

(1984) 01 AHC CK 0054
In the Allahabad High Court
Case No : Civil Revision No. 102 of 1981

Sahdeo Prasad Verma and Another	Vs	APPELLANT
Dr. Raja Ram and Others		RESPONDENT

Date of Decision : 19-01-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, Order 22 Rule 11, Order 22 Rule 4, 11, 37
Trusts Act, 1882 — Section 44, 46, 47, 48

Citation : AIR 1984 All 169

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : Rudreshwari Pd, for the Appellant; Vinod Swarup, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—These connected revisions are directed against a common order passed by the Second Additional Civil Judge, Kanpur dated Nov. 13, 1980 u/s 47. Civil P. C.

2. The revisions arise from the original suit No. 173 of 1954 instituted in the Court of the Subordinate Judge, Kanpur by Sahdeo prasad Verma and others against Raja Ram and others. In brief the allegations of the plaintiffs were that one Hakim Sarju Prasad had created a trust by Will dated Oct. 16, 1907 in respect of house No. 75/109 Ranjeet Purwa Kanpur. The plaintiffs were the trustees. Mahadeo Prasad had been managing for some time the trust property on behalf of the trustees. Taking advantage of his position Mahadeo Prasad declared himself as the owner of the house a will was also executed by him on May 13, 1943 in favour of his daughter and the wife. Subsequent to the death of Mahadeo Prasad these persons asserted themselves to be the owners of the house. The tenants in the house were in collusion with them and they denied the rights of the plaintiffs. The daughter of Mahadeo Prasad had also died and the defendant No. 1 is her husband. The defendant No. 2 was the widow of Mahadeo

Prasad aforesaid. The defendants Nos. 3 to 19 had been living, according to the plaintiffs, as tenants in different portions of the house. They also denied the rights of the plaintiffs and hence the plaintiffs sought them as well to be ejected besides the defendants Nos. 1 and 2. The relief sought was for possession and the recovery of mesne profits. After contest the suit was dismissed by the II Additional Civil Judge, Kanpur on Oct. 31, 1957. The plaintiffs preferred First Appeal No. 55 of 1958 against the judgment and decree of the trial Court. The appeal was allowed on Oct. 20, 1970. The judgment and decree of the trial Court were set aside. The suit was decreed for possession and for recovery of Rs. 3982.5 annas and mesne profits besides pendente lite and future mesne profits. The decree was put to execution on July 31, 1971 by one of the decree-holders, namely, Sahdeo Prasad Verma. Objections were raised by the judgment-debtors u/s 47, Civil P. C. which have been allowed by the II Additional Civil Judge under the impugned order dated Nov. 13, 1980. Aggrieved the decree-holders have preferred these revisions.

3. Learned II Additional Civil Judge has allowed the objections raised for the judgment-debtors on three grounds, namely:--

(i) the Court of II Additional Civil Judge, Kanpur, it has been held, did not have jurisdiction to entertain the application for execution of the decree. The finding is that the Court of the then II Additional Civil Judge which had passed the decree on Oct. 31, 1957 had been abolished: new Court had been created in place thereof and hence the application for execution could not lie in that newly created Court;

(ii) the respondents Nos. 13, 17 and 18 in First Appeal No. 55 of 1958 (corresponding to defendants Nos. 12, 16 and 17 respectively) died during the pendency of the appeal before the High Court but there was no application made for the substitution of their legal representatives and on that account the appeal abated and the decree dated Oct. 20, 1970 is to be regarded as a nullity;

(iii) the execution application having been filed by only one of the trustees did not He since the co-trustees were not made parties thereto.

4. Learned counsel for the revisionists has assailed the findings of the Court below on these points. In relation to the ground No. 1 referred to above; it will be recalled that the suit was instituted in the Court of the then Subordinate Judge, Kanpur. The trial could take place in the Court of the II Additional Civil Judge, Kanpur which dismissed the suit on Oct. 31, 1957. The Court, it appears, was abolished some time thereafter. By order of this Court dated 3rd Dec. 1969 Sri G.S. Sharma was posted as the II Additional Civil Judge, Kanpur. On Dec. 8, 1969 this Court on the administrative side issued notification whereby sanction was conveyed "to the creation of the above additional Court." Section 38, Civil P. C. provides that the decree may be executed either by the Court which passed it, or by the court to which it is sent for execution. The expression "court which passed a decree" is defined in Section 37. In so far as material it provides that

this shall include:--

"37. (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Section 150 of the Code reads as under:--

"Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

5. For the respondents it was contended that since the Court of the II Additional Civil Judge was created by the order of this Court made on Dec. 8, 1969, it cannot be said that this is the same Court which passed the decree on Oct. 31, 1957. The argument also is that there is no basis to assume that the business of the Court of the II Additional Civil Judge as it was prior to the abolition had been transferred to the newly created Court. It may be assumed as contended by the learned counsel that Section 150 quoted above is not attracted and also that the Court of the II Additional Civil Judge was newly created on December 8, 1969, the fact remains that this Court had as well the jurisdiction to try the suit giving rise to the execution in the same manner as the Court of the II Additional Civil Judge, had this jurisdiction when the suit was decided on Oct. 31, 1957. It is not said that there has been diminution in the jurisdiction either territorial or pecuniary during this intervening period. The argument advanced by the learned counsel is that the jurisdiction of the newly created Court to try the suit could have depended upon a transfer made thereof by the present Court of the Civil Judge, at Kanpur. It cannot be overlooked that this was the position existing as well in the year 1957 when the suit was tried and decided by that Court. At that stage as well the Court of the II Additional Civil Judge, acquired jurisdiction to try the suit by virtue of the transfer made thereof to it by the parent court and the position remained unaltered in 1969-70. In my view the expression "instituted at the time of making the application for execution of the decree" appearing in the latter part of Clause (b) of Section 37 covers a case in relation to which the jurisdiction is acquired by virtue of the transfer made by the instituting Court.

6. In taking this view I am supported by the decision in *Khair Ullah Vs. B. Jai Ram Singh and Another*, relied on for the revisionists. In that case the decree was passed by the Court of the Additional Munsif which was subsequently abolished. The Court was recreated thereafter and the application for execution of the decree was moved therein. It was held that the Court on that date would have jurisdiction to entertain the suit, if the suit wherein the decree was passed was to be instituted on that date and further that the fact that the business of the court abolished was transferred to another court could have no relevancy and

could not affect the jurisdiction of the Court which after having been abolished came into existence again. This was also the view taken by the Division Bench in (Bibi) Khodaijatul Kobra and Others Vs. Harihar Missar and Others, . It had been followed in the aforementioned Allahabad case. In the Patna case the decree had been passed by the Court of the Additional Subordinate Judge, Gaya. The Court was abolished subsequently. The business thereof was transferred to the III Subordinate Judge. The Court of Additional Subordinate Judge was re-established some time afterwards. The application made for execution in that Court was held to be competent. Reliance was placed on latter part of Section 37(b) and it was observed also that the Court of the Additional Subordinate Judge being a Court of the same designation bore the impress of the identity of the Court which was abolished. For the respondents reliance in the Court below was placed on the decision reported in Maqbul Ahmad and Others Vs. Pateshri Partab Narain Singh and Others and Mt. Champi Bai Vs. Pearey Lal, . Both these cases were considered by Wali Ullah J. in Khair Ullah Vs. B. Jai Ram Singh and Another, and distinguished. In Maqbul Ahmad v. Pateshari P.N. Singh (supra) consequent upon the abolition of the Court of the Additional Subordinate Judge all its work had been transferred to the Court of the Subordinate Judge. A new Additional Subordinate Judge was posted but the execution pending in the Court of the Subordinate Judge were not transferred to that Court. It was held on these facts that when the Court which had passed a decree was abolished, it is the Court to which the business was transferred which could execute the decree. It will be noticed that this was not the decision based upon Clause(b) of Section 37. The same is true of the decision in the case of Mt. Champi Bai Vs. Pearey Lal, wherein it was observed that it could not be said that the Court of the Additional Subordinate Judge created was the same Court as that which existed prior to the abolition and that it was a Court which was conducting business independently of the Court of the Subordinate Judge. I am in respectful agreement with the view taken by Wali Ullah J. in the case of Khair Ullah following the decision of the Patna High Court reported in (Bibi) Khodaijatul Kobra and Others Vs. Harihar Missar and Others, . Consequently, the view taken by the lower Court to the effect that the execution application did not lie before it cannot be sustained.

7. In regard to the ground No. (ii) mentioned above, there is no dispute that respondents Nos. 13, 17 and 18 in First Appeal No. 55 of 1958 decided by this Court on Oct. 20, 1970 (corresponding to defendants Nos. 12, 16, 17 respectively) died during the pendency of the appeal. It is also not in dispute that there was no application for the substitution of their legal representatives nor was an application made at any stage to set aside the abatement order or for the condonation of delay. In view of Order XXII, Rule 4 read with Rule 11 Civil P. C. Since the right to sue or the right asserted in the appeal by the plaintiffs before this Court did not survive against the remaining respondents-defendants alone, it was incumbent upon the appellant-plaintiffs to cause the legal representatives of the defendants-respondents, to be made parties. Sub-rule (3) of Rule 4 provides that where within the time limited by law no application was

made under Sub-rule (1) the suit shall abate as against the deceased defendant. In order to get over this difficulty, the learned counsel for the revisionists submitted in the first place that defendants Nos. 1 and 2 having been the tenants and the defendants Nos. 12, 16 and 17 mentioned above having been sub-tenants, the decree for ejectment passed against the defendants Nos. 1 and 2 could operate as effective against those defendants also and they could, therefore, as well be ejected on the basis thereof. In support of the contention that the sub-tenants have also to go along with tenants in-chief, he relied on the decisions reported in *Makhan Lal Kela and Another Vs. Girdhari Lal and Another*, ; *Abdul Samis v. Lachhman Das* (1955 All LJ 259). It is argued that in para 18 of the written statement filed by the defendants Nos. 12 and 16 and likewise in para 13 of the written statement filed by the defendant No. 17, it had been pleaded that they had been paying rent to Mahadeo Prasad and his legal heirs. In my opinion this cannot be of assistance to the revisionists. The decision is to be arrived at on the basis of the averments contained in the plaint in this behalf. As is manifest from paras 10, 11, 13 and 16 of the plaint referred to above the case set up by the plaintiffs decree-holders plainly was that the defendants Nos. 3 to 19 (including defendants Nos. 12, 16 and 17) had been living as tenants in different portions of the disputed house; that they were in collusion with the defendants Nos. 1 and 2; that they too were in the position of trespassers and liable to ejectment on this account besides being liable to pay the mesne profits. It was nowhere averred in the plaint that these defendants had been the sub-tenants of Mahadeo Prasad or the defendants Nos. 1 and 2 for that matter nor is there a finding to that effect by the trial Court or in the appeal by this Court. It was a joint decree for possession and mesne profits passed against the defendants including against the deceased.

8. It was next urged for the revisionists by the learned counsel in this connection that the objection taken by the respondents on this score be treated as barred on the principle of constructive res judicata. It is argued that the respondents could have raised the objection in the course of the hearing of the appeal by this Court and since they abstained from so doing they are precluded from now contending that the appeal had abated of that the decree is not rendered a nullity on this account. The contention cannot be sustained in my view. It is not in doubt that due to the death of the aforesaid defendants-respondents during the pendency of the appeal and since there was no application made for the substitution of their legal representatives, the appeal abated against them in view of Order XXII, Rule 4 (3)/ 11 of the Civil P. C. as mentioned above. This was a joint decree passed for possession and mesne profits against all the defendants including the deceased. In the event of the appeal being proceeded with against the rest of the defendants-respondents, there remained the possibility of two contradictory decrees arising. The suit had been dismissed in its entirety by the trial court; the appeal abated against the respondents Nos. 13, 17 and 18 and the decree of the trial Court stands reversed by the decision given in the appeal. Obviously, thus inconsistent decrees have arisen. For these reasons the appeal could not proceed

against the surviving respondents-defendants without the abatement being set aside and the legal representatives of the deceased respondents being substituted. (See: *The State of Punjab Vs. Nathu Ram*, ; *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, ; *Sri Chand v. M/s. Jagdish Prasad Kishan Chand* (AIR 1966 SC 1427); *Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others*, . This is open to be raised in execution proceedings as well. In *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others*, ; it was held that a Court executing a decree cannot go behind a decree between the parties or their representatives and cannot entertain any objection that the decree was incorrect in law or on facts. Where, however, a decree which is a nullity, it was further observed, for instance, where it is passed without at all bringing the legal representatives on the record of a person who was dead at the date of the decree an objection in that behalf may be raised in a proceeding for execution. In *Rana Harkishandas Lallubhai and Others Vs. Rana Gulabdas Kalyandas and Another*, the view taken was that if the plea is that the decree is a nullity and hence it cannot be executed, it would be open to the executing Court to entertain the plea. Reliance in this connection was placed also on the decision in *Moolchand and Others Vs. Maganlal*, ; *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, ; *Chhutan Lal Vs. The Punjab National Bank Ltd., Ajmer and Others*, The bar on the principle of constructive res judicata does not arise where the decree is a nullity or non est. The objectors-respondents in the instant case included the legal representatives of the deceased respondents Nos. 13, 17 and 18. The grievance on their part substantially is that they were the heirs and at any stage before the decree came to be passed against them in the appeal, they did not have the opportunity to represent the estate because they were not arrayed as the parties on the death of their predecessor-in-interest. In so far as the other defendant-respondents are concerned the contention raised in substance is that a conflict of decrees has arisen; the claim was joint against the entire set of defendants and in the absence of the legal representatives of the defendants-respondents, the appeal could not proceed as against them either. In face of this there is no force in the argument that the respondents be debarred from raising the plea on the principle of constructive res judicata. No assistance is derived for the respondents in this connection from the decision in *Ittavira Mathai Vs. Varkey Varkey and Another*, . Therein it was stated that if the suit was barred by time and yet the Court decreed it the Court would be committing an illegality and, therefore, the aggrieved party would be entitled to have the same set aside by preferring an appeal against this and that will not make a decree a nullity. The decree in such a case may be erroneous in law but the Court had jurisdiction to sit in judgment over the subject-matter and the parties thereto. In the present case, however, the infirmity going to the root of matter relates to the legal representatives of the deceased respondents not being given the opportunity of being heard and this constitutes the inherent lack of jurisdiction as explained above. There is no dispute in regard to the general principle concerning res judicata referred to in *Y.B. Patel v. Y.L. Patil* AIR 1977 SC 392 relied for the respondents. There it was held that the principle of res judicata can

be invoked not only in separate subsequent proceedings but is also attracted in subsequent stage of the same proceedings. Once an order is made in the course of a proceeding the same may become final and be treated as such at the subsequent stages as well. In the instant case, there has not come to be any order made in the course of the hearing of the appeal or thereafter relating to the question of abatement or the substitution of the legal representatives of the defendant-respondents. In *R. Viswanathan Vs. R. Narayanaswamy Substituted by V.R. Ranganathan and Others*, also cited for the respondents, the decision related to the merit of the controversy namely whether the executors who had filed the appeal and not have a representative capacity either at the time when the appeal was filed or at the time of disposal thereof and thus this too is of no assistance to them. In *N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*, there were cross-appeals arising from the award given by the District Court u/s 18 of the Land Acquisition Act. One of the three claimants died during the pendency of these appeals. In the appeal filed by the claimants, the legal representatives of the deceased were placed on the record and duly substituted before the abatement could take place. In the appeal filed by the Government, however, the substitution did not take place nor was an application made for the purpose. Upon these facts Hon''ble Shinghal J. expressed the view that the legal representatives of the deceased were to be taken as having abandoned objection to the appeal being proceeded with notwithstanding the fact that the substitution had not taken place. Both the appeal, it may also be noted, were heard together and disposed of by a common judgment by the High Court Hon''ble Desai J. was of the view that in the circumstances since the legal representatives of the deceased had been substituted in the cross-appeal filed by the claimants, there was no abatement at all arising. These were, therefore, distinct facts upon the controversy arising in that case. In the case before us there is nothing to infer that the legal representatives of the deceased abandoned their objection on this score. Hon''ble Shanghai, J. was also of the view that there could, be no inference of abandonment unless there is clear sufficient and satisfactory evidence that the legal representatives of the deceased were aware and had abandoned the objection such as by being substituted in the cross-appeal and both the appeals being decided together. As already said above, the legal representatives of the defendant-respondents are also among the objectors u/s 47 before us and this is not the case of cross-appeal or cross-objection having been filed.

9. From the above, there can be escape in my view from the conclusion that on account of the death of the respondents Nos. 13, 17 and 18 during the pendency of the appeal and in the absence of an application to substitute their legal representatives or to set aside the abatement, the appeal abated against them and as against rest of the respondents, the appeal could not proceed. The decree resulting is in consequence a nullity and the objection on this score is open to be raised in execution proceedings.

10. In so far as the ground No. (iii) is concerned this need not detain us long.

The reference to Sections 44, 46, 47 and 48 of the Trusts Act will show that the provisions concern the execution of the trust. As regards an application for the execution of a decree passed in favour of co-trustees the position would be governed under the general provision contained and under Order XXI, Rule 15 of the Code. Accordingly, whereas in this case a decree has been passed jointly in favour of more persons than one, any one of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all or for the benefit of the surviving decree-holders and the legal representatives of the deceased, as the case may be. (See *Panna Lal Agrawala Vs. Kanhaiya Lal Jain and Others*, ; *K.M. Rao v. N. Adenna* AIR 1949 Mad 654 . The execution sought by one of the decree-holders who is also a co-trustee is to be regarded in the absence of any indication to the contrary as being for the benefit of the entire body of co-trustees and the application is not, therefore, vitiated on this account. The position may have been different in case one of the co-trustees had proceeded, say, to make transfer of the trust property without joining the others such as was the case in AIR 1945 23 (Privy Council); *L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others*, relied on by the Court below.

11. Having regard to the finding recorded above with respect to the ground No. (ii), these revisions fail and are liable to be dismissed. The revisions are accordingly dismissed. Costs on parties.