

(1965) 02 AHC CK 0013
In the Allahabad High Court
Case No : Civil Revision No. 40 of 1963

Uma Shankar Mehrotra

APPELLANT

Vs

Kanodia Brothers and Another

RESPONDENT

Date of Decision : 18-02-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50(2), 38
Limitation Act, 1908 — Article 181, 182

Citation : AIR 1966 All 409

Hon'ble Judges : D.S. Mathur, J

Bench : Single Bench

Advocate : S.N. Kachar, for the Appellant; M.N. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

D.S. Mathur, J.—This is a revision u/s 115, C. P. C. by Uma Shankar Mehrotra against the order dated 5-12-1962 of the First Civil Judge of Kanpur framing two issues for trial and determination as necessary under Order XXI, Rule 50(2). C. P. C.

2. The material facts of the case are that Messrs. Kanodia Brothers Kanpur obtained an ex parte decree against Messrs. S. Varma, Kanpur for the recovery of a sum of Rs. 11,500. Messrs. S. Varma defendant, was to be served through the proprietors. Bhupat Prasad and Uma Shankar Mehrotra. They put in appearance, but Uma Shankar Mehrotra denied to be a partner or proprietor of the defendant-firm. The ex parte decree was passed on 6-7-1955. It was on 27-7-1957 that the decree-holder applied. For execution of the decree by the attachment of the salary of Uma Shankar Mehrotra on the supposition that the case was covered by Clauses (b) and (c) of Order XXI, Rule 50(1), C. P. C. The executing court recorded the finding that without the grant of the leave under Sub-rule (2) of Order XXI, Rule 50, C. P. C., the execution could not proceed against Uma Shankar Mehrotra and this order was eventually maintained.

It was thereafter on 29-8-1961 that the decree-holder made a fresh application for execution of the decree by the attachment of the salary of Uma Shankar Mehrotra and at the same time moved an application under Order XXI, Rule 50(2), C. P. C. for the grant of leave to proceed against Uma Shankar Mehrotra on the ground that he was a partner in the defendant- firm, Messrs. Section Varma. The learned Civil Judge entertained this application and framed the following two issues:

(1) Whether Sri Uma Shankar Mehrotra is a partner in the firm Messrs. Section Varma.

(2) Is the decree-holder entitled to cause the decree to be executed against Sri Uma Shankar Mehrotra as such?

(3) Uma Shankar Mehrotra has come up in revision against this order on the ground that the application under Order XXI, Rule 50(2), C. P. C. was barred by limitation. It is contended that such an application shall be governed by Article 181, and not Article 182 of the Limitation Act. A new ground is also sought to be raised in the revision, namely, that even if the application is governed by Article 182, it is barred by limitation considering that the decree-holder is not entitled to the extension of limitation by virtue of his having moved the execution application on 27-7-1957.

4. The decision on the new point, though relating to limitation, depends upon facts also, and it shall be proper to leave this question open, all the more, when it is open to Uma Shankar Mehrotra to raise at a proper stage the question whether the Second execution application moved on 29-8-1961 is or is not barred by limitation.

5. The point for consideration in this revision, therefore, is whether an application for leave under Order XXI, Rule 50(2), C. P. C., if governed by the provisions of the Limitation Act, comes within the purview of Article 181 or Article 182 of the Limitation Act. In case such an application is governed by Article 181, it shall be clearly time-barred as the application was made more than three years after the accrual of the right to apply; but if the application is governed by Article 182 or there is no limitation for such an application it shall be maintainable provided that the execution application is not barred by limitation.

6. Article 181 is a general clause applicable to applications for which no period of limitation is provided elsewhere in the First Schedule of the Limitation Act or by Section 48 of the Code of Civil Procedure, 1908. This Article shall thus come into operation only if Article 182 is not applicable, and the application cannot be made at any stage of the execution of the decree.

7. Article 182 lays down the period of limitation of an application for the execution of a decree or order of any civil Court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure, 1908. Time from which period begins to run is detailed in Column 3 of the First Schedule. Clause 5 thereof

distinguishes between an application for execution and an application to take some step in aid of execution of the decree or order. An application to take some step in aid of execution of the decree or order is, in substance, an application in execution: it can also be called an ancillary application to enable the decree-holder to apply for or to proceed in execution of the decree. Article 182, if read in isolation, can suggest that it governs an application for execution of the decree, and not an application in execution.

8. Order XXI Rule 50(2), C. P. C. was amended by the Allahabad High Court. Prior to the amendment an application for leave to execute the decree against a person alleged to be a partner in the firm, not one covered by Clauses (b) and (c) of Sub-rule (1), had to be made to the Court which passed the decree; but since after the amendment it can be made to the Court which passed the decree or to which the decree is transferred for execution. A decree can, in view of Section 38, C. P. C., be executed either by the Court which passed it, or by the Court to which it is sent for execution. The Court while passing the decree acts as the trial court and while executing the decree as the executing court. The executing court need not be the same as the trial Court and consequently if the decree is pending for execution before a Court other than the Court which passed the decree, or under some special or general order, decrees stand transferred for execution to another Court, the Court which passed the decree shall be different to the executing Court. Consequently, if the application under Order XXI, Rule 50(2), C. P. C. lay only to the Court which passed the decree, such an application could not be disposed of by the executing court in spite of the fact that execution of the decree was still pending. Where the execution was pending, or the decree could be executed in one Court, and the application under Order XXI, Rule 50(2), C. P. C. had to be made before another Court, the two applications could not be combined in one in spite of the fact that the application under Order XXI, Rule 50(2), C. P. C. is an ancillary application in the sense that after the grant or leave the execution can proceed against a partner in the firm not covered by Clauses (b) and (c) of Sub-rule (1). When under the law it is necessary to make two distinct applications, one for execution and the other to enable the decree-holder to apply for execution against a person not specifically mentioned in the decree, the Courts can insist that the decree-holder should make two distinct applications and not combine the grant of leave under Order XXI Rule 50(2), C. P. C. in the application for execution.

A contrary view has been expressed in *Jagannath Jugal Kishore v. Chimanlal Chowdhuri* AIR 1949 Cal 113 and *Bombay Company Ltd., Karachi v. Kahan Singh* AIR 1931 Lah 736. Had Order XXI, Rule 50(2) C. P. C. not been amended by the Allahabad High Court, I may have considered referring the question to a larger Bench; but the rule as amended by this Court makes it clear that the application under Order XXI, Rule 50(2), C. P. C. can be made to the executing court and, in such circumstances, the two applications can be combined in one.

9. As already mentioned above an application for leave to execute a decree

against a person other than one referred to in Clauses (b) and (c) of Sub-rule (1) can in the State of Uttar Pradesh be made to the Court which passed the decree or to which the decree is transferred for execution. These words are similar to those of Section 38, C. P. C., and refer to a Court which is competent to execute the decree. Consequently, the leave contemplated by Sub-rule (2) of Order XXI, Rule 50, C. P. C. can be granted by the executing court.

10. When the leave is granted by the Court which executes or can execute the decree, the decree-holder can combine both the requests, one for the grant of leave and the other for execution of the decree, in the same application. The decree-holder can also if he so desires, make two distinct applications before the same Court, one for the execution of the decree, and the other for the grant of leave under Order XXI, Rule 50(2), G. P. C. This was done in the instant case. The decree-holder may postpone applying for the execution of the decree till the grant of the leave under Order XXI, Rule 50(2), C. P. C. and in such a case he shall, in the first instance, make the application under Order XXI, Rule 50(2), C. P. C. and apply for execution of the decree against that person after the grant of leave.

11. There cannot be one limitation on the decree-holder adopting either of the first two modes and a different limitation if he adopts the third course, that is, initially merely making an application under Order XXI, Rule 50(2), C. P. C. The law of limitation applicable to one kind of application shall be the same irrespective of the procedure adopted, and consequently the question of limitation shall have to be adjudicated upon keeping this aspect in mind. In other words, if the provisions of law are capable of two interpretations, the one which would further the cause of justice shall be adopted, and not the other.

12. When it is permissible for the decree-holder to apply for execution and also for the grant of leave under Order XXI, Rule 50(2), C. P. C., either in the same application or by making two separate applications, the determining factors of the question of limitation shall be the period within which an application for execution can be made. The application under Order XXI, Rule 50(2), C. P. C. becomes a mere miscellaneous application in a proceeding for execution of the decree, and whether execution against a particular person is or is not barred by limitation shall be determined by the application for execution, and not other applications moved in that proceeding. When the application under Order XXI, Rule 50(2), C. P. C. is an application made in the execution proceeding, its maintainability must depend upon whether the execution application was made within time. In such circumstances, there shall be no separate limitation for the application under Order XXI, Rule 50(2), C. P. C. and in any case such an application shall not be covered by the general clause contained in Article 181 of the Limitation Act. Such an application shall be within time if limitation had not expired for the execution of the decree against the firm, and one can say that such an application shall be governed by Article 182 of the Limitation Act. However, to be more correct, the Court must lay down the law that an

application under Order XXI, Rule 50(2), C. P. C. can be made for so long as the limitation for the execution of the decree against the firm has not expired.

13. There is some difference between an application for execution of a decree or order, and an application to take some step in aid of execution of the decree, but in effect both the kinds of applications are meant to enable the decree-holder to put the decree into execution. If the matter is considered from a broader angle, an application to take step in aid of execution, that is, an application in execution, is akin to an application for execution. In any case, on reading Article 182 of the Limitation Act along with Order XXI, Rule 50(2), C. P. C., as amended by the Allahabad High Court, it can be said that the law is capable of more than one interpretation and in such a case the Courts must give a liberal and equitable interpretation.

14. The decree-holder does, under the decree, acquire a vested right, and that right cannot be taken away except under a clear and unambiguous enactment. Consequently, where the law is not unambiguous and is capable of more than one interpretation, the view in favour of the decree-holder shall have to be adopted such that the decree is not barred by limitation. In this view of the matter it must be held that an application under Order XXI, Rule 50(2), C. P. C. can be made any time for so long as the decree is capable of execution against the firm.

15. Even though Order XXI, Rule 50(2), C. P. C. has not been amended by the Calcutta, Bombay, Madras, Lahore and Sind High Courts, they have expressed the view that an application under Order XXI, Rule 50(2), C. P. C. shall be governed by Article 182 of the Limitation Act or can be made for so long as the decree against the firm is capable of execution. (See AIR 1949 Cal 113 (supra); Ramnath Goenka Vs. Amarchand and Mangaldas, ; Bhagwan Manaji v. Hiraji Premaji AIR 1932 Bom 516, A.H.S. Kuppuswami Ayyar Vs. Rathilal Somabhai and Co. and Others, and Seomal Khemchand v. Lahnibai AIR 1939 Sind 161 (FB)).

16. To sum up, the Civil Judge could entertain the application under Order XXI, Rule 50(2), C. P. C. provided that the execution application made the same day was not barred by limitation. Whether this execution application was made within time, can be raised before the Civil Judge (executing court) and naturally he shall proceed with the application under Order XXI, Rule 50(2), C. P. C. after deciding the question of limitation, if raised.

17. The revision has thus no force, and it is hereby dismissed. Costs on parties. Stay order is vacated.