
(1905) 03 MAD CK 0008
In the Madras High Court

Swaminatha Aiyar and Another

APPELLANT

Vs

Vaithianatha Sastrial

RESPONDENT

Date of Decision : 15-03-1905

Acts Referred:

Citation : (1905) ILR (Mad) 466 : (1905) 15 MLJ 116

Hon'ble Judges : Subrahmania Aiyar, J; Davies, J; Charles Arnold White, J

Bench : Full Bench

Judgement

Charles Arnold White, Kt. C.J.

1. The conclusion at which I have arrived in this case not, I confess, without doubt is that our answer to the question which has been referred to us

should be in the negative. So far as Sections 231 and 248 are concerned no difficulty arises. In Section 234, I think, the legislature intended to

draw a distinction between the Court which passed the decree, which is the Court referred to in the first paragraph of the section, and the Court

executing the decree, which is the Court referred to in the second paragraph of the section., which, if the decree has not been transferred for

execution, would be the Court which passed, the decree, and which if the decree had been transferred for execution, would be the Court to which

the decree had been transferred. The first paragraph is the governing enactment which, in general terms, requires a decree-holder who desires to

execute his decree against the representatives of a deceased judgment-debtor to apply to the Court which passed the decree. The second

paragraph empowers the Court executing the decree, which, may be the Court which passed the decree and may be another Court, to compel the

representative to produce accounts for the purpose of ascertaining the extent of

the liability.

2. As regards Section 248 it is clear from the explanation to the section that when a decree has been transferred for execution, and the

enforcement of the decree is applied for against the legal representative of a deceased party, the notice to the legal representative must be issued

by the Court to which the decree has been transferred for execution. There is no difficulty in reconciling Sections 234 and 248. They can be

construed together and due effect can be given to the provisions of each. It is impossible to give effect to the view taken by the Subordinate Judge

without entirely ignoring the express provisions of Section 234.

3. The real difficulty of construction arises in connection with Section 244, c). Now it is quite clear that in enacting Section 244 (c) the Legislature

were distinguishing between questions which must be determined by the order of the Court executing the decree, and questions which might be

determined by separate suit. They were not distinguishing in cases where a decree had been transferred for execution between the powers to be

exercised by the Court which passed the decree, and the powers to be exercised, by the Court to which a decree has been transferred. Further,

an order u/s 234 is not an order on a question "arising between the parties to the suit in which the decree was passed, or their representatives,

within the meaning of these words as used in Section 244. All that the Court which passed the decree has to consider before making an order u/s

284 is whether A, B, is the personal representative, and whether the decree should be executed against him. All question arising between the

judgment-creditor and the representative are decided by the executing Court after notice has been issued by the executing Court u/s 248.

4. As regards the last paragraph of Section 244 it only applies where a question arises as to who is a representative of a party for the purposes of

that section. It ought not, in my opinion, to be construed as cutting down the powers given to the Court which passes a decree by the express

words of Section 234. The word in Section 244 is "representative" not "legal representative" as in Section 234 and a much wider construction has

been, placed on the word "representative" for the purposes of Section 244 than could possibly be adopted with reference to the words "legal

representative" in Section 234. Section 228 is not inconsistent with the

construction of Sections 234 and. 248 which I inn prepared to adopt. An order u/s 234 is not made in the exercise of powers ""in executing a decree"" but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred.

5. I cannot accede to the contention that the first paragraph of Section 234 is useless and superfluous since it merely provides for an application

being made to the Court which passed the decree and makes no provision for any order being made thereon. I think Section 234 does

contemplate the making of an order--an order in general terms--Let the decree be executed against A.B. the personal representative. Where a

decree has been transferred for execution the question of the extent of the liability of the personal representative is determined by an order u/s 249

by the court to which the decree has been transferred after notice to show cause has been issued by that court u/s 248. On grounds of

convenience, it certainly seems desirable that the application should in all cases be made in the first instance to the court which passed the decree.

Otherwise in. cases of concurrent execution See *Saroda Prosaud Mullick v. Luchmeeput Sing Doogur* 14 M.I.A. 529 and *Krishto Kishore Dutt v.*

Rooplall Doss ILR 8 C. 687 conflicting orders might be made by the different executing Courts. The executing Court, under the order of transfer,

merely exercises a delegated jurisdiction, and it seems both reasonable and convenient, that the order allowing the proceedings to go on should be

made by the Court in which the decree was obtained whilst the working out of the order should be by the Court to which the authority to execute

the decree has been delegated. Notwithstanding the order of transfer, u/s 289 the Court which passed the decree retains the power to order a stay

of the execution of the decree. It has been held by the Calcutta High Court that it retains the power to determine a question of limitation raised in

the execution proceedings. See the case of *Srihary Mundul v. Murari Chowdhry* ILR 13, 257.

6. I think the provisions of Section 234 can be given effect to without doing violence to the language of the other sections to which I have referred..

The canon, of construction, of course, is that a statute ought to be construed so that, if it can be prevented no clause, section or word shall be

superfluous, void or insignificant."" *Regina v. Bishop of Oxford* 4 Q.B. p. 245.

Where a decree which has been transferred for execution is assigned the application for execution must, u/s 232, be made to the Court which passed the decree. On this point the authorities are uniform. The reasons given by Mark by, J. in the case of Shea Narayan Sing v. Harbans Lal 5 B.L.R. p. 497 for holding that, when a decree has been assigned, the application must be made to the Court which passed the decree, appear to me to be also applicable when the decree has been transferred and the judgment-creditor seeks to execute it against the representative of a deceased judgment-debtor.

7. I think the cases of Hirachand Harjivandds and Anr. v. Kasturchand Kanidas ILR 18 B. p. 224 and Shapurji Nana Bhai v. Shanhar Dat Dabe

ILR 17 A. 431 were rightly decided and I am prepared to follow them. The case of Sham Lal Pal and Ors. v. Modhu Sudan Sircar and Ors.

I.L.R.22 C. 558 is no doubt a decision the other way. It is to be observed, however, that in a later Calcutta case Amar Chundra Banerjee v. Guru

Prasunno Mukerjee ILR 27 C. 489 where it was held that, in the case of the assignment of a decree, the application must, u/s 232, be made to the

Court which passed the decree, whilst Banerjee, J. appears to have been of opinion that the case of Sham Lal Pal and other v. Modhu Sudan

Sircar and Ors. I.L.R.22 C. 558 was rightly decided, Stevens, J. declined to express any opinion on the point.

8. As I have stated I think our answer to the question referred should be in the negative.

Subrahmania Aiyar, J.

9. I concur in answering the question in the negative.

Davies, J.

10. In my view there is a direct conflict between the provision in the first paragraph of Section 254 and that in clause (c) of Section 244 read with

the last paragraph which was enacted later. I find myself quite unable to reconcile the two. But we must accept one or the other, and it really does

not matter which, so long as the question which relates only to formal procedure is settled once for all in this Presidency. I therefore agree to the

order proposed to be passed by my learned colleagues.