

# PATNA HIGH COURT

Rajindra Prasad

Vs

Indrasan Prasad

A.F.O.O. No 248 of 1949

(Ramaswami and Choudhary, JJ.)

13.04.1953

## JUDGMENT

### **Choudhary, JJ.**

1. This appeal is brought on behalf of the judgment-debtor against an order of the Subordinate Judge of Chapra, dated 30-6-1949, rejecting certain objections to the execution of a decree.

2. Mr. Hareshwar Prasad Sinha, who argued the appeal, submitted that the Subordinate Judge was wrong in holding that the 'terminus a quo' for limitation was 17-11-1944, on which date the High Court dismissed the appeal preferred by the decree-holders against an order of the Subordinate Judge directing that lots 2 and 3 should be sold first and. in case the sale proceeds thereof were not sufficient, lot No. 1 should be sold. That appeal was presented in the High Court on behalf of decree-holders on 26-10-1942, but the final order of the High Court dismissing the appeal was made on 17-11-1944. While the appeal was pending in the High Court, the Subordinate Judge dismissed the execution case for default on 3-3-1943. The contention of Mr. Hareshwar Prasad Sinha on behalf of the appellant is that the time for limitation starts from 3-3-1943, and the Subordinate Judge ought to have held that the present execution case filed on 17-11-1947, was barred.

3. In our opinion, the argument advanced by Mr. Sinha cannot be accepted as correct. The Subordinate Judge proceeded on the view that Section 14, Limitation Act governed the case and the period between 26-10-1942, till 17-11-1944, during which period the appeal was pending in the High Court, should be excluded under the provisions of Section 14, Limitation Act. This view cannot be supported since Section 14 applies only to a case where the proceeding is pending in a Court which either from defect of jurisdiction or other defect of a like nature is unable to entertain it. It is manifest in the present case that the High Court had jurisdiction to entertain and dispose of the appeal preferred on behalf of the decree-holders against a direction of the Subordinate Judge with respect to the order in which certain lots were to be sold. The lower Court was wrong in applying Section 14 to the present case; on the contrary, the proper Article to apply upon the facts of this case is Article 182 (5), Limitation Act which provides that for the execution of a decree or order of any civil Court the period of limitation is three years

from

"the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order."

The submission of Mr. Sinha on this point is that the High Court was not the "proper Court" within the meaning of Article 182 (5) and the appeal preferred by the decree-holders on 26-10-1942, cannot be deemed to be an application falling within the ambit of Article 182 (5). In our opinion, there is no substance in this argument. Explanation II to Article 182 enacts that "proper Court" means the Court whose duty it is to execute the decree or order, but under Section 107, Civil Procedure Code, an appeal Court has the same powers, and is required to perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction. Normally, the High Court does not itself execute the decrees of lower Courts. The practice is that the High Court remands the case to the lower Court with directions to execute the decree according to law on the basis of the High Court's decision, but in a proper case the High Court has power to execute the decree or order itself. Approaching the question in this way, it is clear that the present case falls within the ambit of Article 182 (5), Limitation Act and the 'terminus a quo' for calculating the period of limitation would be 17-11-1944, when the High Court dismissed the appeal preferred by the decree-holders. This view is supported by a decision of the Judicial Committee in - '*Annamalai Chettiar v. Valliammai Achi*'<sup>1</sup>, in which the appellant who had obtained a decree against the respondents on 3-11-1934, presented a petition to the Court of the Subordinate Judge on 14-12-1934, asking that the decree should be executed by attachment of moneys in the hands of garnishees, and on 21-1-1935, an order absolute was made. One of the respondents then filed an application under Section 47, Civil Procedure Code on 25-7-1935, for the raising of the attachment. The application was allowed by the Court on 22-10-1936. An appeal was taken by the appellant to the High Court against this decision on 3-12-1936. The appeal was dismissed by the High Court on 27-9-1938. Thereafter, on 25-11-1939, the appellant filed an execution petition asking that the decree of 3-11-1934, should be executed by attachment of certain movable properties in the hands of the respondents. In this state of facts it was held by their Lordships of the Judicial Committee that the petition of 25-11-1939, was within time under both branches of Clause 5 of Article 182, Limitation Act. In the course of the judgment it was observed by Sir John Beaumont that where an application for execution is dismissed by the lower Court, the appeal Court is then "the proper Court" within Article 182, Clause 5, and, indeed, the only Court, to execute the decree. In support of his argument, Mr. Hareshwar Pd. Sinha referred to - '*Chandrabati Kalar v. Baidyanath Banerjee*'<sup>2</sup>, in which a single Judge of this Court took the view that the mere filing of an appeal by the decree-holder was not by itself a Step in aid of execution but this decision cannot be held to be authoritative in view of the decisions of two Division Benches of this Court in - '*Jagdeo Narain Singh v. Rani Bhubaneshwari Kuer*'<sup>3</sup>, and - '*Rameshwar v. Rajendra*'<sup>4</sup>, In the first case, certain property of the judgment-debtor was attached and

<sup>1</sup> AIR 1945 PC 176

<sup>3</sup> AIR 1928 Pat 612

<sup>2</sup> AIR 1946 Pat 471

<sup>4</sup> AIR 1932 Pat 8

purchased by the decree-holder. Subsequently, an application was made by the judgment-debtor to have the sale set aside. The entire decretal amount had not been realised; and, instead of proceeding against other property of the judgment-debtor for the balance, the decree-holder waited until the application to have the sale set aside had been dismissed. In the case under Order

21 Rule 90, Civil Procedure Code, the decree-holder filed a 'hazri' of witnesses in attendance and it was held by the High Court that the filing of the 'hazri' was a step in aid of execution within the meaning of Article 182 (5). In the second case there was an appeal by the judgment-debtors against an order of the executing Court rejecting their objection to the attachment of certain properties. While the appeal was pending in the High Court, the property was sold, the sale was confirmed and the execution case was dismissed on part satisfaction. Subsequently, the appellate Court ordered stay of delivery of possession, but later on the appeal was dismissed for non-prosecution. In these circumstances, it was held by the High Court that the order of the appellate Court was the "final order" within the meaning of Article 182 (5), Limitation Act, and the application for further execution of the decree filed beyond three years of the order of the executing Court, but within three years of the order of the appellate Court, was not barred by limitation. The present case falls within the principle enunciated by the authorities, and we are of opinion that the execution petition filed on 17-11-1947, is not barred by limitation, and the decision (though not the reasoning) of the Subordinate Judge on this point is correct.

4. In view of these considerations we hold that this appeal be dismissed with costs.  
Appeal dismissed.