APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1938

June 13.

MA TIN *v.* KO BA THET AND ANOTHER.*

Execution—Person entitled to execute decree—Assignee of the decree—Civil Procedure Code, O. 21, r. 16—Execution application—No objection by judgment-debtor—Application infructuous—Objection in later application—Principle of res judicata*—Substitution of assignee in place of decree-holder—No objection by judgment-debtor—Debtor's objections to assignee executing decree.*

Until the necessary application under O. 21, r. 16 of the Civil Procedure Code has been made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree-holder.

Co-operative Town Bank of Padigon v. *S.V.K.V. Chettyar*, I.L.R. 4 Ran. 426; *Harnand* v. *Rup Chand*, I.L.R. 14 Lah. 744; *Jasoda* v. *Kirtibash*, I.L.R. 18 Cal. 639; *Kheltur Mohun* v. *Ishur Chunder*, 11 Suth. W.R. 271; *Sitabai* v. *Gangadhar*, 37 Bom. L.R. 489; *Umrao Singh* v. *Pahlad Singh*, 33 All. L.J. 1179, followed.

Where no objection is taken by a judgment-debtor against an execution application, but such application does not fructify and no effective step in execution is taken, the judgment-debtor is not debarred by the principle of *res judicata* from raising his objection in a later application.

Genda Lal v. *Hazari Lal*, I.L.R. 58 All. 313, followed.

Further, a judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by la

Gopendraprasad v. *Ramkishore*, I.L.R. 60 Cal. 1181, followed.

G. R. Rajagopaul for the appellant. There is no *res judicata* in this case. The first application for execution was not against the appellant, and though notice was issued to her because the decree-holder had assigned his decree to the first respondent there was no need for the appellant to appear. The appellant's case is that the first respondent is a *benamidar* for her

* Special Civil Second Appeal No. 58 of 1938 from the judgment of the District Court of Myaungmya in Civil Appeal No. 32 of 1937.

and her husband and even if she did appear she need not have disputed the assignment. The notice to her was only to show cause why the assignee should not be brought on the record, and not why execution should not be levied against the appellant. Moreover the execution application in C.E. 90 of 1929 did not fructify; it was dismissed for default. There can be no *res judicata* under the circumstances. It was only in the present application for execution that the appellant did really have an opportunity to raise the objection that the appellant is a *benamidar* for her. See *Genda Lal* v. *Hazari Lal* (1); *Bholanath* v. *Prafulla* (2); *Richharam* v. *Pasupati* (3); *Nageshwar* v. *Jai Bahadur Singh* (4). The cases cited by the lower Courts have no application.

Another objection to the present application is that the 1st respondent had assigned his decree to a third party in 1930. The Civil Procedure Code is not concerned with substantive rights, and once a decree-holder transfers his rights to a third party he ceases to have any interest in the decree. One cannot have two judgment creditors entitled to execute a decree against a judgment-debtor. The Indian High Courts however, have consistently taken the view that so long as the assignee does not get his name brought on the record under O. 21 r. 16 of the Civil Procedure Code, the person whose name is on the record is entitled to execute the decree, and the only authority for the proposition advanced above is the *Co-operative Town Bank of Padigon* v. *S.V.K.V. Raman Chettyar* (5) which overruled the decision of a single Judge on the same point (6). See also *Sadagopa* v. *Raghunatha* (7).

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(1) I.L.R. 58 All. 313.
(2) I.L.R. 28 Cal. 122.
(3) I.L.R. 7 Pat. 465.
(4) I.L.R. 11 Pat. 607.
(5) I.L.R. 5 Ran. 595.
(6) I.L.R. 4 Ran. 126.
(7) I.L.R. 33 Mad. 62.

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Hay for the 1st respondent. The decision in the *Co-operative Town Bank*'s case does not support the appellant, and it is not correct to say that the previous decision is overruled though the headnote says so. So far as this particular question is concerned the earlier decision is still good law, and is in a line with the Indian authorities on the point. The later decision only dealt with the rights of the transferee of a decree as against the judgment-creditor, and is no authority for the proposition advanced. The assignee may have his own rights as against the transferor, but so long as the assignee's name is not brought on the record the transferor decree-holder is still entitled to execute the decree. There is a long line of decisions on this point. *Khettur Mohan* v. *Ishur Chunder* (1) ; *Jasoda Deye* v. *Kirtibash* (2) ; *Sitabai* v. *Gangadhar* (3) ; *Harnand* v. *Rupchand* (4) ; *Umrao Singh* v. *Pahlad Singh* (5).

As regards the question of *res judicata* the appellant should not be allowed to plead it after the expiry of 7 or 8 years. Her conduct is fraudulent, because if her case is true, then it is a fraud on O. 21, r. 16. Moreover the 2nd proviso to that rule states that the decree is not executable only against the other judgment debtors, but not against the appellant.

G. R. Rajagopaul in reply. The effect of the 2nd proviso is that once a decree is transferred to one of co-judgment debtors it is wholly extinguished. Mulla, p. 718. One cannot execute a decree against one's self. As regards fraud the 1st respondent is equally a guilty party if the transaction is regarded as fraudulent.

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(1) 11 W.R. 271.
(2) I.L.R. 18 Cal. 639.
(3) 37 Bom. L.R. 489.
(4) I.L.R. 14 Lah. 744.
(5) 33 All. L.J. 1179.

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DUNKLEY, J.—This appeal arises out of execution proceedings. The N.P.L. Chettyar firm obtained a decree in the Subdivisional Court of Wakèma against Maung Ba E and his wife Ma Mya Me, and Maung Sein Hone and his wife Ma Tin. The last named is the present appellant, and Maung Sein Hone is the 2nd respondent. The N.P.L. firm assigned its decree to one Maung Ba Thet, who is the 1st respondent. In execution case No. 90 of 1929 Maung Ba Thet applied for execution against Maung Ba E alone. At the same time he applied, under the first proviso of Order 21, Rule 16, of the Code of Civil Procedure, for notice of the assignment to him to be issued to the original decree-holder, the N.P.L. firm, and all four judgment-debtors, although notice to the judgment-debtors was unnecessary under the first proviso as amended by the Rule Committee of this Court. These notices were duly served, but only the agent of the N.P.L. firm appeared, and he admitted the assignment. The judgment-debtors did not appear. Subsequently the execution application was dismissed for default, having been entirely infructuous. In the following years there were a number of infructuous applications in execution against Maung Ba E alone. In 1933 (C.E. No. 13 of 1933) there was an application against Maung Ba E and Maung Sein Hone, but this was closed, without anything having been done, at the request of the assignee of the decree, Maung Ba Thet. In 1936 (C.E. No. 20 of 1936) there was an application in execution against all four judgment-debtors, but this was closed at the request of Maung Ba Thet without any of the judgment-debtors having appeared. Then was filed the execution application out of which the present appeal arises, namely No. 19 of 1937. It was originally filed against all four judgment-debtors, but was pursued against Maung Sein Hone and Ma Tin only.

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The appellant Ma Tin took two objections to this execution application, namely—

(1) that Maung Ba Thet was merely the *benamidar* of the decree for herself and her husband Maung Sein Hone. She alleged that she and her husband had paid the decretal amount to the original decree-holder, who had transferred the decree at their request to Maung Ba Thet, so that he could execute it against the other two judgment-debtors Maung Ba E and Ma Mya Me although he had no beneficial interest in the decree ;

(2) that Maung Ba Thet had transferred the decree by a deed of assignment to one Maung Po Hnan on 30th April, 1930, and therefore he was from that date debarred from executing the decree.

Dealing with the second point first, the appellant relies entirely on *Co-operative Town Bank of Padigon* v. *S.V.K.V. Raman Chettyar and one* (1), but this case dealt only with the rights of a transferee of a decree as against the judgment-creditor of the original decree-holder, and is no authority for the proposition that from the date of assignment of his decree the assignor decree-holder is precluded from executing the decree. The contrary has been consistently held by all the High Courts, and it is now settled law that, until the necessary application under Order 21, Rule 16, has been made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree holder, *i.e.* the assignor. He may not be able to execute it for his own benefit, but that is beside the point. This was

(1) (1927) I.L.R. 5 Ran. 595.

laid down as long ago as 1869 in *Khettur Mohun Chuttopadhya* v. *Ishur Chunder Surma and others* (1), and this rule has since been followed by all the High Courts. It was followed by this High Court in *Co-operative Town Bank of Padigon* v. *S.V.K.V. Raman Chettyar and one* (2), which was not overruled on this point in the further appeal (3). I propose to mention only four of the numerous cases of other High Courts in which this rule has been followed, namely *Jasoda Deye* v. *Kritibash Das and another* (4), *Sitabai Rambhau Marathe* v. *Gangadhar Dhanram Marwadi* (5), *Harnand Raiphul Chand* v. *Rup Chand Chiranji Lal* (6), and *Umrao Singh* v. *Pahlad Singh* (7). It is common ground that Maung Po Hnan has never made an application, under Order 21, Rule 16, to execute the decree, and therefore there is no substance in the second point.

As regards the first point, both the lower Courts have held that the principle of *res judicata*, as enunciated in section 11 of the Code of Civil Procedure, is applicable, and that because the appellant failed to appear and raise this point when served with notice in execution case No. 90 of 1929 she cannot now be heard to raise it. For their decision, they have relied upon *Taj Singh* v. *Jagan Lal* (8) and *Dwarka Das* v. *Muhammad Ashfaqullah* (9). The learned Subdivisional Judge also referred to the case of *Subramania Ayyar and others* v. *Raja Rajeswara Dorai and another* (10), but that case is hardly an authority for the application of the principle in the circumstances of the present matter. The law on the subject of *res judicata* as applied to execution proceedings has recently been exhaustively considered

(1) 11 Suth. W.R. 271.
(2) (1926) I.L.R. 4 Ran. 426, 428.
(3) (1927) I.L.R. 5 Ran. 595.
(4) (1891) I.L.R. 18 Cal. 639.
(5) 37 Bom. L.R. 489.
(6) (1933) I.L.R. 14 Lah. 744.
(7) 33 All. L.J. 1179.
(8) (1916) I.L.R. 38 All. 289.
(9) (1924) I.L.R. 47 All. 86.
(10) (1916) I.L.R. 40 Mad. 1016.

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by a Full Bench of the Allahabad High Court in *Genda Lal* v. *Hazari Lal* (1). One of the propositions laid down in that case, with which proposition I am, with respect, in entire agreement, is that where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the objection in a later application. Execution case No. 90 of 1929 did not fructify ; it was dismissed for default without any of the judgment-debtors having appeared before the Court, or without any effective step in execution having been taken. Moreover, it was unnecessary for any of them, except Ba E, to be served with notice or to appear. I would also refer to *Gopendraprasad Shukul* v. *Ramkishore Shaha* (2), which is authority for the proposition that the judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law. Hence the principle of *res judicata* has no application.

It is urged that the second proviso to Order 21, Rule 16, does not in terms prevent the *benamidar* transferee from executing the decree against the real transferee, and that to permit the real transferee to plead the true nature of the transaction in bar of execution would be tantamount to permitting her to plead her own fraud. The answer to this argument is that both the *benamidar* and the real transferee are in *pari delictu*, and that, in this case, Maung Ba Thet cannot have an equity to prevent Ma Tin pleading her fraud on the Court to which he himself was equally a party. Moreover, if Ma Tin succeeds in establishing her

(1) (1935) I.L.R. 58 All. 313. (2) (1933) I.L.R. 60 Cal. 1181.

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contention, the decree will become wholly extinguished, and Maung Ba Thet will not be able to execute it against the other judgment-debtors, who were not parties to the fraud.

This appeal is therefore allowed, with costs in favour of the appellant, Ma Tin, against the first respondent, Ba Thet, in all Courts ; advocate's fee in this Court five gold mohurs. The learned Subdivisional Judge is directed to enquire into and come to a decision on the allegations contained in paragraphs 2 and 3 of Ma Tin's written objection of the 9th October, 1937. If the alleged facts of this objection are found in favour of Ma Tin, Ba Thet's application for execution must be dismissed. If Ma Tin is unable to substantiate her allegations, Ba Thet's application for execution should be dealt with in accordance with law.