
(1934) 01 PAT CK 0008
In the Patna High Court

Chairman, Dhanbad Municipality

APPELLANT

Vs

Janeswar Bhakat and Others

RESPONDENT

Date of Decision : 11-01-1934

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 82(1)(a), 86

Citation : AIR 1934 Patna 83 : 148 Ind. Cas. 918

Hon'ble Judges : Mohammad Noor, J;James, J;Fazl Ali, J

Bench : Full Bench

Judgement

Fazl Ali, J.—The only point for determination in this appeal is whether the application for execution filed by the decree-holder, who is respondent in this case is within time or barred by limitation. The facts of this case are shortly these: On 19th July 1926 the opposite party obtained an ex parte rent decree and although an attempt was made on behalf of the appellants to get this decree set aside they were not successful and their appeal against the order of the trial Court refusing to set aside the rent decree also failed. On 19th February 1929, the decree-holder applied for execution of the decree and on 5th September 1929, certain properties belonging to the appellant were sold in execution of this decree and ultimately upon certain objections made by some of the appellants the sale was set aside on 21st November 1929. The result was that the execution proceeding was revived and then it was discovered that Jagdeo Sahay, one of the judgment debtors had died in the meantime and Kuldeo, Sahay, another judgment-debtor, was reported to be insane.

2. The Court thereupon directed the decree holder-respondent to take steps to substitute the heirs of Jagdeo Sahay and to appoint a guardian for Kuldeo Sahay, the lunatic judgment-debtor. The order that was passed by the executing Court on 14th December 1929, directing the decree-holder to take the necessary steps, was in these terms:

Decree-holder's L.A. files a petition for two weeks time to furnish the name of the legal heir to the deceased Jagdeo Sahai (J.D.) and also to appoint a guardian

for the insane Kuldeo Sahay (J.D. No. 2). Time allowed till 23rd December 1929. If he fails to take necessary steps by that date, the case will be dismissed.

As a matter of fact the decree-holder failed to take the necessary steps by the date fixed by the Court and on 23rd December 1929, the execution case was dismissed for default, but it may be mentioned that on that date the decree-holder had applied for further time, but the Court refused to grant time on the ground that he had been negligent almost throughout since the institution of the execution case.

3. Then, on 5th February 1930, the decree-holder filed his second execution petition which was promptly objected to be by the appellant on the ground that it was time-barred, inasmuch as it was made more than three years after the passing of the decree which was sought to be executed. The Court of first instance held that time against the decree holder must be taken to run from the date when the judgment-debtor's appeal from the order of the trial Court refusing to set aside the ex-parte decree was dismissed and therefore the application was within time.

4. The lower appellate Court has however clearly pointed out that this view is not tenable in law because there was no appeal from the original decree and u/s 181, Clause (b), Chota Nagpur Tenancy Act, the date of the decree of the suit must be taken to be the starting point for the period of limitation and not the date of any other order. The lower appellate Court has however held that certain observations made in the case of Musammat Kaniz Zohra and Another Vs. Rai Syam Kisen and Another, , indicate the principle which should be applied to a case like the present. In that case after an execution proceeding had been dismissed on the ground that no steps had been taken, a subsequent execution petition was considered to be an application in continuation of the original application and the lower appellate Court after referring to these facts observes:

In the present case however the Court allowed the decree-holder further time to take steps and dismissed the case for default, on the decree-holder's failure to take necessary steps in the time allowed. This distinction appears to me to be a real one and accordingly I do not think that that case is quite on all fours with the present one.

5. The lower appellate Court then proceeds to quote the remark made by Chamier, C.J., in that case which was to the effect that in order to get over the difficulty which arises where an application for execution remains pending for several years and results in an order setting aside the sale and thereby the period of limitation is exceeded, the Courts have adopted two expedients: one is to treat the subsequent application as an application made in continuation of the application made before the sale; and the other is to hold that such an application is covered by Article 181, Limitation Act, and the decree-holder is entitled to three years from the date on which the sale is set aside within which to make a further application.

6. In the view of the lower appellate Court in the present case either the second application should be treated as a continuation of the first application or the period of limitation should be held to run from the date on which the sale was set aside and the case should be held to be covered by Section 231, Chota Nagpur Tenancy Act. Now, Section 231, Chota Nagpur Tenancy Act, provides that

all suits and applications instituted or made under this Act for which no period of limitation; is provided elsewhere in this Act shall be commenced and made respectively within one year from the date of the accruing of the cause of action.

It is clear that this case cannot be application for execution is concerned Section 181 specially provides the period of limitation to be three years from the date of the decree where the decree has not been appealed from or reviewed. The only question therefore to be determined is whether the decree-holder's application of 5th February 1930, should be regarded as an application in continuation of his first application for execution, namely the application made by him on 19th February 1929. Now, in this particular case, it is difficult to hold that the executing Court when it dismissed the case on 23rd December 1929 did so really to clear up the file.

7. As a matter of fact some very important steps had to be taken by the decree-holder before the execution could be proceeded with and the case was dismissed after giving a warning in clear terms to the decree-holder that if those steps were not taken by a certain date, the case would be dismissed. As has been pointed out by a Full Bench of the Allahabad High Court in *Dhonkal Singh v. Phakkar Singh* (1893) 15 All 84, a Court has power inherent if not conferred by statute to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application and so it cannot be said that the order of the Court dismissing the decree-holder's application was made without jurisdiction.

I have already said that having regard to the circumstances under which the decree-holder's application was dismissed it cannot be held that the Court was merely seeking an excuse for clearing up the file and not dealing with the case on proper grounds.

8. If this view is correct, it follows that the first execution petition was no longer in existence and therefore it became necessary for the decree-holder to file a fresh. application and this was done on 5th February 1930. If then the second application cannot in law be regarded as a continuation of the first application, there can be no escape from the conclusion that the second application was time-barred because it was clearly made more than three years after the date of the decree which was sought to be executed. The learned Advocate for the decree-holder relies strongly on the case of *Musammat Kaniz Zohra and Another Vs. Rai Syam Kisen and Another*, , and on the case of *Deonarayan Singh v. Ram Prasad*, AIR 1926 Pat. 143. I have already sufficiently dealt with the former case and as to the latter case the facts there seem to have been as follows:

9. A landlord decree-holder had applied for execution of a rent decree, when the executing Court held that the execution should proceed as on the basis of a money decree and not as a rent decree. It proceeded in that way and the sale of certain property of the judgment-debtor was actually confirmed and the case was dismissed on full satisfaction. On the same day the judgment-debtor put in a petition to set aside the sale under the provision of Order 21, Rule 90, and eventually the sale was set aside. The decree-holder then applied once more to execute the decree as a rent decree and it was held in these circumstances that the second application should be treated as a continuation of the preceding application inasmuch as the prayers in both were to execute the decree as a rent decree.

10. This decision only lays down that an application for execution made after a sale is set aside should be regarded as a continuation of the application made before the sale, especially when the prayers made in both the applications are identical. In the present case however it is not questioned that the decree-holder was entitled to ask the Court to proceed with the execution after the sale had been set aside and there can be no doubt that had it not been for the fact that the decree-holder failed to take certain steps which he was required to take by the executing Court which resulted in the dismissal of his application, the application made by him should have been regarded as an application in continuation of the original application for the execution of the decree. The mere fact that both in the present application and in the application that was made in February 1929, a prayer had been made by the decree-bolder for the sale of the same property would not necessarily make the second application a continuation of the first, although it may be mentioned that, it is pointed out on behalf of the appellant, that in the second application a further prayer has been made for executing the decree by the arrest of some of the judgment-debtors.

11. Having regard to the facts of the case and considering the fact that the application of the decree-holder made on 5th February 1930, is barred by limitation I would allow the appeal with costs throughout and set aside the judgment and order of the Court below.

James. J.

12. I agree.