

Shaukat Hussain Alias Ali Akram and Others

Vs

Smt. Bhuneshwari Devi (Dead) By Lrs. and Others

Civil Appeal No. 771 of 1967

(A. N. Grover, D. G. Palekar, K. S. Hedge JJ)

25.08.1972

JUDGMENT

PALEKAR, J. -

1. This is an appeal by special leave. The respondent Bhuneshwari Devi obtained money decree against the appellants in S.C.C. Suit No. 107/95 of 1939 in the court of the Subordinate Judge, Gaya exercising Small Cause Court jurisdiction. At the instance of the decree-holder the decree was transferred for execution to the court of Munsif at Gaya as the decree-holder wanted to proceed against the immovable property of the judgment-debtors. The judgment-debtors filed Title Suit No. 104/67 in the court of Munsif 1st at Gaya for setting aside the decree passed by the Small Cause Court on the ground that it was fraudulent, illegal and without jurisdiction. After filing the suit the appellants filed two applications in the court of the Munsif - one for an injunction against the respondent restraining her from proceeding with execution and the other for staying the further proceedings in the execution case under Order XXI, Rule 29, C.P.C. Two ex parte orders were passed on the same day namely May 11, 1962. Since the appellants did not file any requisite for issue of show-cause notice to the respondent, the injunction was recalled on June 2, 1962. The respondent decree-holder who was not aware that there were two ex parte orders informed the executing court on April 10, 1963, that the order of stay passed in Title Suit No. 104/1962 had been recalled for non-filing of the requisites and prayed for proceeding with the execution. The executing court thereupon passed an order on the same day i.e. April 10, 1963, vacating the order of stay and calling upon the respondent decree-holder to take further steps. In due course the property in dispute was attached and sale proclamation was issued. It does not appear that the appellant judgment-debtor took any objection either to the attachment or to the sale proclamation though notices were issued and served on them. The appellants, however, filed an objection in the court of the Munsif in the pending Title Suit requesting the court to clarify whether the order of stay made by it on May 11, 1962, was still subsisting or not. That court by its order, dated July 26, 1963, remarked that the proceedings in the execution case had been stayed on May 11, 1962, and since the same had not been withdrawn it was still subsisting. The court, however, modified the ex parte stay order of May 11, 1962, calling upon the judgment-debtors to deposit security to the extent of Rs. 550/- in the execution case which was a condition precedent to the stay. The executing court was informed about this order and in due course the executing court fixed August 5, 1963, for furnishing security. The security was not furnished and since the stay did not continue after August 5, 1963, the attached property was sold on August 6, 1963, under proclamation which had already been issued and was purchased by the decree-holder-respondent with the permission of the court.

2. On August 26, 1963, one of the appellant judgment-debtors filed an objection under Section 47 of the Code of Civil Procedure for setting aside the sale. The learned Munsif set aside the sale holding

that the sale was illegal the reason being that the proclamation of sale had been issued when the stay of execution was still in existence. In appeal filed by the decree-holder to the learned Subordinate Judge the view of the Munsif was upheld, and the appeal was dismissed. The decree-holder-respondent went in second appeal to the High Court. The High Court held that the Court of the Munsif was incompetent to stay execution of the decree and, therefore, the order of stay was without jurisdiction and hence null and void. Therefore, the proceedings in execution by way of attachment and proclamation of sale were quite legal and, the sale in favour of the decree-holder was also legal. The learned Judge further pointed out that even assuming that the execution had proceeded during a valid stay, that stay, but virtue of the order of security passed by the court, had come to end on August 5, 1963, and, therefore, the sale which took place on August 6, 1963, was valid.

3. It is from this order that the judgment-debtors have come to this court by special leave.

4. Mr. Chagla appearing on behalf of the appellants prefaced his arguments by stating that the property attached in execution was a very valuable property worth more than Rs. 20,000/- and had been sold for a paltry sum due under the decree and this circumstance itself was sufficient to show that the sale was liable to be set aside. That contention is clearly not open on the materials on record. A judgment-debtor can ask for setting aside a sale in execution of a decree under Section 47, C.P.C. and, in special circumstances which attract the provisions of Order XXI, Rule 90, he may also apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale provided he further proves to the satisfaction of the court that he has sustained substantial injury by reason of the irregularity or fraud. The application made to the executing court in the present case by the judgment-debtors was not one under Order XXI, Rule 90, C.P.C. That is conceded by Mr. Chagla. Had it been the case that on account of fraud or material irregularity in conducting the sale, the sale required to be set aside, evidence would have been led on the point and there would have been a clear finding as to the substantial injury. The judgments of all the three courts proceed entirely on the basis that the application was one under Section 47, C.P.C. and not under Order XXI, Rule 90, C.P.C. They do not deal with the question of material irregularity or fraud in the conduct of the sale, nor do they deal with the injury caused to the judgment-debtors. The only question which was agitated before the courts was whether the sale was illegal in view of the fact that the execution proceedings had taken place during the existence of a stay issued by a competent court. It was also common ground that the stay issued by the Munsif was an Order passed under Order XXI, Rule 29, C.P.C. The first two courts held that the stay was in existence when the execution proceedings ended in the sale while the High Court held that factually it was not so because the sale took place on August 6, 1963, the stay, if any, having ceased to operate after August 5, 1963. The High Court further pointed out that the stay under Order XXI, Rule 29, issued by a court without competence and, therefore, in law there was no legal stay of execution and the sale which took place in due course after attachment and proclamation of sale, was a valid one.

5. Mr. Chagla, thereupon, contented that the Order of stay passed by the Munsif was an order of stay passed by a competent court and the view of the High Court in that respect was not sustainable. Execution at the instance of the decree-holder was pending in the court of the Munsif and at a suit at the instance of the judgment-debtor was also filled in that court and, therefore, that court was competent under Order XXI, Rule 29, to stay the execution pending before it. It was Mr. Chagla's submission that it was competent for every court to stay execution before it if there was a suit pending before that the court filed by the judgment-debtor against the decree-holder. The point is whether the general proposition is sustainable on the provisions of Order XXI, Rule 29, C.P.C.

6. Order XXI C.P.C. deals generally with the execution of decrees and orders. That order is divided into several topics, each topic containing a number of rules. The first four topics cover Rules 1 to 25 and the fifth topic, namely, stay of execution comprises four rules, namely Rules 26 to 29. A perusal of these rules will show that the first three rules i.e., rules 26 to 28 deal with the powers and duties of a court to which a decree has been sent for execution under Rule 26, that court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the court of first instance or the appellate court. It will be seen, therefore, that under Rule 26 the transfer Court has a limited power to stay execution before it. Moreover, under sub-rule (2) if any property is seized by it in the course of execution, it may even order the restitution of the property pending the result of the application made by the judgment-debtor to the court of the first instance or to the appellate court. Rule 27 says that any such restitution made under sub-rule (2) of Rule 26 will not prevent the property of the judgment-debtor from being retaken in execution of the decree sent for execution. Rule 28 provides that any order of the court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the court to which decree was sent for execution. And then we have Rule 29, which deals with a different situation. The Rule is as follows :

"Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the court in which the suit is pending may stay the execution before it. If that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the court of Munsif 1st, Gaya and there was also a suit at the instance of the judgment-debtor against the decree-holder in that court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such court. The words "such court" are important. "Such court" means in the context of that rule the court in which the suit is pending. In other words, the suit must be one not only pending in that court but also one against the holder of a decree of that court. That appears to be the plain meaning of the rule.

7. It is true that in appropriate cases a court may grant an injunction against a party not to prosecute a proceeding in some other court. But ordinarily courts, unless they exercise appellate or revisional jurisdiction, do not have the power to stop proceedings in other courts by an order directed to such courts. For this specific provisions of law are necessary. Rule 29 clearly shows that the power of the court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution. In fact that is emphasised by Rule 26, already referred to. In the case before us the decree sought to be executed was not the decree of Munsif 1st Court, Gaya but the decree of the Subordinate Judge, Gaya passed by him in exercise of his Small Cause Court jurisdiction. It is, therefore, obvious that the Order staying execution passed by the Munsif, Gaya would be incompetent and without jurisdiction.

8. Mr. Chagla sought to rely on a decision of the Bombay High Court in *Narsidas Nathubhai Vohra v. Manharsing Agarsing Thakor* (33 Bom LR 370.), and specially the observations made at page 373. The observations are : "If the execution of a decree is transferred for execution to another court and a suit is brought in the Court in which the execution proceedings were first started against the holder of a decree of that Court, the Court in which the suit is brought would have jurisdiction to pass an Order under Order XXI, Rule 29, though the execution proceedings may be actually pending before another Judge to whom the execution proceedings may have been transferred by the Court". In order to understand these observations, we must know the facts of that case. One Narsidas obtained a money decree against Manharsing in the court of the First Class Subordinate Judge, Ahmedabad. The principal Subordinate Judge of that court was Mr. Jhaveri and the joint Subordinate Judge was Mr. Yajnik. Narsidas filed an application for executing the decree in that court. The judgment-debtor Manharsing filed a suit in the same court for setting aside the decree against him. Thus simultaneously there were two proceedings in the same court namely the court of the First Class Subordinate Judge, Ahmedabad between the two parties - one being a suit filed by the judgment-debtor against the decree-holder and the other being an execution proceeding by the decree-holder against the judgment-debtor in respect of a decree passed by the same court. That brought in directly the provisions of Order XXI, Rule 29, and there was no dispute that the execution proceeding could be stayed. The question, however, was whether, Mr. Yajnik before whom the suit was pending could stay the execution of the decree which was pending before Mr. Jhaveri. It was contended that Mr. Yajnik had no jurisdiction to pass an Order under Order XXI, Rule 29, as the execution proceedings were not pending before him but were pending before the First Class Subordinate Judge, Mr. Jhaveri. This contention was over-ruled. It was pointed out that though there were two Judges attached to the court, the court was one and Order XXI, Rule 29, did not refer to any individual Judge but to the court. Therefore, either of that court in charge of the suit was capable of staying the execution in that court regardless of the Judge before whom the execution was pending. It is in that context that the above observations were made. The observations contemplate a case where after the institution of the execution proceeding in the First Class Subordinate Judges' Court the same is transferred in due course of distribution of business to another Judge attached to that Court. Some little confusion is created by the words 'another court' when they first appear in the above observations. The words 'another court' really stand for 'another Judge of that court' as is clear from the last clause of that very sentence. Having made the above observations, the court further observed "It is not, therefore, necessary in our opinion that the execution proceedings must be pending before the same Judge before whom the suit is pending. It is sufficient if the suit is pending in any court against the holder of a decree of such court". The decision is no authority for the contention put forward by Mr. Chagla.

9. In *Inayat Beg v. Umrao Beg* (AIR 1930 All 121.), the Allahabad High Court had held that where a decree was transferred for execution to a court, the latter could not, under Order XXI, Rule 29, C.P.C., stay execution of that decree in a suit at the instance of the judgment-debtor, the reason being that the decree sought to be executed was not the decree of 'such court', that is, the court in which the suit was pending. That view was dissented from by the Calcutta High Court in *Sarada Kripa v. The Comilla Union Bank* (AIR 1934 Cal 4.). The reasoning was that the Privy Council had held in *Maharajah of Bobbili v. Narasarajupeda Srinulu* (43 IA 238.), that on transfer of a decree, the original court had ceased to have jurisdiction by virtue of Section 37, C.P.C. The holder of a decree of 'such court' will include the court to which the decree was been transferred, the latter having the same powers in executing the decree as if it had been passed by it under Section 42, C.P.C.

10. The above reasoning in the Calcutta case is based upon erroneous assumptions. The Privy

Council was not concerned in *Maharajah of Bobbili v. Narasarajupeda Srinhulu* (supra), with the impact of Section 37 and 42 on Order XXI, Rule 29, C.P.C. It was only concerned to see whether the District Court was the 'proper court' within the meaning of Article 182(5) of the 1st Schedule of the Limitation Act, 1908 in which to apply 'for execution or to take some step in aid of execution'. The District Court of Vizagapattam had passed the money decree in April, 1904 and sent it for execution to the court of Munsif, Parvatipur in September, 1904. The copy of the decree with the non-satisfaction certificate had not been returned to the District Court till August 3, 1910. However, the decree-holder applied to the District Court on December 13, 1907 for execution of the decree by sale of immovable property of the Judgment-debtor which was within the local limits of the jurisdiction of the Munsif's Court. The question was whether this application to the District Court was an application to a 'proper court' in order to save limitation. It was held having regard to Sections 223, 224, 228 and 230 of the C.P.C. of 1882 (which are reproduced in the Code of 1908 as Sections 38, 39, 41 and 42 and Order XXI, Rules 4, 5, 6 and 10), that when the application of December 13, 1907 was made, the District Court was not the plaintiff 'proper court' to which the application to execute the decree by sale of immovable property which had been attached by the court of the Munsif should have been made, the proper court being the court of the Munsif, Parvatipur. "That was the court whose duty it then was to execute the decree so far as it could be executed by that court." Consequently the Privy Council held that the December 13, 1907, application was not an application to the proper court either for execution or for taking a step in aid of execution of the decree. It is to be noted that the Privy Council was not concerned with the problem before us nor with the interpretation of Section 37.

11. Section 37, so far as is material is as follows :

"The expression 'court which passed a decree', or words to that effect, shall, in relation to the execution of a decree, unless there is anything repugnant in the subject or context, be deemed to include -

(a) .....

(b) Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

12. Relying on the above provision the Calcutta High Court in the *Comilla Union Bank* case (supra), seems to have thought that the expression "holder of decree of such court" to be found in Rule 29, will include the court to which the decree was transferred as the transferor court had ceased to have jurisdiction to execute the decree. In the first place, there is nothing in the Privy Council case to suggest that their Lordships had thought that the District Court of Vizagapattam had ceased to have jurisdiction to execute the decree within the meaning of Section 37. Their Lordships had not addressed themselves to that question. They were merely considering if the application to execute made in 1907 to the District Court was an application to the proper court as understood in Article 185(5) of the Limitation Act. They held it was not a proper court because the sale sought was of property within the jurisdiction of another court. On the other hand, there is a long series of decisions which go to show that in spite of transfer of decree for execution to another court, the court which passed the decree does not cease to have jurisdiction. For example in *Jang Bahadur v. Bank of Upper India* (55 IA 227.) the Privy Council has observed at page 233, "On such transfer the former court (that is the court which transferred the decree) does not altogether lose session of the

decree". It was held in that case, that when a judgment-debtor dies after transfer of the decree, the proper court, the order execution against his legal representatives under Section 50 of the C.P.C. is the court which passed the decree under Order XXI, Rule 26, it has jurisdiction to pass orders which are binding on the transferee court under Rule 28. It can withdraw the decree - *Lang v. Jaswantlal* (50 Bom 439.), or order simultaneous execution by another court - *Krishtokishore Dutt v. Rooplal Dass* (ILR 8 Cal 687.). It would not, therefore, be correct to say that upon the transfer of a decree to another court, the court which passed the decree ceases to have jurisdiction to execute the decree within the contemplation of Section 37, C.P.C. As pointed out in *Masrab Khan v. Debnath* (AIR 1942 Cal 321 : ILR (1942) 1 Cal 289 : 46 CWN 144.), the word 'includes' in Section 37, while inclusive in one sense is exclusive in another and under the circumstances specified in clauses (a) and (b) of the section it excludes the original court and substitutes another which, for the purposes of the section is to be regarded as the only court which passed the decree. Moreover, the expression "jurisdiction to execute it" in clause (b) means and includes the competency of the court to entertain an application for execution of the decree. It may happen that in certain circumstances a court may not effectively execute a decree, but that does not mean that it has ceased to have jurisdiction to execute it. It still remains the competent court for the purposes of execution though the decree-holder might have to apply for transmission of the decree to another court for obtaining relief which he wants. Thus in our case the Subordinate Judge's Court which continued to be in existence was still a competent court to entertain an application for execution. It could withdraw the decree from the Munsif's court and execute the decree itself or transfer it to any other court for execution, or, in other words, had still full control in relation to the execution of the decree. And since under Section 37, there could be only one court at a time answering the description of a court passing the decree, the Subordinate Judge's court both factually and in law was the court which passed the decree and it was not necessary to have recourse to clause (b) of Section 37, to discover which court should be substituted for the former.

13. Then again, assuming that the original court ceases to have jurisdiction to execute the decree on its transfer to the transferee court, there is no warrant for the conclusion that the latter court becomes the court which passed the decree in view of the fact that under Section 42, it can exercise all the powers of the original court. Under clause (b) the substitute court is specifically declared to be, not the transferee court, but the court which if the suit wherein the decree was passed was instituted at the time of making the execution application would have jurisdiction to try the suit. So for the purposes of Section 37, the transferee court is not named to be the court which passed the decree, but the court in which the suit would have to be filed at the time of the execution. It may turn out to be the court to which the execution is transferred or it may not be that court. In the case with which we are concerned the Subordinate Judge's Court, Gaya was in existence and it would have been the only court in which the Small Cause suit could have been filed and not the Court of Munsif, Gaya.

14. In our view the decision in *Sarada Kripa v. Comilla Union Bank* (supra), is erroneous. A contrary view is taken by several other High Courts after recording specific dissent. See : *M/s. Khemachand v. Rambabu* (AIR 1958 MP 131.); *Raghvender Rao v. Laxminarasayya* (AIR 1962 Mys 89.); *Sohan Lal v. Rajmal* (AIR 1963 Raj 4.), and *M. P. L. Chettyar Firm v. Vanappa* (AIR 1936 Rang 184.). All these cases agree in the view taken by the Allahabad High Court in *Inayat Beg v. Beg* (supra).

15. Since in the present case the decree sought to be executed by the court of Munsif Gaya was not the decree of that court but the decree of the Subordinate Judge, Gaya exercising Small Cause Court jurisdiction, the court of the Munsif had no competence under Order XXI, Rule 29, to stay the

execution of the decree. The High Court, is therefore, plainly right in holding that the stay granted by that court is null and void and, consequently, the sale which took place after attachment and proclamation could not be regarded as invalid on the ground that the execution had proceeded during the existence of a valid stay order. The result, therefore, is that the present appeal fails. But in the circumstances of the case parties shall bear their own costs in this court.

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