

# CALCUTTA HIGH COURT

Pankaj Kumar Pakhira

Vs.

Nanibala Pakhira

Supreme Court Appeal No. 66 of 1951

(H.K. Bose, C.J. and G.K. Mitter, J.)

02.04.1963

## JUDGMENT

### **Bose, C.J.**

1. This is an application for a certificate under Article 133(1) of the Constitution and the relevant provisions of the Code of Civil Procedure, in respect of a decision of a Division Bench of this Court dated the 10th August, 1950 which affirmed the order of the Court below made in an execution proceeding. The facts giving rise to this application are shortly as follows :

2. On 15th June 1949 the respondent Nanibala Pakhira instituted a suit being Title Suit No. 36 of 1949 in the First Court of the Subordinate Judge at Howrah against her husband Jitendra Nath Pakhira (since deceased) for maintenance, declaration of charge and other reliefs. During the pendency of the said suit Jitendra sold some of his properties to the petitioner Pankaj Kumar Pakhira on 9th July 1950 for a sum of Rs. 15,000/- subject to certain conditions imposing pecuniary liabilities. After this sale the petitioner was added as a party defendant No. 5 to the said suit. Subsequently the wife and the husband settled the suit and filed a petition of compromise and a decree was passed, the relevant portion whereof was as follows :

"In the result let the solenama entered into between defendant No. 1 and the plaintiff be recorded excepting the last sentence of paragraph 3 and the 5th paragraph, the suit be decreed on contest with costs against defendant No. 1 and the defendant No. 5 and ex parte against the rest. The plaintiff is held entitled to get Rs. 40/- as maintenance per month and her arrears of maintenance should be decreed to the extent of Rs. 1440/- and the property described in the schedule 'Ka' to the plaint shall remain a charge for the payment of this decretal amount and for future maintenance at the same rate."

3. The petitioner objected to the recording of this compromise but his objection was overruled and an appeal preferred by the petitioner against the said order was dismissed. No appeal was however preferred against the decree that was passed in the said suit. The respondent thereafter made an application for execution of the said decree by attachment and sale of the properties

upon which a charge was created for the maintenance by the said decree and this case was registered as Execution Case No. 6 of 1953 of the Third Court of the Subordinate Judge at Howrah. The attachment included the properties which had been purchased by the petitioner. The petitioner filed an objection to the said execution proceeding inter alia to the effect that the decree for future maintenance was merely a declaratory decree and the only effective decree passed was with regard to arrears of Rs. 1440/- and with regard to costs, and it was contended that the decree-holder could realise by execution of the decree the sum of Rs. 1440/- and costs but she was required to file a suit and get a fresh decree in respect of future maintenance. The learned Subordinate Judge gave effect to this contention and upheld the objection of the petitioner. Thereupon an appeal was taken to this Court by the decree-holder Nanibala and this appeal came up for hearing before a Division Bench of this Court consisting of S.R. Das Gupta and N.K. Sen JJ. and the learned Judges allowed the appeal inter alia observing as follows :

"On a proper consideration of the matter, I cannot but come to the conclusion that effective decree was passed both with regard to Rs. 40/- per month and Rs. 1440/- and the decree with respect to Rs. 40/- per month was not a declaratory decree....."

On a proper consideration of the matter I am of opinion that the view taken by the learned Judge was wrong and the order appealed against should be set aside." In the ordering portion the Division Bench further observed :

"There will, therefore, be an order setting aside the order of the Subordinate Judge dated the 23rd November 1953 and directing the execution to proceed."

4. After the matter went back to the Court below the petitioner filed another application both under Section 47 of the Code of Civil Procedure and under Order 21, Rule 58 of the Code raising the following objections :-

"(1) The decree-holder being the heir and legal representative of the deceased defendant No. 1 (that is the husband of the decree-holder) and the interest of the deceased judgment-debtor having merged by reason of the death of the judgment-debtor, the decree-holder could not proceed with the execution of the decree.

(2) A charge having been created upon the properties by the decree under execution the decree-holder was not entitled to put up the charged properties to sale except by enforcing the said charge in a suit.

(3) The decree-holder having in an application for execution prayed for attachment of the properties on which the charge had been declared must be deemed to have given up the charge."

5. The learned Subordinate Judge held that the application in so far as it claimed relief under Order 21, Rule 58 of the Code was not maintainable. The attachment was not necessary in case of execution of a charge decree and the prayer for attachment though an irregularity, did not vitiate the execution. The learned Subordinate Judge further held that this objection of the petitioner to the execution was the third objection and in none of the previous objections did he

raise any one of the present objections and the failure to take such objections in the earliest objections was a bar to the petitioner taking such objections at the present stage. In other words, the matter must be deemed to be concluded by constructive res judicata. Against that order of the learned Subordinate Judge, the petitioner preferred an appeal to this Court and also obtained a Rule under Section 115 of the Code of Civil Procedure . The appeal was directed against the dismissal of the objection under Section 47 of the Code and the Rule was directed against the rejection of the claim preferred under Order 21, Rule 58 of the Code of Civil Procedure. This appeal and the Rule came up for hearing before a Division Bench of this Court consisting of Banerjee and Amaresh Roy JJ. and the Division Bench by its judgment dated the 10th August 1960 dismissed the said appeal and discharged the Rule. It is against this decision of the Division Bench that the petitioner now intends to prefer an appeal to the Supreme Court.

6. The Division Bench in dealing with the points raised, inter alia held that the judgment delivered by Das Gupta and Sen JJ. goes to show that the objection of the petitioner to the effect that the remedy of the decree-holder under the decree was to file a suit so as to enforce the charge created, was considered and overruled and that being the position it was not open to the judgment-debtor to take that objection over again before the executing Court and the executing Court had rightly refused to consider that contention. With regard to the objection relating to the prayer for attachment, the Division Bench held that it was an irregularity of mere form and did not go to the substance of the matter. With regard to the objection as to merger of the interest of the deceased judgment-debtor in the interest of the decree-holder, the Division Bench held that the decree being one which had been passed also against the defendant No. 5 (the petitioner) the said decree was enforceable against the petitioner and so there was no substance in this objection. In this view of the matter the Division Bench dismissed the appeal with costs and discharged the rule.

7. In paragraph 17 of the petition for certificate under Article 133(1) of the Constitution, the valuation of the subject-matter in dispute in the Court of First instance and on appeal is said to be more than Rs. 20,000/- and therefore the valuation satisfies the requirement of clause (a) of Article 133 (1); and in paragraph 18 of the petition it is stated that the requirement of clause (b) of Article 133 (1) as to valuation is also satisfied in the present case, although it must be pointed out that the valuation of the suit as given in the plaint and the valuation of the appeal as given in the memorandum is much below that figure. No affidavit-in-opposition has, however, been filed on behalf of the respondent and this statement as to valuation in the petition therefore remains uncontradicted.

8. The points which the petitioner intends to urge before the Supreme Court are substantially those which had been urged before the Division Bench consisting of Banerjee and Amaresh Roy JJ. and they are reproduced in some detail in the grounds set out in paragraph 16 of the petition.

9. On behalf of the respondent a preliminary objection has been raised as to the maintainability of the proposed appeal to the Supreme Court on the ground that the decision of the Division Bench against which the petitioner intends to prefer an appeal is not a judgment, decree or final order within the meaning of Article 133(1) of the Constitution. It is submitted that the effect of the decision of the Division Bench is that the execution application is kept alive and it has now to be disposed of by the executing court after giving opportunities of a hearing to the parties concerned and after conclusively determining the rights of the parties with respect to the

execution of the decree. Reliance was placed on a decision of the Supreme Court reported in *Jethanand and Sons v. State of Uttar Pradesh*<sup>1</sup>, where Shah J. in dealing with the expression 'final order' as occurring in Article 133(1) of the Constitution observed as follows :

"An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order the civil proceeding still remains to be tried and the rights in dispute between the parties had to be determined, the order is not a final order within the meaning of Article 133."

Reference was made by the Supreme Court to the decision of the Judicial Committee reported in *Abdul Rahman v. D.K. Cassim and Sons*<sup>2</sup>, It appears to me that this preliminary objection is one of substance and it should be upheld. In a decision of the Patna High Court reported in *Girwar Prosad Singh v. Rameshwar Lal*<sup>3</sup>, it was held by Dawson-Miller C.J. and Courts J. that an order of a High Court holding that a subordinate Court has Jurisdiction to execute a decree and directing it to proceed with the execution is not a final order in respect of which leave may be obtained to appeal to His Majesty in Council. In the decision of the Judicial Committee reported in 60 Ind. App 76 Sir George Lowndes observed :

"The finality must be a finality in relation to the suit. If after the order the suit is still alive in which rights of the parties have still to be determined, no appeal lies against it. The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one. But if the suit is still left alive and is kept to be tried in the ordinary way no finality can attach to the order."

10. It appears to me that these observations although made by the Privy Council in relation to a suit also apply with equal force to a proceeding in execution of a decree. It may be that certain objections in relation to the execution have been disposed of by the decision of the Division Bench, but such decision has not finally disposed of the application for execution and has not finally decided the rights of the parties in relation thereto. In a Full Bench decision of the Lahore High Court reported in (*Barkat Ram v. Bhagawan Singh*<sup>4</sup>, Lek Chand J. after referring to the relevant observations of the Judicial Committee in Abdul Rahman's case 60 Ind App 76 proceeded to observe as follows :

"These remarks were, no doubt, made in a case in which remand order had been passed on appeal from a decree dismissing a suit on a preliminary suit, but the same test would apply to execution proceedings, and as in the present case the execution application is still pending and is a live application, the order cannot be said to be a final order." (at page 145).

11. The learned Judge also pointed out that the decision against which an appeal was intended to be taken to His Majesty in Council was also not a decree within the meaning of Section 2 Clause (ii) of the Code of Civil Procedure read with Section 47 of the Code.

<sup>1</sup> AIR 1961 SC 794

<sup>3</sup> AIR 1919 Pat 383

<sup>2</sup> 60 Ind App. 76

<sup>4</sup> AIR 1943 Lah 140

12. A Division Bench of the East Punjab High Court in the case of *Barkat Ram v. Bhagawan Singh*<sup>5</sup>, has taken the same view. Bhandari J. with whom Ramlal C.J. agreed after referring to the relevant observations of the Judicial Committee in Abdul Rahman's case 60 Ind App 76 expressed himself thus :

"The same test would apply to order in an execution proceeding. If an execution application is still pending and is a live application an interlocutory order passed during the pendency of that application cannot be said to be a final order."

13. In this case before the East Punjab High Court the order in execution held in effect that steps in regard to limitation and jurisdiction could not be taken up at a late stage of the proceedings and that the proclamation of sale as prepared by the District Judge after the case had been remanded by the Division Bench did not require amendment, and it was held that this order did not decide the execution application itself and could not be regarded as final order. It may be noted that the decision before the East Punjab High Court as reported in AIR 1949 East Punjab 222 was in relation to a proceeding which was one in continuation of the proceeding dealt with in the case decided by the Lahore Division Bench in AIR 1943 Lahore 140. In the case before us as already pointed out, although the decision of the Division Bench disposes of certain objections which were raised by the petitioner in relation to execution, it does not finally dispose of the application for execution and the final determination of the rights in relation to execution and the final disposal of the said proceeding is still to be made by the executing Court. It may be further pointed out that a Division Bench of the Assam High Court has taken a somewhat similar view in the case reported in *Sindhuram Chaudhury v. Krishna Dutta*<sup>6</sup>, In this case it has been held that an order remanding an application for execution of a decree for possession to the lower court to be disposed of according to law is not a final order and the fact that the order has decided an important question of limitation is not by itself material. Thadani C.J. after referring to the decision of Harris C.J. in *Rajkumar Chandra v. Midnapore Zemindary Co*<sup>7</sup>, and the cases reported in AIR 1949 East Punjab 222 and AIR 1943 Lahore 140 came to the conclusion that no appeal lay to the Supreme Court under Article 133 of the Constitution from the order of the Division Bench with which they were concerned in that case. For all these reasons it must be held that the preliminary objection is one of substance and the proposed appeal to the Supreme Court is incompetent.

14. With regard to the merits of the appeal our attention was drawn by the learned Advocate for the petitioner to the cases reported in *Hemangini Dasi v. Kumud Chandra Das*<sup>8</sup>, *Gobind Chandra Pal v. Kailash Chandra Pal*<sup>9</sup> (2); *Kashi Chandra v. Priya Nath*<sup>10</sup>, but it is sufficient to point out that these cases are distinguishable from the facts of the present case and therefore they are of no assistance to the petitioner. On behalf of the respondent the learned Advocate has drawn our attention to the case of *Indramoni Dasi v. Surendra Nath*<sup>11</sup>, where in considering the question whether the consent decree for maintenance creating a charge on certain properties mentioned in the schedule to the plaint was executable without recourse to further suit Sir Ashutosh Mookerjee referred to the relevant cases on the point including the Full Bench case of this Court reported in *Ashutosh Banerjee v. Lukhimoni*

<sup>5</sup> AIR 1949 East Punj 222

<sup>7</sup>54 CWN 874 : AIR 1951 Cal 300

<sup>9</sup>25 Cal LJ 354 : AIR 1917 Cal 82

<sup>6</sup> AIR 1951 Ass73

<sup>8</sup> ILR 26 Cal 441

<sup>10</sup>28 Cal WN 550 : AIR 1924 Cal 645

<sup>11</sup>35 Cal LJ 61 : AIR 1922 Cal 35

*Dehya*<sup>12</sup>, and observed that the decree-holder was entitled to put the decree into execution

without recourse to a fresh suit to enforce the charge notwithstanding the provisions of Rules 14 and 15 of Order 34 of the Code of Civil Procedure. It appears to us that this last mentioned decision is more in point and we do not think that the question intended to be raised by the petitioner as to whether a further suit is necessary to enforce the charge in the present case is one which we can pass on to the Supreme Court for further consideration.

15. In view, however, of our finding that the appeal is incompetent this petition must fail. In the result the application is dismissed with costs and the certificate asked for is refused. Hearing fee is assessed at 5 Gold Mohurs.

**Mitter, J.**

16. I agree.

Leave refused.

<sup>12</sup>ILR 19 Cal 139