

(1953) 10 BOM CK 0010
In the Bombay High Court
Case No : First Appeal No. 56 of 1952

Laxminarayan Devastan and Others

APPELLANT

Vs

Khanderao Yeshwantrao and Others

RESPONDENT

Date of Decision : 20-10-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 73, 73(1)

Citation : AIR 1954 Bom 446 : (1954) 56 BOMLR 232 : (1954) ILR (Bom) 704

Hon'ble Judges : Shah, J

Bench : Single Bench

Advocate : D.V. Patel, for the Appellant; V.M. Tarkunde, for the Respondent

Judgement

1. One Khanderao Yeshwantrao Chandrachud (hereinafter referred to as Khanderao) filed Special Suit No. 39 of 1945 in the Court of the Civil Judge (Senior Division) at Ahmed-nagar against Shri Laxminarayan Devasthan, Poona, and its managers for a declaration that the properties mentioned in para. 1 of the plaint were Saranjam properties belonging to the plaintiff--Khanderao-- and the same were not liable to be sold in execution of the decree in Suit No. 21 of 1933. Suit No. 39 of 1945 was dismissed by the Civil Judge with costs on February 18, 1947. Shri Laxminarayan Devasthan, Poona, thereafter filed Darkhast No. 43 of 1947 for enforcement of the decree for costs against Khanderao, and certain properties belonging to the latter were attached and sold. The sale was confirmed and the sale proceeds were received by the Court.

In the meanwhile one Gokuldas Umedram who had filed Special Suit No. 1502 of 1933 in the Court of the Subordinate Judge at Poona against Sada-shivrao and Yeshwantrao, uncle and father respectively of Khanderao, and had obtained a money decree against them, applied to execute that decree by Darkhast No. 70 of 1945 in the Court of the Civil Judge (Senior Division), Ahmednagar, against Khanderao, as the heir and legal representative of the judgment-debtors. By Ex. 29 the heirs of Gokuldas applied for rateable distribution of the amount received in Darkhast No. 43 of 1947.

2. The learned Civil Judge (Senior Division) by his order dated 16-2-1950, ordered that the proceedings in the darkhast be stayed till the decision of the Debt Adjustment Application filed in the Debt Adjustment Court at Newasa by Khanderao. He observed that if the Debt Adjustment Application was disposed of by the Debt Adjustment Court" and the darkhast was not re-transferred, the amount held- by the executing Court would be paid to the decree-holder in Darkhast No. 43 of 1947, but if the darkhast was re-transferred to the executing Court, rateable distribution would be ordered. The learned Judge accordingly ordered that "the amount held by this Court is ordered to be retained by the Court until further orders".

3. Thereafter on 17-2-1950, Hanmantram (one-of the managers of Shri Laxminarayan Devasthan) applied to the executing Court stating that the-amount realised by the sale of the judgment-debtor's property was lying uninvested in Court and that it may be paid to him on an undertaking that the same would be returned when ordered. The advocate for the decree-holder in Darkhast No. 70 of 1945 (filed by the legal representatives of Gokuldas) agreed that the amount may be paid as prayed, provided security was furnished by Hanmantram. The learned Civil Judge passed an order directing that the amount lying in Court be paid over to Hanmantram. Ultimately the Debt Adjustment Court held that Khanderao was not a debtor within the meaning of the Bombay Agricultural Debtors Relief Act, and returned the papers to the executing Court.

An application was then submitted by the decree-holders in Darkhast No. 70 of 1945 on 4-10-1949, for calling upon the heirs of Hanmantram (Hanmantram having since died) to deposit the-amount in Court as undertaken by Hanmantram. On 21-7-1951, the Court passed an order directing. Hanmantram's heirs and the surety to deposit the amount withdrawn by Hanmantram. The amount was accordingly deposited as ordered by the Court. Thereafter on 3-10-1951, the learned Judge ordered that the amount lying in Court be rateably distributed between the decree-holders in the two darkhasts. It appears that the order dated 3-10-1951, was passed without hearing the parties. The darkhastdars in Darkhast No. 43 of 1947 applied for vacating the order and for hearing arguments on the claim made by the darkhastdars in Darkhast No. 70 of 1945. The application was, however, rejected. Against that order the present appeal has been preferred by the managers of Shri Laxminarayan Devasthan.

4. The dispute in this appeal arises between the decree-holders who have filed Darkhast No. 43 of 1947 and the decree-holders who have filed Darkhast No. 70 of 1945. On the authorities of this Court no appeal lies against an order passed by a Court directing rateable distribution when the dispute is between rival decree-holders only. It has been held by this Court in -- "Shidappa v. Gunisangaya AIR 1931 Bom 350 (A) that an order u/s 73, Civil P. C. determining a question of rateable distribution between rival decree-holders in which the judgment-debtor has no interest does not fall u/s 74 of the Code, and no appeal

lies from that order. The same view was taken by another division bench of this Court in -- "Navaj Bhavdu v. Totaram Govind AIR 1931 Bom 252 (B). The appeal filed by the appellants, therefore, is not maintainable. On the request of Mr. Patel the appeal is allowed to be converted into a revision application.

5. It is urged on behalf of the appellants--managers of Shri Laxminarayan Devasthan--that in the circumstances of the case no rateable distribution of the assets held by the Court can be ordered. It is evident from the facts detailed earlier that in Darkhast No. 43 of 1947 the decree-holders are seeking to enforce the liability of Khanderao personally in respect of costs directed to be paid by him. In Darkhast No. 70 of 1945 the decree-holders are seeking to enforce the liability of Yeshwantrao and Sadashivrao against the property in the hands of Khanderao which he has inherited as their heir and legal representative. The question that arises is whether the two decrees sought to be executed by the rival decree-holders can be regarded as "passed against the same judgment-debtor so as to enable the decree-holders in Darkhast No. 70 of 1945 to obtain an order for rateable distribution. Section 73, Civil P. C., in so far as it is material, provides :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:...."

Sub-section (1) is followed by a proviso which is not material in considering the argument of the appellants. The conditions required to be satisfied for obtaining an order for rateable distribution are five in number :

"(1) The decree-holder claiming to share in the rateable distribution should have applied for execution of his decree.

(2). Such application should have been made prior to the receipt of the assets by the Court.

(3). The assets of which rateable distribution is claimed must be assets held by the Court.

(4) The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for payment of money.

(5). Such decrees should have been passed against the same judgment-debtor."

6. It is undisputed that conditions 1 to 4 are satisfied in this case and the only question which remains is whether the two decrees were passed against the "same judgment-debtor". Now, the provision relating to rateable distribution was enacted with a view to avoid simultaneous prosecution of execution applications against the same property and to provide a procedure for equitable and orderly distribution of the assets received in execution of decrees against the same

person. The Legislature provided that the decrees should have been obtained against the same Judgment-debtor before a right to claim rateable distribution can be exercised. The expression "judgment-debtor" is defined in the CPC as meaning a person against whom a decree has been passed or against whom an order capable of execution has been made.

A "person" in legal parlance is not necessarily an individual. An individual may have several characters or personalities and several individuals may by legal action have collectively one personality. It is evident from the nature of the proceeding, and the claim for rateable distribution that the expression "the same judgment-debtor" cannot be construed literally, i.e. to mean the same individual by name. An individual may have distinct characters and may hold property occupying those legal characters and may also be subject to liabilities occupying those legal characters. If rateable distribution be permitted in respect of a liability incurred by an individual occupying one character in respect of assets received in execution against him in another character, it would undoubtedly lead to the greatest confusion and injustice. In this connection the following observations made by Beaumont C. J. in -- "Jamiyatram Gaurishankar v. Umiyashankar Pranshankar AIR 1941 Bom 327 (C), in dealing with the meaning of the expression "the same judgment-debtor" are very pertinent

"....Therefore, the Court recognizes, and certainly the framers of the CPC have recognized, that the same person may appear in various capacities, and it would seem to me not to be unduly stretching the language of Section 73 to say that the expression "the same judgment-debtor denotes identity of individuality & identity of character, & that two decrees obtained against the same individual, but in different capacities, may be regarded as not obtained against the same judgment-debtor. In considering whether to give a literal or a less literal meaning to Section 73, I think that any Court must have regard to the consequences which are likely to follow from either construction, it seems to me that the grossest injustice and absurdity may follow from holding that decrees against the same person must always be regarded as decrees against the same judgment-debtor for the purposes of Section 73. One may have creditors of estate A, which is solvent, being compelled to share the assets of that estate with the creditors of estate B, which is insolvent and possesses no assets, merely because there is a common trustee of the two estates, it is not difficult to imagine the confusion which might arise in the case of a corporation sole, like the Official Assignee of Bombay, who may have decrees passed against him as representative of many different estates."

Therefore, before two decrees passed can be said to be passed against the same judgment-debtor it must be shown that the legal character of the person against whom the decrees are passed must be the same.

7. At one time the view prevailed in this Court that in order that the judgment-debtors in two execution applications filed may be regarded as "the same judgment-debtor" within the meaning of Section 73 Civil P. C. it was necessary

that not only must they represent the same estate, i.e., they must hold the same legal character, but judgment-debtors against whom the decrees are passed must also be the same individual.

One of the earliest cases which came before this Court in which the meaning of the expression "the same judgment-debtor" fell to be considered was -- "Govind Abaji v. Mohoniraj Vinayak 25 Bom 494 (D) decided by Jenkins C. J. and Chandavar-kar J. In that case one Mohoniraj obtained a money decree against one Bhau Babaji. Bhau Babaji died shortly after the decree was passed and his son Kashinath, as his legal representative, was placed on the record and the property of the deceased was attached and sold in execution. In the meantime, one Govind Abaji, who had obtained a money decree against "Bhau Babaji, deceased, by his son Kashinath and against the estate of Bhau Babaji, deceased", applied to share rateably in the proceeds of the sale held in execution or the decree at the instance of Mohoniraj, The Court held that the application should be refused because even though the second decree was against the estate of the deceased the two decrees could not be regarded as passed against the same judgment-debtor.

It was held in that case that rateable distribution can be ordered only if money decrees are passed against the same judgment-debtor & that the decrees passed against Bhau Babaji & Kashinath Bhau were not passed against the same judgment-debtor. It was observed at page 497 by Chandavarkar J.:

"....It cannot be said,...looking to the names of the parties, that the two decrees are against the same judgment-debtor, it is true that the estate that is liable in the case of both the decrees, is the estate of the deceased Bhau, but Section 295 (Section 73 of the O. P. Code of 1908) does not make the nature of the liability under the decrees contemplated" by it one of the essential conditions for the application of that section."

8. In -- "Chunilal v. Broach Urban Co-operative Bank. Ltd. AIR 1937 Bom 461 (E), -- "Gobind Abaji Jakhadi's case (D)" was followed. The Court in that case held that u/s 73, Civil P. C., 1908, the decrees in execution of which rateable distribution is sought, must be decrees against the same judgment-debtor, and the judgment-debtor cannot be said to be the same, within the meaning of that section, where the earlier decree is against a person whilst- he was living and the second one is against his legal representative after his death,

9. The question then again arose in -- "Jami-yatram Gaurishankar v. Umiyashankar Pran-shankar(C)" (which I have referred to earlier). In that case one decree was passed against a person individually and another decree was passed against him "as representative of a deceased person, and It was held that the two decrees were not against "the same judgment-debtor". Beaumont C. J. who delivered the judgment of the Court took the view that the expression "the same judgment-debtor" in Section 73, Civil P. C. denoted identity of individuality and identity of character or interest and decrees obtained against the same

individual but in different capacities may be regarded as not obtained against "the same judgment-debtor". Even though the two decrees were passed against the same individual, the Court held that inasmuch as he held two different characters in the two suits, the decrees could not be said to have been passed against the same judgment-debtor.

In the present case the two decrees were not passed against the same individual and they were also not passed against the judgment-debtor in the same capacity, if "Jamiyatram's case (C)" is good law, the appellants must succeed in this case.

10. It was urged that the earlier decisions including -- "Jamiyatram's case (C)" must be regarded as overruled by subsequent decisions of this Court. Reliance was placed in support of that contention upon -- "Mulchand Kesaji v. Shiddappa Gurubasappa", AIR 1947 Bom 18 (P). In that case the question as to the meaning of the expression "the same judgment-debtor" again came for consideration and it was dealt with by a full bench of this Court. The head-note of that case states:

"Where a creditor obtains a money decree against the manager of a Hindu joint family and his undivided sons and realises assets by the sale of joint family property, such assets are liable to rateable distribution with another creditor who has obtained a money decree against the manager alone, under the provisions of Section 73, Civil P. C., 1908. In such a case, not only the manager's share in the assets but the entire assets are liable to rateable distribution, either when the second decree is passed against the manager as manager of the joint family or when the sons are under a pious obligation to pay off their father's debts."

The full bench approved of an earlier judgment of this Court reported in -- "Chhotalal v. Nabibhai 29 Bom 528 (G). The full bench took the view that in order to ascertain whether the two decrees may be regarded as passed against "the same judgment-debtor" the decisive test is to ascertain the characters occupied by the judgment-debtors in the two cases and not merely the identity of names of the judgment-debtors in the two decrees In -- "Mulchand Kesaji's case (P)" one suit was against a manager and other members of the joint family and there was another suit against the manager alone, and money decrees were passed in both the suits. It was held that as the same estate was represented, the decrees were against the same judgment-debtor and rateable distribution could be ordered.

11. In a very recent case of this Court reported in -- Dundappa Virupaxappa Kallolgi and Others Vs. Annaji Vardaji and Others, , which is again a full bench decision, it was held that a decree passed against a person and sought to be executed against his legal representatives after his death and another decree obtained against that person's legal representatives in a suit against the person during his lifetime but continued against his legal representatives after his death can be said to have been passed against the same judgment-debtor within the

meaning of Section 73, Civil P. C. The learned Chief Justice in delivering the judgment of the full bench observed at p. 70 of the report:--

"... .the expression "the same judgment-debtor" must be construed in its own context, and.... when the context deals with the realisation of the assets and when judgment-creditors are more concerned with the assets they realise for the purposes of satisfying the decree than with the identity of the judgment-debtor, it is clear that the Legislature did not intend that the expression "the same judgment-debtor" should be construed in a strictly technical sense."

It must, therefore, be accepted that the test which was originally adopted, viz., that there must be identity both of character and individuality of the judgment-debtors in the two decrees before the decree can be regarded as passed against the same judgment-debtor, has undergone a change. In the earlier cases, the Court insisted, before ordering rateable distribution, both upon the identity of the judgment-debtor by name and the identity of the estate represented by him in the two suits, decrees wherein were sought to be executed. In the two full bench decisions which I have referred to the Court took the view, that provided the estate represented was the same, identity in name of the judgment-debtors was unnecessary.

12. Relying upon the two full bench decisions, Mr. Tarkunde submitted that the test for ascertaining whether decrees have been passed against the same judgment-debtor is to ascertain whether in two or more applications against the same individual the same property can be resorted to for satisfying the decrees. Counsel drew my attention to the following observation Dundappa Virupaxappa Kallolgi and Others Vs. Annaji Vardaji and Others, :

"....What is to be distributed rateably are the assets, and if the assets belong to the same person, then it is difficult to see why the principle of rateable distribution should not be open to the judgment-creditor."

and submitted that according to -- "Dundappa"e case (H)" the only material inquiry which the Court should make for ascertaining whether the fifth condition is satisfied is whether the same property is liable for satisfaction of both the decrees in which execution is claimed.

13. There is in my view nothing in the decision of the full bench, or in the observation relied upon, which supports the submission of counsel. It is true that the view prevailed in this Court in the earlier decisions has been modified and the test laid down in those decisions for ascertaining whether the decree is against the same judgment-debtor cannot be applied without qualification. But in order that a right of rateable distribution should be available to a judgment-creditor who is seeking to resort to assets received by the Court in execution of another decree the Court has to consider the nature of the decree and not the identity of the property which is resorted to for satisfying the decree.

In making the observation relied upon by counsel for the respondents the Court

was, as is obvious from the context, dealing with the question whether a liberal construction or a literal or technical construction of the expression "the same judgment-debtor" should be adopted, & it was held that in view of the presumed intention of the Legislature the liberal construction should be adopted. It need hardly be observed that a right to claim rateable distribution can be exercised only if execution of money decrees is sought by two or more decree-holders, and the same property is liable to satisfy all the decrees. Liability of the same property is, therefore, a condition, and not a test, for ascertaining the right to obtain rateable distribution. The learned Chief Justice observed at pp. 70-71:

"....As he (Gajendragadkar J.) points out, (in AIR 1947 Bom 18 (F))" there is no doubt that before Section 73 can be applied it must also be shown that the same identical judgment-debtor occupies the same legal character in all the decrees. Therefore, if a strict interpretation was called for, then a decree against the same judgment-debtor holding different legal capacities would still be a decree falling u/s 73. It has never been suggested--and it cannot be suggested--that that is the true position u/s 73, and the full bench upheld the decision in --"29 Bom 528 (G)" on the ground that a literal construction which insists upon the identity of all the judgment-debtors would clearly tend to defeat the very object with which Section 73 was enacted. Therefore, that is the principle which the full bench laid down. What we are going to do today is really applying the same principle, but to a different set of facts."

It is obvious, therefore, that in -- "Dundappa's case (H)" the Court has not adopted the test of identity of property liable for satisfying the claims suggested by counsel for the respondents. The Court adopted the test of identity of legal character and applied it to the facts of the case before it.

14. It is clear that neither in -- "Jamiyatram's case (C)" nor in the present case is there identity of the estate represented by the judgment-debtor in the two decrees. In -- "Jamiyatram's case (C)" the two decrees were passed against the same individual. In the present case the two decrees even have not been passed against the same individual. The decree passed against Khande-rao in Suit No. 39 of 1945 was passed against him individually. The decree passed in Suit No. 1502 of 1933 was passed against Yeswantrao and Sadashivrao. It is true that in execution of the decree in Suit No. 39 of 1945 the property which devolved upon Khanderao as the legal representative of Yeshwantrao and Sadashivrao may be proceeded against. But the fact that property in the hands of a person may be resorted to in execution of two different decrees, one of which is not passed against him, cannot make the two decrees passed against the same judgment-debtor. Khanderao is not occupying the same legal character in both the decrees.

There is nothing in the Judgment either in the case of -- "Mulchand Kesaji (F)" or in the case of-- "Dundappa (H)" which enables the decree-holders in Darkhast No. 70 of 1945 to obtain an order for rateable distribution. In -- "Jamiyatram's case (C)" the test laid down by Beaumont C. J. was that before rateable distribution can be ordered there must be between the judgment-debtors identity

of individuality and identity of character. Since the full bench decisions in -- "Mulchand Kesaji v. Shiddappa (F)" & -- "Dundappa v. Anna-ji (H)", the identity of estate alone is required. Even applying the test of identity of legal character or legal capacity alone, the respondents are not entitled to rateable distribution. Therefore, even though the test applicable is modified, the ultimate decision in -- "Jamiyatram"s case (C)" stands-good. It may be noted that before the full bench -- "Jamiyatram"s case (C)" does not appear to have been cited and there is nothing to show that it was overruled either expressly or by implication.

15. (The rest of the judgment is not material to the report.) Treating the appeal as a revision application, the rule is made absolute. The order passed by the executing Court dated 3-10-1951, and-the order on Ex. 78 is set aside. There will be no order as to costs in this revision application.

16. Rule made absolute.