
(1958) 09 P&H CK 0020

In the Punjab And Haryana At Chandigarh

Case No : Ex. First Appeal No's. 47 and 48 of 1951

Punjab Co-operative Bank Ltd.

APPELLANT

Vs

L. Bikram Lal and Others

RESPONDENT

Date of Decision : 30-09-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 146, 39, 41, 42, 50

Citation : AIR 1959 P&H 71

Hon'ble Judges : I.D. Dua, J;D. Falshaw, J

Bench : Division Bench

Advocate : S.D. Bahri, for the Appellant; J.N. Seth and R. Sachar for Minor (Amit Lal), for the Respondent

Final Decision : Allowed

Judgement

Bishan Narain, J.—It will be convenient to deal with Execution first Appeal No. 47 of 1951 and Execution First Appeal No. 48 of 1951 together as the points involved in both the appeals are the same.

2. The facts out of which Execution First Appeal No. 47 of 1951 has arisen are these. The Punjab Co-operative Bank Ltd.. obtained a mortgage decree for Rs. 30,000/- against Piare Lal on 31-8-1930 from the Court of the Additional District Judge Lahore. The Bank obtained an order from the Lahore Court for transfer of the decree to Feroze-porc u/s 39, Civil Procedure Code. The Bank then applied to the Court of the Senior Sub-Judge Ferozepore for execution of that decree on 22-4-1943 and it was dismissed on 18-6-1943 after partial satisfaction.

The Bank then applied again on 3-1-46 for execution of the decree but this time the application was made against the legal representatives of the Judgment-debtor as Piare Lal had died in the meanwhile. This application was also dismissed on 7-2-"1947 and on the same date a fresh application was made for realisation of Rs. 8,824/12/4 as balance due under the decree. The legal representatives filed objections on 20-5-1947 urging inter alia" that only the

Court which passed the decree could order execution against the legal representatives u/s 50 Civil Procedure Code,

The parties' evidence On the other issues involving questions of fact was concluded on 20-12-1947 and two days later the legal representatives raised a new objection and that was to the effect that as the Lahore Court was a foreign Court its decree could not be executed by an Indian Court. This objection was however overruled by order dated 6-2-1948. Thereafter the executing Court held that u/s 50, Civil Procedure Code, the application for imp leading the legal representatives lies to the Court which passed the decree and ordered on 21-5-1948 that proceedings be stayed till the decree-holder Bank obtains the necessary orders from the Lahore Court. It appears that the Bank had already approached the Lahore Court on 12-3-1948 for that purpose and that Court by order dated 21-5-1948 impleaded three sons and the widow of the deceased judgment-debtor.

Another application was made to the Lahore Court for impleading Basant Lal Malhotra another son of the judgment-debtor and that this application was granted by an order dated 15-10-1949. The execution proceedings were then resumed in the Ferozepore Court and the execution application was dismissed on the ground that it was not filed in accordance with law as an application for execution against the legal representatives could only be made in Lahore and after 15-8-1947 that being a foreign Court could not deal with the matter. It is against this decision that the Bank has appealed to this Court (Execution First Appeal No. 47 of 1951).

3. The facts out of which Execution First Appeal No. 48 of 1951 has arisen are these. The Bari Doab Bank Ltd., had obtained a money decree for Rs. 24065/10/- against the same Piare Lal on 26-10-1934 from the Court of Sub Judge 1st Class Lahore. The Bank got the decree transferred to Ferozepore u/s 39, Civil Procedure Code. The Ferozepore Court dismissed the application on 30-10-1942. The Bank filed a fresh application on 18-10-1945 for realisation of Rs. 6923/8/- as balance due under the decree. The proceedings were stayed u/s 6 of the Soldiers (Litigation) Act 1925 by order dated 1-3-1946 as Bikram Lal one of the sons and the legal representative of Piare Lal was on active "service.

The execution proceedings were resumed on 12-4-1947. Thereafter the proceedings in this case and in the case of Punjab Co-operative Bank Ltd. were taken together. The same objections were filed by the legal representatives and the same orders were passed thereon as narrated above. The only difference is that the Lahore Court brought the legal representatives on record on 1-7-1949 and the oral evidence was recorded in this case and was made with the consent of the parties in the case of the Punjab Co-operative Bank Ltd. The appeal of the Bari Doab Bank Ltd., is numbered as Execution First Appeal No. 48 of 1951.

4. Now these facts raise two questions of law and they are: (1) Whether the application for substitution of legal representatives must be made only in the

Court which passed the decree and without such an application execution cannot proceed in the transferee Court and (2) Whether an application, for this purpose in Lahore Court after 15-8-1947 is valid,

5. Dealing first with the second question it appears to me that after 15-8-1947 the Lahore Court has become a foreign Court and any order passed by; it after the date u/s 50, C. P. C. has no effect in this country. The first point seems to be more difficult to decide. u/s 50, C. P. C., the decree-holder on the death of the judgment-debtor may apply to the Court which passed the decree; to execute it against the legal representatives of the deceased judgment-debtor. u/s 39, Civil Procedure Code, the Court that passed the decree may send it to another for execution,

On such a transfer the transferee Court has u/s 42, Civil Procedure Code, the same powers-in executing it as if it had passed the decree and u/s 40, Civil Procedure Code, it shall execute it according to the rules applicable to itself. Under Order 21, Rule 22(2), Civil Procedure Code, where an execution application is made against the legal representatives then the executing Court may not issue notice to the legal representatives *Tinder* certain circumstances and it has been repeatedly laid down that the provisions of this order apply to transferee Court as well.

Now the transferee Court continues to have jurisdiction to execute the decree even if repeated applications are made for the purpose till it certifies to the Court that passed the decree the fact of its execution or failure u/s 41, Civil Procedure Code. It is well settled that the Court which passed the decree continues to have jurisdiction to execute the decree itself or to send it to some other Court for this purpose even if it has already transferred it to another Court. In this connection the provisions of Section 146, Civil Procedure Code, are also not to be ignored.

This section provides that when proceedings can be taken against a person on an application then an application can be made against persons claiming under him. Thus under this, section an application can be made against a legal representative of a judgment-debtor. It will not be irrelevant to state at this place that provisions of p. 22 do not apply to execution proceedings and it is not necessary to file a separate application to bring the legal representatives of judgment-debtor on the record.

In view of these provisions of law it appears to me that after transfer of a decree the jurisdiction of the transferee Court is not excluded to execute it against the legal representatives of the judgment-debtor. There was a conflict of views in this matter in various High Courts till their Lordships of the Privy Council held in *Jang Bahadur v. Bank of Upper India, Ltd.*, Lucknow AIR 1928 P.C 162:

"But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject matter continues as before, but a

certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure, e.g., if the application for substitution is made to the Court to whom decree is transferred instead of to the Court passing the decree, the "defect might be waived; and the party who has acquiesced in the Court exercising it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings."

It is clear from this decision that their Lordships of the Privy Council ultimately decided the matter on the ground that the legal representatives of the judgment-debtor were estopped from raising it. This decision to my mind does not hold finally that the transferee Court has no power or jurisdiction to execute the transferred decree against the legal representatives of the judgment-debtor.

It has, however, been decided by the Pepsu High Court in *A.S. Metal Mart v. The First National Bank, Ambala* AIR 1954 Pepsu 115 that the words "may apply" in Section 50 should be read ("shall apply" and that any application for execution of the decree against the legal representatives of the deceased judgment-debtor in the transferee Court is not competent without getting the legal representatives impleaded in the Court which passed the decree.

6. Now if the transferee Court has jurisdiction to entertain such an application then even after partition of the country that jurisdiction has been preserved by para 4 of the Indian Independence (Legal Proceedings) Order, 1947 which lays down--

"x x x x x

(1) all proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day; x x x

x x x x x"

7. In view of the importance of the matter I am of the opinion that the points of law involved in this case should be decided by a larger Bench. Let the papers be placed before the Hon'ble the Chief Justice for orders.

JUDGMENT

I.D. Dua, J.

8-11. (His Lordship stated the facts and continued): These two appeals originally came up before Bishan Narain J. who by his order dated 18-11-1955, felt that in view of the importance of the following two questions the case deserved to be decided by a larger Bench:

1. Whether the application for substitution of legal representatives must be made

only in the Court which passed the decree and without such an application execution cannot proceed in the transferee Court, and

2. Whether an application for this purpose in Lahore Court after 15-8-1947, is valid.

It appears that before the learned Single Judge reliance on behalf of the decree-holders was only placed on sub-para (1) and not on sub-para (3) of para 4 of the Indian Independence (Legal Proceedings) Order, 1947. Para 4 of the Indian Independence (Legal Proceedings) Order, 1947, reads thus:

"4. Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947---

(1) all proceedings pending immediately before the appointed day in any civil or criminal court other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day; "

(2) any appeal or application for revision in respect of any proceedings so pending in any such court shall lie in the court which would have appellate or as the case may be, revisional jurisdiction over that court if the proceedings were instituted in that court after the appointed day; and

(3) effect shall be; given within the territories of either of the 2 Dominions to any judgment, decree order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction within that Dominion."

From the facts narrated above it would be clear that both the execution proceedings were pending in the Court at Ferozepur immediately before the appointed day, i.e., 15-8-1947. Those proceedings by virtue of para 4(1) were to continue in the Ferozepur Court as if the Indian Independence (Legal Proceedings) Order, 1947, had not been passed. In other words for the purposes of these proceedings the Lahore Court could not be considered to be a foreign Court; and in this view of the matter the Court below, in my opinion, was not right in observing that the order of the Additional District Judge, Lahore, after the 15-8-1947, was the order of a foreign Court with respect to the proceedings in dispute.

12. Reading together sub-paras (1) and (3) of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, the picture becomes clearer still. Sub-para (3) lays down that effect must be "given within the territories of both the Dominions of India and Pakistan to any judgment decree or order of any Court such as is referred to in sub-para (1) as if it had been passed by a Court of competent jurisdiction within that Dominion.

This, in my opinion, clearly shows that if an order is passed by the Ferozepur

Court in the proceedings pending immediately before 15-8-1947, then that order must be given effect to in both the Dominions of India and Pakistan as if it had been passed by a Court of competent jurisdiction. In view of these provisions of law I am inclined to take the view that the Ferozepur Court should be considered to be competent to proceed with the execution application against the legal representatives just as the Court passing the decree would be.

13. The matter may be looked at from another point of view as well. Section 50 of the CPC lays, down that where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. In both the appeals before us the decree-holders did actually apply to the Courts which passed the decrees to execute the same against the legal representatives of the judgment-debtor. Section 50 of the CPC is, in the circumstances, fully complied with.

The judgment-debtors, however, say that the Courts at Lahore are foreign Courts and therefore the applications in those Courts are of no avail to the decree-holders. If that is so then the only Court which can deal with the execution applications is the Ferozepur Court and here also the decree-holders have applied for executing their decrees against the legal representatives of the deceased judgment-debtor. I have not been able to appreciate the contention of the judgment-debtors when they contend in the one breath that the decree-holders must approach the parent Court wherever it may be situated, and in the second breath they object that because the parent Court is in a foreign country therefore an application in that Court can be of no avail. Either there is a parent Court in existence which can properly be approached in accordance with law for the purpose of executing the decree against the legal representatives of "the judgment-debtor OP there is no such Court in existence. If such a Court is in existence then the decree-holder has properly approached that Court and if there is no such Court in existence then also the decree-holder has moved the only Court which is seized of the matter viz., the Ferozepore Court.

14. There is still another way of dealing with the question which arises for consideration in the present case. In ILR Luck 314: (MR 1928 PC 162), their Lordships of the Privy Council after noticing an apparent divergence of opinion among the different High Courts in India on the question of interpretation of Section 50, Civil Procedure Code, observed that the matter of getting an order for substitution of the legal representative in place of the deceased judgment-debtor was a matter of procedure and not of jurisdiction and a non-compliance with such procedure could under tile law be waived.

Their Lordships when dealing with this matter, made a reference to Sham Lal Pal v. Madhu Sudan Sircar ILR Cal 558, Amar Chandra v. Gurupro-sonno ILR Cal 488 and Swaminatha Aiyar v. Vaithianatha Sastrial ILR Mad 466 (FB) and finally observed as follows:

"After consideration of all the circumstances of the case under appeal, their Lordships come to the conclusion that the Hardoi Court had jurisdiction to deal with the matter of the execution -transferred to it; that the exercise of such jurisdiction as against the appellant though irregular in the first instance was submitted to for a considerable time by him, He cannot now be reared to object to the exercise of such jurisdiction and it would be to permit a gross abuse of procedure if he was allowed to do so."

In *Mt. Begam Bibi v. Bulaqi Shah* AIR 1926 Lah 84, a Division Bench of the Lahore High Court followed ILR Cal 558 and held that an application for substitution of the legal representative of the deceased can be made to the Court to which the decree; has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by Section 99 of the Code of Civil Procedure.

Similarly in *S. Marahmat Husain Vs. Oudh Commercial Bank Ltd. and Others*, it was observed that Section 50(1) of the CPC does not give an exclusive jurisdiction to the Court which passed the decree for the purposes of substituting the names of legal representatives of the deceased judgment-debtor and an application may also be made to & orders passed by the Court to which a decree has been transferred for execution. In that case also reference was made to ILR Cal 558 and ILR 3 Luck 314: (AIR 1928 PC 162). Procedure, it has repeatedly been observed, is a handmaid and not mistress of law and rules of procedure should subserve and not govern.

Procedure is only a channel to administer law, and it should not be instrumental in impeding or obstructing justice; rules of procedure should always be utilised for advancing and not for defeating the cause of justice. If therefore, as observed by their Lordships of the Privy Council, it is only a matter of procedure, and not of jurisdiction that the Court passing the decree should normally be approached for proceedings against the legal representatives of the judgment-debtor and if failure to approach such Court is a mere irregularity then, where by partition of the country such Court happens to fall in a foreign territory, the transferee Court should in such circumstances be held to possess full jurisdiction to execute the decree against the legal representatives. This principle, in my opinion, is also deducible from the provisions of Section 42 of the CPC which lays down that the Court executing the decree sent to it shall have the same powers in executing the decree as if it had been passed by itself. ?

14. The learned counsel for the respondents has also placed his reliance on the Privy Council decision mentioned above; he, however, contends that an objection based on the omission to approach the parent Court may be waived but if it is not waived then, so the counsel argues, the decree-holder has no right in the first instance to approach the transferee Court for proceeding against the legal representatives of the judgment-debtor. In support of his contention he has further referred us to the case of *Official Trustee of Bengal v. Bas-deo Bhagat* AIR 1937 Pat 2S9.

Their Lordships in the reported case after referring to ILR Luck 314; (AIR 1928 PC 162), observed as follows:

"Their Lordships have held that it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of a deceased judgment-debtor as under the provisions of Section 50, Civil Procedure Code, the application for such execution is to be made to the Court which passed the decree. Their Lordships have, however, held that if the judgment-debtor waived the objection or acquiesced in execution, the proceedings are not void because there is no want of jurisdiction.

In my opinion the learned Subordinate Judge has rightly pointed out that the questions of acquiescence or of waiver can only arise when steps have been taken for execution & the Courts are called upon to decide whether the steps taken should stand or should be set aside. We are at a stage when no execution has been issued. When it is brought to the notice of the Court that a certain procedure is irregular, and when the proceedings can be regularised by applications to the proper Court, there is no reason why the Court should allow the irregular proceeding to continue."

It may be noticed that their Lordships of the Patna High Court expressly observed that if the proceedings could be regularised they should be regularised. In the present case the position adopted by the judgment-debtors clearly shows that if their objections are upheld then the proceedings cannot be regularised. The Patna case thus is of not much assistance to the counsel for the respondents. The next case on which he has placed reliance is Muthukaruppan Chettyar v. Sellami Achi, AIR1938 Rang 385.

Here again the learned Judges relied on ILR Luck 314: (AIR 1928 PC 162), and clearly observed that the matter dealt with by Section 50 of the CPC was one of procedure and not of jurisdiction. On the facts of that case, however, an execution application had been filed in the transferee Court in Burma after Burma had separated from India. It appears that the decree in that case had been passed by a Subordinate Judge in Madras and had been transferred to Burma for execution in October 1936.

I The order for transfer was received in the Court at Burma in October 1936. According to Order 21, Rule 10 (a) Code of Civil Procedure, as in force in Burma, it was provided that in the absence of an application made by the decree-holder within six months of the date of receipt of the papers the Court shall return them to the Court which passed the decree with a certificate of the circumstances. This period of six months had expired on the 29-4-1937 when according to the above provision of law the papers should have been sent back to the Court passing the decree. The application for execution in the transferee Court was made on 19-5-1937.

Separation of Burma had taken effect on 1-4-,1937. On these facts, the petition which the decree-holder filed on 19-5-1937, was obviously to a Court which

could not proceed with the application as no application had been made within six months from the date of the receipt of the order of transfer. In these circumstances the learned Judges of the Rangoon High Court held and in my opinion rightly that the execution application could not proceed in the Burma Courts. The learned counsel then placed his reliance on *S.S. Said-ul-Hamid v. Federal Indian Assurance Co. Ltd New Delhi* AIR 1951 Sim 255. This is a judgment by a learned Single Judge of this Court but it is not clear whether any proceedings were actually pending in a Court in India on 15-8-1947, which circumstance is material for the purposes of interpreting the provisions of para 4 of the Indian Independence (Legal Proceedings) Order.

The judgment only refers to the circumstance that between 11-10-1947 and 15-4-1948, there were no proceedings pending in the Court of the Senior Subordinate Judge at Delhi. In my opinion the only time relevant for determining the applicability and true scope and purpose of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, is the appointed day which is 15-8-1947, This decision is thus not of much assistance to the respondent.

15. Lastly, the learned counsel drew our attention to the judgment of a Single Judge of the erstwhile Pepsu High Court reported as AIR 1954 Pepsu 115- In that case the learned Judge particularly relied on AIR 1937 Pat 239 and *Prasadi Mahton v. Ghulam Murtaza* AIR 1951 pat 618. If this judgment holds that the Court passing the decree is the only Court which has the exclusive jurisdiction to entertain an application for proceeding against the legal representatives of the judgment-debtor then with the utmost respect I disagree with it. Their Lordships of the Privy Council have in clear and express words laid down that this is a mere matter of procedure and not of jurisdiction.

16. After fully considering the matter I am of the view that Section 50 of the CPC does not confer exclusive jurisdiction on the Court which passed the decree for proceeding against the legal representatives of the judgment-debtor and it is a matter purely of procedure and the transferee Court is not completely without jurisdiction in dealing with this matter. Section 42 of the CPC also supports this view. My answer therefore to the two questions referred by the learned Single Judge would be--

(1) an application for substitution of legal representatives need not necessarily be made only in the Court which passed the decree and without such an application execution can proceed in the transferee Court. It would, however, depend on the circumstances of each case. If the objection is waived or if otherwise it is not possible to approach the Court which passed the decree or for other sufficient and adequate reason the transferee Court so considers then it can proceed with the execution application; and

(2) an application for this purpose could on the facts of this case be validly made in the Lahore High Court after 15-8-1947.

17. For the reasons given above I would allow both the appeals, set aside the

orders of, the Court below and send the case back for further proceedings according to law and in the light of the observations made above., The parties are directed to appear before the executing Court on 27-10-1958, when the Court will give another date for further proceedings. There will be no order as to costs in this Court.

D. Falshaw, J.

18. I agree.