APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Ganga Nath

1938
January, 24

NARAIN SARUP (DECREE-HOLDER) *v.* DAYA SHANKAR (JUDGMENT-DEBTOR)*

Hindu law—Joint Hindu family—Manager—Representative capacity—Decree in favour of manager—Subsequent disappearance of manager—Succession of managers—Right of next manager to execute decree—Whether decree deemed to be transferred—Civil Procedure Code, order XXI, rule 16—*Transfer of decree by operation of law—Civil Procedure Code, section* 2(11)—"*Legal representative*".

During the pendency of an appeal *B*, a party, died and the name of his son *H* was substituted. A decree was passed in favour of *H* for a sum of money in respect of a certain property which had belonged to *B*. *H* executed the decree, and a part of the money was realised. Thereafter *H* disappeared and was not traceable; at that time he was the manager of the joint Hindu family consisting of himself and his three sons, one of whom *N* was of age and the other two were minors. About three years afterwards, and before *H's* death could be presumed under the law, *N* made an application for execution of the decree, and the question was whether he was entitled to do so:

Held that, according to Hindu law, when the property descended from *B* to his son *H*, *H* held this property as joint family property with his three sons; therefore, the entry of *H*'s name in the appeal was in the capacity of the manager of the joint Hindu family of which he was a member, though the actual entry did not specify that *H* was the manager of a joint Hindu family. So, the decree being one in which *H* represented the joint Hindu family, the manager of the family for the time being would be the person entitled to execute it, and as *H* had disappeared and was untraceable, the office and function of manager had devolved upon the eldest son *N*, the other sons being minors; and *N* as the present manager of the joint family was entitled to apply for execution. This was not a case of a transfer of the decree at all; the decree was a decree of the joint family, and the joint family had all along been in existence, and the only question was who was entitled to execute it on behalf of the family.

*Appeal No. 2 of 1937, under section 10 of the Letters Patent.

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If, however, the analogy of rules of procedure of order XXI of the Civil Procedure Code was necessary then the rule which would apply would be rule 16 of order XXI, and the present case of the succession of one manager to another would come under the category of transfer of decree "by operation of law", and the present applicant would be entitled under that rule to apply for execution. Succession of one manager of a joint Hindu family by another would not be confined only to cases of death of the previous manager.

The order of a court entering the name of a certain person for the purpose of representing the estate of a deceased party is not an order which decides such a matter as the capacity in which that person is entered. The person is entered merely to represent the estate and it may well be that other persons may afterwards make claims and show that the name of that person was entered in a representative capacity.

Dr. *K. N. Malaviya* and *Shah Jamil Alam,* for the appellant.

Mr. *G. S. Pathak,* for the respondent.

BENNET, A. C. J., and GANGA NATH, J.:—This is a Letters Patent appeal filed by the decree-holder against the judgment of a learned single Judge holding that the appellant Narain Sarup was not competent to apply for the execution of a decree. There was some property of Mst. Saraswati Kunwar to which a claim of inheritance was made by certain persons who are the sons of her daughters and by one Mst. Misri Kunwar who was a daughter, and objection was taken by one Janki Prasad claiming as the reversioner of Kanhaiya Lal, the husband of Mst. Saraswati Kunwar. There was a sale deed by the daughters' sons and the daughter of an eight-anna part of the property claimed to three persons, Bankey Lal, Radha Rawan Lal and Piare Mohan Lal for Rs.40,000. The share of Bankey Lal is separately specified as two annas ten pies. This person Bankey Lal was therefore a party to the litigation. During the pendency of the appeal in the High Court Bankey Lal died and substitution of the name of Har Sarup after the death of Bankey Lal was effected by the court's order dated

the 12th March, 1928. There was a compromise in the appeal and the compromise provided that Sham Behari, Daya Shankar and Mst. Chameli Kunwar, respondents 29, 30 and 34, should pay a sum of Rs.3,250 to Har Sarup within a month and a decree was passed in the terms of the compromise on the 27th October, 1930. Subsequent to this compromise there was an application for execution by Har Sarup on the 20th April, 1931, and the judgment-debtors in question paid half the amount due and the application for execution was dismissed on the 15th August, 1931.

After this Har Sarup, who was the manager of a joint Hindu family consisting of himself and his three sons, one of whom Narain Sarup is of age and the other two are minors, disappeared. No one has been able to ascertain the cause of his disappearance or what has happened to him and there is no presumption of law that he is dead as the period of seven years has not elapsed. On the 19th April, 1934, Narain Sarup who is the manager of the joint Hindu family since the time of the disappearance of his father made an application for execution of the decree and the office reported that there is no decree in the name of Narain Sarup and his application was dismissed on the 6th October, 1934. On the same date he made an application setting out that Har Sarup obtained a decree as manager and karta of a joint Hindu family; that after obtaining the decree Har Sarup disappeared and accordingly petitioner became the manager and karta of the joint Hindu family, and for this reason he has become entitled to take out execution, and that an order was passed directing him to file an application under order XXI, rule 16 which he now does, asking that his name may be entered in the decree as manager and karta of the joint Hindu family. That application was supported by a statement of a witness Dina Nath Karinda, who said that he had been karinda for 16 years and that Har Sarup and his son, the present

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applicant, were members of a joint Hindu family, that Bankey Lal had died and the decree was a decree of the joint Hindu family. This deposition is dated the 5th October, 1934. On this application the court ordered that the application be allowed. Later, on the 10th November, 1934, an objection was filed by the judgment-debtor that notice had not been issued to him and that the civil death of Har Sarup could not be presumed nor could the applicant acquire a right to make an application for execution of the decree. No objection was taken in this application that Bankey Lal, Har Sarup and Narain Sarup did not form a joint Hindu family, nor was the application made that the witness Dina Nath should be recalled for examination and cross-examination in the presence of the objector; the objection was on other grounds. The order of the execution court was very brief, stating that there was no force in the objection and dismissing it. In appeal the learned single Judge considered that "It is obvious from the decree itself that it was not passed in favour of the joint family but in favour of Har Sarup alone. In these circumstances I do not think that order XXI, rule 15 can possibly apply"; and he further held that as there was no evidence that Har Sarup was dead the application would not lie under order XXI, rule 16. Now the learned single Judge did not notice that Bankey Lal was a party to the suit and that he had died during the currency of the appeal and his son Har Sarup had been substituted. In our opinion this makes a difference in the case.

The property assigned to Bankey Lal was either joint family property or his self-acquired property. Learned counsel for objector is no doubt correct in stating that there is no presumption that any particular property in a joint Hindu family is joint property. There is of course the evidence of the witness Dina Nath that the decree was joint family property and if

it were necessary to have further evidence on the point we would allow further evidence to be taken although we note that under order XXI, rule 16 in the case of a decree transferred by operation of law it is not necessary that notice to the judgment-debtor should issue and that such notice would only issue in the case of a decree which is transferred by assignment in writing. We are of opinion, however, that under the rules of Hindu law the property did descend to Har Sarup and his son, the present applicant, as joint family property. These rules are contained in the Mitakshara in the 27th *sloka* of the first section of the first chapter: "Therefore it is a settled point that property in the paternal or ancestral estate is by birth; the father . . . is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor." This text has been considered by their Lordships of the Privy Council in *Muhammad Husain Khan* v. *Kishva Nandan Sahai* (1). and their Lordships pointed out that the text applied to property acquired by the father from his father but did not apply to property acquired by the father from maternal ancestors. Accordingly, therefore, when the property descended from Bankey Lal to his son Har Sarup, Har Sarup held this property as joint family property with his three sons. Therefore the entry of Har Sarup's name in the appeal was merely in the capacity of the manager of the joint Hindu family of which he was a member. It is true that the actual entry does not specify that Har Sarup was the manager of a joint Hindu family but we consider that the order of a court entering a certain person for the purpose of representing the estate of a deceased person is not an order which decides such a matter as the capacity in which the particular person is entered. The person is entered merely to represent the estate and it

(1) I.L.R. [1937] All. 655(664).

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may well be that other persons may afterwards make claims similar to the present and show that the name was entered in a representative capacity. This view has been taken in a Full Bench case of this Court, *Hori Lal* v. *Munman Kunwar* (1), where it was held that where a suit was brought on a mortgage against a karta of a joint Hindu family the other members of the family must be deemed to be parties to the suit through him and the omission of the names of the other members from the array of parties would not be a defect fatal to the suit. BANERJI, J., observed (p. 561): "I do not think that it is essential that the manager, when he brings his suit, should state in distinct terms that he is suing as manager, or that the plaintiff in a suit against the family should describe the defendant as the manager of the family" This view was also taken in *Lingangowda* v. *Basangowda* (2), where it was held that "In the case of a Hindu family where all have rights it is impossible to allow each member of the family to litigate the same point over and over again, . . . and in each of these cases, therefore, the court looks to section 11, explanation VI, of the Civil Procedure Code to see whether or not the leading member of the family has been acting either on behalf of the minors in their interest, or, if they are majors, with the assent of the majors." We are of opinion therefore that the decree as it stood was one in which Har Sarup represented the joint Hindu family.

Now although Har Sarup is not shown to have been dead, he is shown to have been the manager of the joint Hindu family and because he has been lost for a number of years the office and function of manager of the joint Hindu family has devolved on the applicant Narain Sarup who is now the eldest member of the three brothers, his brothers being minors. Part of the business of the manager of a joint Hindu family

(1) (1912) I.L.R. 34 All. 549. (2) (1927) I.L.R. 51 Bom. 450(453).

is to apply for execution of decrees and as this decree belongs to the joint Hindu family we consider that Narain Sarup as manager is entitled to apply for the execution of the decree. We may therefore regard the decree as not having been subject to any transfer at all, but as the joint family has all along been in existence and the decree is a decree of the joint family the only point is who is entitled to apply on behalf of the joint family. We may refer to a ruling in *Gyan Datt* v. *Sada Nand Lal* (1), where one of us held that if the father represented the estate of the joint family during his lifetime it is difficult to hold that the son, though joint with him, cannot represent the estate of the joint family which was represented by his deceased father and is not a person who in law represents the estate of a deceased person. If, however, the analogy of rules of procedure of order XXI of the Civil Procedure Code by necessary then the rule which will apply is rule 16. That rule deals with the transfer of a decree by assignment in writing or by operation of law and presumably the rule intended to cover all the cases of transfer by these two expressions. The present case of the succession of one manager to another would come under the words "operation of law" and the present applicant is therefore entitled under that rule to apply for execution of the decree. There does not appear to be any special rule dealing with the cases of succession of managers of joint Hindu families. Such cases of succession would not always be covered by the case of death of the manager because there might be a case where the manager was incapacitated by illness or old age from acting as manager and was succeeded by another member of the family as manager. Exactly the same point arises in the case of any other group of persons where one person is entitled to act as manager or director and he is succeeded by another member of the group. We consider therefore that the applicant was entitled to apply for execution of the decree.

(1) [1938] A.L.J. 56.

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Another point raised is that the application of the 19th April, 1934, by Narain Sarup, dismissed on the 6th October, 1934, was not an application according to law because of the argument that Narain Sarup was not entitled to apply for execution. We have held that Narain Sarup was entitled to apply for execution and therefore this application was according to law and saves limitation. In this view the present application of the 6th October, 1934, was within limitation.

Some further argument was made in regard to interest being penal, but this objection was taken on the 31st January, 1935, and the present order of the 15th December, 1934, is earlier and therefore this matter is not before us.

For these reasons we allow this Letters Patent appeal and we hold that the applicant is entitled to apply for execution of the decree and we allow the applicant costs of both proceedings in the High Court.

MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

1938 *January*, 24

MAHARAJA OF BENARES (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), sections 42, 43—Non-resident foreigner having business connection in British India—Agent in British India—Agent either appointed by principal or treated as such by Income-tax Officer—Such agent alone is the "assessee" for all purposes of the Act—Notices to be served on him and not on the principal.

The language of section 42(1) of the Income-tax Act makes it clear that in the case of a person residing out of British India who has property or business connections in British India, only his agent in British India or such person as may be deemed and treated as such within the meaning of section 43, and not the non-resident principal himself, shall for all purposes of the Act be treated as the assessee, i.e. as the person to whom a notice under section 22(2) shall issue and by whom the tax is payable. The word "shall" in section 42(1) shows

*Miscellaneous Case No. 52 of 1936.