

RAJASTHAN HIGH COURT

Sohan Lal

Vs.

Rajmal

Ex. Second Appeal No. 59 of 1959

(Jagat Narayan, J.)

24.04.1962

JUDGMENT

Jagat Narayan, J.

1. This is an execution second appeal by Sohan Lal judgment-debtor against an appellate order of the District Judge Partabgarh, confirming an order of the Civil Judge, Chittorgarh, refusing to stay execution proceedings pending in his court under Order 21, Rule 29 Civil Procedure Code.

2. Rajmal, Motilal and Ratanlal respondents-decree-holders obtained a decree against Sohan Lal judgment-debtor-appellant for Rs. 2,252/- from the court of Civil Judge Neemuch in the then State of Madhya Bharat on 15-5-52. The decree-holders got the decree transferred for execution to the court of Civil Judge, Nimbahara from where it was transferred to the court of Civil Judge Chittorgarh on the abolition of the court of Civil Judge, Nimbahera. The mother of Sohan Lal filed an objection purporting to be on behalf of Sohan Lal in the court of Civil Judge, Chittorgarh during execution proceedings objecting to the execution on the ground that the decree obtained against Sohan Lal was a nullity as he was a minor when the decree was passed and no guardian was appointed. This objection was rejected by the executing court as well as by the first appellate Court. An appeal was preferred in the High Court which was dismissed on 3-4-58 on account of some technical defect. A suit was then instituted in the Court of Civil Judge Chittorgarh on behalf of Sohan Lal for a declaration that the decree passed by the Civil Judge Neemuch on 15-5-52 was a nullity. This suit is still pending. During the pendency of this suit Sohan Lal, who has now become, a major even according to his own allegation, filed an application in the suit praying for an

order of temporary injunction restraining the decree-holders from executing their decree. This application was dismissed. He then filed the present application under Order 21, Rule 29 Civil Procedure Code before the executing court for the stay of execution pending decision of the suit between him and the decree-holders. This application was rejected by the execution court on the ground that he had no jurisdiction to stay execution proceedings under Order 21, Rule 29 Civil Procedure Code as the suit pending before it is not against the holder of a decree of the court of Civil Judge Chittorgarh. The judgment-debtor preferred an appeal against this order of the executing court. This appeal was rejected. Against that order the present second appeal has been preferred.

3. A preliminary objection was taken on behalf of the decree-holders that no appeal lies against an order passed under Order 21, Rule 29 Civil Procedure Code Reliance was placed on *Sardar Khan v. Fateh Din*,¹ *Durga Devi v. Hans Raj*,² *V. Raghavayya v. K. Rattamma*³ and *Desikachanar v. Ramachandra*,⁴ There is conflict of opinion on the question whether an appeal lies against an order staying or refusing to stay an execution proceeding. The different views have been classified as follows by Chitale in Note 44 to section 47 Code of Civil Procedure :

"1. The question of stay of execution is clearly a matter relating to the execution of the decree and the decision on such a question is a decree and is therefore appealable.

2. Such a question is one relating to execution but the decision thereon cannot be said to be one on the rights of the parties and consequently cannot amount to a decree and is therefore not appealable.

3. The question relates to execution, but whether an order of stay will amount to a decree depends on the question whether it conclusively determines the rights and liabilities of the parties in regard to the execution of the decree. Thus, an order staying execution on the ground that it is barred permanently or temporarily under a certain special statute will be a decree and appealable as such.

4. The question does not relate to execution at all within the meaning of this section".

4. I am in respectful agreement with the view taken in *S.M. Nagori v. Baburao*,⁵ The question whether an order staying execution proceedings is appealable must be

determined with reference to the terms of sections 2 (2) and 47 Code of Civil Procedure. If the wordings of section 47 are taken in the literal sense they will cover even orders of interlocutory nature that may be passed in execution proceedings which the Legislature could not have intended to be appealable. The order to be appealable must be an order which finally or conclusively determines the question at issue between the parties relating to the execution of a decree. Further it must be a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree and not merely an incidental question as to whether the execution proceedings are to be stayed temporarily or not. I accordingly uphold the preliminary objection. As no appeal lay against the order of the executing court the present second appeal is not maintainable. This second appeal is however treated as a revision application. Order 21 Rule 29 runs as follows :

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree, until the pending suit has been decided".

5. In the present case a suit is pending in the court of Civil Judge Chittorgarh against the holders of a decree of the court of Civil Judge Neemuch which has been transferred for execution to the court of Civil Judge Chittorgarh. Order 21, Rule 29 requires that the suit should be pending in the court which passed the decree, the execution of which is sought to be stayed. That is not the case here. Order 21, Rule 29 is therefore not applicable. This view was taken in the following decisions :

Inayat Beg v. Umrao Beg, ⁶ *Chettyar M.P.L. Firm v. Vanappa Chettyar*, ⁷ *M/s. Khemchand Rajmal v. Rambabu*, ⁸

The judgment-debtor relied on the decision in *Saradakripa Lal v. Comilla Union Bank Ltd.* ⁹ in which the facts were similar. A money decree was passed by the court at Comilla which was transferred for execution to the court at Chittagong. In that court the judgment-debtor filed a suit for setting aside the decree and applied for stay of! execution of the decree which had been transferred from the court at Comilla. The learned Subordinate Judge held that under the terms of Order 21, Rule 29 he was not entitled to stay the execution as the decree had not been passed by him. He relied on the decision in AIR 1930 Allahabad 121 (1). The High Court reversed the decision on the following reasoning :

"Section 37 lays down that the expression 'Court which passed a decree' or words to that effect, shall be deemed to include, where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such, suit. It is urged that, inasmuch as the Comilla Court had transferred the decree for execution to the Court at Chittagong, it ceased to have jurisdiction to execute the decree. In support of this view the case of *Maharaja of Bobbili v. Narasaraju Peda Simhulu*,¹⁰ has been cited, where it was held that, when a decree of a District Court was sent to the Court of a Munsif for execution, the proper Court, in which to apply "for execution or to take some step-in-aid of execution" of the decree is the Court of the Munsif, the original Court having ceased to have jurisdiction. In this view of the case the holder of a decree of such Court under Section 37, Civil Procedure Code will include the Court, to which the decree was transferred. Under Section 42 Civil Procedure Code also 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. The Chittagong Court therefore had powers to stay the execution of the decree, which was transferred to it under Order 21 Rule 29."

6. Even if the executing court ceases to have jurisdiction to execute the decree after it has transferred the execution to another court with all respect I do not see how the transferee court can be regarded as a court which passed the decree within the meaning of section 37 C. P. C., the relevant clause (b) of which runs as follows :

"Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit".

7. The transferee court can only be regarded as the court which passed the decree if on the material date it has jurisdiction to try the suit in which the decree was passed. The court of Civil Judge Chittorgarh admittedly could not try the suit, which was decreed by the Neemuch court, at any time. It cannot therefore be regarded as the court which passed the decree within the meaning of section 37 Civil Procedure Code.

8. I accordingly hold that the transferee court namely the Civil Judge Chittorgarh has no jurisdiction to stay the execution of the decree of the court of Civil Judge Neemuch under Order 21 Rule 29 Civil Procedure Code.

9. In the result I dismiss the appeal filed by the judgment-debtor, treating it as a revision application. In the circumstances of the case, I direct that parties shall bear their own costs of this appeal.

Appeal dismissed.

Cases Referred.

1. AIR 1922 Lah480
2. AIR 1930 Lah 187
3. AIR 1948 Mad 524
4. AIR 1951 Mad 56
5. AIR 1955 Madh Bha 229
6. AIR 1930 All 121
7. AIR 1936 Ran 184
8. AIR 1958 MadPra 131
9. AIR 1934 Cal 4
10. AIR 1916 PC 16