

(1948) 08 PAT CK 0001
In the Patna High Court

Anis Imam and Another

APPELLANT

Vs

Daughter of Jamunabai and Others

RESPONDENT

Date of Decision : 05-08-1948

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : AIR 1949 Patna 117

Hon'ble Judges : Narayan, J;Agarwala, J

Bench : Full Bench

Judgement

Agarwala, J.—This is an appeal by the judgment-debtor. The respondents obtained a final decree on a mortgage on 18th April 1955 and applied for execution on 12th September 1955. The execution case was numbered 102 of 1936. While this was pending, the defendants, appellants appealed against the decree and obtained a modification of it. The application for execution was then amended to bring it into consonance with the modified decree. As a result of objections to the execution of this decree the execution case remained pending until 1948. On 28th September of that year, it was dismissed on the ground that what the decree-holder was trying to execute was the decree of the trial Court, whereas he should have applied for execution of the decree of the High Court. We are not at present concerned with whether that decision was right or wrong. It is sufficient to note that the execution case was dismissed for that reason. The decree-holder, not being satisfied with that decision, applied for a review on 10th January 1944. He also preferred an appeal to this Court, which was Misc. Appeal No. 6 of 1944. The appeal was not pressed, and was, therefore, dismissed on 27th April 1944. The decree-holder, in the meanwhile, on 22nd December 1943, had filed another application to the executing Court, which was numbered as execution case No. 72A of 1943. This application was intended to be either a fresh application for execution of the decree, or an application to continue the previous execution case. On 2nd March 1944, the Court held that execution case No. 102 of 1935 had been dismissed as the result of a mistake of fact and directed execution Case No. 72A of 1943 to proceed. At the same time it

purported to review the order of 28th September 1943, dismissing the execution case No. 102 of 1935. Against that decision the judgment-debtors appealed to this High Court. The appeal was Misc. Appeal No. 192 of 1944. This Court remanded the case to the Court below for consideration of the various matters that were in dispute between the parties.

2. It is contended by the appellant-judgment debtor that the Court had no power to review its order of 28th September 1943, dismissing execution case No. 102 of 1935 on various grounds of which it is sufficient to mention only one, namely, that no notice was issued to the parties interested in opposing that application. Proviso (a) to Clause (2) of Rule 4 of Order 47, Civil P.C. is specific that no application for review shall be granted without previous notice to the opposite party. The Court below has endeavoured to get over this difficulty by holding that the present appellants at least were aware of the application for review. It should be mentioned that the present appellants are not all the judgment-debtors. They are merely certain persons who claim that the decree-holder is attempting to sell property which was not mortgaged and which belongs to them. The finding of the Court below does not, therefore, amount to a finding that all the members of the interested party, that is to say, all the judgment-debtors had notice of the application for review. In these circumstances proviso (a) was a complete bar to the application for review being granted. In so far, therefore, as the Court below has purported to review the order of 28th September 1943 it must be held that it has acted illegally, and that part of the order at least must be set aside.

3. The result of this is that execution case No. 102 of 1935 finally came to an end on 27th April 1944 when the appeal against the order of 28th September 1943 was dismissed by this Court. The present application viewed as a fresh application for execution, is "prima facie barred by limitation, the present application having been made on 22nd September (December?) 1943 for execution of the decree of this Court in First Appeal No. 127 of 1936 which was passed on 21st September 1938, that is to say, well over three years from the date of the application. It is contended, however, that the time occupied by the decree-holder in prosecuting execution No. 102 of 1935 should be excluded u/s 14, Limitation Act. The first Sub-section of that refers only to suits. The second Sub-section provides that in computing the period of limitation prescribed for any application the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court-of Appeal, against the same party for the same relief, shall be excluded where such proceeding is prosecuted in good faith in a Court which from defective jurisdiction or other cause of a like nature, is unable to entertain it. It is contended before us that execution case No. 102 of 1935 failed on account of a defect of jurisdiction of the Court or of some cause of a like nature. This contention is unsustainable. There was no defect in the jurisdiction of the Court to execute the decree which the decree-holder had obtained. The reason why it was dismissed was not because the Court had no jurisdiction but because the decree-holder was held to be attempting to execute a decree which was not in

existence, having been superseded by the decree of the High Court on appeal. That was not a defect of jurisdiction, nor can it be said to be a defect similar to a defect of jurisdiction. The decree-holder, therefore, was not entitled to exclude the time spent in prosecuting execution case No. 102 of 1985 in computing the period of limitation for execution lease No. 72A of 1943.

4. With regard to the contention that the present application should be regarded as an application to continue execution case No. 102 of 1936 the short answer is that that execution case was finally dismissed when this Court dismissed the appeal from the order of the executing Court of 28th September 1943 dismissing that application. That decision operates as *res judicata* between the parties until it is set aside. The decree-holder has made two attempts to set it aside. Both have failed. It was argued, however, on behalf of the decree-holder that an executing Court is always entitled to regard a subsequent application for execution as an application to continue a previous application when the previous application has been dismissed as a result of the Court's mistake. There is no authority for so astounding a proposition. Whether execution Case No. 102 of 1935 was rightly or wrongly dismissed, the judgment of this Court affirming the decision of the Court below cannot be treated as a nullity by the Court entertaining the subsequent application for execution. Even if there had been no appeal to this Court, and the order of dismissal of 28th September 1943 had not been challenged, the executing Court could not have disregarded its own order which had become final and which operated as *res judicata* between the parties.

5. The result is that these appeals must be allowed with costs. There will be one bearing fee in the Court below and in this Court in both the appeals.

Narayan J

6. I agree.