
(1956) 07 CAL CK 0016
In the Calcutta High Court
Case No : A.F.O.O. No. 234 of 1955

Atindra Lal Pakrasi

APPELLANT

Vs

Monoranjan Choudhury and Others

RESPONDENT

Date of Decision : 10-07-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48

Citation : AIR 1957 Cal 142

Hon'ble Judges : K.C. Das Gupta, J;Guha, J

Bench : Division Bench

Advocate : Amaresh Chandra Roy and Hemesh Chandra Sen, for the Appellant;
Shyama Charan Mitter and Purnendu Narayan Biswas, for the Respondent

Final Decision : Dismissed

Judgement

Das Gupta, J.—The first respondent Monoranjan Choudhury obtained a final mortgage decree against the appellant and some other persons on the 18-6-1935. He made his first application for execution on the 13-3-1936; the second on the 15-2-1939; the third on the 15-5-1942; and the 4th on the 15-5-1945. It is not disputed that all these applications were within the time prescribed by the Limitation Act. Execution case No. 21 of 1945 which was started on his application made on the 15-5-1945, was, after various orders with which we are not concerned, adjourned on the 14-8-1947, to 29-8-1947, for orders. On the 29-8-1947, the following order was passed:

"Notice u/s 34 of the B. A. D. Act is put up. Let further proceedings be stayed until further orders."

On the 30-4-1951, this stay order was vacated and the case was struck off. An application praying for execution of the decree was made by the decree-holder on the 15-2-1954. The appellant objected to execution on the ground that it was barred by limitation. This has been rejected by the executing court and the appeal is directed against the order of rejection.

2. It has to be mentioned that the question of limitation was considered by the court below on the basis that the application of 1954 was a fresh application for execution. Admittedly if this be not in law a fresh application for execution but merely an application in a live execution case, no question of limitation would arise. We have therefore thought it proper to address ourselves to this question-- was the application of the 15-5-1954 a fresh execution petition or was it an application in an existing execution case? It is settled law, and was pointed out by the Privy Council as recently as 1939 in AIR 1939 80 (Privy Council) that the question whether an application is a fresh application or merely ancillary or incidental to the continuation of a previous application has to be decided on the circumstances of each case and that the substance of the matter must prevail over the form. It is equally well settled that the mere passing of an order striking off an execution case does not necessarily terminate the case. In *Govermonee Dossee v. Jogutindronarain* 18 SWR 319, where the jurisdiction of the principal Sadar Amin to take steps in execution was challenged on the ground that an order "striking off" the case had been passed earlier, the Privy Council held that the jurisdiction had not ceased as the "striking off" was only for the purpose of disposal of pending cases. (See also *Monarth Das v. Ambika Kanta Bose* 9 Cal LJ 443 (C)).

3. The question therefore is whether in the circumstances of the present case the order striking off the case should be held to have terminated the proceedings. As already stated, the proceedings were started by an order dated the 29-8-1947. The next order we find is the order dated the 29-3-1951. It is in these words:

"Under G. L. No. 5 of 1949 of the Hon"ble High Court issue notice on the judgment-debtor as well as on the decree-holders to show cause why the stay order should not be vacated and the case disposed of fixing 19-4-51 for return and order. The notice to the judgment-debtor should be sent by registered post at court's costs and the notice on the decree-holder to be also served at court's cost."

On the 19-4-1951, the court passed the following order:

"To 26-4-1951 for orders awaiting the service return."

The order of the 26-4-1951, runs as follows:

"Notice on the decree-holder has been served and the notice on the judgment-debtor appears to have been sent by post. Decree-holder to take steps, if any by 30-4-51. Put up on the date fixed for further orders."

Finally on the 30-4-1951, the court passed the order in these words:

"No steps taken. The stay order passed in the case is vacated and the case is struck off."

There can be no question here of the decree-holder's abandoning the execution proceedings. It is interesting to note that the order to take steps by the

30-4-1851, was passed on 26-4-51 in the decree-holder's absence. The decree-holder had no notice that the case would be taken up on 26-4-51. From the fact that in spite of all this the court thought fit to make order striking off the case taken with the circumstances that the notice itself was issued under a General Letter issued by the High Court, it seems reasonable in my opinion to conclude that the order of the 30-4-1951 was passed merely for the purpose of showing disposal of pending cases. I have therefore come to the conclusion that there was no termination of the previous execution case. Consequently, the objection that execution is barred by limitation must fail.

4. This appeal is accordingly dismissed with costs.

Guha, J.

5. I agree.