

(1954) 08 CAL CK 0054
In the Calcutta High Court
Case No : Civil Revn. Case No. 894 of 1953

Sm. Rajlakshmi Dassi

APPELLANT

Vs

Bonomali Sen and Others

RESPONDENT

Date of Decision : 27-08-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 22 Rule 12, Order 22 Rule 4(4), Order 22 Rule 6, 50

Citation : AIR 1955 Cal 573 : 59 CWN 1073

Hon'ble Judges : K.C. Das Gupta, J;Debabrata Mookerjee, J

Bench : Division Bench

Advocate : Saroj K. Chatterji, for the Appellant;Jajneswar Majumdar, for the Respondent

Judgement

K.C. Das Gupta J.

1. A suit instituted by Bholanath Sen and Tulsimanjari Dassi in forma pauperis having been dismissed with costs, they were, under the decree, made liable to Government to pay the sum of Rs. 2484-12-0 on account of costs of court-fees and the sum of Rs. 1115-9-6 to the defendant Rajlakshmi Dassi. Rajlakshmi Dassi applied for execution of this amount together with costs of execution on 13-11-1943 in Title Execution Case No. 41 of 1943.

The Government of West Bengal had applied for execution against Bholanath and Tulsimanjari in the Execution Case No. 25 of 1942 and got four Government Promissory Notes attached. After some vicissitudes, with which we are no longer concerned, the position in the beginning of January 1952 was that in the execution case commenced by the present petitioner the legal representatives of Bholanath and Tulsimanjari, who had died on 20-9-1947 and 8-11-1948 respectively had been substituted in their place.

No such substitution had, however, been made in the execution case started by the Government of West Bengal. An application for substitution of the heirs of

Bholanath Son was indeed made on behalf of Government on 10-1-1952, but it was rejected. In July, 1952 the sale proceeds of two Government Promissory Notes, which had been the property of Bholanath Sen, amounting to Rs. 1869-12-6, were sent by the High Court to the Subordinate Judge's Court.

Thereafter on 12-9-1952 Rajlakshmi applied for payment to her the sum of Rs. 1128-12-3 out of that amount. Before passing any order on this application, the learned Judge directed notice of the application to be served on the Government Pleader. Thereafter on 22-12-1952 the Government of West Bengal made an application for rateable distribution, according to the dues of both the decree-holders, in Title Execution Case No. 41 of 1943 and Title Execution Case No. 35 of 1942. The Court has allowed the prayer and has directed a sum of Rs. 566-4-0 to be credited to the petitioner's decree.

2. It is urged on behalf of the petitioner Rajlakshmi before us that the learned Subordinate Judge acted without jurisdiction in allowing the application for rateable distribution; firstly, because the application of rateable distribution was filed on 22-12-1952--long after the assets had been received by the Court, and secondly, because at the time the assets were received by the Court or when the Court passed the order, there was no valid or subsisting application for execution.

3. In my judgment, there is no substance in the first contention. The statute does not, in my opinion, require that an application for rateable distribution as distinct from an application for execution should be filed before the assets were received. Indeed, it is not necessary at all that any specific application asking for rateable distribution should be filed.

If there are more than one application for execution pending, it becomes the duty of the Court to make an order for rateable distribution as soon as it becomes aware of the fact that there are assets in its custody of the same judgment-debtor in different execution cases. What is necessary is that the applications for execution must be filed before, the receipt of assets.

Reference was made in this connection by Mr. Chatterjee to the case of -- "Jogesh Prosad Choudhury v. Saligram Lachmi Narayan" 45 Cal WN 674 (A) where there is a headnote that "no application for rateable distribution u/s 73 (Civil P.C.) would lie after receipt of such a cheque by the Court". On reading Mukherjea J.'s judgment, however, it is abundantly clear that what the Court was considering in that case was whether the application for execution had been presented before the assets were received, and the main question before the Court was whether the Court could be said to have received the assets till the cheque was actually cashed and converted into money.

The headnote is slightly misleading, but there remains no doubt when the judgment is read that their Lordships were not thinking of any separate application for rateable distribution when there was a previous application for execution before the assets had been received. The same remarks apply, I think, to another case -- Vishnubhotla Ramayya Vs. Sajja Namayya and Others, (B)

where also there is an observation that application for rateable distribution cannot be made after the assets are received. It is clear, however, from the judgment that their Lordships were not thinking of a separate application for rateable distribution apart from the application for execution.

3a. This brings us to the next and important question whether there was on the date the assets were received by the Court, 16-7-1952, any application for execution on which the Court could proceed. It is argued on behalf of the petitioner that as, long before that date Bholanath Sen and Tulsimanjari were dead and their representatives had not been brought on the record, the application for execution that had been filed by the Government of West Bengal against the judgment-debtors now dead could not be considered to be an application on which any Court could proceed.

4. In nay judgment, this contention should succeed.

5. The three provisions of law which require consideration on this question are Section 50, C. P. C. and Order 22, Rule 12 and Order 21, Rule 22, Civil P. C. The primary provision is contained in Section 50 which is in these words:

"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."

6. It has been held in large number of cases that it is not necessary for the decree-holder to start a fresh execution case, but it is open to him either to start a fresh execution case by applying in the form prescribed in Order 21, Rule 11, Civil P. C. against the legal representatives or to ask for substitution of the legal representatives in the execution case already started and apply for execution of the decree therein against the legal representative substituted (vide -- "Purushottam Hargovandas v. Rajbai" 34 Bom 142 (C).)

7. The question is whether a third course, viz., to proceed with the execution case in spite of the death of the judgment-debtor, as if he was not dead, is open to the decree-holder. It is one of the cardinal principles of law that justice must be done after hearing both sides to the dispute. The necessary corollary from this is that there can be no order or decree against a dead man, for a dead man cannot be heard. An apparent exception to this rule is provided in Order 22, Rule 6, Civil P. C. which runs thus:

"Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

I have said "apparent" exception, as it is clear from the rule that it is when death takes place after the hearing that the death is ignored. Another exception was

provided by our High Court by the amendment of Order 22, Rule 4, by adding Sub-rule (4) to Rule 4 which runs thus:

""the Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

8. The very fact that these special provisions were made underlines the stringency of the rule that if a party to an action or proceeding is dead, no action can be taken by the Court straight off against him "or his estate", and the only way by which the plaintiff or the petitioner can get any relief is by bringing the legal representatives on the record by substitution in his place. It is worth mentioning in this connection that an exception as regards the consequence of death of a party is made in favour of execution proceedings under Order 22, Rule 12 in these words:

"Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

The necessary consequence of this is that execution proceedings will not abate on the death of a decree order or a judgment-debtor. But it is important to notice in this connection the difference in language between Order 22, Rule 6 and the new Sub-rule of Order 22, Rule 4 and the language in Order 22, Rule 12.

Whereas in the first case the words carefully provide after saying that the proceedings shall not abate and that "judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place"; and in the new sub-rule of Order 22, Rule 4 it is specifically stated that "judgment may be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place", no such words are used in Order 22, Rule 12 and the Legislature is content with merely providing that the proceedings shall not abate.

The necessary conclusion, in my judgment, is that while, on the one hand, the proceedings will not abate, on the other hand, it will not be possible for the Court to do anything in the way of execution until and unless the legal representatives have been brought on the record.

9. To hold otherwise would, in my opinion, make the provisions of Section 50 nugatory. In my judgment these provisions of Section 50 provide the only way of proceeding against what may be said the estate of the deceased and that it is not merely an alternative.

10. Order 21, Rule 22, Civil P. C. provides amongst other things that where an application for execution is made against the legal representatives of a party to

the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied. What the effect of the omission to issue such a notice or the failure to serve the notice issued would be was considered in a large number of cases by different Courts. So far as our own High Court is concerned, the matter may be said to have been set at rest by the addition of a rule, Sub-rule (3), in these words:

"Omission to issue a notice in a case where notice is required under Sub-rule (1), * * * * " shall not affect the jurisdiction or the Court in executing the decree."

11. The question whether execution could proceed against the estate of a deceased person, if there was no one on the record representing the estate, came up for consideration in this Court as early as 1867 in -- "Lakraj Roy v. Becharam Misser". 7 SWR 52 (D). The learned Judges" answered the question in the negative observing;

"We are quite clear that no execution can issue till some one is placed on the record as representing the estate. Section 210 of Act 8 speaks of execution issuing against the estate; but that does not, in our opinion, mean the estate independent of some person who is, for some reason or another, legally liable to a greater or less extent as representing the deceased person under the decree. We know of no precedent for the issue of execution against the estate of a dead man, when there is no one on record who represents him".

12. In -- "Sheo Prasad v. Hira Lal" 12 All 440 (E) a Full Bench of the Allahabad High Court had to consider the question whether where the? property had been attached during the lifetime of the deceased judgment-debtor the sale that had been held without bringing the legal representatives on the record was valid.

Sir John Edge C. J., with whom three of the other Judges -- Straight, Brodhurst and Tyrrell JJ. concurred, held that there is nothing in the CPC to warrant the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to take any steps to keep in force an attachment of property made in the lifetime of the judgment-debtor and that after a careful examination of the sections in the CPC relating to attachment, he was of opinion that property under attachment must be considered as in the custody of the law. The learned Chief Justice referred approvingly to a distinction between pending suits and pending proceedings in execution in these words:

"West J., in delivering the judgment of the Court in -- "Gulab Das v. Lakshman Narhar" 3 Bom 221 (F), pointed out, I think correctly, the distinction which exists between pending suits and pending proceedings in execution. In the one case the rights of the plaintiff against the defendant have to be ascertained. In the other case and before execution of the decree is had, these rights have been already ascertained, and it only remains to enforce the decree rights by execution.

If the judgment-debtor's property is under attachment the execution of the

decree can proceed against such property, but if at the time of the death of the judgment-debtor his property is not under attachment the judgment-creditor must, except in the case of a decree u/s 89, T. P. Act, proceed u/s 234, if he desires to execute his decree against property which was or the judgment-debtor in his lifetime and which came into the hands of his legal representative at his death, or if he desires to make the legal representative personally liable by showing that property which was of the judgment-debtor came to the hands of the legal representative and was disposed of by him otherwise than "duly" within the meaning of that section".

Mahmood J. who delivered a separate judgment, though coming to the same conclusion that the sale could not be attached, based his decision on the ground that though the omission to hold the sale without the legal representatives on the record was an irregularity, the petitioner, whose position was not that of the legal representative of the deceased judgment-debtor but rested mainly upon the assertion of a paramount or independent title, and also upon the technical plea as to defect in plaintiff's title, could not succeed. In his judgment, Mahmood J. referred to the view of this Court in 7 SWR 52 (D), to which I have already referred, and observed:

"In 7 SWR 52 (D), the High Court of Calcutta laid down the rule that execution cannot issue against the estate of a deceased person if there is no one on the record as representing the estate, and I think the rule so laid down was not only sound under the old Code, which governed that case, but it was also sound under the present Code of Civil Procedure; because the rule of law, notwithstanding recent legislation, still stands firm that "audi alteram partem", and no judicial process requiring the hearing of both parties could therefore be issued without the chance being given to the opposite party to say what he has to say against any proposed judicial process when (and this is important) the law requires that he should have such a chance.

There are of course numerous provisions in the CPC which contemplate the existence of the judgment-debtor, enabling him to raise objections in the course of execution proceedings or to take measures to satisfy the decree in order to save his property from being brought to sale. As illustrations of this I may refer to Sections 257A, 258 and even to Section 291 of the Code, which all contemplate the existence of a living judgment-debtor during execution proceedings.

Similarly, there are many provisions in the Code which contemplate that when a judgment-debtor is dead, execution proceedings should be taken against his legal representative. * * * *

13. A few years later, Edge C. J., sitting with Blair J. had occasion to consider a case where a sale in execution proceedings took place without the legal representatives of the deceased judgment-debtor being brought on the record, though their property had not been attached (vide -- "Madho Prasad v. Kesho

Prasad" 19 All 337 (G), Their Lordships held that the proceedings in execution after the death of the judgment-debtor made in the absence of and without notice to the representative of the judgment-debtor were ineffectual proceedings; and further observed:--

"There is quite sufficient irregularity in the execution of decrees in this country without our introducing the novel system that a decree can be executed against the estate of a deceased judgment-debtor without, any notice to his representative and without anyone to protect the property being brought upon the record."

It may be mentioned that in -- "Tarangini Debi v. Raj Krishna Mondal" 32 CWN 418 (H), when Rankin C. J. held, Mitter J. agreeing, that the omission to bring the legal representatives of deceased judgment-debtor on the record was a mere irregularity which did not make the sale void, he pointed out that the distinction drawn by Edge C. J. between cases where property had been attached during the lifetime and property had not been attached, could no longer be made in view of the substitution of the words "fully satisfied" in Section 50 for the words "fully executed" and at page 419, observed

"The words "fully satisfied" in Section 50 were put in in substitution of the words "fully executed" for the purpose of negating a decision of the Allahabad High Court, that when once a property was attached the decree was fully executed. On that old view there was a special reason for holding that where the judgment-debtor died after the attachment it was not necessary to bring his heirs on the record of the execution case. That special reason has been abolished by the amendment of the section ."

14. Two years after "Madho Prasad's case (G)" we get the pronouncement of the Privy Council in -- "Malkarjun v. Narhari" 27 IA 216 (PC) (I). The judgment-debtor Nagappa died before the decree had been executed and an application had been made against the estate of Nagappa, and in another column Ramlingappa was named as his heir. The Court issued notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest, decided that he was the right person, and so proceeded with the execution.

Their Lordships held that the error could not be held to destroy the jurisdiction of the Court and that in spite of the fact that the right person had not been brought on the record the sale could not be challenged as invalid. It is worth noticing, however, that their Lordships did not at all suggest that it was not necessary to bring the legal representatives on the record.

What their Lordships insisted was that the Court had jurisdiction to decide whether the right person had been brought on the record; that though it made a sad mistake, the Court had jurisdiction to decide wrong as well as right; if it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however

wrong, cannot be disturbed. Dealing with the question of the procedure laid down in law for enforcing liability against the judgment-debtor their Lordships said:

".... a decree had been, made, and partially though to a minute extent, executed against Nagappa, and his estate was liable to make good the balance. to enforce this liability was within the jurisdiction of the Court. If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction." For some years after "Malkarjun's case (I)", several Courts in India gave decisions that omission to serve notice under Order 21, Rule 22 did not affect the validity of the sales. Then came the decision of the Privy Council in -- AIR 1914 129 (Privy Council) (J).

In that case the property of judgment-debtors had vested in the official assignee under the Indian Insolvency Act, 1848, and through the judgment-creditors who had previously attached certain part of it" obtained an order that notice should issue to the official assignee to shew cause why he should not be substituted for the judgment-debtors as a party, this notice was given, and without further notice to the official assignee the property attached was Sold in execution.

Their Lordships held that the auction-purchaser obtained no title against the official assignee. Their Lordships were of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the official assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents.

In the second place no proper steps had been taken to bring the official assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgement debtor had at the time of the sale no right, title, or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property. Their Lordships further said :

"As laid down in -- "Gopal Chunder v. Gunamonee "Dasi" 20 Cal 370 (K), a notice u/s 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case in 27 IA 216 (I), such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative.

It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless and until it was set aside by appropriate proceedings for the purpose. The present case is of a wholly different character."".

15. In -- AIR 1928 162 (Privy Council) (L), the Privy Council had to deal with a case where after a decree had been transferred to another Court for execution the judgment-debtor died. The application for bringing the judgment-debtor's legal representative on the record was made to the transferee Court in spite of the Court which had passed the decree.

Their Lordships held that if the Court to which execution had been transferred made the order that was merely an irregularity in procedure which could be waived. It is important to notice that if the execution could have proceeded without the legal representative being brought on the record at all it would hardly have been necessary to go into this question.

16. In "Tarangini Debi v. Raj Krishna (H), to which I have already referred, Rankin C. J. was of opinion that the omission to bring the legal representative on the record when the sale proclamation had already been served during the life time of the judgment-debtor did not affect the jurisdiction of the Court but was a mere irregularity. It is important to note in this connection his Lordship's observation as regards the necessity of bringing the legal representatives on the record, which are in these words :

"I agree with the contention of the learned vakil for the respondent that it is proper to bring the representatives of the judgment-debtor in a case like this on the record and that this should have been done. I do not agree that it is wholly Unnecessary to bring the judgment-debtor's heirs on the record", and later on :

"It is true that the heirs should be made parties to the execution proceedings."

16a. In -- Taizaddi Talukclar V. Rezia Begum" MR 1942 Cal 436 (M), where Edgley and Akram JJ. answered the question whether execution could proceed against the estate of a deceased judgment-debtor, without bringing the legal representatives on the record in the negative. Edgley, J. observed: "* * * it is clear from Section 50 of the Code that, if the holder of an unsatisfied decree wishes to continue the execution proceedings or wishes to execute the decree against the legal representatives of a deceased judgment-debtor, he must make an application to this effect to the Court."

17. In the Madras High Court in -- "Raghunathasami Ayyangar v. S. Gopauj Rao" AIR 1022 Mad 307 (N), a sale in execution of a mortgage decree had been held after the death of one of the judgment-debtors without his legal representatives being brought on the record; it was held that the Bale was a nullity. Ramesam, J. delivering the judgment said :

"As it is opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some person in the record to represent the estate, one would suppose that such proceedings in execution taken without having the legal representatives of a deceased judgment-debtor on the record are void and do not amount to a mere irregularity.

It is difficult to see how for this purpose, any distinction can be drawn between

the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order. The estate has to be represented on the record by some one interested in watching the proceedings until the sale is confirmed."

In the following year another Bench of the Madras High Court took a contrary view, but that was overruled and "Raghunath's case (N), was approved in -- Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, (O).

18. On a consideration of these authorities, and the principles I have mentioned earlier, I am of opinion that a Court cannot, in law, proceed with the execution of a decree when the judgment-debtor against whom the execution proceedings were, originally sought is dead and no representatives have been brought on the record. For myself, I am inclined to the view that if the Court does it, it acts without jurisdiction.

But even if it be thought when considering whether something that has been done without bringing the representatives on the record will have legal effect or not, that this is a mere irregularity, mere can be no justification for any Court taking any action in the way of execution with its eyes open that the legal representatives are not before the Court.

Either, as I have indicated, the Court acts without jurisdiction or at least the Courts acts with gross irregularity in the exercise of jurisdiction if it makes any order for execution without either the judgment-debtor or the representatives of the judgment-debtor being on the record.

19. My conclusion, therefore is that on 16-7-1952 when the assets were received there was no application for execution of the decree in favour of the Government, on which the Court could act; and the Court should have allowed the application of the present petitioner for payment of her decretal dues out of the amount that had been received from the High Court.

20. I would therefore, make this Rule absolute, set aside the order passed by the learned Subordinate Judge and order that the application of the petitioner be allowed and Rs. 1128-12-3 be paid to her out of the assets in the custody of the Court.

21. The petitioner will get the costs of hearing in this Court.

22. Hearing fee is assessed at five gold mohurs.

Debabrata Mookerjee J.

23. I agree.