APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J

1932

Feb. 26.

NAURANGILAL MARWARI

v.

CHARUBALA DASEE.*

Execution of Decree—Amendment of petition for execution, when allowed—Code of Civil Procedure (Act V of 1908), s. 47; O. XXI., rr. 11 to 14, 17, 22—Indian Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5) (third col.).

Under the Code of Civil Procedure, procedure is intended to be less, rather than more, formal in the case of execution of decrees than in the case of hearing of suits.

Rule 17 of Order XXI of the Code of Civil Procedure, although requiring a preliminary scrutiny of certain formalities, so as to prevent execution petitions not complying with the provisions of the rules 11 to 14 of the said Order from being admitted and filed in court, does not debar amendments of execution petitions in proper cases with the leave of court, even after their admission and filing in court.

Asgar Ali v. *Troilokya Nath Ghose* (1) distinguished.

An *ex parte* order made in an execution case directing substitution of the applicant's name for the original (deceased) decree-holders is not binding upon the judgment-debtors, where the latter did not get notice of, and opportunity to contest, such application for substitution.

SECOND APPEAL by the decree-holder.

The material facts will appear from the judgment.

Sateendranath Mukherji (with him *Byomkesh Basu*) for the appellant. The courts below were wrong in holding that the appellant's application for amending his execution petition was not maintainable. The decree-holder being governed by the Mitakshara school of Hindu law, no succession certificate was necessary.

Satkarhipati Ray (with him *Beereshwar Chatterji*) for the respondent. The appellant's

*Appeal from Appellate Order, No. 204 of 1931, against the order of A. Ray, Addl. District Judge of Midnapur, dated Feb. 13, 1931, affirming the order of B. Mustaphi, First Subordinate Judge of Midnapur, dated Nov. 11, 1930.

(1) (1890) I. L. R. 17 Calc. 631.

application for amending his execution petition was rightly dismissed, as an execution petition cannot be amended after it is filed. See Order XXI, rule 17 of the Code of Civil Procedure and the case of *Asgar Ali* v. *Troilokya Nath Ghose* (1). Moreover, the execution case No. 72 of 1930, being started on the 2nd of June, 1930, is barred by limitation, the previous execution case being filed on the 7th of May, 1927.

Mukherji, in reply.

RANKIN C. J. In this case, a money decree was passed in September, 1916, in favour of two decree-holders against three judgment-debtors for some Rs. 2,000 and was affirmed on appeal on the 4th of June, 1918. After certain execution proceedings, which led to nothing, both the original decree-holders died and the present appellant says that, under the Mitakshara law, their interest in the decree passed to him by survivorship. On the 7th of May, 1927, he presented an execution petition, being No. 64 of 1927, and obtained an *ex parte* order, substituting him as decree-holder. The court made an order for the issue of notices under rule 22 of Order XXI of the Code of Civil Procedure. It is now said, on behalf of the respondents, and may be accepted, that these notices were never served. On the 28th of June, 1927, for anything we know, just because these notices had not been served, the court dismissed that execution case for default, as it was well entitled on that hypothesis to do. On the 2nd of June, 1930, within three years of that order, the appellant brought execution petition No. 72 of 1930, which is the matter before us. Notices were ordered to be served, with the result that certain objections were made by a petition of the 27th of June, 1930, on behalf of the judgment-debtors. Before the execution petition was disposed of, on the 19th of September, 1930, the appellant filed an application asking that his petition of the 2nd of June might be amended by correcting a statement therein to the effect that he had become entitled by succession and

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substituting the statement that he had become entitled by survivorship, the object being to show that no succession certificate would be necessary under the law. One would have supposed that the way in which the matter would be dealt with was by saying "Very well, if you want to claim by "survivorship, by all means do so. We will then "decide the question whether you are entitled to stand "in the shoes of the original decree-holders and the "question whether or not any succession certificate is "necessary and also the question whether or not your "application for execution is time-barred." That, however, was not the way the matter appealed to the first court. The first court, for reasons which I fail to appreciate, refused him leave to amend his petition by stating that he claimed by survivorship; and, while it appears to have discussed all sorts of other points, it does not seem to me that these discussions were of more than academic interest. The matter came before the second court and the second court agreed, again for reasons which I fail to appreciate, that the man should not be allowed to amend his execution petition, and it made certain observations about other aspects of the case.

On this appeal being argued before us, the only contention by way of supporting the refusal to allow this execution creditor to amend his petition was by maintaining that in virtue of rule 17 of Order XXI of the Code of Civil Procedure, no execution petition could ever be amended except in terms of that rule. To my astonishment, the authority of a Full Bench of this Court is vouched for that view [*Asgar Ali* v. *Troilokya Nath Ghose* (1)]. It was a case, however, of an entirely different character from the case before us, and the decision seems to have been motived by rules as to limitation which are no longer in force.

Let us examine what the scope of rule 17 of Order XXI, Civil Procedure Code, really is. Rule 17 of Order XXI is directed to preventing execution petitions being even filed unless they comply, on the

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face of them, with certain elementary requirements laid down in rules 11 to 14; that is to say, there must be a tabular statement and the tabular statement must contain various pieces of information that are therein required; if there is an application for attachment of moveable properties, there must be an inventory attached, or if the application is for attachment of immoveable properties, then certain description of the properties must be contained in the petition, and the court may require an extract from the register of the collectorate in certain cases. Rule 17 says that if an execution creditor does not comply with the formal requirements of rules 11 to 14, his petition shall not even be filed and it puts a duty upon the court, not to take evidence and investigate into any of the facts, but to see that the application is in proper form, though every word of it may be untrue, which is another matter altogether. If the application is defective on the face of it, the court may allow time for its amendment; and if time is allowed and the application is amended, it shall be deemed to have been presented on the date when it was first presented; so that no punishment in connection with the law of limitation is put upon the decree-holder. Then it goes on to say that, when the application is admitted, a proper note is to be entered in the register and then the court may order execution. Now, because the rule requires a preliminary scrutiny of certain formalities before the petition can get upon the file, it is actually argued that that means that after it has got upon the file nobody can ever get his petition amended even with the leave of the court—a thing which is almost ludicrous as an argument. A Full Bench of this Court, in the case referred to, thought that this argument was good as regards formal defects within rules 11 to 14. However that may be, in the present case, the matter on which the decree-holder wanted an amendment has nothing to do with rules 11 to 14. He stated that he had succeeded as an heir to the rights under the decree. If so, the petition was perfectly in form. The court, under rule 17, could

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not know in the least whether that was true or false. Having considered the matter further, the decree-holder found that the correct way of describing his legal position was to say that he had become entitled by survivorship. Under the Code, procedure is intended to be less, rather than more, formal in the execution of a decree than in the case of the hearing of a suit; and the executing court need not have found difficulty in allowing him to amend his petition. To me it is clear that this matter should go back to the original court with a direction to allow the amendment and then to determine whatever is necessary to be decided.

One question which this court should determine is the question of limitation. The facts as to that are that the present petition was presented on the 2nd of June, 1930, and the question is whether, within three years, there was an order made on the previous application for execution. The previous application was presented on the 7th of May, 1927, and the order dismissing it for default which was a perfectly good order—whether notices were served under rule 22 of Order XXI, Code of Civil Procedure, or not—was made on the 28th of June, 1927. This petition, therefore, was within time and the court below will not have to investigate that matter again.

In the court below, a dispute arose upon the question whether the appellant, having been, by an *ex parte* order dated the 27th of May, 1927, substituted for the original decree-holders, it would be open to the judgment-debtors to show if they could that he was not entitled in the shoes of these decree-holders to execute the decree. On that, there is no difficulty at all. It being found that the judgment-debtors had no notice of this order, they are, as a matter of course, entitled to question the right of the appellant to put the decree in execution.

Another question canvassed is, assuming that the appellant is entitled by survivorship, whether

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succession certificate is necessary. That question we leave open for further discussion. If there is any difficulty about it, the trial court must wrestle with that difficulty in the first instance.

This appeal is allowed with costs, hearing-fee—two gold mohurs.

C. C. GHOSE J. I agree.

Appeal allowed.

A. K. D.