

Privy Council Appeal No. 34 of 1927.

Oudh Appeal No. 7 of 1925.

Kunwar Jang Bahadur - - - - - *Appellant*

v.

The Bank of Upper India, Limited, Lucknow, in liquidation - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 29TH MARCH, 1928.

Present at the Hearing :

VISCOUNT SUMNER.

LORD SINHA.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

This is an appeal from an order of the Court of the Judicial Commissioner of Oudh, which confirmed an order of the Subordinate Judge of Hardoi, dismissing the appellant's application that the proceedings in execution of the respondents' decree against him should be discontinued.

The facts are simple. The respondents obtained a decree absolute for sale on a mortgage against Raja Durga Prasad (since deceased), the father of the appellant, in the Court of the Subordinate Judge of Lucknow. As the property which the decreeholder sought to sell under that decree was situate in the district of Hardoi, the Subordinate Judge of Lucknow, who passed the decree, sent it for execution to the Court of the Subordinate Judge of Hardoi under Section 39 of the Code of Civil Procedure, 1908, and the respondents in due course started an execution proceeding No. 175 of 1916 in the Hardoi Court.

The judgment-debtor then died on the 23rd April, 1920. On the 25th May following the respondents filed a petition in the

Hardoi Court, stating therein the fact of the death of Raja Durga Prasad, and praying that in the place of Raja Durga Prasad (deceased) the name of his eldest son, Kunwar Jang Bahadur, be brought on the record as his representative, and that execution proceedings be taken against the said representative. The Subordinate Judge of Hardoi entertained the application and issued a notice to the appellant. No cause being shown, an order was made on the 4th August, 1920, substituting the appellant in the place of his deceased father upon the record of the execution proceeding.

On the 10th August, 1920, the Subordinate Judge of Hardoi made the following order :—

“ In this case, Kunwar Jang Bahadur's name having been substituted for that of Raja Durga Prasad, the deceased judgment-debtor, an amendment be made in the execution application and the Register, and papers be sent to the Court of the Sale Officer, Hardoi, for sale proceedings.”

During the sale proceedings the appellant made various objections from time to time both in the Court of the Subordinate Judge and of the Sale Officer (the Collector of the District). Amongst others, on the 21st February, 1921, he obtained a postponement of the sale for two months on the allegation that he wanted to effect a private sale of the property, and promised through his pleader not to put forth any objections relating to the proclamation or any other objection on the next date. The sale was postponed as the decree-holder's pleader accepted the terms offered.

A postponement on similar terms was also obtained on the 20th January, 1923.

After the proceedings had been pending for $3\frac{1}{2}$ years, the appellant for the first time put in a petition before the Sale Officer on the 10th April, 1924, that the sale proceedings were illegal and without jurisdiction, inasmuch as the decree-holder did not get the name of the appellant entered in the decree of the Court executing the same, in accordance with the provisions of Section 50 of the Code of Civil Procedure. The Sale Officer referred the matter to the Civil Court, *i.e.*, the Subordinate Judge of the Court of Hardoi, where the same petition was repeated.

On the 22nd April, 1924, the Subordinate Judge rejected the application for further postponement of the sale and to discontinue the execution proceeding.

Against that order there was an appeal to the Court of the Judicial Commissioner, which confirmed the order of the Subordinate Judge, and the present appeal is against the last order.

It is argued that, though the execution proceeding was pending before the Hardoi Court, when the judgment debtor Rajah Durga Prasad died, the application to substitute the appellant in his place as his representative could only be made to the Lucknow Court which passed the decree; and that the Hardoi Court had no jurisdiction to make that order.

Obviously, there are no merits in this appeal. It was not suggested at any stage that the appellant was not the legal representative of the deceased judgment-debtor nor was it denied that by the various applications he made to the Hardoi Court he had acquiesced in its jurisdiction until the last moment when the property was being actually put up for sale.

But it is argued that the order of the 4th August, 1920, substituting the appellant in place of his father was a nullity and that all proceedings subsequent thereto in the Hardoi Court were *coram non iudice* and as such void.

Sec. 50 of the Code of Civil Procedure, 1908, is relied upon in support of the argument that the Lucknow Court alone was competent to make the order for substitution.

There is an apparent divergence of opinion among the different High Courts in India on this question. It has been held by the High Courts of Bombay, Allahabad and Madras that the application for execution in such a case should be made to the Court which passed the decree, and that the Court to which the decree is sent for execution is not competent to entertain the application and make an order of execution against the legal representative. On the other hand it has been held by the High Court of Calcutta that an application for substitution if made in such a case to the Court to which the decree is sent for execution, is nothing more than an irregularity which would be cured by the provisions of Sec. 578 of the Code of 1882.

The question turns upon the construction of Sec. 50 of the Code of Civil Procedure of 1908, Clause (1), which is as follows :—

“Where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.”

Now, the words “which passed it” were not in the corresponding section (*viz.*, Sec. 208) of the Code of Civil Procedure, 1859, but were inserted in Sec. 232 of the Code of 1877 and have been since continued in Sec. 232 of the Code 1882 and Sec. 50 of the Code of 1908.

The question is, was the effect of the introduction of those words to confer an exclusive jurisdiction on the Court which passed the decree in the matter of substitution or merely to lay down a rule of procedure as to which of the two Courts an application for substitution should be made?

In order to decide that question, it is necessary to examine the provisions of the Code as to execution when a decree is transferred. Under clause (C) of Sec. 39 of the Code of 1908, a decree, directing the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal

with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (Sec. 41).

If the judgment-debtor dies, before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived; and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

Looked at from this point of view there does not appear to be any real conflict between the different decisions in India. In the case of *Sham Lal Pal v. Madhu Sudan Sircar* (I.L.R. 22, Cal., 558) the application under Sec. 234 of the Code of 1882 (now Sec. 50) was regarded as mere matter of form, *i.e.*, of procedure, as explained by Banerjee, J., in I.L.R. 27, Cal., 488, at page 493. Similarly in the case of *Swami Nath Ayyar v. Vaidya Nath Sastri* (I.L.R. 28, Mad., 466), when the case came on for final hearing, after the decision of the point referred to the Full Bench, Sir Arnold White, C.J., and Subramania Ayyar, J., held that the irregularity involved in the order for substitution having been made by the Court to which the decree had been sent for execution could not be cured by virtue of Sec. 578 of the then Code "as objection was taken by the appellants to the application being entertained by the Court." In other words, there had been no such waiver as would cure a defect in procedure, though no waiver could confer jurisdiction where none existed.

After consideration of all the circumstances of the case under appeal, their Lordships come to the conclusion that the Hardoi Court had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time by him. He cannot now be heard to object to the exercise of such jurisdiction and it would be to permit a gross abuse of procedure if he was allowed to do so.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council.

KUNWAR JANG BAHADUR

o.

THE BANK OF UPPER INDIA, LIMITED,
LUCKNOW, IN LIQUIDATION.

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