

(1959) 09 AP CK 0005

In the Andhra Pradesh High Court

Case No : Appeal against Order No. 41/3 of 1955 and Civil Miscellaneous Petition No. Nil (S.R. No. 16590/59)

Chandravati Bai (died) by Legal representative Kishen Das **APPELLANT**

Vs

Chaganlal deceased by legal representative Mangilal and Others **RESPONDENT**

Date of Decision : 14-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1

Citation : AIR 1962 AP 308

Hon'ble Judges : Srinivasachari, J; Manohar Pershad, J

Bench : Division Bench

Advocate : Lakshminarasayya, for the Appellant; Bishamber Dayal, for the Respondent

Final Decision : Dismissed

Judgement

Manohar Pershad, J.—This Civil Miscellaneous Appeal on behalf of the judgment-debtor arises out of execution proceedings started by the decree-holders herein.

2. The facts which give rise to this appeal are: Chaganlal, Prahlad Rai and Nanu Ram as plaintiffs brought a suit for specific performance against Chandravati Bai, the appellant in the Original Side of the High Court of Hyderabad and obtained a decree, which is in the following terms:

The defendant execute the sale deed within two months of the date of this judgment on the plaintiffs paying the balance of the price i.e., Rs. 15,500/-. If the plaintiffs were to fail in presenting the sale deed to the defendant for execution and registration with the balance only of the price money, this suit shall stand dismissed. On the other hand, if the defendant were to fail to execute and register the sale deed on its presentation together with the balance of the price money this Court will execute and register the sale deed and arrange for delivery of its possession to the plaintiff.

This decree was passed on 1-7-1952; but before the passing of the decree, Chaganlal, having died, his son Mangilal was brought on record as his legal representative. As per the decree, the balance amount was deposited by Mangilal, Prahlad Rai and Nanu Ram in Court on 2nd September, 1952, as 31st August and 1st September 1952 happened to be holidays and the decree-holder prayed for the execution of the decree. The judgment-debtor objected to the execution of the decree on two grounds. The first was that as the amount ordered under the decree was not tendered to the defendant within the period of two months, that cannot be deemed to be sufficient compliance with the order passed and therefore the suit was liable to be dismissed and the plaintiffs shall have no decree in their favour to stand upon.

The second ground urged was that inasmuch as a draft of the sale deed was not filed along with the money, there was not sufficient compliance with the order of the Court and that being a condition precedent, the suit would be liable to be dismissed on this account also. Both these contentions were rejected by the executing Court. Aggrieved by the order of the executing Court, Chandravati Bai had come up in appeal. During the course of the appeal, she died. Her husband has been brought on record as her legal representative.

3. A preliminary objection is raised on behalf of the respondents that in as much as Nanu Ram has died and the legal representation petition filed by the appellant not having been filed within the prescribed period, the appeal will not abate against him alone but in toto, having regard to the nature of the decree. On behalf of the appellant it is contended that as Rules 3, 4 and 8 of Order 22 do not apply to proceedings in execution of the decree or order as provided in Rule 12 of Order 22, the question of bringing the legal representative on record within the prescribed period and the appeal having abated does not arise.

It is further urged that even if it is held that Rule 12 of Order 22 is not applicable to appeals, the delay in filing the application to bring the legal representative on record be condoned, as the appellant was seriously ill for seven months and was confined to bed. On behalf of the respondents, it is contended that in the execution proceedings, the fact of the death of Nanu Ram was brought to the notice of the appellant on 10-12-1958 and the appellant had filed a counter and as no explanation has been given why after 10-12-1958 at least steps were not taken to file the legal representation petition here in this Court, the delay could not be condoned.

4. In so far as the first contention is concerned, it may be pointed out that it is an appeal before us arising out of execution proceedings and not an execution petition. What is provided under Order 22, Rule 12 is "nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order." It follows therefore that if the proceedings are in execution, the provisions relating to abatement contained in Rules 3, 4 and 8 would not apply.

There is conflict of opinion as to the applicability of this rule to appeals against

orders in execution. The Bombay High Court in *Trimbak Narhar Vs. Gopal Narayan*, the Madras High Court in *The Rajah of Kalahasti Vs. P. Jagannadha Rayanimgar (deceased) and Raja Panaganti Parthasarathy Rayanimgar*, the Allahabad High Court in *Changa Mal and Others Vs. Chaubey Ram-Dulare Lal*, the Nagpur High Court in AIR 1938 502 (Nagpur) and the Lahore High Court in *Ajudhia Pershad v. Sham Sunder*, AIR 1947 Lah 13 have held that an appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order and Rule 12, Order 22 does not apply to appeals against orders made in execution proceedings and such appeals are subject to the same rules in regard to abatement as any other appeals and in such an appeal, therefore, if no application is made for bringing the legal representative of a deceased party on record within the period prescribed, the appeal would abate like other appeals. The Calcutta High Court also in the case of *Baksh Ali Sarkar add Ors. Vs. Sarat Chandra Rot Chaudhury and Others*, has taken a similar view. The High Court of Patna on the other hand has in the case of *Hakeem Syed Mohammad Taqi and Another Vs. Fateh Bahadur Singh and Others*, taken a different view. The then Hyderabad High Court in *Kadial Marappa v. Jai Narayan* 24 DLR 644 had also taken a view similar to the other High Courts. The learned counsel for the appellant relying on a Full Bench decision in *Venkatachalam Chetti Vs. Ramaswami Servai (dead) and Others*, contended that the Full Bench has held that Rule 12 of Order 22 applies also to appeals. We cannot agree with the contention of the learned Counsel. It is nowhere held in this decision that Rule 12 of Order 22 applies to appeals against orders made in execution proceedings.

5. The learned counsel drew our attention to the following observation by their Lordships:

It follows from these decisions that in appeals also the same view of R. 12, O. 22 was accepted, as in the case of execution petitions." and contended that their Lordships have held that Rule 12, Order 22 was applicable to appeals also. No doubt, there is this observation but it is not the finding of the Full Bench and as a matter of fact, the Full Bench could not give that finding because the matter was not in appeal before them and even if this observation is taken as a finding, it would, in our opinion amount to obiter. We are, therefore, definite that Rule 12 of Order 22 does not apply to appeals arising against orders made in execution. This contention therefore fails.

6. The next question is whether sufficient reason has been shown to condone the delay in filing the legal representation petition. The reason given in paragraph 1 of the petition S. R. 16590 of 1959 is that the appellant was seriously ill for the last seven months and was confined to sick bed. This application was filed on 15th April 1959. Respondent No. 3 died on 24th March, 1958. It follows, therefore, that this petition to bring the legal representative of respondent No. 3 was filed after 387 days. The appellant argues that he may be given an opportunity to produce evidence, to prove that he was ill for seven months. We

are not inclined to accept this request, far from the counter filed by the other side, it appears that the fact of death of the respondent was brought to the notice of the appellant in the executing Court and he had actually filed a counter on 10-12-1958 and no explanation has been given as to why steps were not taken at least after 10-12-1958 to file a legal representation petition.

7. In the result, this legal representation petition would stand dismissed.

8. The next question that arises is what is the effect of the dismissal of the legal representation petition, whether the appeal would abate in toto or to the extent of respondent 3 alone. We do not wish to go into the discussion as to whether the appeal abates in toto or only to the extent of respondent 3 having regard to the view that we have taken as regards the merits of the appeal.

9. On the merits of the appeal, it is urged that the lower Court has erred in holding that the decree-holder has complied with the provisions of the decree, when as a matter of fact, he urges that the amount ordered to be paid under the decree was not paid in time and draft of the sale deed was not actually presented and that, therefore, it cannot be said that there was sufficient compliance with the terms of the decree. The learned counsel placed his reliance on S.S. Balakrishna Iyer and Another Vs. Parvathammal and Another, Kunj Behari Singh and Others Vs. Bindeshri Prasad Singh and Others , Bhagwat Narain Singh and Another Vs. Srinivas, Ram Kinkar Singh and Another Vs. Smt. Kamal Basini Devi, and AIR 1935 85 (Privy Council)

This argument is equally devoid of force. The decree, as stated earlier was passed on 1-7-52. The decree provided that the appellant should execute the sale deed within two months of the decree on the respondent paying the balance of Rs. 15,500/- and filing a draft of the sale deed. The respondent deposited the amount on 2nd September, 1952 as 31st August 1952 and 1st September 1952 happened to be holidays. No draft of the sale deed was presented, but their contention was that as such a draft had already been produced before the Court during the trial and also exhibited, there was no question of filing any fresh draft.

Question arises whether by the deposit of the amount in Court and by the draft sale deed being already on record, there was sufficient compliance with the terms of the decree. The lower Court has held that that was sufficient compliance. We agree with the view of the court below. The decree did not provide that the amount be paid to the defendant. Rule 1 of Order 21 of the CPC which provides the modes of paying money under decree reads:

All moneys payable under a decree shall be paid as follows: (a) into Court; (b) out of Court to the decree-holder or (c) otherwise as the Court which made the decree directs.'''

The law envisages payment into Court as a valid compliance with decree, even though the decree directs payment to the decree-holder. The respondents, in our opinion, had the option of paying to the defendant or paying into Court and they

chose the latter method and as the Court was closed on 31st August and 1st September, 1952 they paid the amount into Court on the 2nd September. This payment, in our opinion, is a good payment and a valid performance of what the decree requires.

Identical question had arisen in the Bombay High Court in *Wana Ravji v. Natu Murha*, ILR 35 Bom 35. In that case, the decree provided as follows:

The plaintiff should pay by the 10th day of April, 1909, to the defendant Rs. 100/-. If the moneys are not Paid by the plaintiffs as agreed upon, the property in dispute will remain with the defendant by right of ownership and the plaintiff will have no right of ownership over the same.

The plaintiff in that case paid the amount on 14th April 1909. A question arose whether the payment so made was within the terms of the decree. It was held by Chandavarkar and Heaton, JJ. that the payment was properly made, for Order 21, R. 1 of the Code of Civil Procedure, 1908, intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree-holder. In the instant case also a decree was passed in similar terms as those in the Bombay case referred to above.

Similar view has been taken by the Madras High Court in *Sankaran Unni and Another Vs. Kummakattil Ezhuvar Kandan's son Raman*, . This was a case in which the plaintiff obtained a compromise decree, by which if money was paid within the 30th Meenon 1907 (12th April 1922), the sum of Rs. 285/- was to be taken in full satisfaction of the claim. The decree provided that in default of such payment the defendants were to pay the plaintiff the whole of the plaint amount with costs. The defendants put in an application to the lower Court to have satisfaction entered of the decree, on the ground that he tendered the amount to the plaintiff on 12th April, 1922, but as the plaintiff did not receive that amount, he sent it by money order to the plaintiff, which again was refused and he therefore had the money ready with him to be deposited in Court and to give a challan to make that deposit. That was on the reopening day of the Court after the mid-summer holidays, on the 12th June, 1922. On an objection being taken whether that was valid payment, it was held relying on ILR 35 Bom 35 that it was a valid payment.

Another Bench of the Madras High Court in *Chinna Nadar Vs. A.B.V. Arumugham Chetti*, following the decision reported in *Sankaran Unni and Another Vs. Kummakattil Ezhuvar Kandan's son Raman*, has held that where a judgment-debtor agrees to pay the decretal amount on a certain date but the Court is closed on that date, a payment made on the next reopening day is a good payment, and that there is no distinction in this respect between a compromise decree and another decree. This also being a Bench decision this Court is bound by it.

10 S.S. Balakrishna Iyer and Another Vs. Parvathammal and Another, was a case where the question of extension of time under Sec. 148 Cr. P. C. was for

consideration and it was held that where an order is passed allowing an application upon certain terms and providing that it within the time allowed those terms are not complied, with, the application shall automatically and without further interposition by the Court, stand dismissed. No further order of Court is necessary to effect dismissal of the application. In the instance case, there is no question of any extension of time. This ruling, therefore, in our opinion is not applicable to the facts of the case.

After the Bench decision in *Chinna Nadar Vs. A.B.V. Arumugham Chetti*, we do not feel it necessary to go into a detailed discussion of the other authorities cited by the learned counsel. Of the authorities cited, except *Kunj Behari Singh and Others Vs. Bindeshri Prasad Singh and Others* which is a direct authority on this point, the other cases are not direct to the point in question. In *Kunj Behari Singh and Others Vs. Bindeshri Prasad Singh and Others Sulaiman and Kendall, JJ.* no doubt held that Payment into Court was not a valid payment. In that case, under a compromise decree the amount due was to be paid in instalments the whole amount was to become due. On the date of the payment of first instalment, the Court was closed and a tender was filed when the Court reopened. It was held that there was a default in the payment of the first instalment as the defendants who had the option to make the payment direct to the decree-holder or to deposit the amount in Court, could not take advantage of circumstance that the Court was closed on the date of payment. We feel a doubt as to whether in the face of the provisions of Order 21, R. 1 C.P.C. it could be said that the decree-holder could not exercise his option of paying the amount into Court, but it is not necessary to discuss the case as we have already stated we are bound by the Bench decision reported in *Chinna Nadar Vs. A.B.V. Arumugham Chetti*,

11. From the above discussion, it would appear that payment into Court by the respondents was a valid payment and that it was sufficient compliance with the provisions of the decree.

12. Now, the other question that remains to be considered is whether failure to present the draft of the sale deed amounted to non-compliance with the terms of the decree. It is no doubt true that the respondents did not file a draft of the sale deed as provided by the decree, but it was contended by them that it was unnecessary as there was already a draft copy. Ex. 7 on record. When the draft copy of the sale deed was already on record, we also feel that it was unnecessary for the respondents to have further filed copy. They could rely on the draft copy and that, in our opinion, was sufficient compliance with the term of the decree.

13. Yet, another argument was advanced before us that inasmuch as the judgment-debtor has died and there is no proof on record to show that her husband who has been brought on record is in possession of the property, the decree passed in favour of the respondents for specific performance could not be enforced against him. In this connection, the learned counsel relied on *Hamidgani Ammal (one of the L.Rs. of the deceased first respondent) Vs.*

Ammasahib Ammal (died) and Others, We do not find any substance in this argument. We may, in this connection, refer to Section 50 C. P. C. which provided :-

1. Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

2. Whether the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability; the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

14. In view of the above provision, the contention of the learned Counsel fails. The case of Hamidgani Ammal (one of the L.Rs. of the deceased first respondent) Vs. Ammasahib Ammal (died) and Others, does not help the contention of the learned Counsel. In that case, it was held "that when a person comes into Court in execution proceedings as the legal representative of a deceased party, he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest; the decree will not be binding upon him unless he was a party to the suit. If he was not a party to suit or had been dismissed from the suit his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose.

15. In view of the above discussion, we do not find any merit in this appeal. It is dismissed with costs.