
(1965) 10 RAJ CK 0009

In the Rajasthan High Court

Case No : Ex. Second Appeal No's. 27 and 20 of 1962 and 3 of 1964

Durga Prasad

APPELLANT

Vs

Gauri Shankar

RESPONDENT

Date of Decision : 15-10-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2(1), Order 21 Rule 11(2), 141

Citation : AIR 1966 Raj 258 : (1966) RLW 201

Hon'ble Judges : Jagat Narayan, J

Bench : Single Bench

Advocate : B.B.L. Bhargava, for the Appellant; A.C. Inani, for the Respondent

Judgement

Jagat Narayan, J.—These execution second appeals arise out of the same decree and can conveniently be disposed of by one judgment. I have heard the learned counsel for the parties and have perused the record.

2. A final decree in a partition suit between Gauri Shankar respondent and Durga Shankar appellant was passed in favour of the former on 1-10-51 granting the following reliefs :--

A. Exclusive possession over some house properties.

B. Exclusive possession over some agricultural land.

C. Costs of the suit.

D. Right of worship and of receiving offerings in Charbhuj Temple Pushkar between Asoj Sudi 3 and Asoj Sudi 2 once in four years.

Gauri Shankar's first turn of worship after the decree came on Asoj Sudi 3, S. 2009 (22-9-52). This turn was to have come to end on 10-10-53. He filed the first execution application No. 534 of 1953 on 16-7-53, that is before the turn of worship had come to an end. In this execution application he only claimed relief D namely the right of worship and receiving offerings. Notice was issued to the

judgment-debtor who appeared and took time for filing objections. Time was granted to him upto 22-10-53. The turn of worship of Gauri Shankar however came to an end on 10-10-53 and this execution application accordingly became infructuous. On 22-10-53 the decree-holder made a statement that he did not want to proceed with the execution application for the present and the execution application was struck off.

3. Gauri Shankar filed the second execution application (No. 380/54 renumbered as No. 38/58) on 31-3-54 for the grant of reliefs A, B and C. He did not claim relief D in this application as his next turn of worship was to commence after more than two years namely on 7-10-56. In column No. 6 of the execution application it was mentioned by him that the decree was being executed for the first time. No mention of the execution application dated 16-7-53 was made. This was obviously because the application dated 16-7-53 was for relief D whereas the application dated 31-3-54 was for reliefs A, B and C. For these reliefs the second execution application dated 31-3-54 was the first execution application.

4. Notice was issued to the judgment-debtor who appeared and raised two objections. One objection was that the execution application was materially defective inasmuch as no mention about the first execution application dated 16-7-53 was made as required under Order 21 Rule 11 (2)(f) C. P. C. The second objection was that as reliefs A, B and C were not claimed in the first execution application dated 16-7-53 the decree-holder had become disentitled to claim them.

5. Both these objections were overruled by the executing court as well as the appellate court. Execution second appeal No. 27 of 1962 has been preferred against the judgment of the appellate court.

6. The third execution application (No. 492 of 1956 re-numbered as No. 143 of 1958) was filed on 20-8-56 for relief D. The next turn of the decree-holder was to commence on 7-10-56. The judgment-debtor filed a number of objections and the turn of the decree-holder passed before they could be disposed of. On 12-9-59 the executing court dismissed the application on the ground that the turn of the decree-holder had passed and he should apply again before his next turn was to commence.

7. The fourth execution application No. 222 of 1960 was filed on 23-9-60 for relief D. In column 6 of the execution application the decree-holder mentioned the two previous execution applications for this relief namely No. 534 of 1953 dated 16-7-53 and No. 492/56 dated 20-8-56. He did not mention the execution application No. 380 of 1954 filed on 31-3-54, obviously because it did not relate to relief D. The judgment-debtor again raised the same two objections namely that the execution application suffered from a material defect inasmuch as one of the execution applications was not mentioned in column No. 6 and the other was that piecemeal execution was not permissible. The executing court upheld the first objection of the judgment-debtor that the execution application suffered

from a material defect as it did not comply with Order 21 Rule 11 (2) (f), but the appellate court overruled it.

8. Against the decision of the appellate court execution second appeal No. 20 of 1962 has been filed.

9. So far as the first objection is concerned it may be taken to be settled law that failure to mention the result of the previous applications as required under Order 21 Rule 11(2)(f) is not a material defect which may per se vitiate the execution application. In this connection the following decisions may be referred to :--

Rama v. Varada ILR (1893) Mad 142 ; Srimati Saudamini Ghose Vs. The Jessore Registered Loan Company Limited, ; Tadinada Abdul Kharim Saheb Vs. Pulavarti Lakshmanaswami, ; Harbachan Singh Harbaksh Singh and Another Vs. L. Sita Ram L. Kanshi Ram and Others, The object of the provision contained in Order 21 Rule 11(2)(f) C. P. C. is that the executing court should know (1) whether the execution application is within limitation and (2) to what extent, if any, the decree has already been satisfied. The decree-holder can satisfy the executing court on these two points by producing other evidence before it even after filing the execution application and when the court is so satisfied substantial compliance with the rule is made.

10. On behalf of the appellant the decision of a learned single Judge of the Punjab High Court in D. H. M. Framji v. Eastern Union Bank AIR 1951 P&H 371 has been referred to. With all respect I am unable to agree with it. No reason has been given in this decision for the view taken by the learned Judge. Nor has any case been cited to support the view. This decision cannot therefore be taken to lay down the law correctly.

11. The second execution application dated 31-3-54 was filed within 3 years of the decree and was on the basis of it within limitation. No part of the decree had been satisfied till then. Failure to mention the first execution application dated 16-7-53 was therefore of no consequence.

12. In the fourth execution application dated 23-9-60 which was for relief D only the previous execution applications for the grant of the same relief dated 16-7-53 and 20-8-56 were shown. The assistance of the second execution application dated 31-3-54 was not at all necessary to show that the execution application dated 23-9-60 was within limitation. Further the decree had not been satisfied with regard to relief D. Failure to mention the execution application dated 31-3-54 was therefore of no consequence.

13. The appellate court therefore rightly held that the execution applications dated 31-3-54 and 23-9-60 were not defective on the ground of non-compliance with Order 21 Rule 11 (2)(f).

14. Coming now to the second objection that piecemeal execution is barred, I have carefully considered the arguments advanced by the learned counsel for the parties and I am of the opinion that piecemeal execution is not barred. It may be

that in certain cases there are circumstances from which it can be inferred that the decree-holder executing a decree for money for a lesser sum can be taken to have waived his right to levy execution for the balance.

15. Order 2 Rule 2(1) C. P. C. provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. This provision is not applicable to execution proceedings because the proceedings contemplated u/s 141 C. P. C. do not include execution proceedings. It was so held by their Lordships of the Privy Council in *Thakur Prasad v. Fakirullah*, ILR (1895) All 106 (PC). This decision was followed by their Lordships of the Supreme Court in *Dokku Bhushayya Vs. Katragadda Ramakrishnayya*,

16. There is no express provision in the CPC laying down that separate and successive execution applications can be made. But there is no prohibition against it either. It has been held that so far as the CPC is concerned the court ought not to act on the principle that every procedure to be taken is prohibited unless it is expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. In other words the Code is not exhaustive of all forms of procedure necessary to be used in the administration of justice. In this connection the following decisions may be referred to :--

Peruri Sooryaprakasam Vs. P.I. Muniswami Chetti, *Sukhdeo v. Rito Singh* AIR 1917 Pat 495 , *Raghuandan Singh and Others Vs. Parmeshwar Dayal Singh*, *Hukum Chand Baid v. Kamalanand Singh*, ILR (1906) Cal 927 . I am accordingly of the opinion that separate and successive applications for the execution of a decree can be made in which different reliefs may be claimed. In this connection the following decisions may be referred to:-- *Radha Kishen Lall Singh v. Radha Pershad Singh* ILR (1891) Cal 515, *Sadho Saran v. Hawal Pande* ILR (1897) All 98 (FB), *Maleka Khatun v. Azimuddin Ahmed* AIR 1960 Gau 16, *Champalal v. Ghisulal*, Ex. Second Appeal No. 31 of 1962, dated 10-1-1963 (Raj).

On behalf of the appellant the decision of the Nagpur High Court in *Govindprasad v. Ramraskal* AIR 1956 Nag 91 was referred to. This decision is mainly based on the decision of the Bombay High Court in *Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi*, A reading of that decision goes to show that the learned Judges were greatly influenced by the rule of English law laid down in *Forster v. Baker*, 1910-2 KB 636. That rule is based on the English Judicature Act 1873 the provisions of which are different from the provisions of the Code of Civil Procedure. It is true that the learned Judges did not base their decision on 1910-2 KB 636. They based it on the proposition that nothing is permissible under the Code for which there is no express provision. With all respect I am unable to subscribe to that proposition for reasons which I have already indicated above.

17. I am accordingly of the opinion that there is nothing in the CPC which may bar piecemeal execution. But as I have pointed out above it may be that in

certain cases there are circumstances from which it can be inferred that a decree-holder executing a decree for money for a lesser amount can be taken to have waived his right to levy execution for the balance.

18. In the present case the question does not arise. Relief D claimed in the execution applications dated 16-7-53, 20-8-56 and 23-9-60 is quite distinct from reliefs A, B and C claimed in the execution application dated 31-3-54. From the fact that in the first execution application dated 16-7-53 only relief D was claimed it cannot be inferred that the decree-holder waived his right to get reliefs A, B and C.

19. I accordingly hold that the appellate court rightly held that the second objection of the judgment-debtor was not sustainable.

20. On remand of execution case No. 222/ 1960 by the appellate court the executing court passed an order that the decree-holder may be put in possession out of turn because he was prevented from taking possession over the temple to exercise his right of worship and receiving offerings for his previous three successive terms. This order was affirmed by the appellate court. This order is erroneous in my opinion. The executing court has no jurisdiction to put the decree-holder into possession of the temple at any time not provided for under the decree. However the order of the appellate court was stayed by this Court with the result that the decree-holder was not put into possession in contravention of the terms of the decree.

21. The result is that execution second appeals Nos. 27 of 1962 and 20 of 1962 are dismissed and execution second appeal No. 3 of 1964 is allowed. In the circumstances of the case, I direct that parties shall bear their own costs of these appeals.