

(1975) 04 BOM CK 0012

In the Bombay High Court

Case No : Letters Patent Appeal No. 12 of 1974

Jagdishgir Laxamangir Gosavi and Another

APPELLANT

Vs

Rangacharya Gururacharya Swami Rambagwale and Others

RESPONDENT

Date of Decision : 14-04-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48

Citation : AIR 1976 Bom 261

Hon'ble Judges : Vaidya, J;Lentin, J

Bench : Division Bench

Advocate : J.R. Lalit, for the Appellant; V.B. Rege, for the Respondent

Judgement

Vaidya, J.—The above Letters Patent Appeal is filed against the order of summary dismissal of first appeal No. 35 of 1974. The appellants are the judgment-debtors against whom a consent decree was passed in Special Civil Suit No. 50 of 1949, filed by the respondents-decree-holders' legal representatives. The suit was to recover the amount due on a mortgage dated September 10, 1945 of Rupees 7000/-. There is now no dispute that the present special darkhast No. 89 of 1960 to execute that decree is within time. It is not necessary to refer to the objections filed by the judgment-debtors as all those objections were overruled. We are now concerned only with the objections of the judgment-debtors to the execution that were raised subsequent to the order of sale of the mortgage property, dated July 15, 1971.

2. The executing Court appointed a Commissioner to ascertain whether there was no truth in the Biliff's report stating that the mortgaged property had ceased to exist in the condition in which it was mortgaged. The Commissioner reported that it had ceased to exist in that condition. Thereupon the decree-holder filed an application Ex. 128 in the darkhast on October 29 1971 for issuing an order of attachment of his movable and for realizing the decretal amount by the said attachment and sale of the movable. The decree-holder also filed an application for attachment of property bearing city survey No. 4373 situated in

Pandharpur.

3. The applications were opposed by the judgment-debtors by filing their objections at Ex. 143. They contended that these applications for amendments of the Darkhast were barred by time and on some other grounds that were described as "minor grounds" by the learned Judge. The learned Judge heard these objections and by his judgment and order dated November 22, 1973 allowed the amendments following a decision of this Court in *Manmappa Shiddappa v. Ningappa Rangappa* 49 Bom LR 673 : AIR 1948 Bom 116 the head-note of which runs as follows:

"A decree-holder applied in 1932 for execution of his decree obtained in 1925 by sale of certain landed property of the judgment-debtor. The judgment-debtor being an agriculturist, the papers were sent to the Collector. The decree was not fully satisfied by the sale held by the Collector in 1942, and the decree-holder asked for amendment of his application by the addition of a prayer for the attachment and sale of a house belonging to the judgment-debtor. On the question whether the amendment could be allowed:

Held, that the decree-holder was not shown to have been guilty of any lack of diligence in prosecuting his execution and that, therefore, in the circumstances of the case the Court had a reasonable discretion to accept the amendment."

The only point which was discussed by the learned Civil Judge and which appears to have been urged before him was with regard to limitation u/s 48 of the Civil Procedure Code. The learned Civil Judge, found that there were no laches on the part of the plaintiff and applying the tests laid down by the Division Bench of his Court in the above case, allowed both the amendments by his judgment and order dated November 22, 1973. The said decision was challenged in first appeal No. 35 of 1974, which was summarily dismissed, as stated above; and the above Letters Patent Appeal is filed against the said summarily dismissed appeal under Clause 15 of the Letters Patent.

4. The only point which arises in the above letters patent appeal is whether the executing Court was right in holding that the amendments should be allowed, having regard to the decision of *Macklin and Bavdejar, JJ.* in the aforesaid *Hanamma's* case. Mr. Lalit the learned counsel for the judgment-debtors relied on a decision of *Hidayatullah, J.* as he then "was, in AIR 1948 272 (Nagpur) where *Hidayatullah J.* observed at p. 273.

"The present application for amendment seeks to proceed against the immovable property and therefore the mode of execution is certainly different. In ILR (1945) Nag 555 : AIR 1945 Nag 239 a C form has been sent and sale had taken place of some property mentioned in the C form. On ratable distribution the decree of the decree-holder in that case was not satisfied. He applied for amendment of the first application by inclusion of some other items of property. It was held on the authority of the cases cited in this ruling that this was a fresh application for execution and not an application for amendment. It has been held in some other

High Courts that amendment can be allowed in suitable cases and the Courts are not limited by Order 21, Rule 17, Civil Procedure Code, if it does not alter the execution proceedings. This has been laid down in ILR (1941) Cal 251 : Shekendarali Meah Vs. Abdul Gafur Choudhury and Others, and AIR 1940 Mad 19. The view of this Court, however, has been to treat applications for execution against new items of property as fresh applications. Another case in Point Misc. Appeal No. 165 of 1943, decided on 29-3-1945 (Bom). I am bound by these two cases of this Court, especially ILR (1945) Nag 555 : AIR 1945 Nag 239 which is a Division Bench case. Even if I disagreed with the view propounded therein, I do not consider this case suitable for reference because the present appeal can be decided on other grounds."

The learned Judge held that the application before him was an application under Order 21 Rule 17; and therefore it was not an application which attracted the provisions of Section 48. He even went on to say in the last para of his judgment that although it was not necessary, to decide the case on the ground of fraud, he would say nothing more about it except to indicate that if it was necessary he would have accepted the plea of fraud and allowed him to plead it even at this late stage. In other words the judgment cannot be said to be a judgment which lays down any authoritative ratio regarding the meaning of "fresh application" u/s 48 which, in our opinion, is decided by the above Division bench decision of this Court in Hanmappa's case AIR 1948 Bom 116.

5. Mr. Lalit has also tried to support his contention that the applications for amendment are barred by Section 48 relying on an unreported judgment of Deshmukh and Mukhi, JJ. in First appeal No. 347 of 1965 decided on 3rd/4th October 1974 (Bom). But that appeal arose out of an order for personal decree against respondent No. 1 in that case and not for amendment of the execution application, as in the present case; and it is therefore easily distinguishable. Apart from the fact that the ratio in Hanmappa's case AIR 1948 Bom 116 is binding on us, we find that most of the High Courts have taken the view that what is contemplated u/s 48 by the words "fresh application" is a substantive application for execution and not one which is merely ancillary or antecedent to a previous application.

6. Moreover the highest court also laid down that an application would be a fresh application only where a previous application was finally disposed of and hence the application mentioned in Section 48 cannot be an application to continue the substantive application already pending on the file of the Court. (See Pentapati Chinna Venkanna and Others Vs. Pentapati Bengararaju and Others, It is also well settled that the question whether an application for execution of a decree is a "fresh application" within Section 48 of the CPC must be decided on the circumstances of each case, on the substance of the matter and not merely on the form of the application. (See the AIR 1939 80 (Privy Council)

7. The facts of the present case are almost identical with the facts in the case of Pentapati Chinna Venkanna and Others Vs. Pentapati Bengararaju and Others,

The AIR 1939 80 (Privy Council) also was one where the decree-holder applied for sale of the property which had not been attached; and it was held that the application could not be regarded as a fresh application in the sense of Section 48 of the Code merely by reason of the steps which the decree-holder though were necessary to take in executing the decree.

8. Turning therefore to the facts of the present case, we find that in column 10 of the execution application the decree-holder has stated that Rs. 12807/- is to be recovered from the J. D. with future interest and costs by sale of the mortgaged properties through Court. The Darkhast application was, therefore, in substance to recover the money due under the mortgage. It is also well settled that the Courts look with disfavour upon the decree-holders trying to execute against more property than is absolutely necessary for the purpose of satisfying the decree; and the disfavour is reflected in the proviso to sub-rule 14 of Order 21. The Division Bench in Hanmappa's case AIR 1948 Bom 116 observed:

"It was therefore the duty of the decree-holders to apply for the attachment and sale of only so much property as he thought would be necessary to satisfy his decree and it would be unfair to penalise him for his failure to apply for the attachment and sale of more property merely because after 9 years the Collector has failed to secure a price which would satisfy the decree."

In the present case also it would be most unfair to deprive the decree-holder's heirs of their right to recover the moneys due under the decree merely because they had earlier asked for realization of the amount by sale of the mortgaged property.

9. Looking at the substance of the darkhast, in our opinion, there can be no doubt that the darkhast is for recovering the amount. It still continues to be the darkhast for recovering the amount. Merely because the amount was to be recovered first by attachment and sale of immovable property, now by sale of movable property, it cannot be said that the darkhast is changed in substance or in the nature. Applying therefore the above principles laid down by the Division bench of this Court, the Supreme Court and the Privy Council, we hold that the applications for amendments were rightly allowed in the present case as they are not "fresh applications" within the meaning of Section 48 of the Civil Procedure Code.

10. Mr. Lalit tried to submit before us that the applications were also barred under Article 136 of the Limitation Act 1963. The contention is without any substance because the applications are only for the amendment of the darkhast which was pending. The applications are not fresh applications for execution of the decree within the meaning of Article 136.

11. In the result, we confirm the judgment and order passed by the learned Civil Judge, Senior Division, Sholapur on November 22, 1973. the record and proceeding be sent immediately.

12. The Letter Patent Appeal is dismissed with costs. In Civil Application 663 of 1974, the rule is discharged with costs; and the interim stay is vacated.
13. Appeal dismissed.