

(1962) 11 BOM CK 0010

In the Bombay High Court

Case No : Letters Patent Appeal No. 41 of 1959

Namdeo Digamber Gaikwad and Others

APPELLANT

Vs

Vijaykumar Ramchandra Shaha and Others

RESPONDENT

Date of Decision : 15-11-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 21 Rule 16, Order 41 Rule 11, Order 41 Rule 2, Order 6 Rule 4
Dekkhan Agriculturists Relief Act, 1879 — Section 15B

Citation : AIR 1963 Bom 244 : (1963) 65 BOMLR 408 : (1963) ILR (Bom) 576 : (1963) MhLj 603

Hon'ble Judges : Patel, J;K.K. Desai, J

Bench : Division Bench

Advocate : V.M. Limaye and S.J. Deshpande, for the Appellant; V.V. Albal, for the Respondent

Judgement

Patel, J.—This is an appeal under Letters Patent against the summary dismissal of the execution appeal of the Judgment-debtors 8 to 10 by Mr. Justice Tarkunde under Order 41 Rule 11 of the Civil Procedure Code.

2. The facts necessary for the decision of this appeal are as follows:- On February 17, 1923, one Ramchandra Raoji Shah advanced on mortgage a sum of Rs. 2500/- to Dixit family. After this he filed a suit, being suit No. 626 of 1936. As the defendants were agriculturists, accounts were taken under the provisions of Deccan Agriculturists Relief Act, 1879, and eventually a decree dated April 6, 1937 was passed for a sum of Rs. 5000-5-3 and costs of the suit, the costs being a sum of Rs. 497-5-0. The decretal amount was payable by annual instalments of Rs. 800/- each, the first Instalment being payable on 31st March 1938. The decree also provided that if there was default in the payment of any instalment, the judgment-debtors do pay interest on the balance due to the plaintiff at the rate of 6 per cent per annum from the date of default (in the payment of instalment) and that the mortgagees be entitled to sell the property u/s 15-B of the Act. It is accepted that no instalment was paid. An application was therefore

made by Ramchandra Shah on 31st March 1941, being Darkhast No. 541 of 1941, for recovery by execution, of four instalments which then had fallen due. The defendants judgment-debtors contended that the decree should be sent for execution to the Collector under the provisions of Schedule III of the Civil Procedure Code. The papers were forwarded to the Collector. Immediately within a short time the Bombay Agricultural Debtors Relief Act, 1939, came into force and after the Board was constituted for this area, all the papers were forwarded to the Board at the request of the judgment-debtors for settlement of the debt due under the decree. The papers were sent to the Board on 22nd April 1942. After that that Act was replaced by another Act, being Bombay Agricultural Debtors Relief Act, 1947, and the matter stood transferred to the Court. The Court returned a finding that the case was not governed by the B. A. D. R. Act and therefore directed the execution proceedings to be sent to the regular side and proceeded with. This order was made on 13th March 1947 and the papers were actually transferred to the regular Court on 29th August 1947. In the meantime the decree-holder on 2nd August 1946 assigned the decree by executing a registered assignment deed in favour of one Ganpatrao Deshmukh. Within a short time after the execution of the assignment deed, Ramchandra Shah died on 16th March 1947. The heirs of the decree-holder did not come forward to prosecute the Darkhast. But on 2nd of September 1947 the assignee made an application under Order 21 Rule 16 for being brought on record and allowed to execute the decree. When notice of this proceeding was issued to the judgment-debtors, they took up the contention that the assignment in favour of Ganpatrao Deshmukh was as a benamidar for themselves and therefore, he had no right to execute the decree against them. They contended that the decree-holder settled the matter by accepting Rs. 1700/- in full satisfaction of the decree. As they had not got that amount with them, they requested Ganpatrao Deshmukh to pay the same to the decree-holder which he paid and as Security for the fulfilment of a contract of sale of certain land to him for the amount so paid he took this assignment deed but it was agreed that he was not to execute this decree against them. In this application notice was also sent to the heirs of the decree-holder who appeared in those proceedings. They seem to have contended that their father was deceived into giving the assignment and that the assignee did not obtain any rights to execute the decree under the terms thereof. They also offered to pay back Rs. 1700/- to the assignee reserving the rights and remedies regarding execution of the decree against judgment-debtors.

3. The executing Court by its judgment and order dated 14th April 1949 upheld the contention of the judgment-debtors that the assignment was taken by the assignee as benamidar for the judgment-debtors with an understanding that the decree was not to be executed. It did not give any finding on the contention raised by the son of the decree-holder and naturally so. The plea of deceit was very vague and no particulars thereof were given. As has been often pointed out that such plea is no plea. The party relying on fraud or deceit must give the facts on which such allegation is founded. No issue was also pressed on that point. The

assignee came to this Court in appeal which was heard by Mr. Justice Vyas on 22nd September 1950 who dismissed it. Against this judgment the assignee filed an appeal under the Letters Patent, being Appeal No. 51 of 1950 which was dismissed by Mr. Justice Bhagwati and Mr. Justice Dixit on 24th January 1952. They upheld the findings of both the Courts that Rs. 1700/- were paid by the assignee on behalf of the judgment-debtors and that the amount was paid for and on behalf of the judgment-debtors as part and parcel of adjustment which was not certified. They also upheld the contention that the assignee was acting as the benamidar of the judgment-debtors and on this ground the Court held that the benamidar could not execute the decree against the judgment-debtors. It may also be mentioned that on the same date on which the executing Court dismissed the application of the intervener assignee, (April 14, 1949) it also dismissed the darkhast filed by Ramchandra Shah on the ground that the heirs of the decree-holder had not come forward to execute the decree. There was no appeal from that order and that order to-day stands as final,

4. After this, it seems the present appellants purchased the property from the original Judgment-debtor, the heirs of the decree-holder after the proceedings ended in the High Court filed a new Darkhast for execution on 12th March 1953. It was dismissed on 30th September 1953. A third darkhast was filed on 11th October 1951 which was dismissed on 20th June 1955. The fourth darkhast from which the present appeal arises was filed on 15th April 1958. Naturally the heirs of the original judgment-debtor did not bother about the execution proceedings. The purchasers (referred to as judgment-debtors 8, 9 and 10), however, contested the execution proceedings. They contended that because of the assignment the judgment-creditors were not entitled to execute the decree, that there was estoppel and that the execution was barred by the law of limitation and by Section 48 of the Civil Procedure Code.

5. The learned Trial Judge-negative the first two contentions and upheld the last partially. He construed the decree to mean that the principal amount had to be returned by instalments of Rs. 800/- and the subsequent interest payable because of the default also became payable by instalments and therefore the last date for payment of instalments would be 31st March 1953. Accordingly he held that Rs. 5299-2-0 were allowable in execution proceedings. He also allowed interest on this amount, He directed the darkhast to proceed in respect of Rs. 8449-2-9. The appeal of the Judgment-debtors was dismissed.

6. It is firstly contended that Section 48 applies to the case and that the Darkhast must be held as unexecutable. It is contended secondly that in view of the assignment the decree-holder is not entitled to execute the decree. In our view, it is not necessary to decide the first point since it is sufficient to dispose of the execution proceedings on the second point.

7. Now, it is clear that the assignment by Ramchandra Shah is by a registered assignment deed which is perfectly valid document. The only method of getting over that document is to have it avoided for any of the reasons which make a

contract not binding on a party. It has not so far been avoided on any such ground. The assignment therefore must necessarily bind the decree-holder. As pointed out by us in the earlier part of the judgment, the trial Court expressly held that there was an adjustment for which Rs. 1700/- were paid, that this was paid on behalf of the judgment-debtors and that the assignee was their benamidar and had undertaken not to execute the decree. This finding was in terms confirmed by the Division Bench finally in the Letters Patent Appeal. It has not been declared to be invalid on any of the grounds on which the decree-holder relied. One must therefore be driven to the conclusion that so far as the assignment deed is concerned it is binding on Ramchandra Shah and his legal representatives i.e., his sons.

8. The decree-holder has his title in the decree. Section 232 of the old Code gave a discretion to the Court to allow the transferee to execute the decree. But under the present Code the transferee is entitled as of right to execute the decree. On such a case when transfer is complete and effective the decree-holder though formally the "holder" cannot be allowed to execute the decree. In the present case the title to the decree having vested in the judgment-debtors the decree becomes exhausted. In *Banarasi Das v. Maharani Kuar*, ILR 5 All 27, Mahmood J. said in connection with the acquisition of the rights of the decree-holder by one of the judgment-debtors:

"Whilst in a matter of this kind we are bound to consider the language of the Civil Procedure Code, we do not think that the rules of adjective law should be administered regardless of the fundamental principles of substantive law and equity. Where the language of the statute itself is silent upon any special point, the Courts in applying the rules of procedure will import such consideration as will render the application of those rules consistent with equity and substantive law."

In *Degumburee Dabee v. Eshan Chunder Sein*, 9 Suth WR 230 (FB), Peacock, C. J. held that when one of the judgment-debtors satisfied the decree and got it assigned to himself he was not entitled to execute the decree but must recover contribution by a suit. In *Mt. Asia Bibi Vs. Malik Azir Ahmad and Others*, the learned Judges said :

"Where the rights of a decree-holder and the liability of a judgment-debtor become united in one and the same person there would obviously be merger."

In such a case it is held that the decree cannot be executed. In our view the principles of substantive law ought to be applied and it must be held that where the interests of the judgment-debtor and the judgment-creditor merge the decree cannot be executed. Since the benamidar has merely the legal title but the real title vests in the real owner the same result must follow in the present case. The 2nd proviso to Order 21 Rule 16 is merely an extension of this principle and cannot be construed to mean that because one of the judgment-debtors cannot execute the decree the original decree-holder should in spite of the

assignment be entitled to execute it. To hold otherwise would bring about inconvenient and unjust results and would create unnecessary litigation. In OUR view, therefore, the decree-holder's heirs cannot execute the decree.

9. It was argued by Mr. Albal that the decision in the earlier proceeding raised by the assignee must be held to invalidate the assignment and therefore the right of the decree-holder to execute the decree survives. If one reads the judgments of all the three Courts in those proceedings, it is impossible to uphold the contention.

10. Our attention was also invited to the last paragraph of the judgment of Mr. Justice Bhagwati where he says:

"A peculiar situation has arisen The decree-holder would be entitled to execute the decree for the whole of the amount because the sum of Rs. 1700/- paid by the assignee to him and which he admits to have received from the assignee has not been certified on the decree, and if and when the decree-holder proceeds to execute the decree against the judgment-debtors the judgment-debtors presumably will have to pay the whole of the decretal amount and they would be relegated only to their remedy for damages, if any, against the decree-holder."

11. He there visualises what would happen as a result of that judgment. It is no one's ease that this point could have been argued before the learned Judges by any of the parties before the Court. The only question before the learned Judges was as to whether or not because at the assignment deed the assignee was entitled to execute the decree against the judgment-debtors, being their benamidar. As to what would happen subsequently could never be a matter of decision between the parties. At no time was such an issue raised and no decision sought on it. He only says that because the adjustment was not certified the decree-holder would be entitled to disregard it and ask for execution of the decree, that the assignee had paid Rs. 1700/- for which judgment-creditor was not even bound to give credit in the execution proceedings and that all the trouble and litigation would certainly have been avoided if the proceedings brought by the assignee could have been disposed of within a stated time. This observation has nothing to do with the right of execution of the decree-holder. In this connection it must also be remembered that the Darkhast filed by the decree-holder was dismissed because the heirs did not choose to proceed with the execution and no appeal was filed against that order. The learned Judge was answering a passing argument on behalf of the assignee. Moreover both the decree-holder's heirs and the judgment-debtors were co-re spondents i.e. in the position of co-defendants and the question not being in dispute between them the finding could not be conclusive. That question therefore, could not have been decided by the learned Judges and they have not actually decided it. The question therefore is still open.

12. It is argued that this point was not taken in the trial Court in express terms

and therefore in the Letters Patent Appeal it should not be allowed to be taken. It is a pure question of law and no facts are required to be investigated. The only ground on which the learned Judge directed execution was that the High Court had negatived the right of the assignee to execute the decree and that the decree-holder was therefore entitled to execute the decree. This ground in view of our Judgment as above is not tenable.

13. In the result the Darkhast must be dismissed with no order as to costs throughout.

14. Application dismissed.