

(1987) 01 KAR CK 0006
In the Karnataka High Court
Case No : M.F.A. No. 1702 of 1982

Laxmi Nagappa Hegde

APPELLANT

Vs

The Karnataka Bank Ltd., Sirsi and Others

RESPONDENT

Date of Decision : 29-01-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58

Citation : AIR 1988 Kar 44 : (1987) ILR (Kar) 1186

Hon'ble Judges : P.A. Kulkarni, J

Bench : Single Bench

Advocate : B.M. Krishna Bhat, for the Appellant; Kumud Rao, for B.V. Krishnaswamy Rao and V.G. Sabhahit, for the Respondent

Judgement

1. This is an appeal by the appellant (applicant in Misc. Case No. 22/77) on the file of the Civil Judge, Sirsi, against the order dated 29-11-1978 passed by the Civil Judge, Sirsi in Misc. Case No. 22/77, dismissing the same.
2. The appellant had filed a suit O.S. No. 23/74 against respondent 2 in the Court of the Civil Judge, Karwar, for recovery of money. She obtained an order in interim attachment of the amount due to respondent 2 from the L.I.C. The said suit was later on transferred to the Court of the Civil Judge at Sirsi which was established in 1977 and the suit came to be decreed on Nov. 21, 1981.
3. Respondent 1 Bank obtain a money decree against respondent 2 in Arbitration Case 1/76 on the file of the Civil Judge, Karwar. Respondent 1 after obtaining the decree in Arbitration Case 1/76 in the Court of the Civil Judge Karwar, sued out execution in Execution Case 16/77 against respondent 2 in the Court of the Civil Judge, Sirsi and the executing Court attached the amount due to respondent 2 from the, L.I.C. and palled for the amount for partial satisfaction of the decree in the said execution and it closed the case.
4. Thereafter the present appellant filed an application under O. 21, R. 58 , C.P.C. against respondent 1 Bank and respondents 2 and 3.

5. It was resisted by the respondent The trial Court ultimately dismissed the petition. Hence the a appeal.

6. The initial objection raised by the learned counsel Shri Bhat is that initiation or institution of the Execution Case No. 16/77 in the Court of the Civil Judge, Sirsi, for executing the decree passed by the Court of the Civil Judge, Karwar, was ab initio void and the Court at Sirsi had no jurisdiction to entertain the execution and that therefore all the subsequent proceedings taken in the execution proceedings were null and void and without jurisdiction and that as she had got attached the amount welting advance her claim should be allowed. The main contention of Mr. Bhat was that the Court of the Civil judge at Sirsi had no jurisdiction at all to entertain the execution unless the decree was transferred to it for execution by the Court of the Civil Judge, Karwar. Mr. Bhatt relied on Vandse Gopalakrishna Shanabhogue v. Trasi Gavisandraya Laxman Shanbhogue AIR 1964 Mys 34. The facts in the said case were that there was initially only one Court of subordinate Judge for the entire Mangalore District and on 1-8-1961 a new subordinate Court was established at Udipi having jurisdiction over a portion of Mangalore District. The decree passed by the subordinate court at Mangalore was sought to be executed in Udipi Court without that decree being transferred to it by Mangalore Court. The Division Bench consisting of Justice Hegde and Justice Tukol held that Udipi Court had no jurisdiction to execute such a decree unless the decree was transferred to Udipi Court for execution. It found on facts that the subordinate Court at Mangalore had not ceased to have jurisdiction and therefore it alone had the jurisdiction to execute the decree and that the Udipi Court could execute such a decree only if that decree is sent to it for execution. The said ruling interpreted Ss. 37, 38 and 39 as they stood before the amendment. The CPC has been amended in 1976. Section 37, C.P.C. as it stands amended reads as : -

"S. 37. Definition of Court which passed a decree :-

The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include, -

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree would have Jurisdiction to try such suit.

Explanation - The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court shall also have jurisdiction

to execute the decree, if at the time of making the application or execution of the decree it would have jurisdiction to try the said suit." Present Explanation has been inserted by Act 104/76. The explanation was not on the statute book when the said Gopalakrishna's case was decided.

7. The learned counsel Mrs. Kumud Rao, referred me to the commentary of the learned author Sri Sarkar on Civil Procedure Code, Sixth Edition, at page 111, which reads as :

"The word "includes" though it extends the meaning of the expression "Court which passed the decree" in one sense, does in another sense restrict it. The effect of the words is to exclude in the circumstances specified in Cls. (a) and (b) the original Court and substitute for it another Court which for purposes of the section is to be regarded as the only Court which passed the decree. The expression "jurisdiction to execute it" in Cl. (b) means and includes the competence of the Court to entertain an application for execution of the decree. It may happen that in certain circumstances a Court may not effectively execute a decree, but that does not mean that it has ceased to have jurisdiction to execute it. It still remains the competent Court for the purposes of execution though the decree-holder might have apply for transmission of the decree to another Court for obtaining the relief which he wants. (Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others, followed in Packianathan v. Mathevan AIR 1957 Trav-Co 69 (FB) and quoted with approval in Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others, adding that under S. 37 there could be only one Court at the time answering the description of a Court passing the decree). The above being the true import of S. 37, as approved by the Supreme Court, the effect of the newly added explanation appears to be only this that in the circumstances mentioned, namely where the territorial jurisdiction of the subject matter of the decree subsequent to the passing of the decree has been transferred to another Court although the original court does not thereby lose jurisdiction to execute the decree and remains the only Court which passed the decree under S.37, that another Court which would be entitled to try the suit if it was then instituted has also been invested with an independent jurisdiction to execute the decree without any order of transfer by the Court which passed the decree."

Therefore, on account of insertion of the Explanation to S. 37, there would be now two Courts, which would come within the meaning of the words "the Court which passed the decree. One Court would be the Court that actually passed the decree and the second one is a Court, which has been. Established newly having jurisdiction over apart of the territory. New Court thus established having jurisdiction over a portion of the territory will have to be also deemed as a Court that passed the decree. Therefore, such a Court also would have the jurisdiction to execute the decree without that decree being transferred to it by the Court which originally and actually passed the decree.

8. The learned counsel Sri Bhat referred me to S. 38 of the C.P.C. which reads

as: -

"A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution."

Section.38 cannot be read in isolation from S.37. Section 38 only says that the decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The phrase "by the Court to which it is sent for execution" would mean the Court striate beyond the territorial jurisdiction of the Court which passed the decree. But however, it is read along with explanation to S. 37 above extracted, the newly established Court for a part of the territory will have to be deemed as a Court that passed the decree. Therefore, S. 38 will not help Mr. Bhat. Then he referred me to S. 39 of the C. P.C., which says that the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction. Subsection (3) of S. 39 reads as : -

"For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed."

Sub-section (3) of S. 39 makes it clear that the transferee Court must be also a competent Court. It does not in any way come in conflict with the explanation appended to S. 37. Therefore, this also will not help Mr. Bhat in the least.

9. A similar question came up before this Court in *Syndicate Bank Vs. Mahadevappa*, After considering the principles laid down in *Merla Ramanna Vs. Nallaparaju and Others*, and in *Gowrammal Vs. Lingappa Gowder*, and the principles laid down in *Gopalakrishna v. Laxman* AIR 1964 Mys 34 and after taking into consideration the newly added explanation to S. 37 and Ss. 38 and 39, it was held that there would be two Courts now which can be said to have passed the decree, that is, one which actually and factually passed the decree and the second one which is newly established for a portion of the territory over which also the Court that actually passed the decree had originally the jurisdiction. In the said ruling this Court held that the Court that actually passed the decree and the new Court established for a portion of the territory would both be the Courts which would come within the ambit of the phrase "Court which passed the decree". Taking that view this Court held that in such cases both the Courts would have the jurisdiction.

10. The view taken or the principle laid down in the said *Gopalakrishna*'s case that the newly established Court cannot execute the decree unless the decree is transferred to it for execution stands statutorily annulled and repealed and overruled by the amended Ss. 37 and 39, C.P.C.

11. Therefore, under these circumstances, the Court of the Civil Judge at Sirsi which was established in 1977, would also come within the ambit of the words,

"the Court which passed the decree". Thus the Court at Sirsi would also have the jurisdiction to entertain the execution. Therefore, the arguments to the contra advanced by Mr. Bhat is rejected.

12. It becomes clear from the facts that the appellant had got attached the amount due to respondent 2 from the L.I.C. much before respondent 1 got attached the same in the said execution proceedings. The contention of Mr. Bhat is that as the attachment got effected by his client was prior, the Executing Court could not call for the amount from the L.I.C. in the present execution and make an order of payment of the same to respondent 1. The order of attachment got by the appellant in the suit was only in the nature of a prohibitory order. It does not apply to transfers by operation of law. It has been laid down in *Mt. Sundarbai v. Ganpat* AIR 1935 Nag 171 as : -

"The mere fact that he had made a prior attachment would not give him an interest in the property within the meaning of R.59 nor would it prevent the property being subsequently attached in execution of another decree."

Therefore the argument of the learned counsel Sri Bhat that as the order of attachment got effected by his client was prior in point of time, respondent 1 had no right to get it attached again and that the Court had no jurisdiction to order payment of that amount to respondent 1, is without substance.

13. Mrs. Kumud Rao urged that an application to get the attachment removed, was not competent and maintainable. In this connection, it would be useful to refer to the commentary of the learned author Shri Mulla on C.P.C. 14th Edn., pages 1546 and 1547. It reads as :-

"Where the property attached is debt. -

A obtains a decree against B for Rs. 5,000 and attaches in execution of the decree a debt alleged to be due by C to B. Can apply under this rule to have the attachment removed ? It has been held that he can. Under the earlier rules if his application was dismissed he could file a suit for a declaration that no debt was due from him to B. Further, if he did not file such a suit within a year the order would be conclusive against him. But if no adverse order was made on the application, he was not barred from showing in subsequent proceedings that the debt was smaller or that no debt was due under the present rule. C can file an objection to the attachment of the debt and questions arising from such objection and relevant to such objection are to be determined by the Court dealing with the objection. The order made on such determination would be as if it were a decree and is appealable. C's remedy, if the order is adverse to him, is by way of an appeal and not by way of a suit. It has been held that a garnishee's objection that the debt was not due did not come within the purview of the earlier Rr.58 to 63. It is submitted that that would also be so under the present R. 58 for the reason that there cannot be any claim to or objection against non-existing property. His denial of the debt cannot be treated as a claim falling within the purview of the rule Where, however, the existence of the debt is

admitted, but a question is raised as to the conditions under which it is payable this rule would apply. In an early Bombay case, it was observed that the procedure laid down in the sections of the 1882 Code corresponding to Rr. 58 to 63 as they existed before 1976 did not apply to a debt attached in execution, the reason given being that a debt was not property capable of possession within the meaning of the earlier Rr. 60 and 61, and that if alleged that no debt was due, the proper course was for the Court to satisfy itself as to its existence and if it was satisfied that no debt existed, it should abstain from proceeding to sell the debt. But this view was dissented from and it was hold that the words "Possessed" the earlier Rr. 60 and 61 were not restricted to objects capable of physical possession, but applied also to objects capable of constructive possession, such as a debt. Moreover, the word "property" in the present rule is wide enough to include a debt. It is not open to the judgment-debtor to claim under this rule that a debt alleged to be due to him really belongs to another person."

Hence her argument in this connection merits to be rejected.

14. Therefore, under these circumstances, the trial Court rightly dismissed the petition filed by the present appellant under O. 21, R. 58, C.P.C.

15. In the result, the appeal is, dismissed.

16. Appeal dismissed.