

MANU/BH/0156/1929

**Equivalent Citation:** AIR1929Pat565, (1930) ILR 9 PAT 372, 122Ind. Cas.148

## IN THE HIGH COURT OF PATNA

Decided On: 29.07.1929

Appellants:**Hakeem Syed Mohammad Taqi and Ors.**

**Vs.**

Respondent:**Fateh Bahadur Singh and Ors.**

### **Hon'ble Judges/Coram:**

*Das, Kulwant Sahay and Stewart Macpherson, JJ.*

## JUDGMENT

### **Das, J.**

**1.** I adhere to the opinion which I have expressed in the order of reference. It is contended that, since the legislature has made it quite clear that the provisions as to abatement of suits shall not apply to proceedings in execution of a decree or order, we ought not to have any difficulty in holding that the appeal, arising, as it does, out of an order made in execution proceedings, has not abated, notwithstanding that substitution was not applied to within the time prescribed by law.

**2.** Now, the scheme of the Code is perfectly clear. There is a procedure for suits, a procedure for execution, and a procedure for appeals. There was a controversy at one time on the question as to whether the procedure as laid down in the Code in regard to suits could be applied to execution proceedings. That controversy was set at rest, first, by the intervention of the legislature, and secondly by the decision of the Judicial Committee in *Thakur Prasad v. Fakir Ullah* [1895] 17 All. 106. In dealing with the point, their Lordships of the Judicial Committee said as follows:

But the whole of Chap. 19 of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable.

**3.** Their Lordships were dealing with the Code of 1882; but the position is, if anything, more clear under the present Code. In my judgment, Order 22, Rule 12, does no more than recognize the well-established principle that the procedure provided in the Code in regard to suits does not apply to applications for execution of the decree.

**4.** But then arises the question, what is the meaning of the words, "proceedings in execution of a decree or order," in Order 22, Rule 12 of the Code. For the solution of this question, we have to examine the scheme of the Code. The procedure as to execution is laid down in part 2 and Order 21 of the Code. It will be noticed that appeals from orders in execution proceedings are not dealt with in any of the sections dealing with execution. On the other hand, the procedure as to appeals is laid down in part 7, Order 41, 42, 43, 44 and 45 of the Code. It will be noticed that there is no suggestion any where in these provisions that a distinction exists between appeals in execution proceedings and appeals generally.

**5.** Having regard to the scheme of the Code, I am of opinion that the words "proceedings in execution" in Order 22, Rule 12 of the Code mean proceedings for the enforcement of rights declared by decrees or orders as provided in Chap. 2 and Order 21 of the Code. Section 38 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. It is clear, to my mind, that proceedings in execution are proceedings in the Court which passed the decree or in the Court to which the decree is sent for execution, and relating to the execution, discharge or satisfaction of the decree. An appellate Court may have to consider the propriety of an order made in execution proceedings; but, in doing so, it does not purport to execute the decree; and the proceedings in the appellate Court cannot be described as proceedings in execution.

**6.** It has been argued that, since the procedure as to abatement has no application to execution proceedings, so it ought not to have any application to appeals from orders in execution. There are two answers to the argument. In the first place, the Code is self-contained, in regard to its provisions relating to execution. There is no room for the application of the procedure as to abatement to execution proceedings, since it is clear both from the Code itself and from the provisions of Limitation Act that the legislature contemplated that there might be a succession of applications for execution.

**7.** When a decree-holder dies, the execution proceedings comes to an end; but it is open to the legal representative of the decree-holder to commence fresh execution proceedings against the judgment debtor. So also a decree-holder has the right to proceed against the legal representative of a deceased judgment-debtor in a fresh execution proceeding. But there is no provision for a succession of appeals in execution matters. It has been contended that it is open to a legal representative of a deceased decree-holder to ask for leave to continue the appeal on his behalf. This contention brings me to the second answer which I propose to give to the main argument, and it is this: where the legislature has provided a special procedure for obtaining such leave, it is not open to a litigant to have recourse to another procedure not provided in the Code. Substitution is a method for obtaining, such leave, and it is the only method provided in the Code, so far as suits and appeals are concerned. An examination of Order 22 will make this position perfectly clear. Rules 3, 4 and 8 apply in terms to suits, Rule 11 provides, "in the application of this order to appeals, so far as may be the word "plaintiff" shall be held to include an appellant, the-word "defendant" a respondent, and the word "suit" an "appeal." It is clear, then, that Rules 3, 4 and 8 apply to appeals, not indeed by their own force, but by force of Rule 11. That rule is without qualification and exception and must apply whenever we are dealing with an appeal.

**8.** I have already said, that, in dealing with appeals, the legislature has not drawn a distinction between appeals in execution matters and appeals generally. How is it possible for us, then, to say that Rules 3, 4 and 8 shall not apply to appeals in execution matters, when the legislature has definitely said that they shall? It is argued that Rule 12 puts the intention of the legislature beyond possibility of doubt; but, if there was any foundation for the argument, Rule 11 would have been stated to be subject to the provision of Rule 12. Reading the Code as a whole, it seems to me that there is a procedure for suits, a procedure for execution, and a procedure for appeals; and Rules 3, 4 and 8 apply to suits by their own force and to appeals by force of Rule 11; but they do not apply to proceedings in execution as contemplated by Chap. 2 and Order 21 of the Code. In my judgment, as no distinction has been drawn in the Code between appeals in execution matters and appeals generally, and

as the provision of Rule 11 is without qualification or exception, Rules 3, 4 and 8 apply to appeals in execution matters; and I must answer the reference accordingly.

**Kulwant Sahay, J.**

**9.** The question for decision in this reference is, whether an appeal arising out of an order passed in the course of proceedings in execution of a decree or order abates on the death of the respondent if the appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law.

**10.** The answer to the question depends on the true construction of Order 22, Rules 11 and 12, Civil P.C. Rule 3 and 4 provide the procedure in the case of the death of one of several plaintiffs or of the sole plaintiff, and in case of the death of one of several defendants or of the sole defendant in a suit, and they provide that where within the time limited by law no application is made to bring the legal representative of the deceased plaintiff or the deceased defendant on the record the suit shall abate. Rule 11 provides that in the application of this order to appeals the word 'plaintiff' shall, so far as may be, be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal. It, therefore, follows that in the event of the failure of the appellant to substitute the legal representative of the deceased respondent within the time limited by law, the appeal shall abate as provided in Rule 4. Rule 12, however, then prescribes that nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

**11.** The question is whether an appeal from an order passed in the course of proceedings in execution of a decree or order comes within the mischief of Rule 12, or, in other words, whether the words "proceedings in execution of a decree or order" in Rule 12 refer to proceedings in the original Court, or whether they include proceedings carried in appeal against orders passed in the course of execution proceedings. In my opinion, Rule 11 is controlled by Rule 12, and Rules 3, 4 and 8 do not apply to appeals against orders passed in the course of proceedings in execution of a decree or order. An appeal is merely a continuation of the proceedings in the trial Court, and the limitation imposed by Rule 12 must, in my opinion, apply not only to proceedings in the trial Court but also to the continuation of the same proceedings in the appellate Court.

**12.** It is contended on behalf of the respondents that Rule 11 is general in its terms and, as there is no distinction made in the Code of Civil Procedure between appeals against decrees and appeals against orders passed in the course of execution proceedings, Rule 11 applies to all appeals and, therefore, appeals against orders in execution proceedings come within the provisions of Rule 11. To my mind, this contention is not sound. It is true that no distinction is made in the Code of Civil Procedure between appeals against orders passed in the course of execution proceedings and other appeals; but the effect of Rule 12, which comes immediately after Rule 11, is to exclude the operation of Rule 11 from appeal against orders passed in proceedings relating to execution of a decree or order. It is contended on behalf of the respondents that Rule 12 applies only to proceedings in execution of a decree or order which are specifically dealt with in Part 2 and Order 21, Civil P.C., viz., to proceedings in the Court of first instance, and the reason for that is that, it is always open to the representative of the deceased decree-holder to apply for fresh execution, or for the decree-holder to apply for fresh execution against the representative of the deceased judgment-debtor and, as there can be a succession of

applications for execution either by or against the representatives of a deceased decree-holder or judgment-debtor, therefore the rules relating to abatement of suits do not apply to proceedings in execution, and, as there can be no succession of appeals, the rules relating to abatement must apply to appeals.

**13.** In my opinion, this contention is not sound. It is true that there can be a succession of applications for execution and there can be no succession of appeals; but it is always open to the legal representative of a deceased appellant to apply for leave to prosecute and proceed with the appeal after the death of the appellant and, similarly, it is always open to the appellant to apply to proceed against the legal representative of the deceased respondent in appeal; and the procedure laid down for substitution of the legal representative of the deceased appellant or the deceased respondent in Rules 3 and 4 read with Rule 11 is not exhaustive. Such application can be made at any time within the period of limitation provided by the residuary Article 181, Lim. Act, viz., 3 years from the time when the right to apply accrues.

**14.** That Rule 12 applies to appeals in proceedings relating to execution of decrees has been held in *Mir Khan v. Shrafu* A.I.R. 1923 Lah. 560. In *Baksh Ali Sarkar v. Sarat Chandra Roy* [1918] 46 I.C. 911 the question was directly raised and Woodroffe and Smither, JJ. rejected the application for substitution not on the ground that the appeal had abated but on the ground that it was not a fit case in which the representative of the deceased respondent should have been allowed to be brought on the record. No decided case has been brought to my notice, and I am not aware of any in which it has been held that Rules 3 and 4, Order 22, apply to appeals in proceedings, relating to execution of a decree. If the appeal be a mere continuation of the execution proceedings and to my mind there can be no doubt about it Rule 12, Order 22 is applicable, and Rules 3, 4 and 8 cannot apply to such appeals.

**15.** I have given my earnest consideration to the question raised and I regret I am unable to agree with my learned brother Das, J. in the answer he proposes to give to the question referred to the Full Bench. I would answer the question by saying that Rule 12, Order 22 applies not only to proceedings in execution of a decree or order in the Court of first instance but also to appeals against orders passed in the course of such proceedings and that, therefore, the present appeal has not abated.

**Stewart Macpherson, J.**

**16.** I agree with Kulwant Sahay, J. In my judgment Rule 11 does no more than explain that Order 20 is to apply to appeals, and in what manner, and Rule 12 which follows excepts proceedings in execution of a decree or order at every stage from the application of Rules 3, 4 and 8 as covered by that explanation.

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