

(1945) 05 CAL CK 0019
In the Calcutta High Court
Case No : Appeal No. 159 of 1943

Hrishikesh Saha and others	Vs	APPELLANT
Sreematy Radha Rani Kar, Judgment-debtor and another		RESPONDENT

Date of Decision : 04-05-1945

Acts Referred:

Citation : (1945) 05 CAL CK 0019

Final Decision : Allowed

Judgement

B. K. Mukherjea, J.—The facts giving rise to this appeal may be shortly stated as follows: Certain persons who may be called the Sahas and who are represented in this appeal by the appellants and pro forma respondent obtained a final mortgage decree against one Akhoy Kumar Kar in the Court of the Second Subordinate Judge of 24-Parganas for a sum of Rs. 1,19,000 odd on 13th June 1930. The decree was put into execution on 8th August 1930, the execution case being registered as Title Execution Case No. 187 of 1930, and it is admitted that no portion of the decretal dues has been realised up till now. On 23rd December 1941, the judgment-debtor Akhoy died. The death was reported to the Court on 10th January 1942, and on 5th March 1942, the decree-holders made an application for continuing the execution proceedings against the widow and sons of the judgment-debtor on substitution of their names as legal heirs in place of the deceased. The widow whose name is Radharani and who figures as respondent 1 in this appeal objected to the application for substitution made by the decree-holders on the ground that the judgment-debtor having died leaving behind him a will by which she was appointed the sole executrix, she alone was the legal representative of the deceased and that there could be no substitution of the intestate heirs of the judgment-debtor in the execution proceeding. It was stated by her in the petition of objection that she had already applied for probate of the will though no grant was actually made in her favour at that time. The Court by its order dated 25th April 1942, dismissed her objection and allowed substitution of all the intestate heirs of the judgment-debtor including Radharani, the widow. It is rather curious to notice that on the very same day orders for

substitution were made in two miscellaneous cases (Miscellaneous cases Nos. 39 of 1940 and 8 of 1941) which arose out of objections filed by the judgment-debtor in the same execution case, and in both of them Radharani was allowed to be substituted in her capacity as executrix as the sole legal representative of the deceased judgment-debtor. On 8th June 1942, the probate Court made an order granting probate of the will to Radharani and on 16th September 1942, she brought this fact to the notice of the executing Court. On 29th September 1942, the decree-holders applied for amendment of the execution petition by describing Radharani as the sole executrix and legal representative of the judgment-debtor and striking out the names of the other heirs from the execution record. On 1st October 1942, this application was allowed, and the execution petition was amended. On 3rd October 1942, Radharani filed a petition objecting to the execution of the decree contending, inter alia, that as the application for substituting her as the sole legal representative of the deceased judgment-debtor was made more than 12 years after the date of the decree it was in substance a fresh application for execution and consequently the execution case was barred under S. 48, Civil P. C. The Subordinate Judge by his order dated 5th April 1943 overruled this contention and held that S. 48, Civil P. C., could not be attracted to the facts of this case, as the application of the decree-holders made on 29th September 1942 was merely ancillary to the original petition for execution and could not be treated as a fresh application within the meaning of S. 48, Civil P. C. Later on, however, there was an application made by Radharani for review of the order made on 5th April 1943 and the learned Judge by a fresh order made on 13th May 1943 vacated the earlier order and dismissed the execution case being of opinion that the application for bringing Radharani on the record as the sole legal representative of the judgment-debtor was a fresh application for execution as contemplated by S. 48, Civil P. C., and as that application was presented more than 12 years after the date of the decree the execution of the decree was barred. It is against this order that the decree-holders have come up on appeal to this Court.

2. Having heard the learned advocates on both sides, we are of the opinion that the order made by the Subordinate Judge on 13th May 1943 is a wrong order and cannot be sustained. We agree with the learned advocate for the appellants that there were none of the grounds contemplated by O. 47, R. 1, Civil P. C., upon which the Court could set aside, by way of review, the previous order made by it on 5th April 1943. There was no error apparent on the face of the record nor discovery of any new and important piece of evidence subsequent to the passing of the order. If the decision was erroneous, it was open to the judgment-debtor to challenge it by way of appeal. But it is not necessary for us to base our decision on this somewhat technical point, for, we are definitely of opinion that the view of law taken by the Subordinate Judge in the subsequent order made on 13th May 1943 is not sound and cannot be accepted. The whole controversy really centres round the point as to whether the application made by the decree-holders on 29th September 1942 was in substance a fresh application for

execution within the meaning of S. 48, Civil P. C. It is well settled by authorities that the expression "fresh application" as used in S. 48, Civil P. C., means a fresh substantive application and not merely an ancillary one made with the object of moving the Court to proceed in the matter of a substantive application already on the file : vide 18 ALL. 483 Rahimali v. Fulchand ("96) 18 All. 482 (F.B.) and 33 ALL. 517 Ramsarup v. Dasrath ("11) 33 All. 517 : 9 I. C. 817. Section 48, Civil P. C., does not lay down that as soon as the period of 12 years elapses from the date of the decree the executing Court becomes functus officio and cannot proceed with the execution of the decree any further. Provided no fresh application for execution is presented after the lapse of 12 years from the date of the decree the executing Court can certainly continue a proceeding in execution commenced but not completed before the expiry of 12 years and if an application has got to be made by the decree-holders in furtherance of and ancillary to the petition for execution already filed, S. 48, Civil P. C., would have no application. Mr. Bose argues that if a judgment-debtor dies pending an execution proceeding and the decree-holder applies for continuation of the proceeding against his heirs under S. 50, Civil P. C., it amounts to a fresh application for execution and if it is made when 12 years have already passed from the date of the decree, it would come within the mischief of S. 48, Civil P. C. We cannot accept this contention as sound. When the judgment-debtor dies pending an execution proceeding it is not necessary for the decree-holder to file a fresh application under O. 21, R. 11, Civil P. C. He can continue the same execution proceedings against the heirs of the deceased by bringing them on record in place of the original judgment-debtor: vide 34 Bom. 142 Purshottam v. Rajbai Rajaji ("10) 34 Bom. 142 : 4 I. C. 839. It has been held further by the Bombay High Court that even if any separate application is made in such circumstances it would not be a fresh application within the meaning of S. 48, Civil P. C.: vide 33 Bom. L.R. 858 Shankar v. Hiralal ("31) 18 AIR 1931 Bom. 425 : 134 I. C. 730: 33 Bom. L. R. 858. The Subordinate Judge has relied strongly on a decision of the Patna High Court which is to be found reported in A. I. R. 1940 Pat. 571 Maharaja Bahadur Ram Ranbijaya Prasad Singh Vs. Kesho Prasad Singh and Another, . The facts of that case however are quite different. We are quite prepared to hold that if the decree-holder after he has presented his petition for execution wants to proceed against any new party whose name was not mentioned in the petition or wants to attach and sell any new property not included in it, the application might be regarded as a fresh application for execution. But this principle cannot possibly apply where the decree-holder does not want to proceed against any new party but prays for continuation of the proceeding against an heir or legal representative of the judgment-debtor originally on the record. In our opinion therefore if the application made by the decree-holders on 29th September 1942 be regarded as a fresh application for execution against the legal representative of the deceased judgment-debtor under S. 50, Civil P.C., it would be merely ancillary to the substantive petition against the original judgment-debtor and could not rank as a fresh application within the meaning of S. 48, Civil P. C. As under O. 22, R. 12, Civil P. C., the provisions of Rr. 3 and 4 of that Order do not

apply to execution proceedings, no other question of limitation regarding the time within which substitution has to be made can possibly arise.

3. Furthermore, it appears, as stated above, that in the two miscellaneous cases arising out of the same execution proceeding Radharani got herself substituted as the sole executrix and legal representative of her husband and the orders were made by the Court in the same execution record on 25th April 1942 when 12 years had not run out from the date of the decree. She thus introduced herself as a party to the execution case in her capacity as representative of her husband's estate. In these circumstances the application of the decree-holders presented on 29th September 1942 can be treated as a formal application for correcting the description of Radharani in the cause title of the execution case and nothing more, she being already made a party to the execution case on her own application and within 12 years from the date of the decree.

4. In the result, therefore, the appeal is allowed. The order of the learned Subordinate Judge dated 13th May 1943 is set aside and that made on 5th April 1943 restored. The appellants will be entitled to the costs of this appeal. Hearing fee three gold mohurs.

Ellis, J.

5. I agree.