

(1930) 11 AHC CK 0021
In the Allahabad High Court

S. Marahmat Husain

APPELLANT

Vs

Oudh Commercial Bank Ltd. and Others

RESPONDENT

Date of Decision : 05-11-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 41

Citation : AIR 1931 All 320

Hon'ble Judges : Bennet, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bennet, J.—This is an appeal by a judgment-debtor against an order in execution passed by the learned Subordinate Judge of Azamgarh. This order was passed in course of execution of a decree which had been passed by the learned Subordinate Judge of Fyzabad in Suit No. 5 of 1913. (The Oudh Commercial Bank against Mt. Saleha Bibi and her husband Syed Riasat Husain judgment-debtors.) The procedure of the Court of Azamgarh has given rise to several objections which have been dismissed by that Court and which have been the subject of various grounds of appeal. The first objection which is taken is that on 24th November 1921 a certificate which is not before us as it is not on the record is said to have been issued by the Court at Azamgarh to the Court at Fyzabad. This certificate was apparently in printed Form 5 of App. E or possibly Form 4. Both are forms under Order 21, Rule 6. According to the lower Court on this certificate the words were written in regard to this execution proceeding: Send to the Collector for execution." The argument of the learned Counsel for the appellant judgment-debtor is that this is a certificate of the result of the execution proceedings u/s 41, Civil P.C., and that after sending that certificate the Azamgarh Court had no further jurisdiction in these execution proceedings. Now Section 41 states as follows:

The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute

the same, the circumstances attending such failure.

2. This section clearly contemplates either that execution should take place or that the Court to which the decree has been transferred should certify that it has failed to execute the decree. But the words "send to the Collector for execution" do not come under any of the words in Section 41." It is neither certified that execution has taken place nor that there has been a failure to execute. Accordingly we consider that the use of this form did not amount to the issue of a certificate u/s 41 and therefore that the jurisdiction of the Court in Azamgarh was not at all affected by that matter.

3. The next point which was argued before us was in regard to an application made by the decree-holder on 29th November 1921 that execution should continue and that the names of three persons Khairunnissa, Khurshed Husain and Banne Bibi should be added as judgment-debtors. On this notice was issued and a "rubkar" was sent to the Collector that these names be added and the application was granted. Now the reason for adding these names was that both the original judgment-debtors Mt. Saleha Bibi and Syed Riasat Husain had died. There was an application made in the Azamgarh Court on 1st December 1921 for execution of decree against ten persons including the present appellant Marahmat Husain in place of the deceased judgment-debtors, and that application was granted and at that time Marahmat Husain made no objection that the Azamgarh Court had no jurisdiction. The present objection indeed is only taken against the order of 29th November 1924 that three other persons should be added as legal representatives. The chief point on which the argument is based is that in various rulings it has been held that u/s 50, Sub-section 1, only the Court which passed a decree has power to order that the decree should be executed against the legal representatives of a deceased judgment-debtor. That section does no doubt clearly direct that the application may be made to that Court. The question broadly which has been argued before us is whether that "section gives an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of legal representatives for a deceased judgment-debtor, or whether an application may also be made to and orders passed by that Court to which a decree has been transferred for execution. Section 42, Civil P. C, provides that

the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.

4. For the judgment-debtor appellant it was argued that although Section 42 gave jurisdiction to the Court to which a decree was transferred for purposes of execution that jurisdiction does not include the particular jurisdiction given by Section 50, Sub-section 1, exclusively to the Court which passed the decree. Now if that were so, a very remarkable result would arise, because Section 47, Sub-section 3, states that a Court executing a decree shall determine all questions which arise as to whether any person is or is not the representative of a party. In this subsection the language used is imperative and the subsection states that

that Court shall determine that class of question. There is little distinction to be drawn between the questions to be determined by Section 47, Sub-section 3 and the questions to be determined by Section 50, Sub-section 1. In the Pull Bench ruling of the Madras High Court on which the appellant relies *Swaminath Ayyar v. Vaidyanath Sastri* [1905] 28 Mad. 466, one of the Judges stated that there was a direct contradiction between these two sections, that is Sections 244 and 234, Civil P.C. of 1882.

5. The appellant has relied on *Hirachand Harjivan Das v. Kasturchand Kasidas* [1894] 18 Bom. 224, *Seth Shapurji Nana Bhai v. Shankar Dat Dube* [1895] 17 All. 431, (single Judge ruling) and *Swaminath Ayyar v. Vaidyanath Sastri* [1905] 28 Mad.466 and *Nazhatuddaula Abbas Khan v. Prince Wala Kadar Husain Ali Mirza* [1908] 11 O.C. 112. No doubt these rulings are in favour of the narrow interpretation of the Code put forward by the appellant, but we note that in none of these rulings is there any consideration of the question which is argued before us as to whether Section 42 gives the Court to which a decree is transferred the same powers as that Court has u/s 50 or not. In fact in the ruling of the Full Bench of the Madras High Court in *Swaminath Ayyar v. Vaidyanath Sastri* [1905] 28 Mad.466 Section 228 (now Section 42) is dismissed in a single line with the remark that it is not inconsistent with the construction of Section 234 and Section 248 which the learned Judges adopted. Now in *Sham Lal Paul v. Madhu Sudan Sircar* [1895] 22 Cal. 558, it has been held that the Court to which a decree is transferred for execution has full jurisdiction to deal with the question of substitution of the legal representatives of a deceased judgment-debtor. It was further held that even assuming that an application u/s 234 to the Court which passed the decree was a necessary preliminary to proceedings u/s 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and u/s 578 the order of the Court of first instance should not have been reversed on account of such irregularity. Now there is a recent authority of the Privy Council reported in *Jang Bahadur v. Bank of Upper India, Ltd.* AIR 1928 P.C. 162. The question before their Lordships was the validity of an order bringing legal representatives of the deceased judgment-debtor on the record which was passed by the Court at Hardoi to which a decree had been transferred from Lucknow for execution. On p. 320 their Lordships stated:

The question is; was the effect of the introduction of those words to confer an exclusive jurisdiction on the Court which passed the decree in the matter of substitution or merely to lay down a rule of procedure as to which of the two Courts an application for substitution should be made.

6. Their Lordships held that Section 50 merely lays down a rule of procedure and that it does not confer exclusive jurisdiction to deal with this matter on the Court which passed the decree. Their Lordships stated at p. 322:

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 heard 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.

7. Now applying that ruling to the present case we find that the appellant cannot make any valid objection to the exercise of such jurisdiction in addition of other three persons for the deceased judgment-debtor by the order of 29th November 1924. We also note that the three persons whose names were to be substituted by the order of 29th November 1924: made no objection to the addition of their names, nor has any objection ever been made by them although six years have elapsed. One point remains which was brought forward by the appellant, and this was to the effect that when the decree was transferred u/s 68, Civil P.C. to the Collector, then the Collector became the Court -executing the decree and that no jurisdiction remains in the Court of the Subordinate Judge of Azamgarh. Section 68, Civil P. C, does not use language which supports this allegation of the appellant; that section merely states that the execution of the decree shall be transferred to the Collector. It does not state that the Collector shall become the Court executing the decree. We consider that the Court executing the decree remains the Court which sends the decree for execution to the Collector and that the powers conferred by the CPC on the Court executing the decree remain with that Court and do not pass to the Collector. We consider therefore that this appeal fails and we dismiss it with costs.