APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

1937
January, 8

CHANDIKA (JUDGMENT-DEBTOR-APPELLANT) *v.* KAMLA PRASAD AND ANOTHER (DECREE-HOLDERS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), order XXI, rule 14—Mortgage—Rule 14 of order XXI, Civil Procedure Code if applies to mortgage decrees—Limitation Act (IX of 1908), Article 182(5)—Execution of decree—Application for execution of decree for sale on mortgage—Omission to produce copies of khewats required by rules 187 and 188 of Oudh Civil Rules, effect of—Expression "in accordance with law"—Article 182(5), meaning of.

Order XXI, rule 14 applies only to cases where an application is made for attachment of any land and as no attachment is required in the case of a decree for sale based on a mortgage, order XXI, rule 14 is inapplicable to mortgage decrees. *Iqbal Narain* v. *Jaskaran* (1), relied on.

The expression "in accordance with law" in Article 182, clause (5) should be taken to mean that the application though defective in some particulars is one upon which execution could lawfully be ordered. If the omissions are such as to make it impossible for the court to issue execution upon it, it should be held that such an application is not in accordance with law. Where, therefore, in an application for execution of decree for sale on a mortgage there is an omission to produce copies of the khewats as required by rules 187 and 188 of the Oudh Civil Rules it is not such an omission as to make it impossible for the court to issue execution upon it. The fact that the application is subsequently dismissed on account of the decree-holders' default cannot make the application ineffective for saving the limitation if it was a proper application made in accordance with law. *Khalil-ur-Rahman Khan* v. *The Collector of Etah, in charge of the estate of Rao Maharaj Singh* (2), and *Pitambar Jana* v. *Damodar Guchait* (3), relied on.

Mr. *M. P. Srivastava*, for the appellant.

Mr. *P. N. Chaudhry*, for the respondents.

SRIVASTAVA, C. J.:—This is a first execution of decree appeal by the judgment-debtor. The facts of the

*Execution of Decree Appeal No. 69 of 1935, against the order of Pandit Krishna Nand Pandey, Civil Judge of Fyzabad, dated the 1st of June, 1935.

(1) (1916) 47 I.C., 639. (2) (1933) 11 O.W.N., 41.
(3) (1926) I.L.R., 53 Cal., 664.

1937

CHANDRIKA v. KAMLA PRASAD

Srivastava, C.J.

case are that on the 7th of July, 1928, a final decree for sale on the basis of a mortgage was passed against the appellant. The first application for execution was made on the 6th of July, 1931. The prayer made in this application was that the mortgaged property be sold under order XXI, rule 54/66 of the Code of Civil Procedure. The report made by the office on this application was that as it related to mortgaged property therefore proceedings under order XXI, rule 54 were not necessary but the applicant should be required to produce copies of khewats and to state whether the property was ancestral or self-acquired. On the same day, presumably after the above-mentioned report was made by the office, the decree-holders made an application praying for time to produce the necessary copies. Thereupon the court ordered the necessary documents to be produced on the 20th of July. When the case was taken up on the 20th of July, the decree-holders were absent and the application for execution was accordingly dismissed. The second application for sale was made on the 5th of July, 1934. The objection raised by the judgment-debtor against this application was that it was barred by time inasmuch as limitation could not be saved by the previous application for execution as it was not in accordance with law. The court below has disallowed this objection, and hence the present appeal.

It has been contended on behalf of the judgment-debtor-appellant that the application, dated the 6th of July, 1931, was defective as the certified copies of the khewats were not produced as required by order XXI, rule 14 of the Code of Civil Procedure. Reference was also made to order XXI, rule 17, clauses (1) and (2) of the Code of Civil Procedure, and it was argued that as the requirements of rule 14 were not complied with therefore it must be held that the application was not in accordance with law. The opening words of order XXI, rule 14 clearly show that it applies only to cases

1937

CHANDRIKA v. KAMLA PRASAD

Srivastava, C.J.

where an application is made for attachment of any land. It is well-settled that no attachment is required in the case of a decree for sale based on a mortgage. If authority were needed reference may be made to a decision of the late Court of the Judicial Commissoner of Oudh in *Pandit Iqbal Narain* v. *Jaskaran and another* (1) in which it was held for the same reason that order XXI, rule 14 is inapplicable to mortgage decrees. As already stated the report of the office made on the application also was to the same effect. I would also note that the application does not contain any specific prayer for attachment though no doubt such a request might be implied by reason of the mention of order XXI, rule 54. In my opinion the mention of order XXI, rule 54 in the application was quite superfluous. It could not mislead anybody as the office also had reported that order XXI, rule 54 did not apply to the case. In the circumstances I am of opinion that the order requiring the applicant to produce certified copies of the khewats was not one under order XXI, rule 14, but presumably under rules 187 and 188 of the Oudh Civil Rules. Thus my conclusion is that in the present case it is not possible to say that the requirements of rule 14 were not complied with, and rule 17 does not, therefore, apply to the case. No inference can therefore be drawn about the application not being in accordance with law by reason of the non-compliance with the requirements of rules 11 to 14 mentioned in order XXI, rule 17(1) of the Code of Civil Procedure.

Next the question is whether for any other reason it is possible to say that the application in question was not one in accordance with law. In *Pitambar Jana* v. *Damodar Guchait* (2) it was held that the expression "in accordance with law" in Article 182, clause (5) should be taken to mean that the application though defective in some particulars was one upon which execution could lawfully be ordered. If the omissions were such as to make it impossible for the court to issue

(1) (1916) 47 I.C., 639. (2) (1926) I.L.R., 53 Cal., 664.

execution upon it, it should be held that such an application was not in accordance with law. Applying this test to the present case I am of opinion that the omission to produce copies of the khewats as required by rules 187 and 188 of the Oudh Civil Rules was not such an omission as to make it impossible for the court to issue execution upon it. There can be no doubt that the application was made to the proper court for execution. There was no material defect in the terms or contents of the application itself. In fact the only defect suggested so far as the contents of the application go is that the description of the property sought to be sold was not given. I am clearly of opinion that the alleged defect is of no substance as full specification of the property is to be found in the decree for sale. The fact that the application was subsequently dismissed on account of the decree-holders' default could not make the application ineffective for saving the limitation if it was a proper application made in accordance with law. In *Khalil-ur-Rahman Khan Moulvi, Khan Bahadur* v. *The Collector of Etah, in charge of the estate of Rao Maharaj Singh* (1) their Lordships of the Judicial Committee held that in considering whether an earlier application is effective to save limitation under Article 182(5) of the Limitation Act (IX of 1908) it is sufficient to show that an application was made in accordance with law to the proper court for execution or to take some step in aid of execution of the decree. It is the aplication and not the result of the application which is contemplated as being sufficient to save limitation. I am therefore of opinion that the learned Subordinate Judge was right in holding that the application, dated the 6th of July, 1931, was one in accordance with law and was sufficient to save limitation under Article 182, clause (5) of the Indian Limitation Act. —

I would therefore dismiss the appeal with costs.

SMITH, J.:—I have heard the judgment just now dictated by my learned brother the Acting Chief Judge.

(1) (1933) 11 O.W.N., 41.

1937

CHANDRIKA v. KAMLA PRASAD

Smith, J.

The main argument by the learned counsel for the appellant was based upon rules 13 and 14 of order XXI of the Code of Civil Procedure. That argument proceeded on the assumption that an application had been made for the attachment of the property in question, and we were given to understand at first that a definite application for attachment was, in fact, included in the application of the 6th of July, 1931. It turns out, however, that there was no such definite application, and that the only foundation for that argument is the mention of rule 54 of order XXI in the closing part of the application. As has been pointed out by the learned Acting Chief Judge, it was not necessary for any application for attachment to be made in view of the fact that a final decree for sale of the mortgaged property had been passed, and accordingly these rules 13 and 14 of order XXI have no application. It was argued by the learned counsel for the appellant with reference to order XXI, rule 17(2), of the Code of Civil Procedure that until an application which has been ordered to be amended is, in fact, amended under the provisions of sub-rule (1) of that rule, it must be deemed not to be an application in accordance with law. On that point reference was made to the case of *Jayanuddin Khan* v. *Jamiruddin Sarkar* (1). No doubt if an application is in reality defective in any material respect, and is ordered to be amended, and is not, in fact, amended, it cannot be regarded as an application made in accordance with law. In the present case, however, all the material particulars required by order XXI, rule 11(2) were given. As I have said, a small slip crept in in the form of a reference to order XXI, rule 54, and the learned counsel for the appellant ingeniously argues that that slip in itself rendered the application an application not in accordance with law. This, however, is not an argument that in my opinion requires serious consideration. The result is that I agree with my learned brother that the application of the 6th of July,

(1) (1917) 21 C.W.N., 835.

1937

CHANDRIKA v. KAMLA PRASAD

1931, was an application made in accordance with law, and that the subsequent application made on the 5th of July, 1934, was accordingly within time.

It should be added that the learned counsel for the respondents argued further that in any case the application that was made by the decree-holders on the 6th of July, 1931, for time to file certain papers in itself constituted an application to the court to take a step in aid of execution, and that that application itself would operate to save limitation for the subsequent application of the 5th of July, 1934. This argument is supported by a reference to the case of *Haridas Nanabhai Gujrati* v. *Vithaldas Kisandas Gujrati* (1), and would appear to be a correct argument. It is not, however, necessary to decide that point definitely in view of the opinion we have both arrived at as to the validity of the main application of the 6th of July, 1931. I therefore concur in the order proposed, namely that the appeal be dismissed with costs.

Smith, J.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

1937 *January*, 11

MUSAMMAT BARFO (DEFENDANT-APPELLANT) *v.* NARAIN PRASAD AND ANOTHER (PLAINTIFFS-RESPONDENTS)

Hindu Law—Succession—Reversioner's suit for succession—Evidence not only of his being relation but also of absence of nearer heirs, if essential—Second appeal—Raising question of law for first time in appeal—Court's power to allow raising of legal pleas in appeal.

It is incumbent on a plaintiff claiming as a reversioner not only to establish the particular relationship set up by him, but also to give some evidence showing *prima facie* that there are no nearer heirs. *Ganga Dass* v. *Kashi Ram* (2), relied on.

*Second Civil Appeal No. 234 of 1935, against the decree of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 27th of May, 1935, upholding the decree of Pandit Girja Shankar Misra, Additional Civil Judge of Lucknow, dated the 28th of August, 1934.

(1) (1912) I.L.R., 36 Bom., 638. (2) (1928) O.W.N., 932.