

(1936) 06 CAL CK 0033
In the Calcutta High Court

Kanai Lal Saha and Others

APPELLANT

Vs

Baijanath Khetri and Others

RESPONDENT

Date of Decision : 08-06-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Section 7

Citation : AIR 1937 Cal 649

Judgement

1. This is an appeal preferred by the judgment-debtors who had put in an objection u/s 47, Civil P.C., the said objection having been overruled by the Court below. The facts necessary to be stated are the following: The decree that was sought to be executed was a final decree for sale on a mortgage. It had been obtained on the death of the mortgagee, Bishandas Khetri, by his heirs No. 1 Baijanath Khetri, No. 2 Ramnath Khetri, minor, No. 3 Babulal Khetri, minor, and No. 4 Narayandas Khetri, minor, the said minors being represented by their guardian and elder brother Baijanath Khetri. That was the form of the title contained in the decree. The decree was passed on 4th February 1931. The application for execution which has given rise to this appeal was filed on 2nd February 1934. It was filed by the said Baijanath Khetri for himself and also as guardian and elder brother of Ramnath Khetri, minor, Babulal Khetri, minor, and Narayandas Khetri, minor. The objection that was taken on behalf of the appellants was that the decree was barred by limitation. The ground upon which this objection was pressed before the Subordinate Judge was that the decree-holder Baijanath, being a major, was competent to give a valid discharge and that therefore the decree-holders were not entitled to rely upon Section 7, Lim. Act, to save limitation. The learned Subordinate Judge having overruled this plea, the appellants have preferred the present appeal.

2. In support of the aforesaid contention which was urged on behalf of the appellants in the Court below and has been repeated before this Court, two decisions have been cited and it is necessary to refer to them at the outset in order to clear the ground for a consideration of the question that has been

raised. One of them is the decision in *Khajeh Salaluddin and Others Vs. Mt. Afzal Begum and Another*, . This decision has been relied upon in support of the contention that a guardian-ad-litem appointed in a suit does not continue as such without a fresh appointment in the execution proceedings, and when a litigation has been terminated by the final decree, there is no longer any *lis pendens*. This case has been relied upon for the purpose of the contention that although in the course of the suit *Baijanath Khetry* had assumed the role of guardian in respect of the minors, yet by the passing of the final decree in the suit the *lis* had terminated and so he no longer remained a Court guardian and his disability as such was removed and that when thereafter he came in and put in the application for execution, he was not entitled nor was any of the other decree-holders entitled to rely upon Section 7, Lim. Act. It will be observed however that the aforesaid decision expressly limited itself to cases of decrees for recovery of money, because the learned Judges laid down the aforesaid proposition, on which reliance has been placed on behalf of the appellants, in well guarded language observing thus:

We are now speaking of simple decrees as the decree in this suit for the payment of money and not in relation to mortgage-decrees or decrees for delivery of accounts.

3. The authority of this decision, in whatever way it might be sought to be used in favour of the appellant, cannot be invoked for the present contention which has arisen in respect of execution proceedings relating to a final decree for sale in a suit on mortgage. The other case to which reference has been made on behalf of the appellant is the decision in *Bholananda Jha v. Padmanund Singh* (1902) 6 C W N 348. In that case a rent-decree had been obtained by an adult plaintiff and three minors who were described in the plaint as suing through the adult plaintiff as their guardian ad litem. It should be observed that the facts of the case do not appear very clearly from the judgment of this Court which has been relied upon, but there is towards the end of the judgment a passage which runs in these words:

It is unnecessary in this particular case to consider whether a discharge by a person who was acting as next friend, supposing all the plaintiffs had been minors, would have been a valid discharge or not. In the present case we have the fact that one of the plaintiffs was undoubtedly an adult competent to give a valid discharge, The matter therefore comes directly u/s 8, Limitation Act, and there does not seem to be any reason for holding that the plaintiffs are protected by provisions of Section 7.

4. This passage has been relied on as supporting the contention that where there is a plaintiff, who jointly with certain minors whom he represents as guardian ad litem or more accurately speaking as next friend in the suit, obtains a decree and such adult plaintiff by reason of his relation to the minor plaintiffs is able to give a valid discharge for all, then the mere fact that in the execution proceedings that followed he is representing the minors in the same capacity is not a ground

upon which it can be said that there was any disability which would enable the plaintiffs as decree-holders to invoke the aid of Section 7, Limitation Act.

5. As already stated, the facts of the case are not very clear and it is not unlikely that upon the materials that were before the Court in that case the Court did, as a matter of fact, come to the conclusion that there was no such disability. But if the case is relied on as laying down the proposition in the broad terms in which the contention has been put forward before us, it must be admitted that the authority of this decision can no longer be upheld, having regard to the decision of the Judicial Committee in *Ganesha Row v. Tuljaram Row* (1913) 36 Mad 295. In that case which was a suit for partition by a member of the joint family and the father who himself was a defendant was appointed guardian ad litem of his minor son, their Lordships reversing the decision of the Courts in India held that the powers of the father were controlled by the provision's of Section 462 of the Code and he could not without leave of the Court do any act in his capacity of father or managing member of the joint family which he was debarred from doing as guardian ad litem and that to hold otherwise would be to defeat the object of the enactment. The dictum pronounced as aforesaid by their Lordships of the Judicial Committee must necessarily be regarded as having finally settled the law on the point.

6. Putting aside these two decisions therefore on which reliance has been placed on behalf of the appellants, we have to consider the facts of the case and to determine whether the plea of limitation which has been taken on behalf of the appellants can be sustained. Section 7, Limitation Act, runs in these words:

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under no such disability and discharge can be given without the concurrence of such person, time will run against them all. But where no such discharge can be given, time will not run against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

7. The decree, as already stated, was obtained by Baijanath Khetri for himself and as guardian ad litem, as it is stated in the cause title of the decree, but to put it more correctly, as the next friend of the minor plaintiffs his three brothers. It was sought to be executed in exactly the same form within three years from the date on which the decree was obtained. In those circumstances it was for the appellants when they take the plea of limitation to plead and to show that Baijnath was competent to give a valid discharge in respect of the decree. On this point there is no allegation in the petition that was put in on behalf of the appellants u/s 47 of the Code nor was there any affidavit nor any other evidence offered in any shape. This omission on the part of the appellants, in our opinion, is sufficient for the purpose of overruling the objection which they were allowed to urge at the hearing of their application in the Court below. There is not a particle of evidence, nor even any suggestion anywhere, indicating that Baijanath Khetri was the managing member of the joint Mitakshara family consisting of

himself and his minor brothers.

8. Then there is the fact which has already been noticed above, namely that Baijanath had sued and obtained a decree not only for himself but as next friend in respect of his minor brothers and it was in the same capacity that he made the application for execution in respect of the decree which he had previously obtained. That being the position when the Court entertained the application for execution, it must be held that although no order was expressly passed allowing Baijanath to represent the minors as their next friend for the purpose of the application, yet as a matter of fact, he was tacitly allowed by the Court to represent them in those proceedings. That being the position, the case seems to us to be on all fours with the case in *AL.VR.CT. Lakshmanan Chetty and Another Vs. V.R.RM.V.L. Subbiah Chetty*, in which under exactly similar circumstances the learned Judges of the Madras High Court, referring to the decision of the Judicial Committee in *Ganesha Row v. Tuljaram Row* (1913) 36 Mad 295, held that as the father acted as the next friend of his minor sons in the suit and in the decree, he was not in a position to give legal and valid discharge of the decree without the leave of the Court obtained under Order 32, Rule 6, Civil P.C. Such disability existing, there can be no doubt whatsoever that the plea which the appellants have taken cannot be allowed to succeed.

9. A contention has been urged on behalf of the appellants that it is not permissible to refer to the disability provided for in Rule 6 of Order 32 of the Code inasmuch as the provisions of that Order do not in terms apply to proceedings in execution. It is quite true that such is what has been laid down in a number of decisions of several of the superior Courts in India. It may be pointed out however that there are also decisions of some of the Courts in this country which have taken a very different view of this question. But even though the terms of Order 32 of the Code do not apply to execution proceedings, there can be no doubt that the procedure laid down in that Order and the principle which underlies the provisions contained in that Order must be taken to apply not only to suits but to execution proceedings as well. We are of opinion therefore that if Baijanath was treated as the next friend of the minors for the purpose of the execution of the decree which he had previously obtained in the very same capacity, the disability which Order 32, Rule 6 provides for is a disability which cannot be said to have been got over because the provisions of that Rule do not in their terms apply to execution.

10. The result, in our opinion, is that the view which the learned Judge has taken on the question of limitation appears to us to be correct. The appeal, accordingly, fails and is dismissed with costs: hearing-fee being assessed at five gold mohurs.