

(1928) 11 BOM CK 0036

In the Bombay High Court

Case No : Appeal from Order No. 11 of 1927

Nadirshaw Jamshedji Mody

APPELLANT

Vs

Purshottamdas Ganpatdas Gajjar

RESPONDENT

Date of Decision : 08-11-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 16, 51(d)

Citation : (1929) 31 BOMLR 320 : 118 Ind. Cas. 694

Hon'ble Judges : Patkar, J;Murphy, J

Bench : Division Bench

Judgement

Patkar, J.—[His Lordship, after setting out the facts as above, proceeded:] The lower Court held that the receiver had no right to present the present darkhast as the attachment before judgment in Suit No. 1050 of 1918 was subsisting, and that the receiver as an officer of the Court was bound to take notice of this order for attachment. Secondly, the lower Court held that, if the receiver had a right to execute the decree, the application for execution would be barred by limitation as the Darkhast No. 29 of 1924 was beyond time on the ground that the receiver could not take advantage of the applications filed by Nensukh in the years 1919 and 1922 as he had no right to apply on account of the appointment of the appellant as the receiver on July 19, 1921. On these grounds the lower Court dismissed the application for execution.

2. On appeal before us two additional points have been taken on behalf of the respondent, first, that the receiver was appointed pendente lite in Suit No. 2232 of 1921, but the appointment of the receiver was not referred to in the final decree and after the final decree the appointment of the receiver came to an end, therefore, the appellant Mody had no right to execute the decree. On the point of limitation it was argued that the applications made by Nensukh could not be taken advantage of by the receiver as there was the consent decree between Nensukh and Purshottam and the decree was attached by consent in Suit No. 1050 of 1918.

3. Dealing with the additional points, we think that the effect of the order of the appointment of the receiver Mody in the preliminary decree was that in addition to his right as a mortgagee or assignee of the decree he was allowed to execute the decree in Suit No. 481 of 1916. A receiver can be appointed to execute a decree u/s 51, Clause (d), of the Civil Procedure Code. The appellant as receiver was, therefore, entitled to execute that decree. With regard to the contention that the order for the appointment of a receiver does not appear in the final decree, it appears that the decree was a mortgage-decree, and the decree, so far as it related to sale of immovable property for the satisfaction of the mortgage debt, had to be made absolute. It was not necessary to make the order for the appointment of the receiver absolute in the final decree. But even if there was a failure to refer to the order of appointment of the receiver in the final decree, we think that the right of the receiver to execute the decree is not, thereby, extinguished. In Halsbury's Laws of England, Vol. XXIV, paragraph 805, page 415, it is laid down that when a receiver has been appointed on an interlocutory application without any limit of time it is not necessary to provide for the continuance of the receiver in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers.

4. With regard to the second additional point, namely, that these darkhasts were not applications in accordance with law on account of the order for attachment in Suit No. 1050 of 1918, it appears that the order of attachment before judgment was passed on November 15, 1922, and the applications by Nensukh were filed in 1919 and 1922 prior to the order of attachment before judgment on November 15, 1922, and though the second and third darkhasts were afterwards disposed of on the ground there was then an existing attachment, it cannot be said that the applications made by Nensukh on March 10, 1919, and August 19, 1922, were not applications in accordance with law, for at the time when the applications were made, there was no order for attachment in existence.

5. Now, dealing with the points taken by the lower Court, the first point is whether the receiver has a right to execute the decree, and whether as an officer of the Court he was bound to take notice of the order of attachment before judgment passed by the High Court. On November 15, 1922, the order for attachment before judgment was passed by the High Court, but the appellant was appointed as receiver on July 19, 1921. He had also an assignment of the decree on June 4, 1920, and was also a mortgagee of Nensukh. His rights had come into existence before the order for attachment before judgment on November 15, 1922. Under Order XXXVIII, Rule 10, attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. The receiver was not a party to Suit No. 1050 of 1918 and had antecedent rights prior to the passing of the order on November 15, 1922. No doubt, there was a consent decree between Nensukh and Purshottam on February 21, 1923, under which the attachment before judgment was to continue, but the effect of both the decrees was that Mody had a prior right as a mortgagee and was entitled to execute the decree as receiver, and the rights of

the mortgagees were recognized in the consent decree, for Nensukh had to redeem the decree and hand it over to Purshottam within six months, and also to redeem the properties which were mortgaged to Mody, and then to effect a second mortgage in favour of Purshottam. The rights, therefore, of Mody as a mortgagee and as a receiver entitled to execute the decree in Suit No. 481 of 1916 are neither affected by the order for attachment passed on November 15, 1922, nor by the consent decree dated February 21, 1923. The attachment would operate on Nensukh's equity of redemption. The rights of the receiver, in our opinion, are paramount and are not affected by any consent decree between Purshottam and Nensukh. We think, therefore, that the view taken by the lower Court that the receiver is not entitled to execute the decree is erroneous.

6. The second point is whether the applications for execution by Nensukh are applications in accordance with law, and whether the darkhast by the receiver is beyond time. The appointment of the receiver does not put an end to the rights of the person who is a party to the decree. The receiver represents both the parties to the suit. According to Halsbury's Laws of England, Vol. XXIV, paragraph 723, page 384, the possession by the receiver, though it necessarily displaces the possession of the owner or occupier to some extent for the purposes of the appointment, does not interfere with the rights and liabilities of the parties to the action in relation to strangers, Nensukh's rights, therefore, as against Purshottam, who was not a party to the suit in which Mody was appointed receiver, are not affected. It was held in *Jasoda Deye v. Kirtibash Das* I.L.R.(1891) . Cal. 639 that the person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person u/s 232 corresponding to Order XXI, Rule 16, of the Civil Procedure Code, that he has taken the decree-holder's place. In that case a widow in a joint Hindu family was held to be entitled to execute the decree though a receiver was appointed. However, in the present case, in Darkhast No. 1017 of 1922 Purshottam was arrested on an application in execution by Nensukh. He filed an appeal to this Court, First Appeal No. 288 of 1922, and the order for his arrest was set aside on the ground that Purshottam had filed a suit in the High Court against Nensukh and got an order from the Court referring the matter to the Commissioner for accounts and the Commissioner had reported in Purshottam's favour for a sum larger than that for which he had been directed to be arrested. The order for arrest was, therefore, set aside. No point was taken in the darkhast in which Purshottam was arrested that the darkhast was not maintainable by Nensukh on the ground that the receiver was appointed. We think, therefore, that if there is anything in the point which is now taken on behalf of the respondent that Nensukh had no right to execute the decree, that point might and ought to have been taken in the previous darkhast in which Purshottam was arrested. We think, therefore, that Nensukh had a right to apply for execution of the decree and that his Darkhast No. 1017 of 1922 filed on August 19, 1922, was an application in accordance with law. If that application is in accordance with law, the first application, Darkhast No. 29 of 1924, filed by the receiver on

December 21, 1923, would be within time, and the several subsequent darkhasts are within three years of each other. We think, therefore, that the application by the receiver is within time, and that the applications and darkhasts which were filed by Nensukh in 1919 and 1922 were applications in accordance with law. I have already stated that those applications were filed prior to the order of attachment before judgment on November 15, 1922, and although they were eventually disposed of on the ground that there was a compromise decree and the subsequent attachment in Suit No. 1050 of 1918, it cannot be said that those applications when they were filed were not applications in accordance with law.

7. It is urged on behalf of the appellant that the application to execute the decree was allowed to be proceeded with in the darkhast by the receiver, i. e., Darkhast No. 29 of 1924, and that the application having been accepted by the Court, it should be considered as a starting point of limitation, and reliance is placed on the decisions in the cases of *Mungal Pershad Dichit v. Grija Kant Lahiri* I.L.R.(1881) . Cal. 51 *Desaippa v. Dwndappa* I.L.R.(1919) . 44 Bom. 227 *Prabhuling Appa v. Gurunath Balaji* I.L.R.(1920) . 45 Bom. 453 and *Gulappa Rudrappa Ershetti Vs. Erava Basanagowda Patil*, . In that darkhast, though the application was allowed to proceed, the plaintiff did not appear on the subsequent date and the application was disposed of for default. The cases cited before us show that action was taken by the executing Court on the application of the judgment-debtor. In *Mungul Pershad Dichit v. Grija Kant Lahiri* an application for time was made by the judgment-debtor. In *Desaippa v. Dundappa* the decree was ordered to be paid off by instalments. In the present case on the second day the plaintiff did not appear, and the application was struck off for default. It is not necessary in the circumstances of the present case to go into the question whether Darkhast No. 29 of 1924 affords a starting point of limitation.

8. It is argued on behalf of the respondent that this appeal is not maintainable as the receiver is net a representative of the judgment-debtor. The receiver is the representative of both the parties to the action, and in no far as the lower Court disallowed the application to proceed, it was an order against the receiver who was entitled to execute the decree, and the receiver, in our opinion, was entitled to appeal against the order declining to execute the decree at his instance. Under Order XXI, Rule 18, if there had not been the appointment of the receiver, and if Purshottam had to execute) the decree against Nensukh, he would have been entitled to execute the decree for Rs. 6,000, for under Order XXI, Rule 18, Clause (1)(b), he would have been entitled to execute the decree for the difference between the two cross deorees. The effect of the order of the lower Court is that Purshottam is allowed to execute his decree for the whole amount of Rs. 13,500, whereas the receiver who comes in the place of Nensukh is prevented from executing his decree for Rs. 7,000, Mody, besides being a receiver appointed by the High Court, was also an assignee of the decree, and was a mortgagee of Nensukh. We think, therefore, that the receiver was in every way competent to execute the decree of Nensukh against Purshottam, and the

lower Court, in our opinion, was wrong in refusing the application for execution.

9. We would, therefore, reverse the order of the lower Court and remand the case to the lower Court and direct it to proceed with the execution of the decree. The appellant to have the costs of this appeal. The rest of the costs to be dealt with by the lower Court at the final disposal of the darkhast.

Murphy, J.

10. We are concerned with three decrees in this case. The first one was for Rs. 7,000 and made in favour of a person called Nensukh against Porshottam, in Suit No. 481 of 1916. The second one was obtained by Purahottam against Nensukh in Suit No. 1050 of 1918. And the third one was for Rs. 15,000 in favour of one Mody against Nensukh, partly on a mortgage of decree No. 1 of Nensukh, this being in Suit No. 2232 of 1921. The question is whether Mody, who in his suit was appointed a receiver to execute the decree obtained by Nensukh in Suit No. 481 of 1916, can proceed in execution. At the material times decree No. 1 had been obtained and execution applications were being made, in the case of decree No. 2 an attachment before judgment had been obtained and the suit ended finally in a compromise decree, the attachment on decree No. 1 in Suit No. 481 of 1916 being ordered to continue. In the third proceeding Mody, as I have stated, was appointed a receiver, and it ended in a preliminary decree and a final mortgage-decree for sale. The appellant is attempting to execute Nensukh's decree against Purshottamdas. The learned Subordinate Judge has held that he cannot succeed for two reasons, one being that the appellant could not proceed while the decree remained under attachment, and the second, that his right was time-barred.

11. I think it is simpler to take the point of limitation first. The decree in Suit No. 481 of 1916 was made on January 23, 1918. Since then there have been eight separate applications for execution, of these, the first two were made by Nensukh in 1919. In July 1921, Mody was appointed a receiver in the course of his own suit against Nensukh. Nensukh then made three more applications for execution, and finally the receiver as such made two, besides the present one. The argument is that the receiver, as such, could not take advantage of the applications for execution as steps in aid, which had been made by Nensukh. He was in effect appointed receiver for that special purpose. It is true that the appellant was appointed receiver in July 1921, and Nensukh himself made three applications subsequent to the date, and if the earliest of these, at any rate, is not considered to be a step in aid of execution in accordance with law, then the receiver's earliest application would not be in time. Nensukh was admittedly the decree holder and had the right to execute the decree, and I do not agree that the fact that the receiver had been appointed would invalidate his applications for the purpose of saving limitation. Moreover, as has been pointed out by my learned brother on the strength of the rulings in the cases of Gadigappa Chanbasappa Malkarjun Vs. Shidappa Gurushidappa Yalehalli, , Mungul Pershad Dichit v. Grija Kant Lahiri I.L.R.(1881) . Cal. 51 Desaippa v. Dundappa (1919) ILR

44 Bom. 227 Prabhuling Appa v. Gurunath Balaji I.L.R(1920) . 45 Bom. 453 and Gulappa Rudrappa Ershetti Vs. Erava Basanagowda Patil, , the present application cannot be held time-barred, being within limitation of the last one, where no such objection as that it was barred by limitation was taken. This being so, this objection cannot be taken in the course of the present application.

12. The other ground on which the application has been dismissed was that owing to the order of attachment at the preliminary stage of the suit between Nensukh and Purshottam, the applicant was not entitled to pursue execution in his character as receiver, and that this disqualification still exists, since the order of attachment was ordered to continue in the final decree obtained in that suit. But I do; not agree that the order of attachment in that suit can have this effect. The applicant was the mortgagee and the decree sought to be executed had also been assigned to him. He had brought a suit on his mortgage, and was appointed a receiver in the course of that suit. These rights accrued to the applicant before the date of the attachment before judgment, and that attachment could only have the effect to apply to such interest as the defendant in that suit possessed, I think that, in all these circumstances, the attachment could not possibly operate to prevent all proceedings for execution.

13. On the other two points, which were not discussed by the learned Subordinate Judge but which have been raised in appeal, I agree with the reasons stated and with the conclusions come to by my learned brother Patkar J. and with the order proposed to be made by him.