A

M. P. SHREEVASTAVA

v.

MRS. VEENA

August 24, 1966

B [K. N. WANCHOO, J. C. SHAH AND R. S. BACHAWAT, JJ.]

Code of Civil Procedure (Act 5 of 1908), s. 47 and O. 21 r. 2—Scope of—Decree for restitution of conjugal rights—No application for execution by decree-holder-husband—Application by judgment-debtor-wife for recording satisfaction—When maintainable.

C The appellant (husband of the respondent) obtained a decree for restitution of conjugal rights against his wife. The wife made various attempts to persuade the appellant to take her back into the marital home, but was unsuccessful. She then applied to the Court which passed the decree for an order that the decree be recorded as satisfied. There was, at that time, no pending application by the appellant for execution of the decree or for a decree for divorce.

D On the question, whether the application of the respondent was maintainable either O. 21, r. 2 or under s. 47 of the Civil Procedure Code,

HELD : It was maintainable under s. 47 but not under O. 21 r. 2.

Under s. 47, which deals with the power of the Court executing the decree all questions relating to execution, discharge or satisfaction of a decree and arising between the parties to the suit in which the decree E is passed, shall be determined in the execution proceeding and not by a separate suit. The expression "Court executing the decree" in the section does not mean a "court which is seized of an application for execution of a decree at the instance of the decree holder." A question relating to execution discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment-debtor in the execution department and the pendency of an application for execution by the decree-holder is not a condition for the exercise of the Court's power. An application made F by the judgment debtor in relation to execution, discharge or satisfaction of a decree in a suit to which he or the person of whom he is a representative was a party, is an applicatio nbefore the court executing the decree, and must be tried in that court. [150 G-H; 151 B, C]

Observation *contra* in *Mst. Bhagwani* v. *Lakhim Ram and Anr.* A.I.R. 1960 Punj. 437, disapproved.

G Order 21, r. 2 deals with the procedure to be followed in a limited class of cases relating to discharge or satisfaction of decrees where there has been payment of money or adjustment or satisfaction of the decree by consensual arrangement. It contemplates adjustment of the decree by consent—express or implied—of the parties. Where there is no such consent the rule does not apply. In the instant case there was not evidence of any consent on the part of the appellant, who was never willing to take back his wife. [149 F-H; 150 B-C]

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 609 of 1966.

Appeal from the judgment and order dated March 8, 1965 of the Punjab High Court (Circuit Bench) at Delhi in L. P. A. No. 96-D of 1964.

H. R. Gokhale, Rajini Mathur, O. C. Mathur and *J. B. Dadachanji*, for the appellant.

Bishan Narain and *Lily Thomas*, for the respondent.

The Judgment of the Court was delivered by

Shah, J. On July 25, 1958 the parties to this appeal were married under the Special Marriages Act 43 of 1954. There was a child of the marriage. Alleging that on November 10, 1959, his wife Veena—who will hereinafter be called 'the respondent'—had without reasonable cause deserted him and had failed to return and live with him in spite of repeated requests, the husband, M.P. Shreevastava—hereinafter called 'the appellant'—filed a petition in the Court of the District Judge, Delhi, for a decree for restitution of conjugal rights. This petition was decreed *ex parte* on March 13, 1961. On May 21, 1961 the respondent returned to the residence of the appellant and offered to live with him. She also wrote letters to the appellant requesting him to allow her to go to his house and live with him as his wife, but the appellant refused to receive the letters. Attempts made through certain friends of the family to persuade the appellant to take the respondent back into the marital home were also unsuccessful. The respondent then applied to the District Court, Delhi, for an order that the decree be recorded as satisfied, since the appellant had failed and neglected to allow the respondent to resume conjugal relations even after she went to his house and made a request to that effect. The District Judge, Delhi, held that the decree for restitution of conjugal rights against the respondent stood satisfied, and ordered that it be recorded that the decree was satisfied. In appeal to the High Court of Punjab, Dua, J., confirmed the order passed by the District Court. An appeal under the Letters Patent filed by the appellant met with no success. The husband—M. P. Shreevastava—has then appealed to this Court with special leave.

Two contentions were raised by the appellant in support of the appeal :

(1) The Court of the District Judge and the High Court were in error in recording satisfaction of the decree, because the acts done by the respondent do not in law constitute an attempt to resume conjugal relations; and

(2) that the application filed by the respondent was not maintainable, because at the material date no application for execution of the decree filed by the appellant was pending, and the District Court was on that account not a court executing the decree.

A The District Judge observed that the respondent had made "a genuine effort . . . to come and live with the" husband, "but he (the husband) has spurned that offer", that "there was no obstinacy or disinclination on the part of the" wife "to come back and live with her husband", and that the wife "has all along been keen to live with him and has made a number of attempts to prevail B upon him to take her back." Dua, J., observed that "the decree for restitution of conjugal rights . . . can be obeyed and satisfied if the wife goes and lives with the husband as a wife or reasonably does all she can do in that direction. . . In case, however, the judgment-debtor is willing to obey the decree but the unjustified obstruction towards the performance of the decree comes from the decree-holder, then, the judgment-debtor would be fully entitled C to approach the Court and pray that the decree be recorded as satisfied so that the decree-holder may not fraudulently and *mala fide* utilise the decree for the purpose of securing a decree for divorce". On a review of the evidence, the learned Judge agreed with the Trial Court. The High Court hearing the appeal under the Letters Patent agreed with that view.

D It was never argued on behalf of the appellant in the Court of First Instance and the High Court that attempts proved to have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court.

E But it was said that the respondent could not maintain an application for recording adjustment of the decree under O. 21 r. 2 C.P. Code, nor could she maintain an application for recording satisfaction of the decree for restitution of conjugal rights so long as the husband did not apply to execute the decree, or did not claim a decree for divorce under s. 27 of the Special Marriages Act. Order F 21 r. 2 prescribes the procedure for recording payment of money under any decree or for adjustment of any decree to the satisfaction of the decree-holder. If any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder is enjoined by r. 2(1) of O. 21 to certify such pay- G ment or adjustment to the Court : the judgment-debtor may also inform the Court of such payment or adjustment, and it may be recorded after enquiry: r. 2(2) of O. 21. In the present case, however, there is no adjustment. Adjustment contemplates mutual agreement, and in the present case, there is no evidence of any consent on the part of the appellant who was never willing to take H back the wife and resume conjugal relations. Order 21 r. 2 contemplates adjustment of the decree by consent—express or implied—of the parties: where there is no such consent, O. 21 r. 2 does not apply.

But O. 21 r. 2 prescribes a special procedure for recording adjustment of a decree, or for recording payment of money paid out of court under any decree. However the plenary power conferred by s. 47 C.P. Code upon the Court executing the decree to determine all questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, is not thereby affected. Whereas O. 21 r. 2 deals with the procedure to be followed in a limited class of cases relating to discharge or satisfaction of decrees, where there has been payment of money or adjustment or satisfaction of the decree by consensual arrangement, s. 47 C.P. Code deals with the power of the Court executing the decree.

Counsel for the appellant does not deny to the Court executing the decree power to decide all questions relating to execution, discharge or satisfaction of the decree arising between the parties to the suit in which the decree was passed, but contends that since the power to record discharge or satisfaction of a decree is exercisable only by the Court executing the decree, no substantive petition lies at the instance of the person against whom a decree is passed to record adjustment or satisfaction so long as the decree-holder has not applied for execution. Counsel says that the expression "Court executing the decree" means the "Court which is executing the decree at the instance of the decree-holder", and in support of his contention relies upon the different expressions used in O. 21 rr. 1 & 2 C.P. Code. He points out that under O. 21 r. 1(1)(a) money payable under a decree may be paid into the Court whose duty it is to execute the decree. Similarly an application under cl. (1) or cl. (2) of r. 2 O. 21 for recording payment of money under or adjustment of a decree has to be made to the Court whose duty it is to execute the decree, whereas prohibition against recognition of an uncertified payment or adjustment is imposed upon the Court executing the decree by sub-rule (3). There is no doubt that the expression "Court whose duty it is to execute the decree" means a Court which is under the law competent to, and when requested bound to, execute the decree which is in law enforceable, and where an application is made under O. 21 r. 1(1)(a) or under O. 21 r. 2(1) or (2) there need be no substantive application for execution pending. It also appears, from the terms of cl. (3) of O. 21 r. 2, that the prohibition is against the Court executing the decree. But there is no warrant for the argument that the expression "Court executing the decree" as used in s. 47 C.P. Code means a "Court which is seized of an application for execution of a decree at the instance of the decree-holder". Section 47 enacts the salutary rule that all questions relating to execution, discharge or satisfaction of the decree shall be determined not by a separate suit, but in execution of the decree. The power so conferred may not be limited by any strained or artificial construction of

A the words "Court executing the decree". The expression "Court executing the decree" has not been defined, and having regard to the scheme of the Code it cannot have a limited meaning, as argued by counsel for the appellant. The principle of the section is that all questions relating to execution, discharge or satisfaction of a decree and arising between the parties to the B suit in which the decree is passed, shall be determined in the execution proceeding, and not by a separate suit: it follows as a corollary that a question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment-debtor in the execution department and that pendency of an application for execution by the decree-holder is not a condition of its C exercise. An application made by the judgment-debtor which raises a question relating to execution, discharge or satisfaction of a decree in a suit to which he, or the person of whom he is a representative, was a party is an application before the Court executing the decree, and must be tried in that Court.

There is a catena of cases in which it has been held that s. 244 D of the Code of 1882 and s. 47 of the Code of 1908 apply to disputes arising between the parties contemplated by those sections in relation to a decree even after it has been executed. In *Imdad Ali* v. *Jagan Lal*(1) a decree for possession was executed against the heir of a defendant (who had died during the pendency of a suit) without notice to him. The heir then applied to the Court which E had executed the decree for an order restoring him to possession. At the date of application by the heir no application to enforce the decree by the decree-holder was pending. The High Court of Allahabad however held that the application was maintainable.

In *Dhan Kunwar* v. *Mahtab Singh and others* (2) an application by the judgment-debtor to recover an amount found to be in excess F of the amount lawfully due, the decree having been amended since the execution, was held maintainable under s. 244 of the Code of 1882.

In *Collector of Jaunpur* v. *Bithal Das and Anr*(3) it was held that an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, falls within s. G 244 C.P. Code, 1882. It was observed by the Court that s. 244 "applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution."

In *Gopal Rai* v. *Rambhajan Rai* (4) an application for refund of the decretal amount paid into Court by the judgment-debtor, H after the decree had been satisfied by payment made by another

(1) I.L.R. 17 All. 478.
(2) I.L.R. 22 All. 79.
(3) I.L.R. 24 All. 291.
(4) I.L.R. 1 Pat. 336.

judgment-debtor was held maintainable under s. 47 C.P. Code against the decree-holder who had withdrawn the amount.

In *B. V. Patankar & Others* v. *C. G. Sastry*,(1) this Court held that an application by the judgment-debtor for an order for restoration of possession of property from which the judgment-debtor was evicted without notice, in execution of a decree which had become unenforceable, because of the Mysore House Rent and Accommodation Control Order, 1948, was maintainable.

It is not necessary to multiply cases—and they are many—in which applications by judgment-debtors raising questions relating to execution, discharge or satisfaction not falling within O. 21 r. 2 were held maintainable, and absence of a proceeding by the decree-holder to execute the decree was held not to be a bar to the maintainability of the applications. In our view, the High Court of Madras was right in its interpretation of s. 244 of the Code of Civil Procedure, 1882, when they observed in *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank Ltd.* (2) :

> "We are unable to accede to the contention . . that, with reference to the terms of section 244, the question raised by the petition could only be raised in answer to a claim made....on an application . . for execution. That section simply provides that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by separate suit. We cannot construe the words 'a Court executing a decree' as meaning, . . that the section only covers cases of proceedings initiated by the decree-holder and does not include applications (relating to the execution, discharge or satisfaction of the decree) made by the judgment-debtor."

We are unable to hold that the *dictum* of the Punjab High Court in *Mst. Bhagwani* v. *Lakhim Ram and Another*(3) that "as no execution proceedings (at the instance of the decree-holder) were pending, the Court (which was called upon to determine whether there was an adjustment of a decree by an executory contract) could not be regarded as one which was 'executing the decree'," is correct. There is, in our judgment, no antithesis between s. 47 and O. 21 r. 2: the former deals with the power of the Court and the latter with the procedure to be followed in respect of a limited class of cases relating to discharge or satisfaction of decrees.

The appeal fails and is dismissed with costs.

V.P.S. *Appeal dismissed.*

(1) [1961] 1 S.C.R. 591.
(2) I.L.R. 23 Mad. 377, 380.
(3) A.I.R. 1960 Punjab 437, 438.