
(1932) 02 CAL CK 0035
In the Calcutta High Court

Nourangilal Marwari

APPELLANT

Vs

Sm. Charubala Dasi and Others

RESPONDENT

Date of Decision : 26-02-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22

Citation : AIR 1932 Cal 766 : 140 Ind. Cas. 747

Hon'ble Judges : Rankin, C.J

Bench : Division Bench

Judgement

Rankin, C.J.—In this case a money decree was passed in September 1916 in favour of two decree-holders against three judgment debtors for some Rs. 2,000 and was affirmed on appeal on 4th June 1918. After certain execution proceedings which led to nothing both the original decree-holders died and the present appellant says that under the Mitakshara law their interest in the decree passed to him by survivorship. On 7th May 1927 he presented an execution petition being No. 64 of 1927 and obtained an ex parte order substituting him as decree-holder. The Court made an order for the issue of notices under Rule 22, Order 21, Civil P. C. It is now said on behalf of the respondents and may be accepted that these notices were never served. On 28th June 1927, for anything we know, just because these notices had not been served the Court dismissed that execution case for default as it was well entitled on that hypothesis to do. On 2nd June 1930, within three years of that order, the appellant brought execution petition No. 72 of 1930 which is the matter before us. Notices were ordered to be served with the result that certain objections were made by a petition of 27th June 1930 on behalf of the judgment-debtors. Before the execution petition was disposed of, on 19th September 1930 the appellant filed an application asking that his petition of 2nd June might be amended by correcting a statement therein to the effect that he had become entitled by succession and substituting the statement that he had become entitled by survivorship, the object being to show that no succession certificate would be necessary under the law. One would have supposed. that the way in which the

matter would be dealt with was by saying:

Very well, if you want to claim by survivorship, by all means do so. We will then decide the question whether you are entitled to stand in the shoes of the original decree-holders and the question whether or not any succession certificate is necessary and also the question whether or not your application for execution is time barred.

2. That however was not the way the matter appealed to the first Court, The first Court, for reasons which I fail to appreciate, refused him leave to amend his petition by stating that he claimed by survivorship; and while it appears to have discussed all sorts of other points, it does not seem to me that these discussions were of more than academic interest. The matter came before the second Court and the second Court agreed again. for reasons which I fail to appreciate that the man should not be allowed to amend his execution petition, and it made certain observations about other aspects of the case. On this appeal being argued before us, the only contention by way of supporting the refusal to allow this execution creditor to amend his petition was by maintaining that in virtue of Rule 17, Order 21, Civil P. C., no execution petition could ever be amended except in terms of that rule. To my astonishment the authority of a Full Bench of this Court is vouched for that view : *Asgar Ali v. Trilokya* [1890] 17 Cal. 631 (F.B.). It was a case however of " an entirely different character from the case before us, and the decision seems to have been motivated by rules as to limitation which are no longer in force.

3. Let us examine what the scope of Rule 17, Order 21, Civil P. C., really is Rule 17, Order 21, is directed to preventing executing petitions being even filed unless they comply, on the face of them, with certain elementary requirements laid down in Rules 11 to 14; that is to say, there must be a tabular statement and the tabular statement must contain various pieces of information that are therein required; if there is an application for attachment of move-able properties there must be an inventory attached, or if the application is for attachment of immovable properties then certain description of the properties must be contained in the petition, and the Court may require an extract from the register of the Collectorate in certain cases. Rule 17 says that if an execution creditor does not comply with the formal requirements of Rr 11 to 14 his petition shall not even be filed and it puts a duty upon the Court not to take evidence and investigate into any of the facts, but to see that the application is in proper form though every word of it may be untrue, which is another matter altogether. If the application is defective on the face of it, the Court may allow time for its amendment; and if time is allowed and the application is amended it shall be deemed to have been presented on the date when it was first presented; so that no punishment in connexion with the law of limitation is put upon the decree-holder.

4. Then it goes on to say that when the application is admitted a proper note is to be entered in the register and then the Court may order execution. Now,

because the rule requires a preliminary scrutiny of certain formalities before the petition can get upon the file it is actually argued that that means that after it has got upon the file nobody can ever get his petition amended even with the leave of the Court--a thing which is almost ludicrous as an argument. A Full Bench of this Court in the case referred to thought that this argument was good as regards formal defects within Rules 11 to 14. However that may be, in the present case the matter on which the decree holder wanted an amendment has nothing to do with Sr. 11 to 14. He stated that he had succeeded as an heir to the rights under the decree. If so, the petition was perfectly in form. The Court under Rule 17 could not know in the least whether that was true or false. Having considered the matter further the decree-holder found that the correct way of describing his legal position was to say that he had become entitled by survivorship. "Under the Code procedure is intended to be less rather than more formal in the execution of a decree than in the case of the hearing of a suit; and the executing Court need not have found difficulty in allowing him to amend his petition. To me it is clear That this matter should go back to the Original Court with a direction to allow The amendment and then to determine whatever is necessary to be decided.

5. One question which this Court should determine is the question of limitation. The facts as to that are that the present petition was presented on 2nd June 1930 and the question is whether within three years there was an order made on the previous application for execution. The previous application was presented on 7th May 1927 and the order dismissing it for default which was a perfectly good order--whether notices were served u/s 22, Order 21, Civil P. C, or not--was made on 28th June 1927. This petition therefore was within time and the Court below will not have to investigate that matter again.

6. In the Court below a dispute arose upon the question whether the appellant having been by an ex parte order dated 27th May 1927 substituted for the original decree-holders it would be open to the judgment-debtors to show if they could that he was not entitled in the shoes of these decree-holders to execute the decree. On that there is no difficulty at all. It being found that the judgment-debtors had no notice of this order they are as a matter of course entitled to question the right of the appellant to put the decree in execution. Another question canvassed, is, assuming that the appellant is entitled by survivorship, whether succession certificate is necessary. That question we leave open for further discussion. If there is any difficulty about it the trial Court must wrestle with that difficulty in the first instance. This appeal is allowed with costs, hearing fee two gold mohurs.