(1968) 04 BOM CK 0027

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 472 of 1963

Deoram Mangalram		APPELLANT
	Vs	
Nandan Shivram		RESPONDENT

Date of Decision: April 22, 1968

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 146

Citation: (1969) 71 BOMLR 529 : (1969) MhLj 552

Hon'ble Judges: Chandurkar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Chandurkar, J.
This is a second appeal by the legal representative of a decree-holder whose application for execution of the decree obtained by his father against the respondents has been rejected by both the Courts below as barred by limitation.

2. Facts which are necessary to appreciate the dispute between the parties are that in Civil Suit No. 30 of 1956 one Mangalram obtained an ex parte decree against the defendants-respondents, on February 14, 1957 in the Court of the Small Causes, Amravati. After the decree, the decree-holder died on August 30, 1957. On December 3, 1958, the appellant, who is the son of the deceased decree-holder, filed an application purporting to be one under Order XXI, Rule 16, CPC before the executing Court below and the prayer in that application was that "his: name may kindly be allowed to be substituted in place of the decree-holder and he be kindly allowed to execute the decree... ". A notice of this application was issued to the judgment-debtors, but they did not enter appearance though they were served. On June 28, 1959, the Court directed the present appellant, who was the applicant, to file a succession certificate. This succession certificate was obtained and was filed before the Court on July 22, 1960. On that day the Court passed the following order:

Applicant with Shri Jawarkar. He files succession certificate. It is ordered that the name of the applicant be substituted as legal representative of the deceased Mangalram. Note be taken in C. S. R. Papers be filed.

In the meantime, on August 29, 1959, the applicant had filed another application also under Order XXI, Rule 16, Civil Procedure Code, signed by himself along with the widow, four daughters and two other sons of the deceased decree-holder stating that they had also interest in the decree and their names may be allowed to be substituted in place of the decree-holder and that they be allowed to execute the decree. Since the order of the Court directed that only the applicant-appellant should be brought on record as legal representative, it will be only the first application with reference to which the rights of the parties will have to be decided.

3. After this order was passed on July 22, 1960, the present appellant filed an application on August 13, 1960, for transfer of the decree to regular side for execution and then filed an execution application on October 6, 1960.

4. The judgment-debtors objected to the execution application on the ground that it was barred by limitation as it was filed more than three years from the date of the decree. The appellant relied on the order of the Court passed on July 22, 1960 reproduced above and contended that that order was passed on an application which was a step-in-aid of execution, and therefore, the application for execution was not barred.

5. The trial Court, however, held that the application was barred by limitation under Article 182 of the Limitation Act, .1908, and dismissed the execution application. The decree-holder then filed an appeal against the order of the executing Court and the appellate Court confirmed the order of the trial Court.

6. The lower appellate Court relied on a decision of the Supreme Court in Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and Others, and held that the Supreme Court had opined that Order XXI, Rule 16, Civil Procedure Code, did not provide for any application for bringing on record the legal representatives of the deceased decree-holder, and that the remedy of the appellant was to file an application as contemplated by Order XXI, Rule 16, Civil Procedure Code, and to proceed with the execution directly. The lower appellate ''Court, therefore, held that the application made by the appellant on December 3, 1958 was not in accordance with law. According to the lower appellate Court that application was unnecessary and superfluous and it could not, therefore, be a step-in-aid of execution. Thus the lower appellate Court took the view that the application for execution filed on October 6, 1960 was filed more than three years after the date of the decree and as there was no application which could be said to have been made as step-in-aid of execution, the execution application was barred by limitation. It is against this order that the appellant has come up in appeal.

7. It is the contention of the learned Counsel for the appellant that the question, whether an application purporting to be made under Order XXI, Rule 16, Civil Procedure Code, could be a step-in-aid of execution of the decree within the meaning of Article 182, Clause (5), of the Limitation Act, 1908, was not before the Supreme Court and that the decision of the Supreme Court in Jugalkishore''s case was not correctly appreciated by the lower ''Courts. The learned Counsel relied heavily on a Full Bench decision of the Madhya Pradesh High Court in Onkar Singh Gulab Singh and Others Vs. Meharban Singh Ahar Singh, , in which the Full Bench has analysed the decision in Jugalkishore''s ease. The appellant relied on the observations of the Full Bench in para. 17 of the judgment in which it is observed:

...The Supreme Court case, Jugalkishore v. Roto Cotton Co., (Supra) was not concerned with the interpretation of the expression '' in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree '' occurring in Clause (5) of Article 182 of the Limitation Act.. There was thus no question of limitation and the observations of Bhagwati J., relied on by Shrivastava J., were made by him when considering the submission of the learned Counsel for the appellant that the application for execution, dated 25-4-1951 filed in that case was defective qua an application for execution and that consequently no execution could levy on its basis.

The other observations relied on by the learned Counsel were in para. 18 of the judgment where it has been stated:

Thus, all that the Supreme Court ruled was that Order XXI, Rule 16, of the CPC contemplated an application for execution and an application which did not comply with the requirements of Rule 11(2)(j) of Order XXI was defective as an application for execution.

8. In order to appreciate the contention raised by the appellant it is necessary to see what exactly was the decision in Jugalkishore''s case and whether that decision could be relied upon by the judgment-debtors in order to contend that the application dated December 3, 1958 was not an application in accordance with the law and that the order passed thereon on July 22, 1960 is not an order which could be a starting point for a fresh period of limitation under Clause (5) of Article 182 of the limitation Act. As I shall presently show the question whether an application for bringing on record the legal representatives of the decree-holder was "an application in accordance with law" within the meaning of Article 182(5) of the Limitation Act did not fall for consideration before the Supreme Court in Jugalkishore''s case,

9. The facts in Jugalkishore''s case were: A firm Habib and Sons had sued Jugalkishore for the recovery of Rs. 7,113-7-0 with interest at 6 per cent, per annum on the basis of certain transactions in gold and silver effected by the firm as ''pacca adatias''. While this suit was pending the plaintiff-firm, on February 7, 1949, transferred all its assets and properties with its business in Bombay to the

respondent Company, viz., Raw Cotton Co. Ltd. The suit, however, continued in the name of the original plaintiff as the assignee did not get itself substituted in the. place of the plaintiff. The decree was also passed in favour of the original plaintiff Habib and Sons. The partners of Habib and Sons having in the meantime migrated to Pakistan, the transfer in favour of the firm was confirmed by the Additional Custodian of Evacuee Properties. The firm then filed an application for execution of the decree against Jugalkishore. This application was in the form contemplated by Order XXI, Rule 11, Civil Procedure Code. However, in the column in which the mode in which execution was sought was required to be stated, it was stated that the Court be pleased to declare the firm as the assignee of the decree and substitute it for the original decree-holder. A notice under Order ,XXI, Rule 16, Civil Procedure Code, was issued to Jugalkishore to show cause against the said application. It was contended by judgment-debtor Jugalkishore that the respondent-company was not a transferee of the decree within the meaning of Order XXI, Rule 16, of the Code. The question which fell for consideration was whether the assignee was entitled to execute the decree and after examining the rival contentions of the parties the Supreme Court held that the provisions of Order XXI, Rule 16, Civil Procedure Code, postulate (a) that the decree has been passed and (b) that the decree has been transferred by assignment or by operation of law. In this view of the matter the Supreme Court found that there was no transfer of the decree in favour of the respondent-Company after the decree was passed and that there was no assignment in writing. The Supreme Court also held that the transfer in favour of the respondent-Company could not be treated as an equitable assignment as there was no agreement to transfer a decree to be passed in future and all that could be said was that by operation of equity the respondent-Company had become entitled to the benefits of the decree as soon as it was passed. The transfer in question was thus held not to have the effect of transferring the decree to the respondent by operation of law within the meaning of Order XXI, Rule 16, of the Civil Procedure Code. The Supreme Court, however, held that the respondent-Company was nonetheless the real owner of the decree and was entitled to execute it by virtue of Section 146 of the Code.

10. A contention was also raised before the Supreme Court that the application filed by the respondent-Company under Order XXI, Rule 11, Civil Procedure Code, was defective as an execution application. While considering that contention the Supreme Court held that the defect in the application under Order XXI, Rule 16, Civil Procedure Code, was in the specification of the mode in which the assistance of the Court was required, and that the particulars which were required to be filled in column ''J'' were not in accordance with the requirements of Order XXI, Rule 11(2)(j). The Supreme Court further held that the Court should have scrutinised the application as required by Order XXI, Rule 11(1) and if it was found that the requirements of Rules 11 to 14 as may be applicable were not complied with, the Court should have rejected the application or allowed the defect to be remedied

then and there or within a time to be fixed by the ''Court, and it was also held that subsequently the defect in the application was cured as the decree-holder had filed another application for execution which was a sufficient compliance with the provisions of Order XXI, Rule 11(2)(j) of the Code of Civil Procedure. It is thus clear that the question whether such an application could be construed as an application which would be a step-in-aid of execution for the purposes of Article 182(5) of the Limitation Act did not fall for consideration before the Supreme Court. Thus the decision in Jugalkishore''s case cannot be held to be laying down the proposition that an application by the legal representatives of a deceased decree-holder to bring their names on record cannot be considered as a step-in-aid of execution within the meaning of Article 182(5) of the Limitation Act. This is also the view propounded - by the Full Bench of the Madhya Pradesh High Court in Onkarsing''s case as will be clear from the observations quoted earlier. The Full Bench has also taken the view, with which I agree, that an application for substitution would be tenable as a step-in-aid of execution within the meaning of Article 182(5) of the Limitation Act, 1908. The Full Bench held that observations to the contrary in an earlier case in Hemchandra v. Tekchand [1959] M. P. L. J. 733 were not good law.

11. The words "an application made in accordance with law" found in Article 182(5) of the Limitation Act, 1908, do not have any technical meaning. It is well-established that a liberal construction must be placed on these words used in Article 182(5) with a view to enable the decree-holder to obtain the fruits of his decree. These words were construed by the Madras High Court in Sekharipuram Gramom Krishna Aiyar v. Namiassan Veetil Mayankurti AIR [1922] Mad. 30 in which it has been observed:

...The article does not say anything about necessary application, and we cannot therefore introduce such a notion into it. If an application written or oral has been made asking the Court to take some step in aid of execution, it forms a starting point under the article.

It was held in Janardan Govind v. Narayan Krishnaji I. L. R. (1918) 42 Bom. 420 that the words "in accordance with law" do not necessarily connote that the application should be one prescribed or required by law but only that it should accord with law. The Madhya Pradesh High Court has observed in Onkarsingh''s ease as follows:

In this connection, we approve the observations at page 1248 in Pal''s Law of Limitation that ''to test whether any application is in accordance with law or not, it will not be necessary to find out a provision requiring such application. All that we have to see is that it has not violated any provision of law.

It is, therefore, clear that an application which a Court is competent to grant and if it is granted it furthers the cause of execution, it would be an application which would ''be an application in accordance with law within the meaning of Article 182(5) of the Limitation Act.

12. It must be noticed that the present appeal does not arise out of an order on an application dated December 3, 1958 purporting to be under Order XXI, Rule 16, Civil Procedure Code, though the question which has now been canvassed on behalf of the judgment-debtors is that, the application dated December 3, 1958, which purports to be under Order XXI, Rule 16, Civil Procedure Code, on which the order was passed by the executing Court was not maintainable. The question as to whether any given application is in accordance with law or not must inevitably depend upon the facts and circumstances in each case. As observed by a Division Bench of this Court in Govind Krishna and Others Vs. Malhar Narsingrao Nadgu, :

The expression " an application made in accordance with law " has given rise to several interpretations all of which cannot be easily reconciled. In interpreting this expression it is necessary to avoid the temptation of laying down any general test which could be universally applied and the application of which would in all cases lead to a correct conclusion. The question as to whether any given application is in accordance with law or not must, in our opinion, inevitably depend upon the facts and circumstances in each case.

It is not necessary for the purpose of limitation under Article 182(5) of the Limitation Act that an application to take a step-in-aid of execution should be made in a pending execution petition, [See Ayi Goundan v. Solai Goumdan A. I. R. [1945] Mad. 189 and Gopal Shankar Jahagirdar Vs. Raising Premji Gotivala, .

13. In the instant case after an application was made by the appellant for bringing on record his name as legal representative of the deceased decree-holder a notice of that application was issued to the judgment-debtors. The judgment-debtors did not appear in those proceedings. The Court called upon the applicant to produce a succession certificate and passed an order allowing the application and directed the Civil Suit Register to be amended. It is not contended that that order is without jurisdiction. That order has not been challenged by the judgment-debtors though they were entitled to challenge it. If that order was not without jurisdiction at the most what could be urged by the judgment-debtors is that it would be a wrong order. But even then a wrong order passed by the Court with jurisdiction would bind the parties. The order of the executing Court passed on July 22, 1960 has the effect of holding that such an application was maintainable. If an operative order has been passed on such an application, it could not be said on the facts of this case that the application on which the order was passed was not in accordance with law. The Court had taken the view that the present applicant was entitled to be brought on record as a legal representative; the records which needed to be rectified because of the death of the decree-holder were directed to be corrected and the legal representative was shown as the decree-holder and if these steps have been taken on an application by the Court with jurisdiction, it must be held that the application dated December 3, 1958 was "an application in accordance with law" and was a step-in-aid of execution. Even otherwise it is too late for the judgment-debtors to

contend in this execution proceeding that the application dated December 3, 1958 was not maintainable. Entertaining such a contention in the present appeal would amount to entertaining an appeal against the order dated July 22, 1960 which has become final between the parties.

14. I am also supported in the view which I have taken by a Division Bench decision of the Andhra Pradesh High Court in Chanda Yadgiri Vs. M. Venkataiah and Others, . In that case the transferee of a decree made an application under Order XXI, Rule 16, CPC and annexed an assignment deed in his favour. This document wag insufficiently stamped and it was sent to the revenue authorities for impounding it. But as there was a delay in getting it back, the executing Court struck off the execution from the file. The assignee made- another application tinder Order XXI, Rule 16, Civil Procedure Code, on November 19, 1953, for recognition of the transfer and for the issue of notice to the judgment-debtors, as more than two years had elapsed since the passing of the decree. Though notice was issued, the judgment-debtors did not appear and the petition for transfer of the decree was accepted. "Within 3 years thereof i.e. on October 5, 1956, the assignee filed an execution application. This execution application was dismissed as, being time-barred, as the executing Court took the view that the application dated November 19, 1953 did not contain a prayer for execution of the decree as the request was only for the issue of notice to the judgment-debtors. The assignee-decree-holder filed an appeal against this order and while considering the question whether the application dated November 19, 1953 could be said to be in accordance with law, and as such could serve as a step-in-aid of execution, the Division Bench observed in para. 7 of the judgment as follows:
That takes us to the question whether the petition does not serve any purpose at all, i.e. whether it could operate as a step-in-aid of execution. In our judgment, such a petition, could be regarded as a step-in-aid of execution. A transferee of the decree cannot seek to execute the decree without his transfer being recognised by the Court. We are aware of the fact that two independent petitions need not be filed-one for recognition and another for execution. Both the reliefs could be clubbed in one petition. But when a petition is filed under Order 21, Rule 16, C. P. C. without giving the necessary particulars, two courses are open to the executing Court under Order 12, Rule 17, C. P. C. namely, either to return it for amendment of the petition or to reject it. Instead of adopting either of the two courses, the Court made an order accepting the petition. Therefore, the petition must be deemed to be one in accordance with law, and as such serves as a step-in-aid of execution.

The facts of the instant case before me are similar. When the application dated December 3, 1958, was presented it was open to the Court to reject it or to call upon the person making the application to furnish necessary particulars and as the Supreme Court has observed in Jugalkishore''s case the defect could be remedied so as to make that application for execution a valid application. But instead of doing

that, the Court treated it as valid and passed an operative order on it in favour of the appellant.

15. A similar view has also been taken in prayagdas v. Indirabai (1943) Nag. 784. The Division Bench has observed that (p. 735) :

.. .An application made thereafter to the Court transferring the decree by a legal representative of the deceased decree-holder for the substitution of his name is a step in aid of execution even though it is not accompanied by an actual application for execution under Order XXI Rule 10 of the Civil Procedure Code.

Two independent applications one for substitution and the other for execution may not be necessary as observed in this decision but even then this decision is an authority for the proposition that an application for substitution of his name by the legal representative of a deceased decree-holder serves as a step-in-aid of execution.

16. The learned Counsel for the respondents then relied on a decision in Murgeppa Mudiwallappa v. Ramchandra ILR (1913) 87 Bom. 550 15 Bom. L. R. 557 for the proposition that an application by the representative of a judgment-creditor to obtain a certificate under the Succession Certificate Act is not a step-in-aid of execution within the meaning of the Indian Limitation Act, 1908, Schedule I, Article 182, Clause (5). I am unable to appreciate how this decision can help the judgment-debtors. The application dated December 3, 1958, was not an application to obtain a succession certificate. The succession certificate filed in the proceedings, which are initiated on the application dated December 3, 1958, was produced because of an order of the Court in that case passed on June 28, 1959 by which the applicant was directed to produce the succession certificate.

17. I am, therefore, unable to uphold the order of the Courts below that the application for execution filed on December 3, 1958 was not in accordance with law, and therefore, could not be a step-in-aid of execution. The application for execution filed on October 6, 1960 was filed within three years from the date of the order on the application, and was thus not barred by limitation.

18. The result, therefore, is that the orders of both the Courts below are set aside and it is held that the application dated October 6, 1960, is not barred by limitation. The appeal is thus allowed with costs. The executing Court shall now proceed with the execution application.