
(1989) 11 RAJ CK 0047

In the Rajasthan High Court

Case No : Civil Revision Petition No. 183 of 1985

Mahadev Ratarekar and Others

APPELLANT

Vs

Sita Ram and Others

RESPONDENT

Date of Decision : 30-11-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Succession Act, 1925 — Section 214

Citation : AIR 1991 Raj 97 : (1990) 1 WLN 634

Hon'ble Judges : D.L. Mehta, J

Bench : Single Bench

Advocate : Vimal Choudhary, for the Appellant; M.D. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

D.L. Mehta, J.—This revision petition is directed against the order dated 1st December 1984, passed by the learned Addl. Munsiff and Judicial Magistrate, 1st Class, Kekri, in civil execution case No. 79/1981.

2. Legal representatives of the deceased decree-holder Mahadev Ratarekar, has preferred this revision petition being aggrieved by the order dated 1-12-1984, passed by the learned Addl. M. J. M. Kekri, rejecting their application for execution on the ground that before filing the execution petition they have not obtained the succession certificate.

3. Suit was instituted by late Mahadev Ratrekar, against Surya Bahadur Malla, the judgment debtor. A decree was passed by the trial court. An appeal was preferred by the judgment debtor. Conditional stay order was granted on the condition that the appellant judgment debtor will furnish a solvent security to the satisfaction of the court, Sita Ram, executed the solvent security bond and mortgaged his properties specified in the schedule annexed with the security bond for the satisfaction of the decree which may be confirmed at a subsequent stage after dismissal of the appeal. Sita Ram, limited his liability of guaranteeing

the payment of the decree to the extent of Rs. 25,000/- Appeal was dismissed and the decree was maintained in favour of the decree-holder with the further modification that Sita Ram, who has executed the solvent security and mortgaged the properties while executing a security bond will be liable to make the payment to the extent of Rs. 25,000/- out of the decretal amount. After the death of the decree-holder, execution petition was preferred by the legal representatives namely sons of the deceased on 3rd January, 1975. On behalf of Sita Ram, objections were filed that the petitioners have not obtained the succession certificate as required under the provisions of Section 214 of the Indian Succession Act, 1945, as such the execution petition is not maintainable. The objection petition filed by the judgment debtor namely Sita Ram, was accepted.

4. During the life time of Sita Ram, suit No. 44/1969 and 23/1970 were instituted in the court of Learned District Judge, Ajmer. Decree-holder filed a suit under Order 21, Rule 63, CPC for the declaration that the mortgage property belongs to Sita Ram and Ram Narain, in equal share in that suit. The sons of Sita Ram, were also party. Decree-holder had to institute the suit as the adverse order was passed against him under Order 21, Rule 58, CPC. The suit filed by the decree-holder was decreed.

5. Being aggrieved with the judgment and decree passed by the learned Distt. Judge, the sons of Sita Ram, filed an appeal before this court which has been registered as appeal No. 74/ 1974 and is pending before this court. During the pendency of the appeal, decree-holder Mahadev Ratarekar, died. Application under Order 22 was moved by the sons of Sita Ram, before this court and prayed therein that Vinayak and Ganesh, both are the sons of decree-holder and are only the legal representatives of the decree-holder and they should be brought on record in place of the decree-holder. The application was accepted and Vinayak and Genesh, have been brought on record as legal representatives of the deceased Mahadev Ratrekar, decree-holder. An execution petition was also filed by Vinayaka, Ganesh and Smt. Kamla Bai.

6. Mr. Choudhary, learned counsel for the petitioners submits that there is an admission of the non-petitioners that Vinayaka and Ganesh are the legal representatives of the deceased decree-holder. However, as a "precaution the execution petition has been filed by adding the name of the daughter Smt. Kamla Bai also as a party. Mr. Choudhary, further submits that u/s 21 of the Evidence Act admission of a party can be used against the person who is making admission. He further submits that the non-petitioners have admitted while moving an application under Order 22 that the present petitioners who are the sons of the decree-holder are the legal representatives of the deceased as such they cannot be allowed to raise objection about the maintainability of the execution petition, which the present petitioners have filed as legal representatives of the deceased. He further submits that the non-petitioners cannot be allowed to throw hot and cold water at a time and the doctrine of

estoppel should be applied against them.

7. On the other hand, Mr. Agarwal, learned counsel for the non-petitioners submits that an admission made in the application moved under Order 22 should not be used against the non-petitioners. He further submits that the admission is rebuttable and cannot be taken as a conclusive proof. I agree with the view of Mr. Agarwal, to some extent that the admission made by his clients can not be taken as a conclusive proof of the fact which Mr. Choudhary, wants to use by admission so made against the persons who are making it. However, one cannot forget that the burden of disproving admission shift on the persons who are making admission and unless it is disproved this may be a relevant factor in considering a particular fact and may be sufficient as a proof of fact if not rebutted.

8. Mr. Choudhary, further submits that Section 214 prohibits the recovery of the debts through the process of the court from debts of deceased person. He further submits that the amendment of the debt as used in Section 214 should be limited only to the unsecured debts.

9. Mr. Choudhary, learned counsel for the petitioners has cited before me the case of Arisetty Ramakrishnaiah and Another Vs. Pattipati Vengayya and Another, in which it was held as under (at page 6 paras 13 and 18)) :--

"The plaintiff in execution of his money decree against the Manager of a joint Hindu family sought to attach the properties in the hands of the sons. One of the sons claimed title to the property on the basis of a partition decree obtained during the pendency of the execution proceedings. His claim having been allowed, the plaintiff filed a suit under Order 21, Rule 63, CPC alleging that the partition decree was fraudulent and was obtained to defeat the creditors. The suit was purported to be filed in representative's capacity.

"Held that the claim regarding fraudulent transfer was not outside the scope of the claim suit and could be enquired therein."

10. Mr. Choudhary has also cited before me the case of Aysha Beevi Mariya Ummal Kunju and Others Vs. Abdul Karim Rahuma Beevi and Others, in which it was held as under :--

"It is not necessary for mortgagees legal representatives for filing a suit to recover the mortgage money by sale of the charged property since "debt" in the provision docs not include such decree."

Mr. Choudhary, has also cited before me the case of Bankimchandra Shivashanker and Others Vs. Vishnuprasad Meganlal Vaidya and Others,

11. On the other hand, Mr. Agrwal, learned counsel for the non-petitioners has relied upon the judgment of this court given in the case of Ganeshmal v. Anand Kanwar AIR 1978 Raj 273 . This court has held that the production of the succession certificate is necessary for the purpose of execution of a decree. This Court has further observed in para 9 of the said judgment that this judgment

should not be considered as an explanation as to whether a succession certificate would necessary in case a person wants to proceed with the execution application of a deceased decree-holder as a surviving co-parcener under the Hindu Law. The judgment cited by Mr. Agarwal, does not help his clients as the decree was a simple decree of money and was not a decree having a charge on the mortgage party. Secondly, second point has also not been decided by this court whether the surviving co-parcener of the deceased decree-holder can execute a decree without obtaining a succession certificate, or not. Mr. Agarwal, has also cited before me the case of Gyarsilal and Others Vs. Murli, In which it was held that the production of a succession certificate, by the legal representatives is a condition precedent for proceedings with the suit. This case does not apply in the facts and circumstances of the present case. Mr. Agarwal, has also cited before me the case of Aparti Panda Vs. Govinda Sahu, The Orissa High Court, while dissenting from the judgment of Patna High Court and some other cases of other High Courts held that the succession certificate is necessary for proceeding with the execution of the decree.

12. In this civil revision petition important question of law arises for consideration with regard to interpretation of the word "debt" as used in Section 214 of the Succession Act, 1925. Particularly, in view of the fact that the courts in the country are divided and there is no direct decision on this point of this court or of the Supreme Court. The question of law which arises for consideration is whether on the death of the decree-holder having a decree that charge on the mortgage property the legal representative of the deceased decree-holder can execute the decree without obtaining a succession certificate or production of succession certificate or whether the production of the succession certificate is a condition precedent for the presentation of the execution proceeding. The decision on this point should independent of the interpretation of the would "debt" as used in Section 214 of the Succession Act, 1925.

13. So far as the present execution is concerned it is an admitted position that Sita Ram, becomes the judgment debtor by executing mortgage deed as a surety by producing surety bond at the appellate stage. He executed the mortgage bond and undertook to satisfy the decree upto the extent of Rs. 25,000/- and mortgaged the property for the same.

14. The debt is a sum of money payable at present or in future by reason of a present obligation when a person is trying to execute the mortgage decree with a charge on the mortgage property, he is really trying to enforce the charge. He is not trying to recover the debt within the meaning of Section 214, of the succession Act, 1925. Similarly, the word "debt" would both cover a decree for cost which is not passed on the basis of any pre-existing debt but is passed relating to the recovery and the cost incurred during the pendency of the suit, the present decree is one, to enforce a mortgage security and not for a mere personal decree against the mortgager who has executed the security bond in the Court.

15. I am of the view that the mortgage decree is a charge on the mortgage property and the decree holders are enforcing the charge and are not recovering debt. Enforcement of the charge on the mortgage property by the legal representatives of the decree-holders cannot be said to be a debt as defined u/s 214 of the Succession Act, 1925. Apart from that the non-petitioners have already admitted by filing an appeal that the persons who have filed execution petition are the sons of the deceased decree-holder and they are the legal representatives of the deceased and it is an admission and it can be used against them and for this reason, the present petitioner can continue the execution proceedings without obtaining the succession certificate.

16. In the result, the revision petition filed by the petitioners is accepted, the order dated 1st December, 1984, passed by the learned Munsif Magistrate, Kekri, is set aside. The decree will be executed in accordance with the law.

There is no order as to costs.