

(1939) 12 PAT CK 0009

In the Patna High Court

Bhishundeo Narain Missir and Others

APPELLANT

Vs

Raghunath Prasad Missir

RESPONDENT

Date of Decision : 12-12-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Article 182(5)

Citation : AIR 1940 Patna 677

Hon'ble Judges : Wort, J;Meredith, J

Bench : Full Bench

Judgement

Meredith, J.—This is a judgment-debtor's appeal from an order of the learned District Judge of Muzaffarpur, dated 18th May 1939 affirming an order of the Subordinate Judge of Muzaffarpur, dated 14th February 1939 dismissing an application u/s 47, Civil P.C., in execution proceedings. The point now taken is one of limitation, and the dates material to the determination of the question are as follows:

7-8-1933 : Decree passed in favour of the respondent for Rs. 2264 by the Munsif, Second Court, Dar-bhanga. 20-7-1935 : Application made to the Munsif, Second Court, Darbhanga, by the decree-holder for transfer of the decree for execution to the Munsif, Second Court, Muzaffarpur. 20-4-1935 : The Munsif, Second Court, Muzaffarpur, who had powers up to Rs. 4000 was transferred and was succeeded by a new Munsif, having powers up to only Rs. 1000. 5.8-1935 : The District Judge of Muzaffarpur on receipt of the decree from the Munsif, Second Court, Darbhanga, transferred it for execution not to the Munsif, Second Court, Muzaffarpur (who by that time had not the necessary powers) but to the Munsif, First Court, Muzaffarpur (who also had no special powers). 22.5-1936: The decree-holder filed his application for execution not before the Munsif, First Court, Muzaffarpur, but before the Subordinate Judge, First Court, Muzaffarpur. 29.5-1936: The Subordinate Judge, First Court, Muzaffarpur, returned the application together with the certificate of non-satisfaction and the order of transfer, to the applicant, on the ground that he

had no jurisdiction. The same day the decree-holder re-filed it before the Munsif, First Court. The Munsif also returned the papers for presentation before the proper Court, on the ground that he had no jurisdiction. 4.6-1936 : The decree-holder goes back to the Subordinate Judge, First Court, Muzaffarpur, and refiles his application before him. This time the Subordinate Judge, First Court, accepts it. 11.5-1937 : An objection made by the judgment-debtors to execution is dismissed by the Subordinate Judge. 26-8-1937 : Against this order of dismissal there was appeal to the District Judge, who, on this date, allowed it and dismissed the execution case on the ground that the Subordinate Judge had no jurisdiction, as the decree had not been transferred to his Court. 13-4-1938 : The High Court in second appeal upheld the order of the District Judge. 18-7-1938 : The decree-holder filed a fresh application before the Munsif, Second Court, Darbhanga, for transfer of the decree for execution to the Subordinate Judge, First Court, Muzaffarpur. 21-7-1938 : The District Judge of Muzaffarpur thereupon passes an order transferring the decree for execution to the Subordinate Judge, First Court, Muzaffarpur. 22-7-1938 : The present application for execution is filed before the Subordinate Judges. It is contended, first, that the application for transfer, filed on 20th July 1935 before the Munsif of Darbhanga, was not a step-in-aid of execution within the meaning of Article 182(5), Limitation Act, because it was not made in accordance with law, as it was for transfer to a Court having no jurisdiction; if this application was not a step-in-aid, giving a fresh start for limitation under Article 182(5), then the present application must be barred by limitation.

2. Secondly, even if that application be taken to be a step-in-aid, the second application for transfer filed on 18th July 1938, before the Munsif at Darbhanga, cannot be taken to be a step-in-aid, because it was not made to the proper Court; as the decree had been previously transferred to Muzaffarpur, and no certificate of non-satisfaction had been received by the Munsif, Darbhanga, he had no jurisdiction to entertain a fresh application for execution or for transfer of the decree.

3. If the application of 18th July was not a step-in-aid, then the application for execution dated 22nd July 1938, would, in any case, be out of time, being more than three years after the application of the 20th July 1935. The Court below has held that the application of 20th July 1935 was a step-in-aid. It has recorded no clear finding with regard to the application of 18th July 1938, but it may be presumed that it was its opinion that it could not have saved limitation, because it holds that the application of 22nd July 1938 was in time, as the decree-holder u/s 14, Limitation Act, was entitled to exclude the time spent in prosecuting his application made in 1936 to the Subordinate Judge, this being a proceeding prosecuted with due diligence in good faith in a Court, which, from defect of jurisdiction, was unable to entertain it.

4. Mr. B.C. De, for the appellants, as regards Section 14, argued, in the first place, that Section 14 must be read subject to Article 182(5), and not vice versa:

the special provision must control the general provision, and Section 14 can-not be used so as to extend the limitation period of three years fixed under Article 182. Secondly, even if that could be done, this is not a fit case for its application since the decree-holder was not prosecuting his application with due diligence in good faith. "Good faith," as defined in the Act, involves "due care and attention." It follows then, that there are three questions for decision:

(1) Was the application of 20th July 1935, for transfer of the decree to the Court of the Munsif, Second Court, Muzaffarpur, a step-in-aid, was it in accordance with law?

(2) Was the application of 18th July 1938, a step-in-aid ? and (3) Is the decree-holder entitled to exclude the time spent in prosecuting the application of 20th July 1935, u/s 14, Limitation Act?

5. Upon the first point, I am of opinion that the application of 20th July 1935 was an application to take a step-in-aid of execution within the meaning of Article 182(5), which runs as follows:

(Where the application next hereinafter mentioned has been made) 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.

Article 182 provides three years" limitation from that date. It is, of course, settled that an application for transfer of a decree is a step-in-aid of execution, *Amrit Lal v. Mnr. Idhar* AIR 1922 Pat 188 but in order to save limitation, such an application must also be an application in accordance with law.

6. There are rulings to the effect that an application to a Court having no jurisdiction is not in accordance with law. The application which we are at present considering was not, however, an application of this kind. It was an application for transfer made to the proper Court, that is, the Munsif, Second Court, Darbhanga, which had passed the decree. It was for transfer to a Court which at that time had not the necessary jurisdiction, but which shortly before that had had it. Upto 30th April 1935 the Munsif, Second Court, Muzaffarpur, had the necessary pecuniary jurisdiction to execute the decree. As the learned District Judge has observed, under Order 21, Rule 5, Civil P.C., the original Court should not transfer the decree direct to the Second Munsif of Muzaffarpur but was bound to send it to the District Judge of Muzaffarpur under Order 21, Rule 8. The District Judge could then transfer the decree to any Subordinate Court of competent jurisdiction, and was not bound to send the decree to the particular Court mentioned in the original application for transfer.

7. There is nothing to show that the decree-holder had direct knowledge in fact that the Second Munsif of Muzaffarpur had ceased to exercise jurisdiction up to Rs. 4000. The application was not, therefore, an application to transfer the decree to some Court which could never possibly have jurisdiction to execute it,

but was an application for transfer to a Court which for temporary reasons, not known to the decree-holder, was at that particular time incompetent to execute the decree.

The District Judge of Muzaffarpur, on receipt of the application, finding that the Munsif, Second Court, had no longer jurisdiction, could and should have transferred the decree to a competent Court.

8. Instead of that, though he did not transfer it to the Second Munsif he transferred it to the Munsif, First Court, who also had no jurisdiction. It may well be that the word "Munsif" was merely a clerical error made in the District Judge's office and what was intended was a transfer to the Subordinate Judge, First Court, which was the proper Court to which to make the transfer. However, that may be, the application for transfer was to a Court which the decree-holder having regard to its previous history might quite reasonably suppose to have the necessary jurisdiction; and the application would have gone to a Court of competent jurisdiction but for a mistake in the office of the learned District Judge. What the rulings state is that the phrase "made in accordance with law" does not include an application to the Court to do something which either from the decree-holder's direct knowledge in fact or from his presumed knowledge of law he must have known the Court was incompetent to do.

9. I agree with the District Judge that the presumed knowledge of law refers to knowledge of the general law and not to knowledge of any particular orders varying the pecuniary jurisdiction of a particular Court. It would be unreasonable to expect the decree-holder to keep track of every change in the pecuniary jurisdiction of Munsif's Courts in other districts dependent upon the transfers of particular officers. In my view it cannot be said that an application for transfer of a decree to a Court of any other district which for merely temporary and accidental reasons, has not the necessary jurisdiction at the particular time is not an application in accordance with law. That disposes of the first point.

10. I turn now to the second point, that is, regarding the application of 18th July 1938. It must be held, I think, that this was not an application which could save limitation under Article 182(5), because it was not made to the proper Court, and that is one of the express requisites of the provision in question. Manifestly, without receiving a certificate of non-satisfaction from the Court to which the decree had been transferred, the Munsif Darbhanga, could not entertain a fresh application for execution. On this point there is the direct authority of the Privy Council in *Maharaja of Bobbili v. Narasaraju Peda Baliara Simhulu Bahadur* AIR 1916 PC 16 wherein it was laid down that an application to a Court asking it to do what it has no jurisdiction to do, is not in accordance with law or a step-in-aid of execution. This ruling was followed in *Kumar Kamakhya Narain Singh Vs. Kalipado Dutt*, wherein it was also held that an application for execution made to a Court, which has already transferred the decree for execution elsewhere is not a step-in-aid.

11. I come now to the third point, whether the application of 22nd July 1938, though more than three years after the application of 20th July 1935, can yet be held to be in time by the application of the provisions of Section 14, Limitation Act.

The argument that Section 14 must be read subject to Article 182(5) and cannot be used to extend the period of three years' limitation prescribed by Article 182, appears to me to be based upon a misconception. There is no question of extending the period of three years. The question is rather of excluding certain periods from the calculation under which the three years period is made up. There is in fact no question of either provision being controlled by or subject to the other. Article 182(5) and Section 14 are dealing with quite distinct matters. The former prescribes the terminus a quo, the point from which limitation shall begin to run; the latter has nothing to do with this, and relates only to the method to be adopted in calculating the total time that is to be counted after the starting point has been fixed. Clause (5) of Article 182 has nothing to do with any period of time; it has only to do with a fixed point of time.

12. It is quite conceivable that a proceeding might be started in a Court without jurisdiction by an application not in accordance with law, an application which could not possibly form a fresh starting point for limitation under Article 182(5); but that fact would not prevent the exclusion of the period for which the proceeding initiated by the application was being prosecuted, so long as it was being prosecuted in the Court without jurisdiction with due diligence and in good faith. For Section 14(2), which relates to applications, refers only in wide terms to a civil proceeding, whether in a Court of first instance, or in a Court of Appeal, against the same party for the same relief, and says nothing whatever about the proceeding being in accordance with law or in the proper Court. On the contrary, it does apply in express terms to a proceeding in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

13. The conditions for the application of Section 14(2) are five : (1) that there is another civil proceeding; (2) that it is against the same party; (3) that it is for the same relief; (4) that it is prosecuted with diligence and in good faith; and (5) that the Court from defect of jurisdiction or other cause of a like nature is unable to entertain it. Only these five conditions have to be satisfied for the application of Section 14(2), and no condition that the proceeding must be in accordance with law is to be found in them, either expressly or by implication. Nor, as I have said, can the words of Article 182(5) be imported into Section 14(2), since the provisions relate to quite different matters. That the words "any application" in Section 14(2) will include an application for execution is well settled, and there are numerous cases where it has been held that a decree-holder is entitled to exclude the time during which he has been prosecuting his execution bona-fide and with due diligence before a Judge whom he believed bonafide, though erroneously, to have jurisdiction.

14. I may refer first to a case under the old Limitation Act of 1859, where

Section 20 corresponded to Article 182 of the present Act. Their Lordships of the Privy Council in *Hira Lal v. Badrl Daa* (80) 2 All 792 laid down that it was the object of the Legislature in the Limitation Act (14 of 1859), Section 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, bona fide and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle should prevail in the construction of Section 20 with regard to executions.

15. That view was taken before the second clause was enacted in Section 14. In a case twelve years later (in 1892), the Calcutta High Court laid down in *Rajballabh Sahay v. JaiKrishna Prasad* (93) 20 Cal 29 that u/s 14, Limitation Act, the decree-holder was entitled to a deduction of all the time occupied in executing his decree in a Court having no jurisdiction, his application upon the facts of the case having been manifestly made in good faith.

In 1900 the Calcutta High Court again held in *Jahar v. Kamlni Debi* (01) 28 Cal 288 that a proceeding to enforce a decree taken in a Court, which was erroneously believed by the decree-holder to have jurisdiction, is a bona fide proceeding within the terms of Section 14, Limitation Act (15 of 1877).

16. That was a case where the property at the date of the decree was situated within the jurisdiction of the Munsif's Court at Nawabganj. Subsequently, by order of the Local Government, the local jurisdiction in respect of the thana was transferred to the Court of the Munsif at Malda. After the transfer was notified, the decree-holder, within the time fixed by the law of limitation, applied for execution in the Malda Court. After the sale it was found that the decree-holder had obtained no certificate from the Nawabganj Court transferring the decree for execution by the Malda Court, and the latter had, therefore, no jurisdiction to execute the decree. The decree-holder then applied to the Nawabganj Court for a transfer, and was held to be entitled u/s 14, Limitation Act, to a deduction of the time during which the application erroneously made to the Munsif of Malda had been pending, as the proceeding had been taken in good faith. Their Lordships observed that the District Judge had wrongly held that ignorance of law, that is to say ignorance on the part of the decree-holder that his application could only be made in the Nawabganj Court, prevented his pleading good faith within the terms of Section 14, Limitation Act. The case in 2 All 7924 was, they said, an authority to the contrary.

18. They observed further that in 2 All 7924 their Lordships of the Privy Council had pointed out that in that case the Judge himself believed he had jurisdiction and acted accordingly, and so also in the case before their Lordships. So also, I should observe, in the present case, for the Subordinate Judge, Muzaffarpur, entertained the application on the second occasion and dismissed the objection of the judgment, debtors. It was only when the case came to the District Judge on appeal that it was held that the Subordinate Judge had no jurisdiction.

19. In *Kakamani Bayappa v. Kotta Venkanna* (11) 11 ICO 338 where the Sub-Court at Ellore had transferred its decree for execution direct to the Special Assistant Agent instead of to the Agent, Godavari; where that order having been set aside an application was filed in the proper Court, the applicant was held entitled to a deduction of the time spent between the date of order of transfer to the wrong Court and the date of return of the proceedings to the right Court in accordance with an appellate order, and that he must be deemed to have been bona fide prosecuting his application for execution within the meaning of Section 14, Limitation Act, as he was not responsible for the order of the Court transferring the decree to a wrong Court.

20. Here, I may remark that in the present case the decree-holder was not responsible for the fact that the District Judge finding the Munsif, Second Court, Muzaffarpur, no longer had jurisdiction, wrongly transferred the decree to the Munsif of First Court instead of to the Subordinate Judge, First Court.

Coming to the present Limitation Act (IX of 1908), it was held in *Kala Singh v. Gehna Singh* ("32) 19 AIR 1982 Lah 531 that the wording of Sub-section (2) of Section 14, Limitation Act, is comprehensive enough to cover all applications and is therefore applicable to bona fide applications for execution, if they have been filed and presented in a wrong Court in circumstances described in that section.

21. In *Pandu Dagadu Mahar Vs. Jamnadas Chotumal Marwadi*, where it was found on appeal that certain proceedings in the Haveli Court were without jurisdiction, it was held that the decree-holder was entitled to exclude the time spent in prosecuting those proceedings u/s 14(2), Limitation Act 1908, since he ought not to suffer because when the proper proceedings were in the Vadgaon Court, the Judge sitting in the Haveli Court had wrongly entertained the darkhast. In my view, there can be no doubt about the proposition that Section 14(2), Limitation Act, applies to execution proceedings in suitable cases, and Article 182(5) cannot in such cases bar its application.

In support of the contention that Section 14(2) should not be applied in the present case, as the proceedings were not in good faith, reliance is placed on *Shaikh Fazlul Jamil and Others Vs. Shaik Helaluddin*, a case of this High Court.

22. That was a case where the execution petition had been filed in the Court of the Munsif, First Court, Purnea, though the decree had been passed by the Court of the Subordinate Judge, and there had been two previous execution proceedings, both in the Court of the Subordinate Judge. It was held that the decree-holder was not entitled to exclude the time spent in the Court of the Munsif. It was pointed out that "good faith" for the purposes of the Limitation Act was defined in Section 2(7):

Nothing shall be deemed to be done in good faith which is not done with due care and attention.

In the case under consideration the decree on the face of it showed that it had

been passed by the Subordinate Judge. The decree-holder postponed action till the very last moment and though the decree was staring him in the face as one of the Subordinate Judge, his agent negligently filed the execution application in the Munsif's Court. Clearly they observed, such an act could not be said to be done with due care and attention. The District Judge had found that the decree-holder had acted in good faith; that, however, they held, was a question of mixed law and fact which the High Court could go into in second appeal. In that particular case, therefore, Section 14 was not applied, though there was clearly an implication that it could have been applied if the decree-holder had acted in good faith. The facts of that case were quite dissimilar to those of the present case. In the present case also, however, the District Judge has recorded an express finding that the decree-holder was prosecuting the proceedings in the Court of the Subordinate Judge in 1936 in good faith.

24. With regard to this finding, I shall only say that, whether it is a correct finding, in so far as it is a finding of fact, is a point which does not concern us in second appeal; and in so far as it may be considered a finding of law, there is nothing in the case upon which it could be held that it is legally wrong.

23. In my view the decree-holder in the present case is clearly entitled to exclude the time spent in prosecuting his case in wrong Courts. The exclusion of even two days would make the present application of 22nd July 1938, an application within time, always provided that the application of 20th July 1935 was a step-in-aid. I have held that it was so. Even, however, had it not been possible to come to that finding, the present application would still be in time, for a reason which I shall now state. The time to be excluded u/s 14(2) is from 20th July 1935 to 13th April 1938, the date when the High Court finally affirmed the order of the District Judge holding that the Subordinate Judge had no jurisdiction; that is to say, the decree-holder is entitled to an exclusion of about two years and nine months. If two years and nine months be excluded, the application of 22nd July 1938 was in time, even calculating from the date of the decree, which, as I have said, was passed on 7th August 1933. I would dismiss the appeal with costs.

Wort, J.

25. I agree.