BOMBAY HIGH COURT

Krishna Govind Patil

Vs

Moolchand Keshavchand Gujar

(John Beaumont, Kt., C.J. Macklin and Sen, JJ.)

06.03.1941

JUDGMENT

John Beaumont, C.J.

1. This is a second appeal from a decision of the District Judge of Belgaum, and has been referred to a full bench, because it raises a question, whether the decision of a bench of this Court in *Raghunath Govind v. Gangaram Yesu* [1] is correct.

2. There was a decree in this case for maintenance, and the decree-holder assigned certain arrears of maintenance under that decree to the present respondent. The present respondent applied to execute the decree under Order XXI, Rules 11 and 16, of the Civil Procedure Code. The answer made by the judgment-debtor was that the arrears of maintenance purported to have been assigned had in fact been paid, and, therefore, there was no effective assignment. The trial Judge held the satisfaction proved and dismissed the darkhast. The learned District Judge, in appeal, held on a legal point that the satisfaction was not proved and directed execution to proceed. In this Court the first point taken is that inasmuch as the alleged payment has not been certified under Order XXI, Rule 2, it is not open to the judgment-debtor to prove such payment, even if in fact it took place.

3. Order XXI, Rule 2, provides in Sub-rule (1) that when a decree is adjusted out of Court, the decree-holder has to certify such adjustment to the Court whose duty it is to execute the decree, and the Court is required to record the same accordingly. Then Sub-Rule (2) enables the judgment-debtor to get payment or adjustment recorded, where the decree-holder fails, to do so. Then Sub-Rule (3) provides that a payment or adjustment, which has not been certified or recorded, shall not be recognised by any Court executing the decree. I apprehend that that rule was passed in the public interest. No doubt, sometimes it operates harshly by preventing an honest debtor, who has paid Off his creditor, from proving the fact; but, on the other hand, it prevents false claims of payment having been made being presented to Courts in execution. The

Legislature having enacted that rule, it is the duty of Courts to give effect to it. Rule 10 provides that where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent under the provisions in the Code to another Court, then to such Court Rule 11 specifies the particulars which have to be given in an application for execution. Then Rule 16 deals with the assignment of a decree and provides, so far as material, that where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Those last words certainly seem to suggest that the assignee will be placed in the same position as the decree-holder, if the Court is satisfied that the assignment is in order. The first proviso to the rule requires notice to be issued to the transferor and the judgment-debtor, and the Court has to hear their objections to the execution of the decree.

4. Now, the view which this Court took in Raghunath Govind v. Gangaram Yesu was that inasmuch as under Rule 16 the application has to be made to the Court which passed the decree, which may not be the Court for the time being executing the decree, because execution of the decree may have been transferred to another Court under the provisions of Sections 38 and 39 of the Code, the Court hearing an application under Rule 16 is not a Court executing the decree within Order XXI, Rule 2, Sub-Rule (3). The Court in effect treated the application under Rule 16 as being an application for leave to execute the decree, and considered that until that leave was given, the Court which passed the decree was not a Court executing the decree, But, with all respect to the learned Judges who decided that case, they have overlooked the fact that an application under Rule 16 is in the express words of the rule an application for execution of the decree, and it is not an application for leave to execute the decree. Form No. 7 in Appendix E, which is the form of notice to be issued under Rule 16, recognises that an application has been made to the Court for execution of the decree on the allegation that the decree has been transferred to the applicant, and then it gives notice to show cause why execution should not be granted, not why leave to execute should not be granted. So that, in my opinion, on the wording of Order XXI, Rule 16, it is clear that the Court to which the application is made, which is the Court which passed the decree, is hearing the application as an executing Court, and is accordingly bound by the prohibition contained in Rule 2(3).

5. Mr. Datar contends that there must always be two applications, one under Rule 16 to get the assignment recognised and a further application under Rule 11 giving the particulars of the methods in which execution is prayed, and that the first application is really not one for execution. No doubt, it is open to the assignee to make two applications as was held by Mr. Justice B.J. *Wadia in Baijnath v. Binraj: In re Jankiprasad*[2] and in a case where there are any complications, or where the decree has been transferred for execution at the instance of the

decree-holder to another Court, that may be a desirable course. But I entertain no doubt that it is not necessary to have two applications. A single application may ask that the decree be executed at the instance of the assignee in the manner specified, complying with the requirements of Rule 11, and that course was in fact adopted in the present case.

6. The decision of this Court in Raghunath v. Gangaram was followed by bench of this Court in *Ganpaya v. Krishnappa*[3] but Mr. Justice Shah, who was the only Judge who had not been a party to the decision in Raghunath v. Gangaram (supra), in following the decision expressed a difficulty in seeing how the assignee of the decree could be in a worse position than the decree-holder. No doubt, the decision has been followed in unreported cases in this Court, but it has not met with the approval of other High Courts. It was dissented from by a full bench of the Madras High Court in *Subra-manyam, v. Ramaswami*[4] where earlier decisions of that Court, which had been relied on by this Court in Raghunath v. Gangaram (supra), were overruled. The decision has also been dissented from by the Allahabad High Court in *Murari Lal v. Raghubir Saran*[5]

7. It is said that on the principle of stare decisis we ought not to overrule the decision, but it is not a decision which enacts any principle of law, or which affects title to property. It seems to me to be a decision which is based on a plain misconstruction of the words of Rule 16, and as it has not been followed in other High Courts, I think it is desirable that this Court should come into line with the rest of the High Courts, and that we should overrule the decision in Ganpaya v. Krishnappa .

8. On that view of the case, it is not necessary to consider the view which the learned District Judge took on the question whether payment was proved, but I must not be taken as doubting the correctness of the view of the law which the learned District Judge took on that part of the case. It is, however, not necessary to deal with that matter.

9. The appeal, therefore, will be dismissed with costs.

Macklin, J.

10. I agree.

Sen, J.

11. I agree.

Cases Referred.

1(1923) I.L.R. 47 Bom. 643, S.C. 25 Bom. L.R. 474
2(1936) 39 Bom. L.R. 540
3(1924) 26 Bom: L.R. 491
4(1932) I.L.R. 55 Mad. 720, F.B

5(1933) I.L.R. 56 All. 694