Dhurandhar Prasad Singh vs Jai Prakash University And Ors on 24 July, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2552, 2001 AIR SCW 4856, 2001 AIR SCW 2674, 2001 AIR - JHAR. H. C. R. 211, 2001 ALL CJ 2 1607, 2001 (4) SCALE 495, 2001 (4) LRI 116, 2001 (4) SCALE 220, 2001 (3) SERVLJ 432 SC, 2001 (6) SCC 534, (2001) 5 JT 573 (SC), 2001 (7) SRJ 253, (2001) 5 JT 578 (SC), (2001) 3 ESC 504, (2001) 3 LAB LN 810, (2001) 2 UC 290, (2001) 90 FACLR 919, (2001) 3 CURLR 13, (2001) 4 SCALE 220, (2003) 2 SCT 50, (2001) 4 SCJ 389, (2001) 5 SUPREME 278, (2001) 4 RECCIVR 280, (2001) 4 SCALE 495, (2001) WLC(SC)CVL 585, (2001) 44 ALL LR 579, (2001) 3 ALL WC 2331, (2001) 3 BLJ 215, (2001) 3 CALLT 55, (2001) 4 CIVLJ 82

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Bench: B.N. Agrawal

CASE NO.:
Appeal (civil) 4481 of 2001

PETITIONER:
DHURANDHAR PRASAD SINGH

Vs.

RESPONDENT:
JAI PRAKASH UNIVERSITY AND ORS.

DATE OF JUDGMENT: 24/07/2001

BENCH:
G.B. Pattanaik & B.N. Agrawal

JUDGMENT:

B.N.AGRAWAL, J.

Leave granted.

In this appeal decree holder-appellant has challenged the judgment rendered by Patna High Court whereby revision application has been allowed, order passed by the executing Court, rejecting objection under Section 47 of the Code of Civil Procedure (hereinafter referred to as the Code) to the executability of decree passed in title suit No. 115 of 1977, set aside and objection allowed. Plaintiff-appellant filed suit for a declaration that order dated 11th October, 1977, passed by defendant No. 2 (respondent No.3) who was Secretary of Governing Body, Ganga Singh College, terminating the services of plaintiff, was illegal. According to the case of the plaintiff disclosed in the plaint, he was appointed as Routine- cum-Examination Clerk in the said college, which was affiliated to Bihar University, by Principal of the College on 8.1.1977 which was subsequently approved by the ad hoc Governing Body. After constitution of the regular Governing Body, defendant No.2 passed an order terminating the services of plaintiff in contravention of Statutes of Bihar University which necessitated filing of the present suit. In the said suit, the Governing Body of the College in question which was defendant No. 1 entered appearance but no written statement was filed and the defendant absented itself and the suit was fixed for exparte hearing which was decreed exparte and the defendants were permanently restrained from giving effect to the order of termination. As the judgment debtors refused to comply the directions contained in the decree, the appellant levied execution. In the said execution case, an objection under Section 47 of the Code was filed on behalf of Principal of the College as well as the Bihar University objecting to the executability of the decree on grounds, inter alia, that during the pendency of the suit on Ist October, 1980, the College in question became the constituent unit of the Bihar University and the erstwhile Governing Body ceased to exist but the University was not impleaded party in the suit and consequently the decree was not executable against it inasmuch as the exparte decree was obtained against the erstwhile management by suppressing this fact. As subsequently during the pendency of the execution case, Jai Prakash University was formed and the college in question thereupon became a constituent unit of the said University, the same also filed similar objection to the executability of the decree.

The executing court allowed the objection and thereafter when the matter was taken to the High Court in revision, the case was remanded to the executing Court to dispose of the objection afresh after giving opportunity of adducing evidence to the parties. After remand the parties adduced evidence in support of their respective cases and the executing Court by its order dated 22nd September, 1997 rejected objection under Section 47 of the Code, against which order when a revision was preferred before the High Court, the same was allowed, order passed by the executing Court was set aside and objection under Section 47 of the Code was allowed. Hence, this appeal by Special Leave.

Mr. Prabha Shanker Mishra, learned Senior Counsel appearing on behalf of the appellant in support of the appeal submitted that although the college in question was taken over by the Bihar University as its constituent unit with all its assets and liabilities and thereby it was a case of devolution of interest during the pendency of the suit within the meaning of Order 22 Rule 10 of the Code, the High Court was not justified in holding that the decree cannot be executed against the University on the ground that it was not made party in the suit inasmuch the decree could have been passed against the erstwhile management and the University was bound by it as no step whatsoever was taken by the University to intervene in the matter by seeking leave to continue which alone was

entitled for the same. Learned counsel for the Respondent-University, on the other hand, submitted that under Order 22 Rule 10 of the Code, it was duty of the plaintiff who was prosecuting the suit to ensure by seeking leave of the Court, that effective relief is granted to him by bringing the University on record which was a necessary party. It has been further submitted that decree passed against the previous management which has ceased to exist is akin to a decree passed against a dead person without bringing his legal representatives on the record, which is a nullity. Thus, in view of the rival submissions, the following questions arise for our consideration:-

> 1. Whether in a case of devolution of interest during the pendency of a suit as postulated under Order 22 Rule 10 of the Code, decree passed against the predecessor-in-interest without bringing the successor-in-interest on the record would make the decree nullity and the same can be executed against such a person who was not impleaded as party?
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> 2. Whether application under Order 22 Rule 10 seeking leave of the Court is required under law to be filed by that person alone upon whom interest has devolved during the pendency of the suit and by nobody else?

In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the Court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The Legislature while enacting Rules 3,4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although

he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record.

Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in Moti Lal v. Karab-ud-Din [1898] 25 Cal.179, he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in Prannath v. Rookea Begum [1851-59] 7 M.I.A. 323, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

The effect of failure to seek leave or bring on record the person upon whom the interest has devolved during the pendency of the suit was subject matter of consideration before this Court in various decisions. In the case of Sm.Saila Bala Dassi v. Sm. Nirmala Sundari Dassi and another AIR 1958 Supreme Court 394, T.L.Venkatarama Aiyar, J. speaking for himself and on behalf of S.R.Das, C.J. and A.K.Sarkar and Vivian Bose, JJ. laid down the law that if a suit is pending when the transfer in favour of a party was made, that would not affect the result when no application had been made to be brought on the record in the original court during the pendency of the suit.

In the case of Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiama Dass, AIR 1975 Supreme Court 2159, while considering the effect of devolution of interest within the meaning of Order 22 Rule 10 of the Code, on the trial of a suit during its pendency, this Court has laid down the law at page 2160 which runs thus:-

> This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the

mutt or to the manager of the temple may be substituted as a party under this rule.

In the case of Kiran Singh and others v. Chaman Paswan and others AIR 1954 S.C.340, question was raised, when decree passed by a Court is nullity and whether execution of such a decree can be resisted at the execution stage which would obviously mean by taking an objection under Section 47 of the Code. Venkatarama Ayyar, J. speaking for himself and on behalf of B.K.Mukherjea, Vivian Bose, Ghulam Hasan, JJ., observed at page 352 thus:

It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.

In the case of Ittyavira Mathai v. Varkey Varkey and another AIR 1964 S.C.907, the question which fell for consideration before this Court was if a Court, having jurisdiction over the parties to the suit and subject matter thereof passes a decree in a suit which was barred by time, such a decree would come within the realm of nullity and the Court answered the question in the negative holding that such a decree cannot be treated to be nullity but at the highest be treated to be an illegal decree. While laying down the law, the Court stated at page 910 thus:-

If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities.

Again, in the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others AIR 1970 S.C.1475, the Court was considering scope of objection under Section 47 of the Code in relation to the executability of a decree and it was laid down that only such a decree can be subject matter of objection which is nullity and not a decree which is erroneous either in law or on facts. J.C.Shah, J. speaking for himself and on behalf of K.S.Hegde and A.N.Grover, JJ., laid down the law at pages 1476-77 which runs thus:- A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be

erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

In the case of Everest Coal Company (P) Ltd. v. State of Bihar and others, (1978) 1 SCC 12, this Court held that leave for suing the receiver can be granted even after filing of the suit and held that the infirmity of not obtaining the leave does not bear upon the jurisdiction of the trial court or the cause of action but it is peripheral. It also held that if a suit prosecuted without such leave culminates in a decree, the same is liable to be set aside. These observations do not mean that the decree is nullity. On the other hand, the observation of the Court at page 15 that any litigative disturbance of the Courts possession without its permission amounts to contempt of its authority; and the wages of contempt of Court in this jurisdiction may well be voidability of the whole proceeding would lend support to the view and such decree is voidable but not void. In the case of Haji Sk.Subhan v. Madhorao, AIR 1962 S.C.1230, the question which fell for consideration of this Court was as to whether an executing Court can refuse to execute a decree on the ground that the same has become inexecutable on account of the change in law in Madhya Pradesh by promulgation of M.P.Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 and a decree was passed in ignorance of the same. While answering the question in the affirmative, the Court observed at page 1287 thus:-

The contention that the Executing Court cannot question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect.

In the case of Vidya Sagar v. Smt. Sudesh Kumari and others, AIR 1975 S.C.2295, an objection was taken under Section 47 of the Code to the effect that decree passed was incapable of execution after passing of U.P.Zamindari Abolition and Land Reforms Act, 1950 and the objection was allowed by the High Court and when the matter was brought to this Court, the order was upheld holding that decree was incapable of execution by subsequent promulgation of legislation by State Legislature.

The expressions void and voidable have been subject matter of consideration before English Courts times without number. In the case of Durayappah v. Fernando and others [1967] 2 All England Law Reports 152, the dissolution of municipal council by the minister was challenged. Question had arisen before the Privy Council as to whether a third party could challenge such a decision. It was held that if the decision was complete nullity, it could be challenged by anyone, anywhere. The Court observed at page 158 thus:-

The answer must depend essentially on whether the order of the Minister was a complete nullity or whether it was an order voidable only at the election of the council. If the former, it must follow that the council is still in office and that, if any councillor, ratepayer or other person having a legitimate interest in the conduct of the council likes to take the point, they are entitled to ask the court to declare that the council is still the duly elected council with all the powers and duties conferred on it by the Municipal Ordinance.

In the case of In re McC. (A minor) [1985] 1 Appeal Cases 528, the House of Lords followed the dictum of Lord Coke in the Marshalsea Case quoting a passage from the said judgment which was rendered in 1613 where it was laid down that where the whole proceeding is coram non judice which means void ab initio, the action will lie without any regard to the precept or process. The Court laid down at page 536 thus:-

Consider two extremes of a very wide spectrum. Jurisdiction meant one thing to Lord Coke in 1613 when he said in the Marshalsea Case (1613) 10 Co. Rep.68b, at p.76a:

when a court has jurisdiction of the cause, and, proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the court who executes the precept or process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process.

The Court of the Marshalsea in that case acted without jurisdiction because, its jurisdiction being limited to members of the Kings household, it entertained a suit between two citizens neither of whom was a member of the Kings household. Arising out of those proceedings a party arrested by process of the Marshalsea could maintain an action for false imprisonment against, inter alios, the Marshal who directed the execution of the process. This is but an early and perhaps the most

quoted example of the application of a principle illustrated by many later cases where the question whether a court or other tribunal of limited jurisdiction has acted without jurisdiction (coram non judice) can be determined by considering whether at the outset of the proceedings that court had jurisdiction to entertain the proceedings at all. So much is implicit in the Lord Cokes phrase jurisdiction of the cause.

In another decision, in the case of Director of Public Prosecutions v. Head [1959] Appeal Cases 83, House of Lords was considering validity of an order passed by Secretary of the State in appeal preferred against judgment of acquittal passed in a criminal case. The Court of Criminal Appeal quashed the conviction on the ground that the aforesaid order of Secretary was null and void and while upholding the decision of the Court of Criminal Appeal, the House of Lords observed at page 111 thus:-

This contention seems to me to raise the whole question of void or voidable: for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under Section 64 of the Act of 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the 10 years during which she was unlawfully detained, since it could all be said to flow from his negligent act; see section 16 of the Mental Treatment Act, 1930.

But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it.

This question was examined by Court of Appeal in the case of R. v. Paddington Valuation Officer and another, Exparte Peachey Property Corporation, Ltd. [1965] 2 All England Law Reports 836 where the valuation list was challenged on the ground that the same was void altogether. On these facts, Lord Denning, M.R. laid down the law observing at page 841 thus:-

It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null and void without more ado. The other kind is when the invalidity does not make the list void altogether, but only voidable. In that case it stands unless and until it is set aside. In the present case the valuation list is not, and never has been, a nullity. At most the first respondent-acting within his jurisdiction-exercised that jurisdiction erroneously. That makes the list voidable and not void. It remains good until it is set aside.

De Smith, Woolf and Jowell in their treatise Judicial Review of Administrative Action, Fifth Edition, paragraph 5-044, has summarised the concept of void and voidable as follows: Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems arose from the premise that if an act, order or decision is ultra vires in the sense of outside jurisdiction, it was said to be invalid, or null and void. If it is intra vires it was, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record. Clive Lewis in his works Judicial Remedies in Public Law at page 131 has explained the expressions void and voidable as follows:-

A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant.

Thus the expressions void and voidable have been subject matter of consideration on innumerable occasions by courts. The expression void has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole world. So far the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.

Under Section 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the court executing

> the decree and not by a separate suit. The powers of Court under Section 47 are quite different and much narrower than its powers of appeal, revision or review. A first appellate Court is not only entitled but obliged under law to go into the questions of facts as well like trial court apart from questions of law. Powers of second appellate Court under different statutes like Section 100 of the Code, as it stood before its amendment by Central Act 104 of 1976 with effect from 1.2.1977, could be exercised only on questions of law. Powers under statutes which are akin to Section 100 of the Code, as amended and substituted by the aforesaid Central Act, have been further narrowed down as now in such an appeal only substantial question of law can be considered. The powers of this Court under Article 136 of the Constitution of India, should not be exercised simply because substantial question of law arises in a case, but there is further requirement that such question must be of general public importance and it requires decision of this Court. Powers of revision under Section 115 of the Code cannot be exercised merely because the order suffers from legal infirmity or substantial question of law arises, but such an error must suffer with the vice of error of jurisdiction. Of course, the revisional powers exercisable under the Code of Criminal Procedure and likewise in similar statutes stand on entirely different footing and much wider as there the court can go into correctness, legality or propriety of the order and regularity of proceeding of inferior court. It does not mean that in each and every case the revisional court is obliged to consider question of facts as well like a first appellate Court, but the court has discretion to consider the same in appropriate cases whenever it is found expedient and not in each and every case. Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a Judge.

Powers of review cannot be invoked unless it is shown that there is error apparent on the face of the record in the order sought to be reviewed.

The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the governing body of the College which was defendant without seeking leave of the Court to continue the suit against the University upon whom the interest of the original defendant devolved and impleading it . Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.

Now we proceed to consider the second question posed, but before doing so, for better appreciation of the point involved, it would be appropriate to refer to the provisions of Order 22 Rule 10 of the Code which runs thus:-

> 10. Procedure in case of assignment before final order in suit.(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of plaintiff has devolved. Likewise, in a case where interest of defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara Coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the interest of the original plaintiff has devolved has no cause of action to prosecute the suit, but if there is any other co-sharer who is supporting the plaintiff, may have a cause of action to continue with the suit by getting himself transposed to the category of plaintiff as it is well settled that in a partition suit every defendant is plaintiff, provided he has cause of action for seeking partition. Thus, we do not find any substance in this submission of learned counsel appearing on behalf of the appellant and hold that prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested.

Thus, in view of the foregoing discussions, we have no difficulty in holding that the High Court was not justified in allowing objection under Section 47 of the Code.

In the result, the appeal is allowed, impugned order passed by the High Court is set aside and that by the executing Court restored. In the circumstances of the case, we direct that the parties shall bear their own costs.

..J. [G.B.PATTANAIK] ..J. [B.N.AGRAWAL] NEW DELHI DATED: July 24, 2001.