
(1963) 10 OHC CK 0008
In the Orissa High Court
Case No : M.A. No. 3 of 1962

Arakhit Padhan and Others

APPELLANT

Vs

Iswar Chandra Misra and Others

RESPONDENT

Date of Decision : 08-10-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, 105(2), 2(2), 47

Citation : AIR 1964 Ori 83

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : B. Mohapatra and R.K. Mohapatra, for the Appellant; Asok Das, L. Rath and B.B. Rath, Respondent I, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, J.—The judgment-debtors are the appellants. Iswar Chandra Misra and Padma Dibya, brother's widow of the former, obtained a joint decree against the appellants and others in Title Suit No. 18 of 1946-47 in the Court of the Munsif, Nayagarh. Iswar also filed Execution case No. 74 of 1956 without mentioning in the execution application that it was for the benefit of both the decree-holders. The judgment-debtors filed an objection u/s 47, CPC that the execution application was not maintainable as it was not in conformity with Order 21, Rule 15 Civil Procedure Code. The executing Court overruled this objection.

In Misc. Appeal No. 16 of 1958, the learned Subordinate Judge, Puri passed the following order :-

"..... the execution petition as such should be held as not maintainable in law. At the same time I must observe that the execution petition should not straightway be thrown out because of this. The learned executing Court before actually dismissing the execution application as not maintainable, should better give an opportunity to the decree-holder executing the decree to substantiate the fact of his executing the decree for the benefit of both the decree-holders, by producing

evidence as to either an express or implied assent of Padma Bewa to the execution proceeding. With the above directions I would thus set aside the decision of the learned Munsif."

After remand, Padma Dibya was examined and the Courts below have concurrently found that Padma is a member of the undivided Hindu Mitakshara joint family with Iswar Chandra Misra and that she gave express assent stating that the execution case had been filed on behalf of both. They further held that the execution application was maintainable and dismissed the objection u/s 47 Civil Procedure Code. Against the order the learned Subordinate Judge dated 6-12-1961, the miscellaneous second appeal has been filed.

2. The findings of fact that Padma Dibya is a member of the undivided Hindu Mitakshara joint family consisting of Iswar and herself and that the execution case had been filed for the benefit of both the decree-holders have not been rightly assailed in second appeal. Mr. Mohapatra raised the following contentions : -

(i) The Subordinate Judge exercised his jurisdiction with material irregularity in directing that evidence would be taken to determine whether Padma Dibya had given consent, express or implied, to the execution application filed at the instance of Iswar alone; and

(ii) Under Order 21, Rule 15, CPC evidence is not permissible to substantiate a case whether the execution was for the benefit of all the decree-holders.

3. Mr. Asok Das raised a preliminary objection that the judgment-debtors not having gone up against the remand order cannot assail it in this appeal.

4. The following points require consideration : -

(I) Can the effect and validity of the remand order be questioned in this Miscellaneous second appeal?

(II) The scope of Order 21, Rule 15, Civil Procedure Code.

(III) If the remand order can be questioned, whether the Subordinate Judge exercised his jurisdiction illegally or with material irregularity in directing that the decree-holder should be given opportunity for adducing evidence in support of the existence or otherwise of an express or implied assent on the part of Padma Dibya.

5. This remand order is an interlocutory order. It does not finally determine the rights of the parties. The question whether the execution application was maintainable was left to be determined by the executing Court after taking evidence. It was not a final order, nor did it finally determine the rights of the parties in controversy. Though it related to a question within Section 47 CPC it did not amount to a decree within the meaning of Section 2(2) CPC as it did not conclusively determine the rights of the parties. Section 105(2) CPC enacts that notwithstanding anything contained in Sub-section (1), where any party

aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. The remand order did not amount to a decree and no appeal lay therefrom. The appellants are therefore not precluded from disputing the correctness of the remand order in this appeal. The matter is concluded by a decision of the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, . The preliminary objection has no force and must be overruled.

6. For correct appreciation, Order 21, Rule 15, CPC may be quoted -

"Rule 15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on the application made under this rule, it shall make such order as it deems necessary for protection of the interests of the persons who have not joined in the application."

It is clear that the rule does not enjoin that the execution application must contain a statement that the entire decree is being executed for the benefit of all the decree-holders. There is authority for the proposition that the absence of such a statement does not render the application for execution as being not in accordance with law : *Bangar Raju v. Suraiahmma Bahadur* AIR 1957 AP 403 and *Kamal Kishore Prasad Singh, v. Hari Har Prasad Singh* AIR 1951 Pat 645. There is also authority for the proposition that when one of the several decree-holders executes a decree, he executes it prima facie for the benefit of all : *Aru-nachala Chettiar v. Virappa Chettiar* AIR 1928 Mad 800. In *Nuzat-ud-Dowala v. Beni Madhav* AIR 1926 Cal 811, their Lordships observed that the omission on the part of a decree-holder to state in the application for execution the names of all the persons who were interested in the decree was not such a defect as would invalidate the execution.

It is not absolutely necessary that the names of all the decree-holders should be given in the execution proceeding and that it is in the discretion of the Court whether notice should be given or not to the other decree-holders or to the judgment-debtors before making an order for execution under Order 21 Rule 15, Civil Procedure Code. It is not obligatory upon the Court to issue such a notice. Courts have even gone to the extent of holding that when one of the several decree-holders applies for execution and others do not object to the execution being granted to him, it is not for the judgment-debtors to say that sufficient steps have not been taken to safeguard the interests of other decree-holders : *Jagdeo Singh and Another Vs. Babu Lal Sah*, , *Ghanayalal v. Madho Parshad* AIR 1931 Lah 600 and *Yaramath Khan v. Amirul Umra* AIR 1926 Mad 1198.

7. In AIR 1949 73 (Orissa) a Bench of this Court laid down that evidence could be taken in the execution proceeding itself to determine whether the execution had been filed by one of the decree-holders for the benefit of all. Ray, C. J., expressed himself as follows :

"The next contention which has been dealt with by the lower appellate Court centres round his finding that the application for the execution was on behalf of both the decree-holders. His contention of law that the execution at the instance of one of the several decree-holders, unless made for the benefit of all the decree-holders, will not lie, is a sound one, subject to what Mr. Mohapatra contends that the fact that the application was made on behalf of the decree-holders can be substantiated, or the defect, if any, can be made good by the other decree-holders coming into the execution case and either giving their express or implied assent to the proceeding."

On the basis of this authority, the remand order has been made to give opportunity to Iswar to make out a case of assent by Padma Dibya. In AIR 1926 Cal 811 their Lordships have subscribed to such a view as would be apparent from their observations --

"In the present case the other decree-holders having subsequently come in, and having given consent to the execution of the decree, and there being no reason to suppose that their interests having been properly safe-guarded, I am unable to say that this defect is one which would invalidate the proceedings in any way."

8. It is unnecessary to further pursue the matter. When Courts have gone to the extent of holding that when one of the several joint decree-holders executes a decree, he executes it prima facie for the benefit of all, it would be futile to contend that AIR 1949 73 (Orissa) does not lay down good law in enunciating that the defect can be made good by giving opportunity to one of the decree-holders to substantiate in the execution proceeding itself that the execution is for the benefit of all. Apart from the fact that this Division Bench decision is binding on me, I say with respect that lays down the correct law.

8a. Mr. Mohapatra, however, contends that even though Iswar could legally adduce evidence in the execution proceeding to establish that the execution was for the benefit of all, he having failed to adduce such evidence at the initial stage should not have been given opportunity to fill up the lacuna after remand and that in passing the remand order, the appellate Court exercised jurisdiction illegally and with material irregularity. This argument has nothing special in its application to execution cases. No hard and fast rule can be laid down. Even in AIR 1926 Cal 811 no evidence had been adduced in the case although the arguments had already been heard. An identical objection was advanced. Their Lordships negated it by saying -

"The learned Judge granted the application of the decree-holders and I am unable to hold that in the circumstances, to which I have referred, he exercised his jurisdiction wrongly in allowing the decree-holders to adduce further evidence

although arguments had already been heard in this case."

In P.M.A.R.M. Muthiah Chettiar Vs. Lodd Govinda Doss Krishna Doss Varu and Another, , a Full Bench of that Court held that the Court had jurisdiction to allow other decree-holders to intervene in a pending execution application under Order 21, Rule 15, CPC if it was not being properly conducted by the decree-holder filing it. - In this case, a bare statement in the execution application that it is for the benefit of all the decree-holders would have sufficed. Its omission is due to the neglect and ignorance of the lawyers representing Iswar. The case comes from the Ex-State of Nayagarh. It is not unlikely that the legal position was not clear and the lawyer did not advise for examination of Padma Dibya at the initial stage. In the circumstances of this case, I am satisfied that the lower appellate Court exercised his jurisdiction properly.

9. The appeal fails and is dismissed. In the circumstances, parties to bear their own costs throughout.