

2021 Scej 1133

Supreme Court of India

Before: JUSTICE SANJAY KISHAN KAUL and JUSTICE B.R. GAVAI

VAISHNO DEVI CONSTRUCTION Rep. Thr. Sole Proprietor (D) Thr. LRs & Anr v. UNION OF INDIA & ORS

VAISHNO DEVI CONSTRUCTION Rep. Thr. Sole Proprietor (d) Thr. Lrs & Anr

versus

UNION OF INDIA & Ors

CIVIL APPEAL NO.18278 OF 2017 With C.A. No.18279/2017

21.10.2021

CPC O. 21 R. 16 - Assignment pre the decree and an assignment post the decree - Whether a person who does not have a written assignment of the decree, but who has succeeded to a decree holders' right, is entitled to such decree under Section 146 of the CPC - Law Commission recommended amending Order XXI Rule 16 to clarify that it does not affect the provisions of Section 146 and that a transferee of rights in the subject matter of the suit can obtain execution of a decree without separate assignment of the decree - The objective appears to be to not have multifarious proceedings to determine the issue of assignment, but to determine the issue of assignment in the execution proceedings itself - The objective of amending Order XXI Rule 16 of the CPC by adding the Explanation was to avoid separate suit proceedings being filed therefrom and to that extent removing the distinction between an assignment pre the decree and an assignment post the decree - Thus, what has been discussed even in the judgment in *Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd. 1955 PLRonline 0001*, as a view based on the equitable principle was sought to be incorporated in Order XXI Rule 16 of the CPC by adding the Explanation, something which had not been done earlier - Once the legislative intent is clear, and the law is amended, then the earlier position of law cannot be said to prevail post the amendment and it is not in doubt that the present case is one post the amendment. [Para 25, 26, 27] [#2021 Scej 1133](#)

JUDGMENT

Sanjay Kishan Kaul, J. - The contours of the legal controversy which arise for consideration in the present appeal emanate from the plea of the appellants claim based as an assignee of the decree holder in terms of Order XXI Rule 16 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') in their application filed under

Section 47 of the CPC by taking recourse to Section 146 of the CPC read with Section 2(1)(g) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act'). The significant aspect is the addition of the explanation to Order XXI Rule 16 of the CPC, which was added pursuant to the recommendation made by the Law Commission of India in its 54th Report on the CPC in 1973, which in turn was a sequitur to the conflicting views of the High Courts on the matter in issue.

The facts:

2. In order to appreciate the controversy, relevant facts are being set out. On 29.12.1995, a [contract](#) was awarded by the Union of India to one Surendra Nath Kanungo @ S.N. Kanungo for executing the work of extension of runway at Port Blair Airport (hereinafter referred to as 'Works'). Shri S.N. Kanungo passed away in the year 2012 and is represented by legal heirs in the present proceedings as respondent Nos.2 to 7, while respondent No.1 is the contract awarding authority.

3. Shri S.N. Kanungo entered into an arrangement whereby the Works were assigned to Vaishno Devi Constructions, a sole proprietorship concern of Prabhat Bhushan Kanungo (appellant No.1 in CA No. 18278 of 2017). It appears that appellant No.2, Surya Prakash Kanungo was also taking care of the work. A different part of the work was assigned to BeeDee Builders, a sole proprietorship of Swapna Das and, once again, apparently her husband Bijoy Kumar Das was playing a role in executing the Works as the said two parties are impleaded as appellant Nos.1 and 2 in CA No. 18279/2017. Shri S.N. Kanungo was a special class contractor and it appears from the case set up by the appellants that they were to act on behalf of S.N. Kanungo to carry out the Works for which they were to be paid monthly remuneration and hiring charges of certain equipment that was to be provided by the appellants herein. The appellants claim to have supervised the work of extension of runway on behalf of Shri S.N. Kanungo but apparently some part of their dues were not paid. Shri S.N. Kanungo is stated to have executed an Assignment Deed along with a cheque in favour of Mr. Prabhat Bhushan Kanungo for Rs.1 crore as security on 27.10.1999 to secure payment of such dues. The claims were in respect of both the appellants.

4. It appears that some disputes arose between Shri S.N. Kanungo and respondent No.1 which were referred to arbitration and an award was passed in his favour on 22.03.1999. Shri S.N. Kanungo received the money under the award on 28.01.2001.

5. Another reference was made in respect of another set of non-payments claimed by Shri S.N. Kanungo from respondent No.1. The dispute was referred to the sole arbitration of Shri T.K. Mishra, who passed an award in favour of S.N. Kanungo on 31.10.2006. Respondent No.1 filed proceedings before the High Court of Calcutta to set aside the award under Section 34 of the A&C Act. The proceedings succeeded in terms of an order of the learned single Judge of the High Court dated 28.09.2007. On appeal being preferred before the Division Bench of the High Court, the judgment of the learned single Judge was reversed by a judgment dated 03.03.2008 and the appeal was allowed.

6. Shri S.N. Kanungo, in order to recover the amount, filed an execution case before the

District Judge, Port Blair, being Other Execution Case No.01/2008. During the pendency of the execution proceedings, respondent No.1 filed an SLP in the Supreme Court, being SLP(C) No.21507/2008, challenging the judgment of the Division Bench dated 03.03.2008 and seeking stay of the execution proceedings. Notice was issued and stay of execution proceedings was granted in his favour. During the pendency of the SLP, Shri S.N. Kanungo passed away in 2012 and was substituted by his legal heirs in both the SLP and the execution proceedings. The Supreme Court ultimately dismissed the SLP vide order dated 19.01.2016 making only an alteration of the rate of interest while observing that the interest awarded was on the higher side and, therefore modifying it to 8% (simple interest) from the date of the bill.

7. It is at that stage that the appellants in the two appeals before us came into the proceedings by filing objections in the form of an application under Section 47 read with Order 22 Rules 1&2 of the CPC read with Sections 2(1)(g) and 36 of the A&C Act.

8. The claims made by the appellants were on the basis of an assignment made by Shri S.N. Kanungo and, thus, sought to keep any order for release of the amount in abeyance in full or in part to protect their interests. It appears that the prayer for interim relief did not succeed as the applications were dismissed on 08.04.2016. Ultimately on 26.12.2016, both sets of objections claiming a right in the decretal amount were also rejected by the executing court on the basis that the Assignment Deed and cheque had not been proved in those proceedings to establish the fact of assignment. It may, however, be noted that there was no trial in this matter before the executing court.

9. The aforesaid order was then sought to be assailed before the Calcutta High Court by filing a civil revision petition which was dismissed vide impugned judgment dated 13.02.2017. On the SLP being preferred, notice was issued on 17.04.2017 and a direction to maintain status quo was also simultaneously issued pending disposal of the matter. Since the dispute between the two sets of private parties would cause liability of interest on respondent No.1, in terms of order dated 06.03.2018, the request of respondent No.1 to deposit the decretal amount in the executing court was accepted. One would presuppose that this amount would be kept in an interest-bearing deposit.

Appellants' Submissions:

10. Learned counsel for the appellants sought to contend that the appellants were the authorised assigned representatives of Shri S.N. Kanungo. They relied on the amended provisions contained in Order 21 Rule 16 of the CPC in their application under Section 47 of the CPC by taking recourse to Section 146 of the CPC read with Section 2(1)(g) of the A&C Act, claiming that Shri S.N. Kanungo voluntarily executed an assignment deed on 27.10.1999, which is a document in writing, while simultaneously issuing a cheque as security.

11. Order XXI of the CPC is titled as "Execution of Decrees and Orders". Rule 16 of Order XXI deals with "application for execution by transferee of decree" and reads as under:

"Order XXI

Execution of Decrees and Orders

.....

16. Application for execution by transferee of decree.—Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

[Explanation. —Nothing in this rule shall affect the provisions of section 146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.]”

12. It may be observed that the Explanation was inserted by Act 104 of 1976 (hereinafter referred to as the ‘Code of Civil Procedure (Amendment) Act, 1976’) w.e.f. 01.02.1977 and has a material bearing in the conspectus of the respective arguments. The recourse to Section 47 of the CPC in the application arises from this provision specifying the questions to be determined by the court executing a decree, and it reads as under:

“47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

[***]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”

13. Section 146 of the CPC deals with the “Proceedings by or against representatives” and reads as under:

“146. Proceedings by or against representatives.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him.”

14. It was, thus, the case of the appellants that their claim raised a question to be determined by an executing court within the parameters of Section 47 of the CPC in the context of the appellants claiming rights under the assignment of Shri S.N. Kanungo (as per Section 146 of the CPC). Section 2(1)(g) of the A&C Act being part of the definition clause reads as under:

“2. Definitions. —

(1) In this Part, unless the context otherwise requires,—

.....

(g) “legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;”

15. The provisions of the CPC were thus sought to be made applicable to these proceedings for execution of an award which had culminated in a decree in the capacity of an assignee/representative to claim from Shri S.N. Kanungo on account of the assignment.

16. In the conspectus of the aforesaid dispute, the common case is that the judgment of this Court in **Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.** 1955 PLRonline 0001 , AIR 1955 SC 376 is of utmost significance. This is so as the failure of the appellants to succeed before the courts below is predicated on the reasoning that this judgment of the Supreme Court covers the case against the appellants. A specific reliance was placed on para 26, as per which Order XXI Rule 16 contemplates the actual transfer of the decree by an assignment in writing executed “after the decree is passed”. Thus, while a transfer of or an agreement to transfer a decree that may be passed in the future may, in equity, entitle the intending transferee to claim the beneficial interest in the decree after it is passed, such equitable transfer does not relate back to the prior agreement and does not render the transferee a transferee of the decree by an assignment in writing within the meaning of Order XXI Rule 16 of the CPC.

17. Learned counsel for the appellants sought to invite our attention to certain other

paragraphs in support of the proposition they seek to advance, more specifically paras 52, 54, 56 and 59. Earlier judicial precedent of the Bombay High Court and the Calcutta High Court were referred to for the proposition that Order XXI Rule 16 was not intended to apply to cases where serious contest arose with respect to the rights of persons to an equitable interest in a decree. Two views were mentioned, i.e., the strict view about the requirement of existence of a decree; and the other view based on equity, when an agreement has been entered into in writing albeit prior to the decree which may be optional for the courts depending on the extent of investigation required to arrive at a conclusion. *Prabhashinee Debi v. Rasiklal Banerji* 1931 ILR 59 Cal 297. This is followed up by a discussion in para 53 of the judgment on the scope of Order XXI Rule 16 of the CPC. The SC opined that until a person applying for execution establishes his title as the transferee of a decree, he cannot claim the benefit of that provision. Such assignment can be in writing or by operation of law. In this behalf Section 5 of the Transfer of Property Act, 1882 defines “transfer of property” as an act by which the transferor conveys property in present or in future to the transferee or transferees. In that context it was observed that a decree which is the subject matter of transfer must be in existence as on the date of the transfer. The words “in present or in future” qualify the word “conveys” and not the word “property” in Section 5 and would, thus, not operate to a decree which would come into existence in the future. Such a decree could not be said to be transferred by an assignment in writing and the matter resting merely in a contract to be performed in the future which may be specifically enforced as soon as the decree was passed would be no transfer automatically in favour of the transferee of the decree when passed. The discussion ends with the opinion that any warrant for importing this equitable principle while construing the statutory provision enacted under Order XXI Rule 16 of the CPC would not be appropriate as it does not prescribe any mode in which such an assignment in writing has to be executed in order to effectuate a transfer of a decree.

18. The Supreme Court noticed that the High Court of Calcutta in **Purna Chandra Bhowmick v. Barna Kumari Devi** AIR 1939 Cal 715 had applied the equitable principle and held that the plaintiff in whose favour the defendant had executed a mortgage bond assigning by way of security the decree that would be passed in a suit instituted against a third party for recovery of money due on unpaid bills for work done, was entitled to a declaration that he was an assignee of the decree passed in favour of the defendant and as such, was entitled to realise the decretal debt either amicably or by execution. The high court further held that there could be no objection to decide a question involving investigation of complicated facts or difficult questions of law in execution proceedings, as Section 47 of the CPC authorised the Court executing the decree to decide all questions arising therein and relating to execution of the decree, as it facilitates adjudication and obviates the necessity of filing a separate suit for determination of the same.

19. A distinction was made in respect of transfer of an actionable claim within the meaning of Section 3 of the Transfer of Property Act, 1882. In cases of transfer of book debt or property coming within the definition of actionable claim, the same necessarily involved transfer of a transferor’s right in a decree which may be passed in his favour in a pending litigation and the moment a decree is passed in his favour by the court of law, that decree is automatically transferred in favour of the transferee by virtue of the assignment in

writing already executed by the transferor. The book debt does not lose its character of a debt by its being merged in the decree and without anything more, the transferee is entitled to the benefit of the decree passed by the court in favour of the transferor. The transferee of an actionable claim would, thus, step into the shoes of the transferor and claim to be transferee of the decree by virtue of the assignment in writing executed by the transferor in his favour. The transferee could, therefore, claim to execute the decree under Order XXI Rule 16 of the CPC.

20. In the conspectus of the discussion what was submitted by learned counsel for the appellant was that the amendments made to the CPC vide the Code of Civil Procedure (Amendment) Act, 1976 are of significance as the judgment is pre that amendment. Of course, this was an alternative plea to the plea based on a claim of an assignment deed being an actionable claim.

Respondents' Submissions:

21. The respondents, on the other hand, disputed the right of the appellants and claimed that the Assignment Deed itself is a disputed document which had not seen the light of the day for 17 years till 2016, and did not find a mention in the appellants' legal notices. The appellants could have taken recourse to the Assignment Deed when an award was delivered in favour of late Shri Surendra Nath Kanungo on 22.03.1999. The cheque given as a security could have been encashed when the awarded money was paid to Shri S. N. Kanungo in 2001. The appellants took no steps in pursuance of that award but have raised the issue only at the stage when the second award had been made in 2006. Notably, the second award was confirmed by the Supreme Court as well. The appellants were not the legal representatives of Shri S.N. Kanungo, but at best that was an independent claim that could be adjudicated in appropriate civil proceedings. The decree not being in existence, the respondent claimed they were fully covered by the judgment in **Jugalkishore Saraf** (supra) and that the amendments to Order XXI Rule 16 would not change the position of law as laid down therein.

22. It was pleaded that the appellants were amongst such persons who were engaged by Shri S.N. Kanungo and had been paid their dues. There was no amount outstanding and nothing was owed to them. The Assignment Deed and the cheque dated 27.10.1999 were fraudulent documents and the letter head and the signed cheque of Shri S.N. Kanungo had been misused.

Conclusion:

23. On analysis of the submissions there is little doubt that the impugned judgments would have been completely in accordance with law if the amendments were not made in 1976 and would have been fully covered by the judgment in **Jugalkishore Saraf** (supra). Thus, the only aspect which we have to consider is whether that amendment made any difference to the legal position as enunciated in the said judgment.

24. It is an admitted position that the explanation was added to Order XXI Rule 16 which did not exist earlier, pursuant to the recommendations made by the Law Commission of India in

its 54th Report on the Code of Civil Procedure, 1908. The Explanation was so added due to conflicting High Courts' decisions on the question, i.e., whether a person who does not have a written assignment of the decree, but who has succeeded to a decree holders' right, is entitled to such decree under Section 146 of the CPC.

25. In **Penniah Pillai v. T. Natarajan Asari** AIR 1968 Mad 190 the Madras High Court decided this question in the affirmative. The high court gave liberty to the transferees to avail of Section 146 if they did not fall within the provisions of Order XXI Rule 16 of the CPC and, thus, would cover transferees of a property after the decree was passed. In this behalf the learned Judge disagreed with an earlier judgment of the Madras High Court in **K.N. Sampath Mudaliar v. Sakunthala Ammal** 1964 2 MLJ 563 opining that Section 146 of the CPC could not have the effect of overriding Order XXI Rule 16 of the CPC. The Law Commission agreed with the view taken in the former judgment (which was delivered at a later point of time) and further noted that this view was supported by the High Courts of Andhra Pradesh **Satyanarayana v. Arun Maik** AIR 1955 AP 81, **Patna Ramnath v. Anardei Devi** AIR 1964 Pat 311 and **Kerala Mani Devasia v. Varkey Scaria** (1960) Ker. LT 1077. as well. Thus, the Law Commission recommended amending Order XXI Rule 16 to clarify that it does not affect the provisions of Section 146 and that a transferee of rights in the subject matter of the suit can obtain execution of a decree without separate assignment of the decree. The objective appears to be to not have multifarious proceedings to determine the issue of assignment, but to determine the issue of assignment in the execution proceedings itself.

26. In the conspectus of the aforesaid we are of the view that the objective of amending Order XXI Rule 16 of the CPC by adding the Explanation was to deal with the scenario as exists in the present case, to avoid separate suit proceedings being filed therefrom and to that extent removing the distinction between an assignment pre the decree and an assignment post the decree. Thus, what has been discussed even in the judgment in **Jugalkishore Saraf** (supra) as a view based on the equitable principle was sought to be incorporated in Order XXI Rule 16 of the CPC by adding the Explanation, something which had not been done earlier. Once the legislative intent is clear, and the law is amended, then the earlier position of law cannot be said to prevail post the amendment and it is not in doubt that the present case is one post the amendment.

27. We may further add that while considering the divergent views of the High Courts, the Law Commission took note of the fact that two different interpretations of **Jugalkishore Saraf** (supra) had been adopted. Thus, the Law Commission really sought to clarify the legal position so that the conflicting interpretation of the Supreme Court judgment would not survive. The Explanation clearly stipulates that nothing in Order XXI Rule 16 of the CPC would affect the provisions of Section 146 and the transferee of the right in property which is subject matter of a suit may apply for execution of the decree without separate assignment of the decree as required by law. No doubt the appellants are not parties in the suit proceedings but they claim as assignees of the decree holder.

28. We make it clear that we are not going into the validity of the document, i.e., the Assignment Deed or the cheque as that would be a matter to be decided by the executing

court. The question was as to whether at the threshold, the appellants' objection could be rejected on the ground that they were assignees who had acquired the rights prior to the passing of the decree. The rest of the job would be of the executing court, despite the considerable prolongation which has taken place. We may only add that our endeavour to see that an amicable solution is found by the parties was not successful, thus we have little option but to set aside the impugned judgments and remit the matter back to the executing court for determination in terms of the judgment of this Court. Considering the lapse of time that has already taken place, the executing court will endeavour to give its consideration as early as possible. 29. The appeals are accordingly allowed leaving the parties to bear their own costs.