

Mt. Partaba And Ors. vs Ganga Bux on 1 September, 1950

Equivalent citations: AIR1951ALL417, AIR 1951 ALLAHABAD 417

JUDGMENT

Chandiramani, J.

1. This is the second appeal of the judgment-debtors against the appellate order dated 14-7-1945, of Shri K. N. Joshi, District Judge, Rae Bareilly, dismissing the objections of the judgment-debtors against the execution of the decree.

2. The facts so far as they are relevant for the purposes of this appeal are as follows: On 2-6-1930, Ram Narain Singh obtained a decree for contribution against eighteen defendants, including Lachman Prasad and Acchaibat Nath. The liability of each defendant was separately specified. During the course of the execution proceedings Lachman Prasad died and on the record were brought Suraj Narain and Bindeshwari Prasad, objectors-appellants, At a later Stage of the proceedings, Acchaibat Nath also died and in his place were brought on the re-cord Basdeo, Kalp Narain and Tribhawan Nath, objectors-appellants. The first execution application was made on 6-7-1931, against all the judgment-debtors, including Lachman Prasad and Acchaibat Nath. This was consigned to records on 17-12-1931. The second execution application was given on 19-12-1932, and was consigned to records on 28-2-1933. It was not against Lachman Prasad and Acchaibat Nath. The third execution application was made on 1-6-1934, against several judgment-debtors including Lachman Prasad and Acchaibat Nath. This application was clearly within time. It was dismissed on 6-10-1934. The fourth execution application was filed on 27-10-1936, but not against Lachman Prasad and Acchaibat Nath. This was consigned to records on 29-10-1937. The fifth execution application was given on 19-12-1939, by Ganga Bakhsh respondent, son of the original decree-holder, against Acchaibat Nath and Suraj Narain and Bindeshwari Prasad, appellants, the legal representatives of Lachman Prasad, who was then dead. This application was infructuous and was consigned to records. This application had clearly been made more than three years after the final order in the last application against them or their predecessors which was dismissed on 6-10-1934. The sixth application was given on 28-7-1942, by the respondent against Suraj Narain and Bindeshwari Prasad, objectors, and Acchaibat Nath. It is in this application that the present objection on the question of limitation was raised. This application was registered, and on 28-7-1942, it was directed that a prohibitory order for attachment should issue on the responsibility of the decree-holder. The order was actually issued on 30-9-1942, and it was directed that notice should issue to the judgment-debtors to ascertain what objections, if any, they had against the sale of the property. The attachment was made on 13-11-1942. Notices were then issued on 16th/18th November 1942, requiring the judgment-debtors to show cause against the sale of the property. These notices were duly served, and on 11-12-1942, the Court recorded an order that the service on the judgment-debtors was sufficient but they were absent. On 20-2-1943, it was recorded that the judgment debtors were absent, and it was ordered that the execution application should be

transferred to the Collector. Some time later, the papers were apparently returned to the executing Court on account of some defect. This defect was got cured on 4-3-1944. In the meantime, while the papers were with the executing Court, an application was made on 19-1-1944, that Acchaibat Nath then being dead, his heirs, objectors appellants, Basdeo, Kalp Narain and Tribhawan Nath, be brought on the record and notice under Order 21, Rule 22, Civil P. C. should be issued to them. Notices were issued in due course. All the legal representatives were duly served. It, however, appeared that on the notice of Basdeo the endorsement of the service was sufficient, but by an oversight it had not been signed. The papers were accordingly returned to the Civil Judge, Allahabad, to whom they had originally been sent for service, for the necessary signature. This was done by the Civil Judge, Allahabad on 1-5-1944. On 3-6-1944, the Court ordered substitution of Basdeo, Kalp Narain and Tribhawan Nath, objectors. The execution application was accordingly amended and so also the execution register and the papers were apparently sent to the revenue Court. On 2-9-1944, the present appellants filed objections, the main objection being that the application of 1939 was time barred and therefore the present application for execution was also time barred. On 4-9-1944, the Court ordered that a rubkar should issue to the revenue Court to stay proceedings.

3. The objections were heard on merits and it was decided by the Court that the execution application was not time barred. The objectors appellants then went up in appeal. It was urged that the application of 1939 was barred because it had been made more than three years after the date of the last order in the previous application which was disposed of on 6-10-1934. The respondent urged before the Court that this objection on the question of limitation should have been raised long before, and it should have been raised before the execution was transferred to the revenue Court. The learned lower appellate Court held that this contention was correct, and as the objection had not been raised earlier, the principles of res judicata applied, and the objection could not be raised by the present objectors. The Court relied upon Raghubar Singh Gokaran, 3 O. W. N. 241 : (A. I. R. (13) 1926 Oudh 291). The appeal was dismissed.

4. In this appeal it is once more urged that the objections of the appellants were not barred by the rule of res judicata. It was said that it is clear that the execution application of 1942 was barred because the application of 1939 was barred and the Court ought to have dismissed the application for execution in exercise of its powers under Section 3, Limitation Act, and as this had not been done, there was an error apparent on the face of the record and the objections ought to have been treated on the footing of an application for review under Order 47, Rule 1, Civil P. C. I have heard the learned counsel at considerable length and am satisfied that there is no force in this appeal.

5. It is not disputed by the learned counsel for the appellants that the principles of res judicata do apply to execution proceedings, and that they also apply to decisions on questions of limitation, and that the decisions on such questions may be either express or implied. It has been held by a Full Bench of the Allahabad High Court in Genda Lal v. Hazari Lal, A. I. R. (23) 1936 ALL. 21 : (68 ALL. 313 F. B.), that a judgment-debtor is not precluded by the principle of res judicata from raising the plea of limitation in an execution proceeding unless (1) there was express adjudication on the question of limitation against a judgment-debtor in an earlier execution proceeding or at an earlier stage of the same execution proceeding; or (2) if there was adjudication implied in an order which,

taken with the surrounding circumstances, should be taken to imply a conscious determination of the question of limitation adversely to the judgment-debtor; or (3) if the judgment, debtor did not fail to take the plea of limitation when it might and ought to have been taken, and no relief prayed for in the execution application, was granted, nor a partial satisfaction of the decree was obtained by the decree-holder.

6. In *Bansidhar v. Jagmohan Prasad*, 1944 O. W. N. 365 : (A. I. R. (32) 1945 Oudh 21), a Bench of the late Oudh Chief Court held that where notice of an execution application is served on the judgment-debtor but he fails to appear and after some proceedings for substitution of names the execution application is consigned to the records, that does not imply an adjudication of the question that the application was within limitation and the judgment-debtor is not precluded from raising the plea of limitation in a subsequent execution proceedings. It is clear that in 1939 when the appellants Suraj Narain and Bindeshwari Prasad were substituted on the record in place of their deceased father Lachman Prasad, the execution was consigned to records and became infructuous and so the proceedings at that stage do not give rise to any operation of the principles of *res judicata* on the question of limitation. The position in the 1942 application, however, is different. We have seen that on 20-2-1943, the Court, after due service on the judgment-debtors, Suraj Narain and Bindeshwari Prasad, appellants and Acchaibat Nath, father of the other three appellants Basdeo, Kalp Narain and Tribhawan Nath, directed execution to proceed and transferred the proceedings to the Collector. The objection as to limitation should have been raised before this order was passed, and when it was not raised, and execution was ordered to proceed, it shall be deemed that the question of limitation was considered and decided. This was the view taken in *Raghubar Singh v. Gokaran*, 3 O. W. N. 241 : (A. I. R. (13) 1926 Oudh 291). It was held in that case:

"An Interlocutory order passed in execution proceedings is final in respect of a matter decided by it if such matter is raised again in subsequent, or in continuation of the same, proceedings.

Where, therefore, the judgment-debtor does not choose to oppose execution of the decree against him, and the Court seized of the execution proceedings allows the execution to proceed by transferring the decree to the Collector for further action, there is an implied adjudication of the question that the execution of the decree is not barred by limitation and subsequently, after the death of the judgment-debtor, it is not open to his representatives-in-interest to raise the question of limitation, the bar resting not upon the provisions of Section 11, Civil P. C. but upon general principles of law."

The learned counsel for the appellants does not challenge the proposition laid down in this case.

7. The learned counsel for the appellants says that it does not appear that Basdeo was sufficiently served before he was substituted on the record. This is not correct because in an earlier part of the judgment I have already shown that in respect of Basdeo the service had been endorsed to be sufficient, but the endorsement had by some oversight not been signed and this defect was later rectified by the Civil Judge to whom the process had been sent for service. When the order was

passed on 3-6-1944, substituting the heirs of Acchaibat Nath on the record, the heirs had been sufficiently served. On the authority in *Raghubar Singh v. Gokaran*, (3 O. W. N. 241 : A. I. R. (13) 1926 Oudh 291) it was no longer open to the heirs of Acchaibat Nath to raise any objection as to limitation.

8. It was said in this case for the appellants that the order of 20-2-1943, does not operate as res judicata because there was in this case an error apparent on the face of the record, the error being that although the application for execution was time barred, the provisions of Section 3, Limitation Act, had not been applied by the Court, and the order should have been reviewed. It appears that the order of execution was passed on 20-2-1943, whereas the objection on the ground of limitation was filed on 2-9-1944, This was clearly long after the period of limitation for a review application had expired. It was argued that even if the application was time barred, the Court could exercise its inherent jurisdiction under Section 151, Civil P. C. This contention also is without foundation for inherent jurisdiction is exercised in the interests of justice generally in cases where there is no other remedy open, and not where, although a remedy is open, it is not availed of. In this particular case, assuming that there was an error apparent on the face of the record, the error could have been rectified, either by filing an application for review in the period prescribed by law, or by filing an appeal since the order of execution was appealable. Neither of the remedies was availed of with the result that the order directing execution to proceed had become final. In *Mungul Pershad v. Grija Kant*, 8 I. A. 123 : (8 Cal. 51 P. C.) it has been held by their Lordships of the Privy Council that assuming that a decree is barred at the date of some order made for its execution such order, though erroneously made, is nevertheless valid, unless reversed upon appeal. Their Lordships observed on p. 191:

"Admitting for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made when the notice was served on 28-9-1874; and when the petition of 8-10-1874, was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment-debtor, still his order, though erroneous, was valid, not having been reversed."

On the merits, certainly there is no-justification for saying that there was an error apparent on the face of the record. The executing Court, when passing the order of execution, had to consider the material placed before it on the question of limitation, and if on that material it had not applied Section 3, Limitation Act, although the application was time barred, one could say that there was an error apparent on the face of the record. We find that the only material before the Court on 20-2-1943, was the execution application itself in which it was stated that the previous application had been made on 19-12-1939, and had been consigned to records on 31-5-1941, In these circumstances the application of 1942, on the face of it, was within time and there was no error committed by the Court in ordering execution.

9. The result, therefore, is that I hold that in view of the order of execution dated 20-2-1943, it was no longer open to any of the appellants to raise an objection on the question of limitation. The objection has been rightly dismissed. The appeal, therefore, fails and is hereby dismissed with costs.