Devi Dayal and ors. Vs. Ram Kumari Devi

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Court : Allahabad

Decided On : Aug-22-1960

Reported in : AIR1961All107

Judge : B.N. Nigam and ;R.A. Misra, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 48

Appeal No. : Second Execution Decree Appeal No. 7 of 1957

Appellant : Devi Dayal and ors.

Respondent : Ram Kumari Devi

Advocate for Def. : S.C. Das and ;Ram Krishna Srivastava, Advs. holding brief, for ;S.C. Das, Adv.

Advocate for Pet/Ap. : M.P. Srivastava, Adv.

Disposition : Appeal allowed

Judgement :

Nigam, J.

1. The facts of this case are clear and have been stated by the learned Single Judge who made the reference to the Bench in his order dated 29-9-1959. They also lie within a short compass. The decree-holders Seth Devi Dayal and others obtained a decree against Rani Ram Kumari Devi for a sum of Rs. 5,000/- and odd payable in half yearly instalments of Rs. 272/12/- on 26th August, 1936. The entire amount was made payable in 20 instalments. Seven instalments were paid and then a default was made in respect of three instalments. Thereupon an execution application was filed on 23-11-1941. This was in respect of the entire decretal amount.

A sum of Rs. 481/-/6 was realised. A second execution application for the entire balance was filed on 10-8-1943. A third was filed on 16-12-1946 and the fourth on 14-9-1949. All these three proved infructuous. A fifth application was filed on 6-5-1950. A sum of Rs. 200/3/- was realised. The sixth application dated 31st May, 1951 realised a sum of Rs. 1087/8/- and the seventh application filed on 15-1-1952 brought a sum of Rs. 1031/4/-. The eighth application, which is the application in question, was filed on 15-12-1953 for the realisation of a sum of Rs. 2437/4/3.

It will he seen that the original decree was passed on 26-8-1936 and that the first execution application was filed on 23-11-1941. Thus counted from the date of the

decree and the date when the first execution application in respect of the whole amount outstanding was filed, the present application for execution would he barred by time under Section 48 of the Code of Civil Procedure if the decree-holders are not permitted to count limitation as and when each of the twenty instalments granted under the decree dated 26th August, 1936 fell due.

2. Before the learned Single Judge both theparties relied on the case of Abdul Latif Khan v. Mt. Sikandar Begum : AIR1953All283 , Neither learned counsel challenged the correctness of that decision. The learned Single Judge was, however, unable to follow how the question of prejudice arose. The learned counsel for the judgment-debtor has, however, today challenged the correctness of the decision. We may in passing mention that the objection of the judgment-debtor as regards limitation was rejected by the first execution court but was allowed by the lower appellate court and it is now the decree-holders who have preferred this present appeal.

3. The contention of the learned counsel for the respondent is that once the decree-holders have elected to execute the whole decree, they cannot change their position and seek to execute the decree in respect of each instalment as it fell due. In support of his contention the learned counsel has relied on Shrinivas v. Chanbasapagowda Basangowda, AIR 1923 Bom 201 (2), Gulabrao Yeshwant v. Nagan Ghelabhai, AIR 1925 Bom 326 and Pandurang Vishuanath v. Mahadeo Vishweshwar, AIR 1931 Bom 263. All these rulings have already been considered in the Division Bench case of : AIR1953All283 (Supra), the correctness o which was not challenged before the learned Single Judge, Before us today the learned counsel for the appellants has relied on Hanmant Bhimrao v. Gururao Swamirao, AIR 1943 Bom 36. This was a case on reference to the learned Chief Justice on difference between the two learned Judges of the Bombay High Court. Then again without giving any reason it was held that the decree-holder could not go back on the option once exercised by him.

4. We have considered this Bombay case as well as the previous decision of this court in : AIR1953All283 (Supra). We respectfully agree with the previous decision of this Court. In the Bombay decision it has been stated that it is not open to the decree-holder to exercise his choice afresh. No reason for his inability to do so has been given. In the Allahabad decision to which a reference has been made in the learned Single Judge's order it was clearly stated that unless the judgment-debtor has been prejudiced, it would be open to the decree-holders to re-elect in the matter. What we understand from the use of the word prejudice is that unless the decree-holder is estopped from changing the position, it is open to him to make a fresh election.

It has not been shown to us that the judgment-debtor has at any time been called upon or has actually done something which she could not have been called upon to do so if the decree-holders had not elected to execute the whole of their decree. The learned counsel for the respondent has not even suggested that the amount realised at any time in execution of this decree was in excess of the instalments that were actually due on the date of the institution of that particular execution application. That being so, it is clear that the decree-holders are not estopped from making a fresh election. The learned counsel has only repeated the argument that once an election has been made, the decree-holder is not entitled to make a freshelection. He has not given us any reason for his views.

5. We respectfully agree with the view taken in the case of Abdul Latif Khan : AIR1953All283 (supra), and we do not consider it necessary to make any reference to

any larger Bench, as was suggested by the learned Single Judge in his referring order.

6. On the facts of the case it is clear thatthe decree-holders were in law entitled to make afresh election. The mere fact that this electionwas not clearly stated in the execution application isonly a clerical mistake and a technical objectionand does not appear to have prejudiced the judgment-debtor in any manner. The argument thatcould have been urged has already been urged.We are, therefore, unable to attach any weight tothis suggestion.

7. No other point has been pressed before us. We accordingly accept this appeal and direct that the judgment-debtor's objection as regards limitation be rejected with costs throughout.