Ram Krishna Murarji vs Ratan Chand And Anr. on 14 March, 1955

Equivalent citations: AIR1956ALL32, AIR 1956 ALLAHABAD 32

JUDGMENT

Brij Mohan Lall, J.

1. This is an execution First Appeal against a decision of the learned Civil Judge of Kanpur. The latter has upheld the plea of limitation raised by Sri Niwas, respondent 2, and has struck off the execution application. The only point argued- before me is whether the execution application was time-barred.

2. To understand the facts which give rise to the question of law, it is necessary to state the following genealogical table of which the accuracy is not disputed viz.:

H A R D E O D A S = S R I M A T I G O D A V A R I
_____|_____ | | Ratan Chand = Gulab Chand Srimati Lachchmi Divi | Sri Niwas.

3. On 5-12-1920 Gulabchand, acting for him-self and as certificated guardian of his brother, Ratanchand (then a minor), executed a mortgage deed for Rs. 10,000/-- in favour of Thakur Ram Krishna Murar Ji, hereinafter described as appellant. The appellant sued on the mortgage and obtained a decree against Gulabchand and Ratanchand on 26-7-1922. In 1923 Ratanchand instituted a suit with his mother, Sm. Godavari as his next friend, to challenge the decree obtained by the appellant.

This suit was dismissed by the trial Court but was decreed on appeal by the High Court on 2-4-1928. By reason of this decree, the appellant was made to pay the costs of both Courts. On 3-10-1928 the appellant deposited a sum of Rs. 1129/6/- In Court on account of the costs of the two Courts. This amount was withdrawn by Ratanchand. As he was a minor at that time, his mother, Sm. Oodavari, who was also his next friend, executed a personal bond of Rs. 1129/6/-on 22-1-1929 undertaking to refund this amount in case the High Court's decree was upset.

4. The appellant went up in appeal to the Privy Council against the decision of this Court.

This appeal was allowed on 27-2-1931. As a result thereof the appellant became entitled to claim the refund of the sum of Rs. 1129/-6/- deposited by it by way of the costs of the first two Courts together with interest thereon. On 30-3-1945 an execution application was presented by the appellant before the learned Civil Judge.

Sri Niwas and Ratanchand were impleaded ;

> as judgment-debtors to this application, The prayer contained in this application was for attachment of sum of Rs. 2237-10-6 (to which amount, according to the appellant, the original sum of Rs. 1129/6/- had swelled by accumulation

of interest) out of a sum of rupees twelve thousand which was in deposit in Court. It was alleged in the execution application that, whether this sum was owned by Ratanchand or whether it was a part of assets left by Sm. Godavari, the appellant was entitled, in either case, to appropriate it towards its decree.

The suggestion was that if this sum was owned by Ratanchand the appellant would claim it by way of restitution under Section 144, Civil P. C., and if it was an asset of Sm. Godavari, it could proceed against it under Section 145, Civil P. C. It may be pointed out at this stage that Sm. Goda-vari's assets had devolved by reason of a will on her daughter-in-law, Sm. Lachmi Devi, and after her death on her son, Sri Niwas.

5. Although the appellant had put forward the claim in the alternative as aforesaid, it was agreed between the parties at the time of hearing that the deposit in question formed part of the assets left by Sm. Godavari and Sri Niwas was, therefore, the owner thereof. He was appearing as the legal representative of his grandmother and not as a legal representative of his father. As a matter of fact, the father (Ratanchand) is still alive and there could be no question of any one being his legal representative.

It was on this assumption that the parties went to trial in the court below and on this very assumption the arguments were heard in this Court.

6. The first point that arises for decision is as to what was the nature of the application pre-sented before the learned Civil Judge. The appellant treats it as an application under Section 145, Civil P, C. which could be presented against the surety but which, after her death, has been presented against her legal representatives and is sought to be enforced against the assets left by, her. It has been pointed out above, that in the security bond executed by Sm. Godavari she had undertaken personal liability in respect of the amount withdrawn by Ratanchand.

Section 145, Civil P. C., therefore clearly ap-plies. It says that where any person has become liable as surety ..... for the payment of any money ..... the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and such person shall, for the. purposes of appeal, be deemed a party within the meaning of Section 47. Since Sm. Godavari had undertaken a personal liability, her case fell within the language of this section.

The point has been further clarified by the decision of their Lordships of the Privy Council in the case of -- 'Rohani Ramandhawai Prasad Singh v. 'Har Prasad Singh'. AIR 1943 PC 189 (A), where it

was held that Section 145, Civil P. C., applied only to the personal liability of the surety.

I am, therefore, of the opinion that there is absolutely no doubt that the execution application presented by the appellant was under Section 145, Civil P. C.

7. The next question that arises for decision is as to which article of the Limitation. Act was applicable to the facts of this case. Article 183, as it stood oh the date of the application, governed an application "to enforce an order of His Majesty in Council." . It prescribed a period of twelve years. The point of, time from which this period of twelve years begins to run is mentioned In col. 3 and is as follows:

> "When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right:
>
> Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or, his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be."

8. The word "enforce" in col. 1 is wider in its implication than the word "execute". It embraces all cases where an application is presented as a result of the decision of, the Privy Council even if the decision does not, in its operative portion, expressly mention the particular relief sought in the execution application. For instance, the Privy Council did not clearly say in its decision that the sum of Rs. 1129-6-0 deposited by the appellant shall be refunded to it.

Nor did it say that the surety would be liable to make the refund. But the natural result of the Privy Council decision is that the appellant has become entitled to claim the refund. An application for such a refund is, therefore, an application to "enforce" the order of His Majesty to Council.

9. That the word "enforce" has such a wide Implication has been held in the case of -- 'Sohan Bibi v. Baijnath Das', AIR 1928 All 293 (B). That was a case of restitution. Mukerji J. remarked at p. 294 as follows :

> "It is enough for my purposes to hold and I do hold that, where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to 'enforce' an order in Council and must be governed by Article 183 and not by the general and omnibus Article 181." He referred to an earlier case of -- 'Brij Lal v. Damodar Das', AIR 1922 All 238 (C) where a similar view was taken. This latter case followed a still earlier case of -- 'Madhusudan Das v. Brij Lal', 61 Ind Cas 806 (All) (D). It is true that Done of these was a case under Section 145, Civil P. C. But those cases are authorities for the

proposition that, "where the relief sought flows as a necessary consequence from the order of His Majesty in Council the case is governed by Article 183 and not by Article 181.

10. In the present case, the application was presented, as already stated, on 30-5-1945. i.e. more than twelve years after the date of the Privy Council judgment. No payment has been made either on account of principal or interest. No acknowledgment has been made either. Therefore, the only way to bring the application within limitation is by proof of revivor. Before proceeding to consider as to what revivor means. It may be stated at this stage that an earlier application had also been mode by the appellant on 50-3-1945 but it was not directed against Sri Niwas.

The only person impleaded at that time was Ratanchand who does not represent Smt. Goda-vari's estate. This application was rejected on 7-4-1945 because it was not Pressed, by the appli-

cant. So far as the estate of Sm. Godavari is concerned, the application dated 30-5-1945, is the first application for execution. This application, as already stated, cannot succeed unless revivor is proved.

11. The term "revivor" has been defined neither by the Limitation Act nor by the General Clauses Act nor, to the best of my information, by any other Indian statute. The doctrine of revivor had its origin in the writ of 'scire facias' which was issued by Courts in England. According to the common law of that country, a decree-holder whose decree for money had become more, than one year and one day old could not execute it straightaway against the judgment-debtor unless a writ of 'scire facias' was first Issued.

This writ consisted in giving an opportunity! to the judgment-debtor to show cause as to why execution should not issue against him. If he failed to show cause, the Court allowed the decree-holder to execute the decree and, in that sense, the judgment and decree which were otherwise supposed to have become dormant by efflux of time were "revived". The essence of the doctrine is that notice should be issued to the judgment-debtor and after giving him an opportunity of being heard the Court should record a finding, explicitly or impliedly, that the decree or order in question is executable.

The mere issuing of a notice is not enough, if such notice is not followed by an order from the Court recording a finding, express or implied, that the decree is executable. On the contrary, even if a finding is there, the Court's order will not amount to "revivor" if notice is not issued. Such a case is to be found in the Privy Council case of -- 'Banku Behari Chatterji v. Narain Das Datt', AIR 1927 PC 73 (E). In that case notice was not issued and therefore it was held that no revivor had taken place.

It would, therefore, follow that a notice and a finding by the Court are both 'sine qua non' of a revivor.

12. The counterpart of this writ of 'scire facias' in Indian law is the provision of Order 21, Rule 22, Civil P. C. But revivor is not necessarily the result of proceedings under Order 21, Rule 22, Civil P. C.

Any other notice which has the same effect, e.g., a notice to show cause why a decree should not be transmitted to a different Court for execution, will produce the same result where it is followed by a finding as aforesaid. The case of --'Umrao Singh v. Lachhmi Narain', 1 All LJ 80 (P) is a case of this nature.

13. As already stated, no notice was previously issued against Sm. Godavari or, after her death, against her legal representatives. Therefore, no revivor could take place against her or her legal representatives.

14. In order to clear a possible misunderstanding, it may be mentioned that as early as on 14-12:1931 the appellant had moved an application against Ratanchand for the refund of the said amount. Sm. Godavari was treated as his legal representative, but there was no application against Sm. Godavari.

An order was passed on this application on 25-4-1933 and during the course of that order the learned Civil Judge remarked as follows:

> "Any money due to the minor or the guardian who drew the money on her personal bond and who is thus also liable will be attached and applicant's claim satisfied."

It will appear from the above quoted remark that the Court, had recorded a finding which normally might have amounted to revivor, but the appellant cannot avail of it for two reasons. In the first place, the order dated 25-4-1933 was passed more than twelve years prior to the date of the application, i.e. 30-5-1945. Secondly, this order was passed without issuing notice to Sm. Godavari as surety.

15. In the circumstances, I am definitely of the opinion that there has been no revivor against either the surety or her legal representatives.

16. It has been contended on behalf of the appellant that the surety and Ratanchand, the principal judgment-debtor, are jointly and severally liable to pay the debt and if the application is within limitation as against Ratancnand it should be treated as within limitation against the surety or her legal representatives also. He places reliance on the 'cases of -- 'Muhammad Hafiz v. Muhammad Ibrahim', AIR 1921 All 291 (G); --'Suraj Din v. Narain Rao Permeshwari Prasad (firm)', AIR 1939 All 463 (H); -- 'Badruddin v. Mohammad Hafiz', AIR 1922 All 481 (I) and --'Vyasrao v. Ramchandra', AIR 1945 Bom 489 (J).

All these were cases to which Article 182 applied. None of them was governed by Article 183. In the first two cases it was held that an execution application presented against a surety could, in a subsequent execution application presented against a judgment-debtor, be treated as a step in aid of execution within the meaning of Article 182(5). The next two cases were converse cases in which it was held that an execution application presented against a judgment-debtor could be treated in a subsequent execution case against a surety as a step in aid of execution within the meaning of Article 182(5). All these cases are, therefore, distinguishable.

Each article of the Limitation Act has its own language and it is that language which is to be interpreted in each case. Explanation I, which is peculiar to Article 182 only and which does not find a place in Article 183, lays down that where two persons are jointly liable under a decree an application made against any one of them will keep the limitation alive against the other. By virtue of this Explanation, it has been held in the above-mentioned cases that a step taken against a judgment-debtor will keep alive the limitation against a surety and vice versa. Since these provisions do not find place in Article 183, the conclusions that follow from them cannot be applied to a case governed by Article 183.

In this conclusion I am fortified by the case of -- 'Krishnaiyah v. Gajendra Naidu', AIR 1918 Mad 513 (K) and --- 'Harnarain v. Dayabhai Hira-chand', AIR 1940 Patna 596 (L). Both these cases were governed by Article 183 and it was held that, if the decree was alive against one judgment-debtor, it did not necessarily remain alive against the other and the considerations which mattered in interpreting Article 182 did not apply to a case which was governed by Article 183.

I am, therefore, of the opinion that, even if it be assumed that the limitation has not expired against the judgment-debtor, this circumstance will not make the application within time against Sri Niwas, the legal representative of Sm. Godavari, the surety. Since no revivor has been proved in this case against the surety or her legal representatives, the execution application was rightly held to be time-barred. The decision recorded by the learned Civil Judge is correct.

17. The appeal falls and is hereby dismissed with costs.

18. Leave is granted to the appellant to file a special appeal.