

CASE NO.:
Appeal (civil) 3209 of 2002

PETITIONER:
GOVERNMENT OF ORISSA

Vs.

RESPONDENT:
M/S ASHOK TRANSPORT AGENCY & OTHERS

DATE OF JUDGMENT: 30/04/2002

BENCH:
M.B. Shah

JUDGMENT:

Shah, J.

Heard the learned counsel for the parties.

Leave granted.

Short question involved in this matter is whether an ex parte decree passed against a Company which was taken over by the Orissa Ordinance No.8 of 1991 by the State Government can be executed against the State Government even though the Government of Orissa was not brought on record before passing of the decree? Admittedly, the Ordinance taking over the assets of the Charge Chrome Division of the Orissa Mining Corporation Ltd. was promulgated on 24th September, 1991 and the suit filed by the respondents was decreed against the Charge Chrome Division on 12th November 1991 without bringing the State Government on record as party defendant.

Thereafter, the judgment creditor filed an Execution Application on 24th October, 1994 for recovering the amount decreed from the Government of Orissa as well as other respondents. The State Government contended that the decree is not executable against it as it was not brought on record and there is no decree against it. The trial court rejected the objection raised by the appellant on the basis of decision rendered by this Court in State of Orissa v. Klockner and Company and Others [(1996) 8 SCC 377]. Against that judgment and order, the appellant preferred C.R. No. 117 of 1998 before the High Court of Orissa, Cuttack. The Orissa Mining Corporation Limited also filed C.R. No. 64 of 1998 against the said order by contending that decree against it is not executable. The High Court allowed the revision filed by the Orissa Mining Corporation on the ground that Execution Application against it would not survive as no liability accrued against it. However the revision filed by the State Government was dismissed. Hence this appeal.

Mr. Altaf Ahmad, Additional Solicitor General appearing for the appellant submitted that the judgment and decree passed against the defendant Charge Chrome Division of the Orissa Mining Corporation is not binding on the appellant as the appellant was not brought on record as party defendant. After the Ordinance which was promulgated on 24th September, 1991, it was the duty of the plaintiff respondent to bring the appellant on record as party defendant in view

of its taking over the company, if at all plaintiff wanted a decree executable against it. He submitted that in such cases, procedure prescribed under Order XXII Rule 10 of the CPC which enables the plaintiff to continue the suit is required to be followed. It is his contention that it is the choice of the plaintiff to bring the person on record in whose favour an assignment, creation or devolution of any interest during the pendency of the suit has taken place for continuing the suit and if he does not bring them as party defendants, then the decree passed against the original defendant would not be binding and cannot be executed against the person in whom the interest has devolved.

As against this, learned counsel for the respondent submitted that the judgment and order passed by the High Court is in accordance with law and does not call for any interference.

For appreciating the contentions raised by the learned counsel for the parties, we would only refer to relevant part of Rule 10 of Order XXII of the CPC which reads as under:-

"10(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

Order XXII provides the procedure for bringing the legal representatives of parties on record in case of death, marriage or insolvency of parties. It also provides in which cases the proceeding would abate where legal representatives are not brought on record.

As against that, Rule 10 only provides for continuing the suit where there is an assignment, creation or devolution of any interest during the pendency of the suit. It is an enabling provision to the affected party to continue the suit by or against the person to or upon whom such interest has come or devolved. Normally, if the plaintiff's interest has come to or devolved, say in Y, then Y has to approach the Court for enabling him to continue the suit with the leave of the court. This provision also applies at the appellate stage. Further, defendant would not approach the Court by filing an application that leave may be granted to continue the suit against him. It is for the plaintiff to approach the Court when there is assignment, creation or devolution of interest during the pendency of the suit and Court may permit to continue the said suit against the person upon whom such interest has come or devolved. That means, the party who wants to continue the suit or other proceeding has to apply to the Court to grant leave to continue suit or proceedings in such cases. To expect the party in whose favour an assignment, creation or devolution of interest has taken place during the pendency of the suit, to file application for continuing the suit against him, would be totally unreasonable. Such party may not be knowing about such proceedings. May be that, in cases where principle of lis pendente is applicable, such party may apply to the court for grant of leave to continue the proceeding. Similarly, if the decree is passed against the defendant before assignment, creation or devolution of interest, such party with the leave of court can continue the appeal or file such appeal. It is also true that Rule 10 nowhere provides that suit would abate in cases of assignment, creation or devolution of any interest. The apparent reason may be that suit would not abate against the original defendant and Court may pass a decree against such defendant.

The next question would be whether a decree can be executed against a person in whom interest has devolved pending suit, if such person is not brought on record.

Section 47 inter alia provides that all questions arising between parties to the suit in which decree was passed or their representatives and relating to the execution are required to be determined by the Court executing the decree and not by a separate suit. Explanation I provides that who are considered to be parties to the suit. Therefore, whether decree is executable against the appellant is required to be decided in the execution application and not by the separate suit. Sections 50 and 52 deal with cases when the decree could be executed against legal representatives. The said sections read thus:

"50. Legal Representative.(1) 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.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

52. Enforcement of decree against legal representative.(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."

Section 50 therefore only provides that in case where judgment debtor dies before decree has been fully satisfied, the said decree can be executed against the legal representatives of the deceased only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. This Section contemplates a situation where decree has been passed and thereafter judgment-debtor dies before the decree has been fully satisfied. But it does not provide that a decree passed against a person who is not brought on record in a pending suit can be executed against him. No provision is made that in case of assignment, creation or devolution of interest in a pending suit, decree can be executed against the legal representatives without bringing them on record as party defendants. As against this, Section 52 provides for a situation where a decree is passed against the legal representative of a deceased person. In such cases, the legal representative is a judgment debtor. If the decree is for payment of money out of the property of the deceased, the section permits the decree to be executed against the property of the deceased in the hands of the legal representatives and the legal representatives are liable to satisfy the decree only out of the assets of the deceased in their hands. However, there is no provision which contemplates a situation where a decree can be executed against the legal representative who is not brought on record in case of death of the original defendant or in case where there is assignment, creation or

devolution of an interest during the pendency of the suit by the defendant.

The High Court relied upon the decision of this Court in Klockner & Co.'s case (supra), wherein this Court considered the take-over Ordinance, namely, Ordinance No.8 of 1991. In that case, after the merger of Chrome Division with the State Government, the dispute arose on the basis of previous contract between the Charge Chrome Division and the respondent-Klockner and Co. When the State of Orissa received notice of the arbitration proceedings, it filed suit for a declaration that it was not the successor-in-interest. It also prayed for permanent injunction against the Company from prosecuting the arbitration proceedings. In that context, the Court considered clauses 4, 5, 6, 7 and 9 of the takeover Ordinance. After considering the aforesaid clauses, the Court held that the State of Orissa is a successor-in-interest of the Charge Chrome Division of Orissa Mining Corporation and, therefore, the contention of the State that it has nothing to do with the contract entered into between Klockner and Co. and OMC in respect of which the former has initiated arbitration proceedings invoking Section 3 of the Foreign Awards Act was not acceptable. This decision nowhere deals with the contention which is raised in these proceedings. The Court held that proceedings on the basis of the contract executed by the transferee company could be implemented in view of various clauses of take over Ordinance. There is no dispute in the present proceedings that State Government is successor-in-interest of Charge Chrome Division.

For our purpose, relevant clause 1(5) of the Orissa Mining Corporation (Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991 is as under: -

"1(5) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any property; which has vested in the State Government under Section 3 or instituted or preferred by or against the Charge Chrome Division is pending, the same shall not abate, be discontinued or be, in any way prejudicially affected by reason of the vesting and transfer of the Charge Chrome Division of the Company but the suit, appeal or other proceeding may be continued or enforced by or against the State Government or, where the Charge Chrome Division of the Company is vested under Section 6 in any other company, by or against the other company."

The aforesaid Sub-clause (5) is in consonance with the provisions of Order XXII Rule 10 and other provisions of the CPC. It inter alia provides that if on the appointed day, any suit in relation to any property which is vested in the State Government under section 3 is pending, the same shall not abate or be discontinued or be in any way prejudicially affected by reason of the vesting and transfer of the Charge Chrome Division of the Company but the suit may be continued against the State Government. This would impliedly mean that for continuing the suit against the State Government, the State Government is required to be brought on record. Not that, automatically the State Government is deemed to be party to the suit or proceedings. For continuing the suit, the plaintiff has to file application as contemplated under Order XXII Rule 10 for bringing the State Government on record as a successor-in-interest.

The High Court has also relied upon the decision of this Court in Bhagwan Dass Chopra v. United Bank of India and others [1987 (Supp) SCC 536] for holding that the appellant would become a judgment debtor and the decree passed against the Chrome Division would be binding on the appellant and the decree could be executed against it. In that case, the Court was dealing with the Industrial

Disputes Act, 1947 and held that there is no express provision corresponding to Order XXII Rule 10 of CPC under the Industrial Disputes Act. However, it was necessary to evolve a reasonable procedure to deal with cases where a devolution of interest takes place during the pendency of a proceeding arising under the Industrial Disputes Act. In that context, the Court held as under: -

"It follows that subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and be binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule 10 of Order 22 of the Code of Civil Procedure, 1908 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation."

The aforesaid observations would mean that in such cases it was open to the respondent (plaintiff in the original suit) to implead State Government as party defendant as successor-in-interest, but if there is failure to do so on the part of the plaintiff, it would not mean that the decree against the original defendant whose interest has already devolved in the State Government would be binding to it. It is true that whatever steps have already taken place in pending suit will continue to operate against and be binding on the transferee and in the present case on the State of Orissa. But as stated above, ex parte decree was not passed prior to taking over by the State Government, therefore, such decree would not be binding on the State Government as it was not impleaded in the suit and the plaintiff has not taken steps for continuing the suit against it.

This Court in Dhurandhar Prasad Singh v. Jai Prakash University and Others [(2001) 6 SCC 534] while dealing with the provisions of Rule 10 of Order XXII inter alia observed as under (page 549 para 26): -

"It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained."

This would clearly mean that for continuance of the suit, the person who is affected has to file an application and normally such application is to be filed by the plaintiff. The Court has further observed as under: -

"As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due

diligence could have been known by him."

In the present case, plaintiff has not discharged such duty to apply for leave for bringing the State of Orissa on record as party defendant. Learned counsel for the respondent, however, submitted that as the State Government has not taken steps, such as, (a) moved an application under Order IX Rule 13 CPC for setting aside the ex parte decree, (b) preferred an appeal with the leave of the Court against the original judgment and decree and (c) filed an independent suit for declaration that the ex parte judgment and decree was not binding on the State Government, the decree passed against the original defendant is binding on it as it is a successor-in-interest of the original defendant. In our view, the aforesaid submission cannot be accepted. Even if it was open to the appellant to file application for setting aside the ex parte decree or to prefer an appeal, that would not mean that the ex parte decree which is passed against the original defendant is binding on it as the decree was passed after devolution of interest and not prior to it.

Learned counsel for the respondents contended that successors are bound by the result of the litigation even if such successors are not brought on record and in support of his contention he relied upon the decision rendered by the High Court of Calcutta in Rai Charan Mandal v. Biswanath Mandal [AIR 1915 Calcutta 103]. In our view, this submission is totally misconceived. In the said case, the Court dealt with a situation where interest of the plaintiff devolved on the successors and the successors did not file any application for leave to continue the suit. The Court held that the plaintiff is entitled to continue the suit and his successors will be bound by the result of the litigation. This would not mean that if plaintiff fails to bring the successors of defendant on record, the decree would be binding to the successors.

The aforesaid decision was followed by Patna High Court in Mahanth Harihar Gir v. Karu Lal and Others [AIR 1935 Patna 488]. In that case, after passing of the preliminary decree in the mortgage suit against the defendant-mortgagee and before the final decree, one of the mortgagee had relinquished his right of mahanthship in favour of a third party, appellants of that case, without informing the Court or the decree holder, and the Court held that in such cases Order XXII Rule 10 CPC would be applicable and it was for the defendant or the assignee to file an application for bringing him on record. It is true that after passing of the decree, it was for the defendant or the assignee to take appropriate steps for setting aside the decree but that would not mean that prior to the decree assignee or the person on whom the property has devolved has to apply.

In view of the aforesaid discussion, the impugned order passed by the High Court in CR No.117 of 1998 confirming the order passed by the trial Court in Execution Case No.50 of 1994 rejecting the objection application filed by the appellant, is set aside. It is held that the decree passed against the original defendant Charge Chrome Division is not binding to the appellant and, therefore, it is inexecutable against the appellant.

The appeal is allowed accordingly with no order as to costs.

J.
(M.B. SHAH)

April 30, 2002.

In view of the difference of opinion, the matter may be listed before a larger Bench. The registry is directed to place the matter before Hon'ble the Chief Justice of India for appropriate directions.

J.
(M.B. SHAH)

..J.
(B.N. Agrawal)

New Delhi;
April 30, 2002.

JUDIS