

ALLAHABAD HIGH COURT

Suraj Bux Singh

Vs.

Badri Prasad

Appln. No. 86 of 1961 and Ex. of Decree Appeals Nos. 1 of 1961 and 5 of 1964. ,
against judgment and decree of Civil J, Lucknow
(R.N. Sharma and G.D. Sahgal, JJ.)

24.03.1961. 23.03.1966

ORDER

R.N. Sharma, J.

1. These three cases raise a similar question of law. Because an important question of law is involved in these Cases they were referred to a larger Bench. Thus they came up for hearing before us.
2. The facts from which Civil Revision No. 86 of 1961 arises are these. A money decree was passed by the Judge, Small Cause Court, Lucknow, in favour of the opposite party, Badri Prasad against the applicant, Suraj Bux Singh on 29-4-1958. On 1-11-1958 an application was made for transfer of the decree to the Munsif's court under Section 59 of the Code of Civil Procedure . The transfer was ordered on 29-11-1958 but a transfer certificate was actually sent to the Munsif's court on 9-12-1958. On 29-2-1960 the decree-holder made an application to the Munsif for execution of the decree by attachment and sale of immovable property. The judgment-debtor filed an objection under Section 47, Code of Civil Procedure, on the ground inter alia that the execution was barred by limitation. The learned Munsif did not consider the question of limitation and passed a short order allowing the objection and directing that the execution case be consigned to records on the ground that the decree was of a Small Cause Court and execution could not proceed against immovable property in view of Section 42 of the Code of Civil Procedure by which he probably meant Section 42 as amended in its application to Uttar Pradesh by the U.P. Civil Laws (Reforms and Amendment) Act, 1954. This plea was not taken in the objections under

Section 47 but the Munsif himself considered this point and held that execution could not proceed against immoveable property. Aggrieved by this order the decree-holder went in appeal. The lower appellate court held that because the decree was passed in the year 1952 i.e., before the amendment of Section 42 of the Code of Civil Procedure . A right had vested in the decree-holder to obtain transfer of his decree to a Munsif's court and to execute it by attachment and sale of immoveable property and this right was saved by Section 3 of the aforesaid Act. The appeal was therefore allowed and the Munsif was directed to restore the execution case and the miscellaneous case relating to the objection under Section 47, and after considering the ground of limitation raised by the judgment-debtor, to proceed with the matter according to law. As against this order the Judgment-debtor has come in revision.

3. In the case giving rise to First Execution of Decree Appeal No. 1 of 1961 a money decree was passed by a Judge, Small Cause Court on 29-10-1963. The decree was transferred to a Civil Judge and the decree-holder applied for execution by attachment and sale of immoveable property. The learned Civil Judge held that the execution was not maintainable and struck it off. The decree-holder has come in appeal against this order.

4. In the third case also which gives rise to Second Execution of Decree Appeal No. 5 of 1964 a money decree was passed by a Judge, Small Cause Court, on 27-8-1953. The decree was transferred to a Munsif and one-fourth share of the judgment-debtor in a house was attached and sold on 14-9-1960. The decree-holder himself purchased the property and the sale was confirmed on 10-11-1960. Possession was delivered to the decree-holder through court on 21-9-1961. After this, on 27-10-1961 the judgment-debtor made an application for restoration of possession on the ground that the sale was a nullity inasmuch as immoveable property could not be attached in execution of a decree of the Small Cause Court. The munsif upheld the objection of the judgment-debtor and set aside the sale holding it as void and inoperative. The decree-holder was directed to redeliver possession of the property to the judgment-debtor. The decree-holder went in appeal but it was dismissed and the judgment of the Munsif was confirmed. Aggrieved by this order of the lower appellate court the decree-holder has come in second appeal.

5. The only question of law involved in these cases is whether under Section 42, Code of Civil Procedure, as amended by the U.P. Civil Laws (Reforms and Amendment)

Act, a decree passed by Small Cause Court cannot be executed by attachment and sale of immoveable property by a regular civil court on its being transferred to such court. Section 42 as it stood prior to its amendment was as follows :

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself".

By Section 3 of the U.P. Civil Laws (Reforms and Amendment) Act, 1954 (hereinafter called the U.P. Act) for the existing Section 42 the following was substituted –

"42. The Court executing a decree sent to it shall have the same power in executing such decree as the court which passed it. All persons disobeying or obstructing the execution of decree shall be punishable by such court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself."

It will be seen that only the first sentence of Section 42 has been substituted by a new sentence and the second and the third sentences remain as they were but they have been formed into one sentence. The main difference between the old section and the new section is that while under the old section the court executing a decree sent to it was to have the same powers in executing such decree as if it had been passed by itself, under the new section such court shall have the same powers in executing such decree as the court which passed it.

6. According to the contention of the learned counsel for the judgment-debtors in these cases the language of the amended section should be interpreted in the narrow sense that the powers of the court executing the decree have been restricted to the same powers as can be exercised by the court which passed the decree. It is contended that because a Small Cause Court could not by virtue of the provisions of order 30 rule 82 and Order 50, rule 1, Code of Civil Procedure, execute the decree by attachment and sale of immoveable property, a transferee court too cannot execute the decree in such

manner. On the contrary the contention of the learned counsel for the decree-holders is that because the decrees in all these three cases were passed before the amendment of Section 42 which came into force on 30-11-1954, the decree-holders have obtained a vested right to execute the decrees by attachment and sale of immoveable property after getting them transferred to a court of regular jurisdiction, i.e. a Munsif or a Civil Judge. According to the decree-holders' counsel, this is not a matter of mere procedure so that it could be affected by the amended legislation but it is a matter of substantive right which could not be taken away without specific provision in the amending Act. In that behalf. According to the decree-holders, their substantive right has been specifically saved by the saving provision contained in Section 3 of the U.P. Act. In Sub-Section (1) of Section 3 it is laid down that any amendment made by this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised.

7. There are two decisions of this Court which were referred to in the referring order of our brother, Gyanendra Kumar, J. and are also relied on by the judgment-debtors' counsel. The case of *Karam Chand v. Gur Dayal*,¹ is a single Judge decision. It was held in that case that the result of the amendment in Section 42 is that a decree of the Small Cause Court cannot be executed against immoveable property at All. In this case the suit was instituted after the commencement of the U.P. Act and so the decree was passed after the amendment. The question of vested right of the decree-holder did not arise in this case at all.

8. In the Division Bench case of *Bhukan Lal v. Ishwar Dayal Singh*,² however, the decree was passed in 1950 i.e. prior to the amendment. Because from the report of the case it was not clear in which year the decree was passed, we sent for the original record and ascertained that the decree was in fact passed in the year 1950. It was held in that case that the amended section makes the power of the transferee court in the matter of a decree coterminous with that of the transferring court, and so if the transferring court did not possess a power in executing a decree, the transferee court would also not have that power qua that decree. However, the question of vested right of the decree-holder was neither raised nor considered. The effect of Section 3 of the U.P. Act was also not considered.

9. The point for determination in the present cases therefore is whether the right of these decree-holders which existed under the old law, of obtaining transfer of the decree to a regular court and executing it through that court by attachment and sale of immovable property, was a vested or substantive right so that it could not be taken away by the U.P. Act and was specifically saved by Section 3 thereof or whether it was a mere procedural matter. So far as I know this matter has not been considered by this Court in any case and it is open to us to consider it.

10. It is true that no person has a vested right in any course of procedure and a change in the law of procedure operates retrospectively. If a change in the law in this case is a change in law relating to vested right, then the U.P. Act cannot be applied retrospectively but if it is treated as a change merely in the lay of procedure, then the amended provision will act retrospectively. The contention of the learned counsel for the judgment-debtors is that execution is only a mode of procedure for realization of decree. He has drawn our attention to the fact that Section 51 of the Code of Civil Procedure appears under the heading "Procedure in Execution". This section lays down that the court may, on the application of the decree-holder, order execution of the decree by delivery of any property specifically decreed, by attachment and sale, or by sale without attachment of any property, by arrest and detention in prison, by appointing a receiver or in such other manner as the nature of the relief granted may require. It is urged by the learned counsel that clause (b) of Section 51 under which a decree-holder can proceed by attachment and sale or by sale without attachment of any property (including immovable property), is only a matter of procedure and that right has been taken away by amendment. According to him it is a procedural right that has been taken away and not a substantive right.

11. I do not agree with this contention of the learned counsel. Section 51 of the Code of Civil Procedure only lays down the different modes in which a decree can be executed or the procedure which can be followed for execution. This section does not deal with the rights of the decree-holder which he possesses for execution of the decree. When a person obtains a decree, he gets the right to realize the dues through the aid of the court in the manner he considers best. When the decrees in these cases were passed, the decree-holders got the vested right to realise the decrees in any manner open to them at that time. They could according to the law then in force obtain satisfaction of their decrees by attachment and sale of immovable property through a court of regular jurisdiction. The law gave them the right to do so and there is nothing

in the U.P. Act which takes away that right. On the other hand, Section 3 saves that right. The right to obtain satisfaction of the decree by attachment and sale of immovable property had been acquired by the decree-holders before the commencement of the U. P. Act and the liability of having their immovable property sold, had been incurred by the judgment-debtors.

12. The amendment in Section 42 of the Code of Civil Procedure may appear as effecting a change in the powers of the executing court but it does not hit the substantive right of the decree-holder by placing a bar against his proceeding against the immovable property of the judgment-debtor. How a decree may be executed may be a question purely of procedure but whether a decree holder can realize the decree by sale of immovable property cannot be said to be a matter of mere procedure. A right to realize the decree money from the immovable property of a judgment-debtor is a substantive right, and cannot be taken away by an amendment unless it specifically provides so and takes away that right.

So far as the rights of decree-holders who had filed suits prior to the coming into force of the U.P. Act are concerned, they remain unaffected by the amendment. When these decree-holders filed suits for recovery of their dues, they knew that they would be able to realize them by executing the decree by attachment and sale of immovable property, and they might not have cared to file the suits if they knew that they would not be, able to realize the decrees from immovable properties and would have to confine their right to realization from the person or movable property of the judgment-debtors. When a person files a money suit against another, he files it for the purpose of realizing his money. When a decree is passed, a judgment-debtor incurs the liability to pay his creditor under the decree. The liability to satisfy the decree attaches both to his person and property. It is thus the substantive right of the decree-holder to realize his decree from the Judgment-debtor by attachment and sale of his property including immovable property. How he has to proceed against the, immovable property is only a mode or manner of proceeding against such property. One of the modes of proceeding against immovable property for the recovery of one's decree money is by attachment and sale through the court which passed the decree if it can do so. Another mode of proceeding is by obtaining transfer of the decree to another court where he may apply for execution of the decree by attachment and sale of the judgment-debtor's immovable property. Thus while the right to recover one's dues on the basis of a decree from the property of the judgment-debtor may be a substantive right, the matter how one has to proceed in order to realise his dues from the property may be

procedural matter. It is this reason that Section 51 of the Code of Civil Procedure has been placed under the heading "Procedure in Execution. The fact that the section falls under this heading does not lead to the conclusion that the recovery of one's decree money from the judgment-debtor by attachment and sale of his immovable property is a matter of procedure only.

13. The right to recover the decretal amount from immovable property is similar to a right of appeal and what has been said of a right of appeal applies to such a right also. In the case of right of appeal, it has been held that it is not a mere matter of procedure but a substantive right and vested right and this vested right of appeal can be taken away by a subsequent enactment only if it so provides expressly or by necessary intendment and not otherwise, vide *G. Veeraya v. Subbiah Choudhary*,³

14. In *Ahidhar Ghose v. Jagabandhu Roy*⁴ the question of proper construction of paragraphs 4(1) and 4(3) of the Indian Independence (Legal Proceedings) Order 1947 arose and it was held that the proper construction of these enactments would be to give them as comprehensive a scope as their language permits. If the Court in India had jurisdiction to execute the decree in question even as regards the Pakistan properties, the decree-holder acquired, once the decree had been passed validly under para 4(1), the right to have the Pakistan properties also sold by the Court in India. This right, conferred by para 4(3), in the circumstances in which and having regard to the purpose for which the said provision was enacted, cannot be said to be a mere procedural right and it would thus survive the repeal of the enactment in question under the General Clauses Act, 1897.

15. It appears to us that the object of the amendment of Section 42 was not to narrow down or restrict, the powers of the transferee court but to enlarge its powers. The object of the legislature in enacting the new provision of Section 42 of the Code of Civil Procedure was to give more powers to the transferee courts which were not possessed by them earlier so that they may be able to decide certain classes of objections relating to execution, discharge or satisfaction of the decree, and to obviate the necessity of referring the parties to the transferring court. The object was not to curtail the powers of the transferee courts. It was not intended that a power which was possessed by the transferee court already under the law should be taken away. What used to happen previously was that an unscrupulous judgment-debtor would file a frivolous objection before the transferee court and the case would be sent back to the

transferring court such tactics would sometimes go on unendingly and the judgment-debtors could delay the execution for long. It was therefore considered necessary that powers should be given to the transferee court so that if the judgment-debtor wants to raise any objection relating to the execution, discharge or satisfaction of the decree, he would have to do so before the transferee court and the transferee court would decide the objection without sending back the execution case to the transferring court. It seems to me that the transferee court, if it happens to be a regular court of a munsif or Civil Judge, has not lost the power to execute the decree of a Small Cause Court by attachment and sale of immovable property in the same manner in which it could execute its own decree. However, for the purposes of these cases, I do not consider it necessary to state my final views on this point. In these cases I am holding that because the decrees were passed prior to the commencement of the U.P. Act, the decree-holders had obtained a vested right which was not taken away by the U.P. Act and it is sufficient for the decision of these cases.

16. It appears that in the case of *Bhukan Lal v. Ishwar Dayal (supra)* the point now raised before us was not considered. It was not decided in that case whether the amendment was retrospective or prospective and whether the right affected by the amendment was a vested right or a mere procedural right. It was not considered specifically whether the amendment could affect retrospectively even the cases which had been instituted earlier than the coming into force of the U.P. Act. The only point that appears to have been considered was with regard to the powers of the transferee court after the amendment. I hold that the amendment does not affect the vested rights of persons who had obtained their decrees before the coming into force of the amending Act, to execute their decrees by attachment and sale of immovable property through a court of regular jurisdiction. The decree-holders in the present cases had a vested and a substantive right to get the decrees transferred to a court of regular jurisdiction and execute them by attachment and sale of immovable property. The execution courts to which the decrees were transferred had thus the right to execute them in this manner.

17. In result I dismiss with cost Revision No. 56 of 1961 and confirm the order of the learned Civil Judge, Lucknow, dated 24-3-1961.

18. Second Execution of Decree Appeal No. 1 of 1961 is allowed with costs. The order of the learned Civil Judge dated 13-5-1960 is set aside and he is directed to

restore the execution case and proceed to execute the decree according to law by attachment and sale of immovable property.

19. Second Execution of Decree Appeal No. 5 of 1964 allowed and the objection of the judgment-debtor under Section 47 of the Code of Civil Procedure is dismissed with costs throughout. The order declaring the sale void and inoperative and directing the decree-holder to redeliver possession of the property purchased by him as the auction sale, is set aside.

Revision dismissed and appeals allowed.

Cases Referred.

1. 1960 All LJ 352: (AIR 1960 All 512)
2. 1963 All LJ 220: (AIR 1963 All 587)
3. AIR 1957 SC 540
4. AIR 1952 Cal 846