

## **MYSORE HIGH COURT**

Raghvender Rao

Vs

Botlagunta Laxminarasayya

Civil Revn. Petn. No. 539 of 1958

(B.M. Kalagate, J.)

09.06.1961

### **JUDGMENT**

#### **B.M. Kalagate, J.**

1. The petitioner-plaintiff has presented this petition under Section 115 of the Code of Civil Procedure against the order, dated 28th of April 1958, passed by the Munsiff-Magistrate of Raichur in Case No.11/2 of 1958 on his file.

2. The facts leading up to this petition may shortly be stated as follows:

3. The respondent-defendant obtained a money decree against the petitioner-plaintiff on 10th July 1957 in O.S. No.237 of 1956 in the Court of the District Munsiff of Kavali of Andhra Pradesh. Since the petitioner-plaintiff resided within the jurisdiction of the Raichur Court, the decree-holder got the decree transferred to Raichur Court and started execution proceedings by a petition dated 11th April, 1958. The petitioner-plaintiff, then on 12-4-1958, filed a suit No.11/2 of 1958 in the Court of the Munsiff-Magistrate of Raichur for a declaration that the ex parte decree obtained by the respondent-defendant against him was null and void and not executable as the same had been obtained by fraud. Having filed this suit, he applied for stay of execution of the decree until the decision of his suit pending in that Court. Though the plaintiff-petitioner did not specifically mention in the said petition the provision of law under which it was made, it was however made clear during the course of arguments that it had been filed under Rule 29 of Order 21 of the Code of Civil Procedure. The respondent-decree-holder objected to the stay of execution and contended inter alia that the Raichur Court was not competent to stay the execution of the decree under Rule 29 Order 21 Civil Procedure Code. The learned Munsiff-Magistrate of Raichur upheld the objections of the decree-holder and refused to stay the execution of the decree, dismissing the application. It is against this order that the present revision petition has been preferred.

4. The respondent remained absent and therefore I requested Mr. Kanakasabapathy to assist the Court and I am thankful to him for rendering such assistance as he could in the matter.

5. On the above facts, the main question which falls to be considered in this petition is whether

the transferee Court has jurisdiction under Rule 29 of Order 21 Civil Procedure Code to stay the execution of the decree transferred to it when the judgment-debtor institutes a suit in the transferee Court challenging the validity of the very decree transferred for execution. Mr. Sundaraswamy who appears for the petitioner has contended that the Court below was wrong in refusing to exercise its jurisdiction by holding that it could not stay the execution proceeding under the provisions of Rule 29 of Order 21 C.P.C.

6. Rule 29 of Order 21 C.P.C 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". The important words in this rule are "such Court". If we read the rule, it is plain that the words "such Courts" must mean "a transferee Court". Mr. Sundaraswamy has conceded that the words "such Court" must mean the Court to which the decree has been transferred for execution. Yet he contends that the transferor Court also must be deemed to be "such Court" if we read Sections 37 and 42 of the Code of Civil Procedure together.

7. Firstly he relies upon Section 37(b) of the Code of Civil Procedure. Section 37 reads as follows:

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

X X X X X X

(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". He next relied upon Section 42 Civil Procedure Code which reads:

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. x x x" He, therefore, contends that under Section 42, the transferee Court shall have the same powers as the transferor Court and argues that under Section 37 (b) the transferor Court i.e. the Court of first instance has ceased to have jurisdiction to execute it having transferred the decree to the Raichur Court for execution. If that is so, he then contends that it is the Raichur Court which would have all the powers of the transferor Court. I am unable to accede to this argument. This is not a case where the Court of first instance had ceased to exist. It cannot be said that because the Court which passed the decree has transferred it for execution to another Court, it ceased to have jurisdiction. The transferor Court does not altogether surrender its control.

The Privy Council Case reported in *Maharaja of Bobbili v. Narsaraj*<sup>1</sup>, gave rise to some extent to a difference of opinion among some of the High Courts, a few holding

<sup>1</sup>43 Ind App 238 : AIR 1916 PC 16

that after transferring a decree to another Court for execution, the Court which passed that decree cannot itself execute it on an application for execution made to it after the transfer and before the

certificate of no satisfaction under Section 41 has been returned. The other view is that there is no justification for holding that the transferor Court cannot execute the decree after it is transferred to another Court and that when the transferor Court transfers a decree, it does not divest itself of its powers but only vests the transferee Court with powers which it would not otherwise have. The difference is only with regard to whether when the decree has been transferred to another Court for execution, the transferor Court could execute the decree. But the consensus of judicial opinion now is that the transferor Court does not divest itself of its powers; e.g. when the decree has been transferred to another Court for execution, it may withdraw the execution by calling back the decree or it may even make an order for simultaneous execution by another Court or it may make an order for ratable distribution. Likewise, it has jurisdiction to decide an objection as to the limitation if referred to it by the transferee Court. If the decree is assigned after transfer, the assignee must apply for execution to the original Court. If the judgment-debtor dies after the decree has been transferred for execution, the Court which passed the decree is by reason of Section 50 of the Code of Civil Procedure the proper Court to order that execution should proceed against the legal representative. These instances illustrate the fact that the transferor Court does not divest itself of its powers though the decree made by it has been transferred for execution to another Court. Thus, in my view, the contention of Mr. Sundaraswamy based on Section 37 (b) read with Section 42 C.P.C must fail.

8. However, he relies upon a decision reported in *Saradakripa Lala v. Comilla Union Bank, Ltd*<sup>2</sup>., No doubt, this decision entirely supports the contention put forward by Mr. Sundaraswamy. The facts in that case are somewhat similar to the facts of the present case and, therefore, Mr. Sundaraswamy pressed into service this ruling in support of his contention. It has been held in that case that under the provisions of Sections 37 and 42, the Court to which the decree has been transferred has power to stay execution of the decree under Order 21, Rule 29 Civil Procedure Code Their Lordships of the Calcutta High Court relied upon the decision to which I have already referred viz. AIR 1916 PC 16 : 43 Ind App 238. It was held in the Privy Council decision that when a decree of a District Court was sent to the Court of a Munsiff for execution, the proper Court in which to apply "for execution or to take some step-in-aid of execution" of the decree is the Court of the Munsiff, the original Court having ceased to have jurisdiction. In that view of the case, according to their Lordships of the Calcutta High Court, the words "such Court" under Section 37 C.P.C will include the Court to which the decree was transferred. Then their Lordships referred to Section 42 C.P.C and stated that the Chittagong Court had powers to stay the execution of the decree which was transferred to it under Order 21, Rule 29. It appears their Lordships of the Calcutta High Court read the Privy Council case to mean that the original Court totally ceased to have jurisdiction, and having thus read, came to the conclusion that the transferee Court could stay execution of the decree under Order 21, Rule 29, Civil Procedure Code With great respect, I am unable to agree with the view taken by their Lordships of the Calcutta High Court. I have already stated by way of illustration the instances where the transferor Court does not

<sup>2</sup> AIR 1934 Cal 4

divest itself of its powers. It appears that the attention of their Lordships of the Calcutta High Court was not invited to Rule 26 (1) of Order 21, Civil Procedure Code It reads:

"The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree 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 in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto".

It is apparent from this rule that the transferee Court has been given power to stay the execution of the transferred decree for a 'reasonable time' to enable the judgment-debtor to apply to the transferor Court and obtain the necessary orders. If, as has been held by their Lordships of the Calcutta High Court, the transferee Court could stay execution of the decree under Rule 29, then it is rather difficult to understand why the Legislature provided in Rule 26 that the transferee Court shall stay the execution of such decree for a reasonable time. This also indicates that the transferor Court does not divest itself of its powers. If we read together Rules 26 and 29, it appears to me that the transferee Court has been empowered to stay the execution of the decree for a reasonable time only.

9. Reference may also be made to Rule 28 of Order 21. Civil Procedure Code which states:

"Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution."

This also indicates that the transferor Court does not divest itself of its powers. The provisions made in Rule 26 empowering the transferee Court to stay the execution of a decree for a reasonable time only, clearly indicates that the transferee Court cannot stay the execution under Rule 29.

10. The aforesaid decision of the Calcutta High Court has been dissented from by the Madhya Pradesh and Rangoon High Courts. The Allahabad High Court also has taken a view contrary to it.

11. In *Messrs Khemchand Rajmal v. Rambabu Johrimal*<sup>3</sup>, the facts in which are similar to the facts in the present case, it was held:

"If the words of Order 21, Rule 29 are interpreted in their plain meaning it will be clear that in order to enable the Court to pass suitable orders for stay the identity of the Court passing the decree under execution and the Court trying the pending suit is necessary so that, if the Court which passed the decree

<sup>3</sup> AIR 1958 Mad Pra 131

under execution is different from the Court in which there is the pending suit with judgment-debtor as the plaintiff, then the power under the rule cannot be invoked. This position is not altered by reason of the provisions of Sections 37 and 42."

Nevaskar, J. after referring to the decisions in AIR 1916 PC 16, *Inayat Beg v. Umrao Beg*<sup>4</sup>, and *M.P. L. Chettyar Firm v. Venappa Chettyar*<sup>5</sup>, held that the view taken by the Allahabad and

Rangoon High Courts was preferable to that taken by the Calcutta High Court.

12. Their Lordships of the Rangoon High Court in AIR 1936 Rang.184, in similar circumstances, found themselves unable to agree with the view expressed by the Calcutta High Court, and held that Rule 29 of Order 21, Civil Procedure Code does not empower the transferee Court to stay the execution of the decree. The Allahabad High Court in the decision reported in AIR 1930 Allahabad 121 (1) which is an earlier case, has taken a similar view. Since the facts in the aforesaid cases are practically similar to those in the instant case, I do not think that any detailed examination of the said cases is necessary.

13. I have already stated in my reasons as to why I find myself unable to agree with the view taken by their Lordships of the Calcutta High Court reported in AIR 1934 Calcutta 4. With respect, I agree with the view taken by their Lordships in AIR 1958 Madhya Pradesh 131, AIR 1936 Rang.184 and AIR 1930 Allahabad 121 (1). Therefore the contention put forward by Mr. Sundaraswamy that the transferee Court could stay the execution of the decree under Rule 29 of Order 21, C.P.C fails.

14. Thus, for the reasons stated above, I hold that the order passed by the trial Court is correct and must be upheld. Consequently, this revision petition fails and the same is dismissed.

Petition dismissed.

<sup>4</sup> AIR 1930 All 121

<sup>5</sup> AIR 1936 Bang.184