale, or by the sale without attachment, of any property; (iii) by the arrest and detention in prison of any person; (iv) by the appointment of a

receiver; (v) otherwise, as the nature of the relief granted may require.

Sub-rule (2) prescribes the form for the execution of a decree in all cases. It is not limited to a money decree. The last col. (j) therefore is headed

the mode in which the assistance of the Court is required."" The object of the application being to enforce the decree (which the Court has passed)

the Court is requested to render further assistance to the holder of the decree. He informs the Court the mode in which the Court can assist him.

But all this is for the purpose and with the object of getting for the decree-holder the relief which the Court has already granted under the decree.

Reading the whole of that clause it is clear that the object of the statements in that column is for the decree-holder to inform the Court the manner

in which the Court can get for him the relief which it has already granted. Except that, there is no other object for the application for execution and

for the words put in that column. The Court may pass a decree for specific performance of a contract, or for restitution of conjugal rights, or for

delivery of specific movable property, or a mandatory injunction to demolish certain obstructions. A Court may pass a decree in several forms.

The first four sub-clauses of Clause (j) deal only with the return of specific property, or the arrest of the judgment-debtor, or the sale of his

property or the taking custody of his property through the mediation of a receiver. But there are several other decrees in which these kinds of relief

are not suitable or applicable. Therefore Clause (v) is inserted as a general residuary clause. That must, however, as the words used therein clearly

indicate, also relate to the nature of the relief which the Court has granted by the decree. To put it in other words the application for execution is

only for the purpose of asking the Court to get the actual relief for the decree-holder. Asking the Court to extend the life of the decree for

execution is not, in my opinion, a mode in which the Court''s assistance can be asked to get the relief awarded by the decree. To obtain extension

is a relief not awarded by the decree.. In my opinion, therefore, the practice hitherto followed in the Prothonotary''s office of permitting the

statement ""By the issue of a notice under Order 21, Rule 22"" in col. (j) of Order 21, Rule 11(2), is not supported by authority and is wrong. The

words of Order 21, Rule 22, assume the existence of an application for execution, which is assumed again to be in accordance with Order 21,

Rule 11,, read if necessary with Order 21, Rule 17. When such an application for execution is made, the Court has to scrutinies whether it is made

within a year of the previous application. If it finds the same to be beyond that period the Court directs a notice to issue. That notice the Court may

make absolute, after hearing the parties. Although the application for execution is on file the decree-holder does not get the relief through the

assistance of the Court. The Court directs the issue of a notice. In my opinion, therefore, the issue of a notice under Order 21, Rule 22, is not a

mode of execution and is not a relief which a party asks as awarded by the decree. He has to wait because he has come to Court one year after

the previous order of execution. This is made clear again by the words of Rule 22. On proper grounds being shown the Court can dispense with

the issue of that notice. This clearly indicates that it is not a mode of execution or enforcement of the decree. It is a hurdle which the decree-holder

has to cross or which obstruction is removed by the special order of the Court, before he obtains the relief awarded to him by the decree. The

judgment in 45 Bom. L.R. 4001 to the extent it is held that an application for execution which contains in col. (j) the words ""By the issue of a

notice under Order 21, Rule 22"" is a proper application as prescribed by Order 21, Rule 11, is erroneous.

6. The argument that the decree-holder is unable to trace the property of the judgment-debtor or has not sufficient grounds to obtain an order for

his arrest and detention in prison cannot be considered sufficient to act in contravention of the express provisions of Order 21, Rule 11. If a

decree-holder does not know of any property of the judgment-debtor which he can attach he cannot make a proper application under Order 21,

Rule 11, Clause (j), because he will not be able to give particulars of the property which he asks the Court to attach. That difficulty, however, does

not exist in the case of an application for the arrest of the debtor. The decree-holder may be perfectly conscious that the Court will not make an

order for the arrest. That, however, does not prevent him from making an application for the arrest and to write in the last column ""By the arrest

and detention in prison of the judgment-debtor"" as required by Order 21, Rule 11. By doing so, he complies with the provisions of law, although

he may fail to obtain the order from the Court. Such an application, when filed, is according to the prescribed form and will be retained on file of

the Court. That will meet the requirements of law.

7. That brings me to the question as to what should be done in the present case. It is obvious that by the long practice prevailing in the

Prothonotary''s office, which was accepted in 45 Bom. L.R. 4001 the applicant was led to believe that the application for execution filed by him in

the present case was in proper form. Should he suffer for that erroneous belief on his part? He was led to that belief by the practice and the

decision mentioned above, which I have held are both wrong. I do not think the applicant should suffer for that erroneous belief, which has been

caused by the Court''s practice. In the alternative the applicant has applied for an amendment of his application. Under the circumstances, I allow

the applicant to amend the application for execution by inserting in the last column the words ""By the arrest and detention in prison of the

judgment-debtor."" Under Order 21, Rule 17, the Court has power to permit an amendment even after the period of limitation has expired. It is true

that the Court should not make the respondent lose a valuable right if the right was acquired through the negligence or delay of the decree-holder.

In the present case the applicant committed the error through no default of his, and therefore I am unable to allow the respondent to insist on his

right which he otherwise may have got. It was argued that the permission to allow the applicant to amend his application for execution in the

manner mentioned above would mean allowing him to set up a totally new and independent case. It was pointed out that in 40 Bom. L.R. 6762

there was already an application for execution in which the applicant had sought to attach the property of the debtor, although the description of

the property was not mentioned. It was contended that if the attachment of one property was asked for, the Court would not allow by way of

amendment attachment of another property. In my opinion all these questions, in the circumstances of this case, do not arise. The facts of the

present application are not similar to the facts of any of these illustrations. I therefore think that the order for amendment under Rule 17 is just and

proper in the present case. If necessary, Section 151, Civil P. C, enables me to grant that relief in the exercise of my discretion and allow the

amendment to meet the ends of justice. On that amendment being made the application under Order 21, Rule 11, will be in order and the notice

under Order 21, Rule 22, will be proper.

8. Mr. Desai on behalf of the respondent contends that even on the order made by the Court today a proper application for execution only comes

into being now and therefore the applicant must cause another notice to be issued. According to him he will meet that notice when, issued and

served on him. It is argued on behalf of the respondent that the notice already on the record of the Court under Order 21, Rule 22, must be

dismissed because it is based on an improper application for execution. In my opinion, that argument is unsound, and the clear answer is provided

by the words of Order 21, Rule 17. The amendment if and when allowed relates back to the original date of application for execution and that

application should then be read as if the amendment existed on the day the application for execution was originally made. In that view, the present

notice is properly issued and has to be disposed of on merits.

9. In the affidavit of the respondent, it has been contended that he had made payments and therefore the decree should not be executed. The

affidavit itself mentions that no payments are certified on the decree. As an executing Court I cannot take notice of these payments. The notice

under Order 21, Rule 22, is therefore made absolute.

10. In the normal course, a notice under Order 21, Rule 22, is made absolute without costs being awarded. The principle appears to be that the

decree-holder himself had not applied for execution of the decree for more than a year and had therefore to come to Court. That not being the

fault of the debtor, the decree-holder cannot get the costs from the defendant. In the present case the matter has been argued at considerable

length because of the practice prevailing in the Prothonotary''s office and the judgment in 45 Bom. L.R. 400All these are matters for which I do not

think the parties can be blamed. The result is that the ordinary practice should be adopted and there will be no order as to costs.