

LETTERS PATENT SIDE.

Before Bhandari, C. J. and Kapur, J.

UJAGAR SINGH.—Appellant

versus

KAHAN SINGH, AND TWO OTHERS —Respondents.

Letters Patent Appeal No. 65 of 1953

Code of Civil Procedure (V of 1908)—Section 48(2),
Order 21 rule 11—Application for execution of movable and
immovable property in general terms—List of movable
property only filed—After the expiry of 12 years applica-
tion made for proceeding against land inherited by the
judgment-debtor whose possession taken round-about
that period—Whether a case of amendment or addition.

1955

May, 4th

U. S. obtained a decree for money against K. S. on the 15th February, 1935. In execution of the decree U. S. obtained mustajri of all the lands of K. S. in part satisfaction of the decree. For the balance U. S. made several applications but realized nothing. On the 11th February, 1947, U. S. made an application in accordance with Order 21, rule 11 C. P. C., and asked for attachment and sale of

(1) A.I.R. 1940 Mad. 905

(2) A.I.R. 1944 Sind. 5

movable and immovable property of K. S., but in the list given only movable property was indicated. On the 8th March, 1951, U.S. made an application that he wanted the execution to proceed against the movable property and 20 bighas of land inherited by K. S. and possession obtained roundabout March, 1951. The question debated before the High Court was whether the application dated the 8th March, 1951 was a fresh application or the continuation of the previous application.

Held, that on the facts of this case the application of the 8th of March, 1951, could not be said to be an application for amendment of the application dated the 11th February, 1947, but was a new application for execution and being a case of addition was hit by Section 48 (2) of the Code.

Sri Raja D. K. Venkata Lingama Nayanin Bahadur and another v. Rajah Inuganti Rajagopala Venkata Narasimha Ravanim Bahadur Varu and others (1), *Ram Rattan and others v. Datar Kaur* (2), *Hayatunnessa Chowdhurani v. Achia Khatun* (3), *Bandhu Singh v. Kayastha Trading Bank* (4), *Deorao Suryabhanji v. Ramchandra Amrutlal Rathi* (5), *Gajanand Shah and others v. Dayanand Thakur* (6) and *Diyakaran Nambudiripad and another v. Koodakur Manakkal Brahmadethan Nambudiripad and another* (7), considered and discussed.

Letters Patent Appeal under Clause 10 of the Letters Patent from the order passed by the Hon'ble Mr. Justice Khosla on the 7th August, 1943 in Execution First Appeal No. 220 of 1952. "Kahan Singh and others, versus Ujagar Singh", reversing the order of *Shri Rajinder Singh, Senior Sub-Judge, Ludhiana and thus dismissing the application of the decree-holder for execution in so far as it relates to the issue of process against the immovable property of the judgment-debtor.*

DALJIT SINGH, for Appellant.

Y. P. GANDHI, for Respondent.

(1) A.I.R. 1947 Mad. 216

(2) A.I.R. 1928 Lah. 808

(3) I.L.R. 50 Cal. 743

(4) I.L.R. 53 All. 419

(5) A.I.R. 1948 Nag. 172

(6) A.I.R. 1943 Patna 127

(7) A.I.R. 1945 Mad. 241

JUDGMENT

KAPUR, J.—This is a decree-holder's appeal against a judgment of Khosla, J., dated the 7th of August, 1953, reversing the order passed by the executing Court and thus dismissing the application for execution filed by the decree-holder.

Kapur, J.

Ujagar Singh obtained a decree against Kahan Singh and others for a sum of Rs 5,250 on the 15th February, 1935. In execution of the decree the decree-holder obtained *Mustajri* of all the lands belonging to the judgment-debtors to begin from the 18th June, 1938, for a sum of Rs. 1,440.

Several applications were made in the intermediate period but nothing more seems to have been realized. On the 11th of February, 1947 the decree-holder made an application for execution in accordance with order 21, rule 11 of the Code of Civil Procedure. In giving the mode of execution the decree-holder in column No. 10 of the application stated "by means of attachment and sale of movable and immovable property." Attached to this application is a list of movable property which the decree-holder wanted to proceed against and this included 200 sheep, 60 goats, 1 *jhoti* and a camel. The execution proceedings went on but nothing could be realized and the executing Court then dismissed the application but on appeal coming to this Court the termination of the proceedings by the executing Court was set aside and the executing Court was directed to proceed in accordance with law.

On the 17th of February, 1951 the Court asked a statement of accounts to be put in and the property from which the decree-holder wanted the decretal amount to be realised also to be indicated.

Ujagar Singh On the 3rd March, 1951 is another order of the
 v. Kahan Singh executing Court in which the decree-holder was
 and two directed to file a *goshwara*. On the 8th of March
 others 1951 the decree-holder made another application
 Kapur, J. in which he gave the account according to which
 Rs. 4,328-2-0 was due to the decree-holder from
 the judgment-debtor. He also stated that he
 wanted the execution to proceed against 200 sheep
 and goats and in para Be he stated as under:—

“Land measuring 20 *bighas kham* has been
 inherited by the judgment-debtors
 on the death of * * * * * The
 Judgment-debtors have now got the
 said property by inheritance”
 and then prayed that execution be proceeded
 against this property.

The question which was raised before
 Khosla, J., was whether this application amounted
 to a fresh application or was a continuation of
 the previous application and, therefore, whether
 it was barred by section 48(2) or not. The facts
 which I have given above show that on the date
 when the last application, which was within time
 was made, that is, on the 11th of February 1947,
 it was a general application that execution be
 levied against movable and immovable property
 but in the list given movable property was indi-
 cated. The application of the 8th of March
 1951 shows that it was roundabout that time that
 judgment-debtors inherited the property and,
 therefore, it was on the 8th of March that the de-
 cree-holder indicated that he wanted to proceed
 against that property also. Khosla, J., has held
 that this application is a new application and is,
 therefore, barred by section 48(2) of the Code of
 Civil Procedure.

The decree-holder submits that the application is not a new application but is a mere amplification or at the most an amendment of the application which was made on the 11th of February, 1947.

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In order to determine this it is necessary to refer to the relevant provisions of the Code of Civil Procedure. Order 21, rule 11, deals with applications which have to be made for the purpose of execution. In sub-rule (ii) of clause (j) of rule 11 the mode in which the assistance of the Court is required is laid down and sub-rule (ii) is as under:—

“By the attachment and sale, or by the sale without attachment, of any property.”

Rule 13 requires that in the application the decree-holder must give the description of the property sufficient to identify the same including boundaries or numbers, as the case may be. Rule 17(1) is strongly relied upon by counsel for the appellant and that rule as applicable to this High Court is at page 1620 of Mulla's Civil Procedure Code, Volume II. It is submitted that it is imperative on the Court, if an application does not give the particulars, to get the particulars required under rules 11 to 14 if that has not been complied with, the Court shall fix a time within which the defect is to be remedied, and if it is not remedied, the Court may dismiss the application. Counsel submits that what has happened in the present case is that the application of the 11th of February 1947 was really amended in accordance with the rules of this Court. But in the present case, the application of the 8th of March 1951 shows that at the time when it was made, the judgment-debtors did not possess the property against

Ujagar Singh which the decree-holder now wishes to proceed.
 v. Kahan Singh The application makes it quite clear by the use of
 and two the word "Ab" (now) that the property came into
 others possession of the judgment-debtors round-about
 Kapur, J. the time when the application was made and,
 therefore, it cannot be said that at the time when
 the decree-holder made the application dated 11th
 February 1947, stating that he wanted to proceed
 against the immovable property, the present pro-
 perty was in contemplation.

It has been held in *Sri Raja D. K. Venkata Lingama Nayanim Bahadur Varu and another v. Rajah Inuganti Rajagopala Venkata Narasimha Ravanim Bahadur Varu and others* (1), that although the Code of Civil Procedure speaks of an application for execution, it is not contemplated that the applicaion should be in general terms or kept pending till the decretal amount is fully realized. In that case, it was also held that every application requiring the Court to proceed against a particular property is a substantive application for execution, and an application for attachment and sale of new property which was included in the decree but not in the previous execution application which was in respect of another property is a fresh application for execution and cannot be treated as one for amending or continuing the prior application, although the prayer in the later application may be worded in that manner. Where no question of limitation arises, it is, of course, immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character has to be examined. In this judgment, Patanjali Sastri and Bell, JJ., held that a decree-holder could not be allowed to amend a previous execution application by including fresh properties more than twelve years after the date of the decree,

(1) A.I.R. 1947 Mad. 216

and that is what has happened in the present case. It cannot be said that the present property which is sought to be proceeded against was even within the contemplation of the decree-holder because the property was not in possession of the judgment debtors and, therefore, had not come into existence *qua* the judgment-debtors. This is the view which has been taken by most of the High Courts in India. In *Ram Rattan and others v. Datar Kaur* (1), Tek Chand, J., held that an application for inclusion of another piece of property is a fresh application and not a continuation of the old one. In *Hayatunnessa Chowdhurani v. Achia Khatun* (2), the same view was taken and the Allahabad High Court in *Bandhu Singh v. Kayastha Trading Bank* (3), held that if a piece of property was not included in an execution application and is sought to be included after the period of limitation has expired, it is a fresh application and cannot be treated as an amendment or amplification of the old application. The same rule was laid down by the Nagpur High Court in *Deorao Suryabhanji v. Ramchandra Amrutlal Rathi* (4), and in *Gajanand Sha and others v. Dayanand Thakur* (5), it was held that if a mis-description is corrected, it may be a continuation of the old application but an addition of item of property is a fresh application and is hit by section 48(2) of the Code of Civil Procedure.

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Counsel, however, relies on an earlier judgment of the Madras High Court in *Diyakaran Nambudiripad and another v. Koodalur Manakkal Brahmadathan Nambudiripad and another* (6), where a Division Bench of that High Court held that there is no option or discretion in the Court

(1) A.I.R. 1928 Lah. 80?
(2) I.L.R. 50 Cal. 743
(3) I.L.R. 53 All. 419
(4) A.I.R. 1948 Nag. 272
(5) A.I.R. 1943 Patna 127
(6) A.I.R. 1945 Mad. 241

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with regard to ascertaining whether the requirements of rules 11 to 14 have been complied with. Where the effect of an execution application is that the immovable properties are also sought to be proceeded against but the application is defective, the Court is bound to return the application for amendment to the petitioner after giving suitable time to enable the defects to be remedied and if such action is taken, the case is one of amendment and not of addition. The law laid down in that case must be confined to the facts of that particular case. The application in that case by the decree-holder was made on the 10th November 1943 seeking to attach the properties of the defendants in which the words "movable and immovable properties" were mentioned and to this were added the following words:—

"The schedule of the remaining properties will be filed after enquiry and ascertainment hereafter. Affidavit also will be filed hereafter."

On the 24th of January, 1944 the decree-holder made an application for amendment adding an item of immovable property in the schedule. By the 4th of January the period of limitation had expired and it was argued in these circumstances that the addition of the immovable property was a fresh application and, therefore, barred under section 48. In those circumstances, the learned Judges relying on a judgment of a learned Single Judge held that the attention of the Court having been drawn to the defective nature of the application and it having allowed the defect to be remedied by means of an amendment, the case was not hit by section 48. Be that as it may, the decision in that case must be confined to the facts of the case which was before the High Court

which is quite different from the present case. Ujagar Singh
 In the case which is now before us, the decree-^{v.} Kahana Singh
 holder did not even know that any immovable and two
 property existed and it was not till the 8th of others
 March, 1951, or roundabout that time that the
 property came into possession of the present
 judgment-debtors and, therefore, it cannot be said
 that this is a case of amendment. I am of the
 opinion that this is a case of addition and is hit
 by section 48(2) of the Code of Civil Procedure.

Kapur, J.

I, therefore, agree with the judgment of
 Khosla, J., and would dismiss this appeal but in
 the circumstances of this case I leave the parties
 to bear their own costs in this Court.

BHANDARI, C.J. I agree.

Bhandari, C. J.