

MADHYA PRADESH HIGH COURT

Khemchand Rajmal

Vs.

Rambabu Johrimal

Civil Rem No. 367 of 1957

(V.R. Nevaskar, J.)

20.11.1957

ORDER

V.R. Nevaskar, J.

1. Facts giving rise to the present petition are as follows:

2. Non-applicant Rambabu obtained an ex parte decree for money against the petitioner Messrs. Khemchand Rajmal through Proprietor Rajmal. The decree was transferred by the Delhi Court to the Court of Civil Judge, Indore within whose jurisdiction the judgment-debtor carried on business. An application was thereupon submitted on behalf of the applicant judgment-debtor under Order 21, Rule 29 and section 151 of the Code of Civil Procedure for stay of execution alleging that prior to the filing of the present execution petition by the non-applicant Rambabu, he had filed Civil Suit No. 40 of 1955 in that Court for accounts on the ground of his being the agent of the applicant which was pending and that according to the applicant's estimate he was entitled to recover Rs. 1362/- over and above the amount in execution.

3. The trial Court rejected the application on the ground that no sufficient cause had been shown for exercising the discretion in favor of the applicant. The present revision petition is directed against that order.

4. It is contended by Mr. Jindal in support of the petition that the learned lower Court had failed to exercise jurisdiction vested in it by law under Order 21, Rule 29 Civil Procedure Code for staying the execution in question although all the necessary conditions for its exercise were present. There is according to him a suit pending

before the lower Court against the holder of the decree in question and that decree will be deemed to have been passed by that very Court as a result of statutory fiction created under section 37 of the Civil Procedure Code.

Reliance was placed by the learned Counsel upon the decision reported in *Saradakripa v. Comilla Union Bank Ltd.*¹ in support of his contention. The questions which arise for consideration are, firstly, assuming that the lower court had jurisdiction to execute the decree, whether it has failed to exercise that jurisdiction or acted illegally or with material irregularity in the exercise of that jurisdiction; and secondly, whether the aforesaid view of the Calcutta High Court contains the correct exposition of the law on the point.

5. The lower Court in its order appears to have assumed that it had jurisdiction to act in exercise of powers of stay conferred by Order 21, Rule 29 but that the said power was discretionary and that this was not a fit case for the exercise of such a discretion in favor of the applicant. On consideration of the facts of the case it appears to me that this view of the lower Court as regards the impropriety of using the discretionary power under Order 21, Rule 29 in favour of the applicant, is correct. The non-applicant had filed a suit for recovery of the price of the goods supplied by him to the applicant. In the suit which the applicant filed subsequently at Indore he claims accounts in respect of his dealings with the non-applicant as his agent for the period which was inclusive of the point of time when his liability in respect of the item in the earlier suit arose. That item according to him is a part of his dealings with the applicant as his agent. He therefore expects that he would be able to adjust the item in execution as against the amount which he would obtain in that suit. There is in my opinion neither any special convenience in staying the execution nor any injustice likely to result if the execution of the decree of the non-applicant were not stayed. In case the decree is executed and the amount in execution recovered, that would at the most be an item in his accounts and if the applicant's suit is later decreed the item will get automatically adjusted in that account. Moreover, the view taken by the lower court was a possible judicial view of the matter and it involves neither failure to exercise jurisdiction nor illegality or material irregularity in exercise of its jurisdiction. Since the lower court assumes that it has jurisdiction, there is no failure to exercise jurisdiction. Since no rule of law, procedure or natural justice is violated, there is no illegality or material irregularity in the exercise of jurisdiction. In this view of the matter, it would indeed be unnecessary to consider whether the view of the Calcutta High Court in the case reported in AIR 1934 Calcutta 4, is correct. But since the point

is of some interest and the learned counsel for the applicant has argued the matter with some rest I shall briefly deal with it here.

6. In that case it was held relying upon the decision of the Privy Council in *Maharajah of Bobbili v. Narasaraju*,² that where a Court of first instance which tried the suit transfers the decree therein to another Court for execution, the former Court has no longer jurisdiction to execute that decree and that for that reason under section 37, Civil Procedure Code, it becomes 'the Court which passed the decree' in relation to the execution and that by Section 42, Civil Procedure Code the said transferee court is clothed with the same powers in executing such decree as if it had been the decree passed by itself and further that on that account that Court can act under Order 21, Rule 29 in staying such execution where there is a suit pending against the holder of such a decree in that Court. Contrary view held in the case reported in *Inayat Beg v. Umrao Beg*,³ was dissented from.

7. In order to examine and appreciate the reasoning of the Calcutta High Court in the aforesaid case, it will be necessary to refer to the provision of Order 21, Rule 29, Civil Procedure Code and to see what bearing the provisions of section 37 and Section 42, Civil Procedure Code will have upon that provision.

8. Order 21, Rule 29, Civil Procedure Code is as follows:

"29. 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."

9. If no outside help is taken and the words 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 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.

Is this position altered by reason of the provisions of Sections 37 and 42 read in the light of the decision of the Privy Council in 43 Ind App 238?

10. Section 37, Civil Procedure Code is as follows:

"37. 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,-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(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."

11. This section thus gives a wider meaning to the expression 'the Court which passed the decree' or words to that effect than would ordinarily be understood by including within its scope courts other than the one factually passing the decree when defined circumstances, as indicated in Clauses (a) and (b) of that section exist. In the present context according to Calcutta High Court Clause (b) is material. As per that clause the Court which is included within the widened definition of the expression is that Court which would have jurisdiction to try the suit in which the decree was passed at the time the application for execution is made. Moreover this inclusion will take place only when the Court of first instance in relation to the Court factually passing the decree either ceases to exist or ceases to have jurisdiction. Since present is not a case of cessation of existence of the Court we may omit that part of the condition from consideration. The condition for the applicability of that clause therefore is that the Court factually passing the decree or in case the decree is passed in appeal, the Court of first instance should cease to have jurisdiction. Assuming that this condition is present according to the reasoning of the Calcutta High Court on the authority of the Privy Council decision referred to above, still the Court which will be brought in within the widened scope of the words will be the Court which has jurisdiction to try the suit in which the decree was passed, at the time of making the application for its execution.

12. What Court then will have jurisdiction to try the suit in which the decree under execution was passed at the time of making the execution application? In the case of transfer of decree for execution, even if we may assume that the Court of first instance by reason of the transfer of decree for execution to another Court ceases to have

jurisdiction to execute it, yet it cannot be said that by reason of that circumstance the transferee Court acquires the jurisdiction to try that identical suit at the time the application for execution is made.

13. In the present case it cannot be said that at the time the application for execution is made, Indore Court had jurisdiction to try the suit in which the decree was obtained by the non-applicant at Delhi. That suit, even if it had been filed at the time of execution, would be maintainable in the Delhi Court. It therefore follows that the Indore Court cannot be said to be the Court passing the decree under execution for the purposes of Order 21, Rule 29, merely because the Delhi Court transfers that decree to it for execution.

14. The reasoning adopted by the Calcutta High Court does not take into account the fact that what is included by Clause (b) within the ambit of the expression 'the Court which passed the decree', is the Court in which that very suit will have to be filed in case it is required to be instituted at the time of making the application for execution and that condition for such inclusion is that the Court factually passing the decree ceases to have jurisdiction. On a careful study of the implications and object of Section 37, it appears that the section was intended to obviate some difficulties which might arise under certain circumstances in the matter of execution. One such circumstance is, where the decree is passed by the appellate Court. It is clarified by the section that in that case for the purpose of execution the Court passing the decree would be the Court of first instance. Thus in the context it appears that the definition though inclusive is to a certain extent limiting one too. The appellate Court is not the Court where petition for execution is to be made. So also where the Court passing the decree or where the decree is passed by the appellate Court, the Court of first instance, either ceases to exist or ceases to have jurisdiction to execute the decree, then the application for execution is to be filed in the Court which for all practical purposes takes the place of that Court. The Court factually passing the decree would no longer be the Court entitled to execute the decree but it is the Court which is substituted in its place which will do this. In this case too the definition is limiting one. Cessation contemplated is total or absolute cessation and not temporary loss of jurisdiction by reason of the transfer of the decree for execution.

15. In *M. P. L. Chettyar Firm v. S. A. L. L. A. Venappa Chettyar*,⁴ Mackney J., took the view that Section 37, Civil Procedure Code has no reference to a Court to which a

decree has been transferred for execution. As discussed above this appears to be preferable to that taken by the Calcutta High Court.

16. In AIR 1930 Allahabad 121 (1), the same view is taken as by the Rangoon High Court. In *Masrab Khan v. Debnath Mali*,⁵ it is held that the expression 'ceased to have jurisdiction to execute' is not the same thing as ceased to have jurisdiction to entertain an application for execution. In this view of the matter also the applicability of the decision in 43 Ind App 238, to cases under section 37, Civil Procedure Code is doubtful. On this view also the decision in AIR 1934 Calcutta 4, cannot be said to be correctly given.

17. I, therefore, am inclined to hold that the Indore Court had no power to stay the execution of the decree of Delhi Court in exercise of the powers under Order 21, Rule 29, Civil Procedure Code. I further hold that even if it had such a power, the discretion exercised by the lower Court cannot be said to be illegal or improper.

18. The petition therefore has no force and is dismissed with costs.

Petition dismissed.

Cases Referred.

1. AIR 1934 Cal 4
2. 43 Ind App 238
3. AIR 1930 All 121
4. AIR 1936 Ran 184
5. AIR 1942 Cal 321