
(1968) 04 P&H CK 0018
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 28 of 1968

Jaswant Rai Harbans Rai

APPELLANT

Vs

Dogar Mal Jawahar Mal and Others

RESPONDENT

Date of Decision : 15-04-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63, 48
Limitation Act, 1963 — Section 15

Citation : AIR 1968 P&H 509

Hon'ble Judges : Gurdev Singh, J

Bench : Single Bench

Advocate : K.C. Puri, for the Appellant; H.L. Sarin and Harnam Singh Awasthy, for the Respondent

Final Decision : Allowed

Judgement

Gurdev Singh, J.—This second appeal arises out of proceedings leading to the execution of a decree for payment of Rs. 1379 which Jawahar Mal, father of Dogar Mal respondent No 1, obtained against Harbans Rai father of the appellant Jaswant Rai, and respondents 2 to 6 on 23-10-1975 Bikrami (7th January, 1919). Shortly after that decree was passed, the decree-holder applied for its execution and attached a house to which Smt. Malan filed objections under Order 21, Rule 58, CPC which were accepted. The decree-holder thereupon brought a suit under Order 21, Rule 63, CPC but without success. Ultimately in appeal the High Court for the erstwhile State of Kapurthala by its judgment dated 29th Asuj, 1979 Bk. held that Smt. Malan, who had objected to the execution of the decree, was entitled to stay in that house during her lifetime and accordingly the attached property could not be sold in execution of Jawahar Mal's decree against Harbans Rai so long she was alive. The Full Bench of that High Court, however, directed that the house would remain attached and the decretal amount would remain a charge on that property during the lifetime of Smt. Malan and it would be after her death that the property would be available for satisfaction of Jawahar Mal's decree. Smt. Malan was further restrained from alienating the property or

creating any encumbrance thereupon.

2. Smt. Malan died on the 1st October, 1962 A.D. Thereafter on the 25th of February, 1963, an application for execution of the decree dated 23rd March, 1975 Bikrami was made. A prayer for the sale of the house, in which Smt. Malan had the right of residence, was made to which objections were filed by the legal representatives of the judgment-debtor. Before those objections could be heard and decided, on the 18th December, 1963 the counsel for the decree-holder appeared in Court and stated that the execution application be dismissed as unsatisfied. Thereupon the learned Subordinate-Judge 1st Class Kapurthala, by his order dated 18-12-1963. Exhibit D. H. 1, dismissed the execution application as well as the judgment-debtor's objections without decision on merits. Subsequently on 4th of March, 1964. the legal representatives of the decree-holder made another application for the execution of the decree.

This application was resisted on various pleas, including that of limitation with which alone we are now concerned in this second appeal. It was urged that 12 years' period from the date of the decree, prescribed by Section 48. CPC having expired, the execution application made on 4th March, 1964, was barred by time. This objection prevailed with the executing Court but in appeal, the learned District Judge, Kapurthala, by his order dated 27th February, 1968, has reversed the finding on the question of limitation and holding that the execution proceedings were not barred by time, remanded the case to the executing Court for decision of the remaining issues. It is this order of the appellate Court which is being assailed before me.

3. From the facts stated above, it is apparent that the execution application dated 4th March, 1964. out of which this appeal has arisen, was made long after the expiry of 12 years from the date of the decree. Urging that this application was not barred by time. Mr H. L. Sarin appearing for the respondent-judgment-debtors has contended:

(i) that since the Kapurthala High Court by its judgment Exhibit DH/7 had held that the house which was attached in execution of the decree was not available for sale in satisfaction of the decree so long as Smt. Malan was alive and could only be sold in execution of the decree after her death, the entire period from the date of that decree of the High Court till the death of Smt Malan has to be excluded u/s 15 of the Limitation Act, 1908, in computing the period of 12 years laid down u/s 48 Civil Procedure Code:

(ii) that even if that period is not excluded the effect of the decree of the Kapurthala High Court was to keep the attachment of the house in dispute subsisting and on the death of Smt. Malan the decree-holder was entitled to revive the execution proceedings so as to take benefit of the attachment of the property which was still subsisting; and

(iii) that, in any case, since under the decree of the Kapurthala High Court a charge had been created on the property in favour of the decree-holder, the

period of 12 years prescribed u/s 48 Civil Procedure Code, would start from the date of Smt. Malan's death as it was on that day that the property was available to the decree-holder for satisfaction of his decree.

4. After hearing the parties' counsel and giving my earnest consideration to the question raised. I am of the opinion that there is no substance in the contention that execution of the decree could proceed. This is how I look at the question. The house in which Smt. Malan had the right of residence was attached within the period of limitation allowed for execution of the decree. That attachment was admittedly good. The Full Bench of the Kapurthala High Court by its judgment Exhibit DH/7 held that the property was not available for sale in execution of the decree of Jawahar Mal as Smt. Malan had a right to reside therein for her lifetime. Accordingly they directed that the amount of the decree would remain a charge on that property and it would be after the death of Smt. Malan that the property would be available for the satisfaction of the decree.

The effect of this decree was merely to hold that the house in which Smt. Malan was residing and had a right of residence for her lifetime, was not available for satisfaction of the decree held by Jawahar Mal so long as she was alive. This decree of the High Court in no way affected the right of the decree-holder to obtain satisfaction of his decree by attaching other property of the judgment-debtor, if he had any, or even ask for the arrest of the judgment-debtor which was admittedly then permissible under the law. Thus Mr. Sarin is not correct in saying that so long as Smt. Malan remained alive, the execution of the decree remained stayed under the orders of the Kapurthala High Court and accordingly he was entitled to the benefit of Section 15 of the Limitation Act during that period. The execution proceedings were never stayed. Only the property by attachment and sale of which the decree-holder wanted to satisfy his decree was declared to be not available to him during the lifetime of Smt. Malan. In these circumstances Section 15 has no applicability.

5. The effect of the decree of the High Court Exhibit DH/7. In my opinion, was merely to place the house in which Smt. Malan had life interest, beyond the reach of the decree-holder so long as she was alive. At the same time this house was kept under attachment so that it could be available to the decree-holder for satisfaction of the decree on the death of Smt. Malan. In this view of the matter, if the attachment subsisted, the decree-holder was entitled to take benefit of the same and on the death of Smt. Malan, he could apply for the sale of that property without seeking its reattachment. This he did when he made the application for execution of the decree on the 25th of February 1963. If that execution application is taken as not a new application but in revival of the execution proceedings and to sell the property which had all along remained under attachment during the lifetime of Smt. Malan, the application for execution made on 25th February, 1963 cannot be considered to be a fresh application and there will be no question of its being barred by time. I thus find that the first application made by the decree-holder for execution on 25th February, 1963, was

within time.

6. If the matter had rested here, there would have been no difficulty in the way of the decree-holder to obtain the satisfaction of his decree by sale of the house in which Smt. Malan had the right of residence for her lifetime. Unfortunately, for the reasons best known to the decree-holder, he did not allow that execution application to proceed and instead of having the property sold after adjudication of the objections that had been raised on behalf of the judgment-debtor, the decree-holder got the application dismissed as unsatisfied on 18th December, 1963. This unconditional dismissal of the decree-holder's application for execution dated 25th February, 1963 at his own request put an end to all the execution proceedings that were then pending. Accordingly the attachment of the house which had continued during the lifetime of Smt. Malan, had also come to an end and it could not be revived by any subsequent application for execution of the decree. Thus the application which the decree-holder made on 4th March, 1964, seeking execution of the decree, was a new application and since the previous execution proceedings had come to an end at his own request and the attachment, which had been created by the order of the Kapurthala High Court, no longer subsisted, the decree-holder had to satisfy the Court that his application was within time and the bar of limitation imposed by Section 48 of the Civil Procedure Code, did not operate.

I fail to see how the decree-holder could get out of that bar of limitation, especially in view of my findings that the decree of the Kapurthala High Court did not operate to stay the proceedings of the execution during the lifetime of Smt. Malan and that on dismissal of the application for execution dated 25th February, 1963 at his own request, the attachment of house had come to an end. In this view of the matter the finding of the learned District Judge that the decree-holder's prayer for execution contained in his application brought on 4th March, 1964, is within time, cannot be sustained.

7. Before closing, I would like to refer to the authorities cited by the counsel for the parties. Mr. H. L. Sarin who appears for the decree-holder has placed reliance on *Hulas Singh and Others Vs. Data Ram and Others*, ; *Umrao v. Behari Lal* AIR 1947 All 187; *Satdeo Narain v. Radhey Kaur*. AIR 1920 Pat 354; *Balkishan Dhanraj v. Dhanraj Jainarayan*. AIR 1956 Nag 200 and *Amar Nath and Others Vs. Bankey Behari and Another*, All these authorities were cited in support of the contention that the decree-holder was entitled to exclude the period during which directly or indirectly he is debarred from executing his decree by an order of the Court and to avail of the benefit of Section 15 of the Limitation Act 1908.

All these authorities upon which Mr. Sarin has relied are clearly distinguishable on facts as they relate to the cases in which the decree-holder was prevented by an order of the Court from executing his decree not against any particular property but as a whole. He has not been able to cite a single case in which the finding that the decree-holder cannot proceed against a particular property for sometime has been held to operate as a bar to the execution of the decree attracting the

applicability of Section 15 of the Limitation Act. On the other hand, Mr. K. C. Puri has cited *Narayana Pillai Kunjan Pillai v. Kesava Pillai Sankara Pillai* AIR 1954 Trav Co. 369, where a Division Bench of that Court ruled that the dismissal of an application for execution because of decree-holder's failure to take necessary steps amounts to judicial disposal and any application for execution made thereafter has to be treated as a fresh application for execution.

This supports my finding that the second application made by the decree-holder after the death of Smt. Malan which was instituted on the 4th March, 1964, must be treated as a fresh application and it cannot operate to revive the earlier application dated the 25th February, 1963, which was dismissed as unsatisfied at the request of the decree-holder's own counsel. In *Pingle Venkata Rama Reddy Vs. Kakarla Buchanna and Another*, , a Full Bench of that Court ruled that where once an execution petition is dismissed for default of the decree-holder, it terminates the execution proceedings and a subsequent application for the same purpose will constitute a fresh application within the meaning of Section 48, Civil Procedure Code. The learned Judge further held that in such cases there was no question of continuing or reviving a petition which had been finally and properly dismissed. The test for determining whether an application is a fresh application or not according to their Lordships of the Full Bench, was whether it is a substantive application or an ancillary or incidental one.

Applying that test to the case before us we find that the application made by the decree-holder on 4th March, 1964 was a fresh application as held by me above. Since this application was admittedly made long after the expiry of 12 years prescribed u/s 48, Civil Procedure Code, it was rightly held to be barred by time by the executing Court and the decision of the learned District Judge to the contrary cannot be sustained and is hereby set aside. The appeal is, accordingly, accepted and restoring the order of the executing Court, the execution application is dismissed as barred by time. As the legal question involved in the decision of this case was not free from difficulty. I leave the parties to bear their own costs.