
(1950) 01 CAL CK 0017
In the Calcutta High Court
Case No : Civil Rule No. 1125 of 1949

Dominion of India

APPELLANT

Vs

Gosto Behary Kundu

RESPONDENT

Date of Decision : 19-01-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 82

Citation : AIR 1950 Cal 247 : (1950) 1 CALLT 294 : 54 CWN 749 : (1951) 1 ILR (Cal) 354

Hon'ble Judges : Harries, C.J.;Sarkar, J

Bench : Division Bench

Advocate : Bhabesh Narayan Bose, for the Appellant; Bhabesh Chandra Mitter, for the Respondent

Judgement

Harries, C.J.—This is a petition for revision of an order of a learned Judge of the Presidency Small Cause Court, Calcutta, disallowing the objection of the Dominion of India to a certain execution.

2. On 12th August 1947, the opposite party instituted a suit in the Small Cause Court at Barisal against the Indian General Navigation Company, River Steamship Navigation Company, Bengal and Assam Railway and the Governor-General in Council representing Bengal and Assam Railway. The claim was for short delivery of certain chillies which had been booked from the steamer station of Ibrahimpur in East Bengal for delivery at Forbesganj in Bihar.

3. The first two defendants entered appearance, but it appears that the Bengal and Assam Railway and the Governor-General in Council did not enter appearance. However on 6th February 1948, the plaintiff obtained a decree in the Small Cause Court at Barisal against defendants 3 and 4, that is, the Bengal and Assam Railway and the Governor-General as representing that railway.

4. Later application was made to the Barisal Court for a certificate of non-satisfaction of the decree. The Court gave the certificate in June 1948 and it is

said that written on the certificate were the words that the decree is executable against the East Indian Railway as it had undertaken to pay the liabilities of the Bengal and Assam Railway and therefore had become liable to pay the decretal amount.

5. The Barisal Court sent the certificate of non satisfaction and the decree at the instance of the plaintiff to the Presidency Small Cause Court at Calcutta for execution.

6. On 28th July 1948, the Presidency Small Cause Court wrote to the East Indian Railway informing them that the plaintiff-decree-holder had prayed for attachment of certain movable properties belonging to the railway. Objection was immediately filed on behalf of the Dominion of India objecting to this execution as it was the execution of a decree of a foreign Court. Eventually the Small Cause Court overruled the objection and allowed execution to proceed. It is for revision of that order that the present petition has been preferred to this Court.

7. It is common ground that the Court of Barisal is now a Court in Eastern Pakistan and is not within the jurisdiction of this Court and is not within the Dominion of India. It is now a Court in a foreign country and it seems to have been suggested earlier in these proceedings that a foreign Court could not possibly transfer a decree to a Court in the Dominion of India for execution. Quite clearly the CPC does not govern any decrees made by a foreign Court and would not allow that foreign Court to transfer such decrees to a Court in the Dominion of India for execution.

8. On behalf of the opposite party, however, reliance is placed on certain orders which were made in August 1947 when the Dominions of India and Pakistan were created. These orders were intended to deal with the rights and liabilities of the two new Dominions and with pending legal proceedings.

9. As this suit was instituted on 12th August 1947, it was pending in the Court of Barisal when the two Dominions became independent and were partitioned on 15th August 1947. It has been urged on behalf of the opposite party that after partition the Barisal Court has jurisdiction to proceed with this case as if the partition had never occurred. Reliance is placed on the Indian Independence (Legal Proceedings) Order, 1947, Article 4 (1) and (3). That Article provides:

"Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947,

(1) all proceedings pending immediately before the appointed day in any civil or criminal Court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that Court as if the said Act had not been passed, and that Court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;

(3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such Court in the said proceedings, as if it had been passed by a Court of competent jurisdiction within that Dominion."

10. The argument is that as this suit was pending at Barisal the Court at Barisal had the same jurisdiction over it as if no partition had ever taken place and further that the decree which it passed could be given effect to in either Dominion, as if it had been passed by a Court of competent jurisdiction in either of the two Dominions. What is said is that this decree though made by a Court at Barisal must be treated as a decree made by a Court of competent jurisdiction in India and therefore the provisions as to the transfer of decrees apply and the decree could be transferred to the Small Cause Court at Calcutta.

11. It was urged on behalf of the petitioner that these proceedings could not possibly be continued against the Governor General of India or the Dominion of India in Barisal. But it is pointed out by the learned Advocate for the opposite party that the case is expressly covered by Article 12 (1), Indian Independence (Rights, Property and Liabilities) Order, 1947, which deals with the question of Governor General in Council or the Dominion of India being party to legal proceedings in respect of any property, rights or liabilities transferred by that Order. It seems to me that by reason of Articles 8 and 9 of this Order it is immaterial whether the cause of action in this case was contractual or tortious as in either case the Governor General of India did not cease to be liable by reason of the partition, That being so proceedings could be carried on against him in the Barisal Court.

12. It is unnecessary to come to any definite conclusion upon these contentions because even assuming that the Barisal Court can be treated as a Court in the Dominion of India and can transfer the decree to any other Court in the Dominion of India for execution, nevertheless Small Cause Court in Calcutta could not execute this decree.

13. If the Barisal Court could transfer the decree for execution it could only do so under the pro-visions of these various orders and the Civil Procedure Code. If the CPC applied to the transfer of this decree for execution the Code would apply to the decree itself, and it is pointed out that the decree as it stands is in-executable by reason of Section 82 of the Code.

14. That section reads as follows:

"(1) Where the decree is against the Dominion of India or a Province or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Provincial Government.

(2) Execution shall not be Issued on any such decree unless it remains

unsatisfied for the period of three months computed from the date of such report."

15. The words "such act as aforesaid" refer to the acts mentioned in the earlier sections and there can be no doubt that this section would govern a decree against the Dominion of India for breach of a contract or negligence of a railway. That being so, the section requires that the decree should have on the face of it a time limit for its satisfaction. Learned Advocate for the opposite party contended that we must presume that the Court at Barisal did everything properly; but no presumption can be made in this case because the decree is actually on the record and no time is stated in the decree within which it was to be satisfied. That being so this decree as it stands cannot be executed. Further even if there was on the face of the decree a time limit for its satisfaction the decree could not be executed until a report of its non-satisfaction within the time specified had been sent to the Provincial Government. Before execution could proceed three months must elapse from the date of the report. No report of course was made in this case because no time was fixed in the decree for satisfaction and therefore the Court could not execute the decree.

16. It was contended that even if the decree did not comply with Section 82 it was not void. It is unnecessary to decide whether the decree is void or not. But one thing is quite clear that it is not executable in its present form and that is enough to dispose of this case. That is quite clear from the case of Governor-General in Council Vs. Piramal Marwari, . Whether this decree can be made executable is not a matter upon which this Court can offer any opinion. All that this Court is asked to hold in this petition is that the decree as it stands is not executable and therefore the order of the the learned Judge of the Small Cause Court was erroneous.

17. In my view the learned Judge of the Small Cause Court, Calcutta, should not have ordered execution of this decree and his order permitting execution must be set aside.

18. The Rule is therefore made absolute with costs.

Sarkar, J.

I agree.