

(1985) 01 OHC CK 0023
In the Orissa High Court
Case No : Civil Revision No. 3 of 1982

Govinda Chandra Tripathy and Another	APPELLANT
Vs	
Pal Hira Purchase Ltd.	RESPONDENT

Date of Decision : 02-01-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 106, 41

Citation : AIR 1985 Ori 178 : (1985) 1 OLR 156

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : B.P. Tripathy, for the Appellant; D.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Mohapatra, J.—This revision is directed against the order passed by the learned Subordinate Judge, Puri in Misc, Case No. 130 of 1981 under S. 151 of the CPC (for short the "Code") restoring Execution Case No. 63 of 1972.

2. The relevant facts may be stated in brief. The opposite party (plaintiff-decree-holder) obtained a decree from the Bombay High Court on 24-11-1965 in Suit No. 575 of 1964 against the petitioners (defendants-judgment-debtors). The said decree was transferred to the court of the learned Judge, Puri for execution. Accordingly execution was levied in the aforesaid court against the petitioners on 25-4-1972 in Execution Case No. 63 of 1972 for recovery of a sum of Rs. 15,288.44 paise by sale of movable and immovable properties. The decree could not be executed until 22-4-81 when the opposite party was directed to take steps in aid of execution. On that day the opposite party applied for adjournment which was refused and the execution case was dismissed for default. On 30-4-81 the fact of dismissal of the execution case was intimated to the transferor Court. On 22-6-1981 the opposite party made a petition u/s 151 of the Code for restoration of the execution case stating therein that steps could not be taken on 22-4-81 on account of sudden serious illness of the father of the opposite party's advocate and also due to illness of its manager. Petitioner No. 1 in his counter

alleged negligence by the opposite party and stated that the illness pleaded did not constitute sufficient cause for restoration. The execution case was barred by limitation and the court lacked jurisdiction to direct its restoration. The learned Subordinate Judge by the impugned order held that he had jurisdiction to entertain and dispose of the petition for restoration and as there was sufficient cause he directed restoration of the execution case.

3. Learned counsel appearing for the petitioners raised the following contentions": --

i) After dismissal of the execution case on 22-4-81, the result thereof having been communicated on 30-4-81 to the transferor Court, the learned Subordinate Judge, Puri being the transferee Court had no jurisdiction to restore the execution case.

ii) In the absence of proof of sufficient cause the learned Subordinate Judge exercised his jurisdiction illegally in invoking inherent powers under S. 151 of the Code.

iii) As the execution case stood barred by limitation under Art. 136 after dismissal on 22-6-81, the same could not be restored.

Learned counsel appearing for the opposite party, on the other hand, made reference to Rules 105 and 106 of Order 21 of the Code and urged that the executing court before certification of the result of the execution case u/s 41 of the Code had jurisdiction to direct restoration irrespective of whether the execution petition stood barred by limitation by that date. The points raised require careful examination.

4. Sections 39 and 40 of the Code provide for transfer of a decree to a court of competent jurisdiction either within the State or in another State. Section 41 of the Code provides that the court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure. As already referred to above, Execution Case No. 63 of 72 was dismissed for default by the learned Subordinate Judge on 22-4-81. Misc. Case No. 130 of 1981 for restoration of the execution case was registered on 22-6-81. In between these two dates no order was passed by the learned Subordinate Judge as contemplated in Section 41 of the Code. On the other hand, a marginal note "result sent on 30-4-81" in column 4 of the order-sheet against order dt. 22-4-81 was presumably made by the Clerk of the Court, Column 4 of the order-sheet indicates "Office action taken with date". It thus seems that the result of the execution case on the basis of the order dt. 22-4-81 was communicated to the transferor Court as an office action but, an order as contemplated u/s 41 of the Code was not recorded. Learned counsel appearing for the petitioners urged that communication of the result to the transferor Court on 30-4-81 was sufficient compliance of the provisions of Section 41 of the Code, whereas, learned counsel appearing for the opposite party strenuously urged that

certification u/s 41 of the Code is a judicial act and a note made by a ministerial officer to the effect that the result had been communicated did not satisfy the requirements of Section 41 of the Code. This point which has a bearing of the question as to whether after 22-4-81 the executing court had jurisdiction over the execution case so as to pass the impugned order of restoration is of considerable importance and has to be decided with reference to the decisions cited at the Bar. Relying upon the principle laid down in *Prahlad Prasad Mahrotra Vs. Thakur Prasad Mehra and Company*, , in a case reported in *G. Pannalal Sowcar Vs. Appalabhukatala Sanyasayya Achary*, , and interpreting the provisions of Section 41 of the Code, G.K. Misra, J. (as he then was) held as follows : --

"There is some conflict of authority on this point. The matter is fully discussed in AIR 1961 Pat 149, *Prahlad Prasad v. Thakur Prasad*. Their Lordships observed that the act of sending a certificate u/s 41 is something in the nature of a judicial act and a formal order of the transferee Court to that effect would be necessary to satisfy the requirements of Section 41. Where there is no order of the transferee Court directing that a certificate should be issued u/s 41 and where it did not appear from the order sheet that any such certificate was in fact prepared and signed by the transferee Court and sent to the transferor Court, but the entry in the suit register indicated that an information was sent to the transferor Court relating to the dismissal of the execution case, there is no non-satisfaction certificate as required by law. With respect I am inclined to accept the view as laying down the correct law. The communication made on 25-4-58 cannot be construed as constituting a non-satisfaction certificate."

Learned counsel appearing for the petitioners, however, placed reliance on a decision reported in AIR 3961 Raj. 157, *Ramkumar Chunnilal Agarwala v. Hazarimal Bansilal Kumbhar* in which Sarjoo Prosad, C. J. speaking for the Division Bench held as follows : --

There appears to be divergence of judicial opinion on the point In some cases it is strictly enjoined that a certificate in a particular form should be sent to the Court which passed the decree before any fresh execution can be levied, whereas in other cases it is said that no particular form is necessary and if information is sent to the Court concerned about the result of the execution case that in itself would be sufficient to amount to a certificate within the meaning of Section 41 of the Code."

The Division Bench of the Rajasthan High Court lays more emphasis on the fact that a particular form of certification is not necessary and communication of the result to the transferor Court will satisfy the requirements of Section 41 of the Code. The learned Judges did not hold that instead of certification which is undoubtedly a judicial act, a ministerial act of communication of result of the execution case will satisfy the requirements of Section 41 of the Code. They did not also lay down the proposition that no separate order of non-satisfaction is required to be recorded. Therefore, the decision of the Division Bench of the

Rajasthan High Court Ramkumar Chunilal Agarwala and Others Vs. Hazarimal Bansilal Kumbhar and Others, is distinguishable. In view of the principle laid down by this Court in G. Pannalal Sowcar Vs. Appalabhukatala Sanyasayya Achary, it cannot but be held that certification of the result of the execution proceeding is a judicial act and not a ministerial act. Therefore, the ministerial act of sending the result of the execution case on 30-4-81 in this particular case did not satisfy the requirements of Section 41 of the Code. This being the position, the executing Court i.e. the learned Subordinate Judge, Puri, had still retained jurisdiction for the purpose of restoration of the execution case. The first point urged by the learned counsel for the petitioners cannot, therefore, be sustained.

5. The petition for restoration of the execution case was made under S. 151 of the Code and it appears from the impugned order that the execution case was restored by the learned Subordinate Judge in exercise of his inherent powers. In the restoration proceeding one witness, namely, the advocate for the opposite party was examined. No witness was examined on behalf of the petitioners. On the evidence placed before him, the learned Subordinate Judge was satisfied that on account of the sudden illness of the father of the advocate for the opposite party and the illness of the opposite party's manager it was not possible to take steps on 22-4-81 for which a petition for adjournment was filed. It will not be out of place to refer to 29 (1963) CLT 495, Akshya Padhan v. Ramkrishna Panigrahi, in which Misra, J. (as he then was) held that in a civil revision it is not the jurisdiction of the High Court to ordinarily interfere with the findings of fact based purely on the assessment of evidence. I, with respect, accept the principle and find nothing from records of the court to take a view different from that of the learned Subordinate Judge to the effect that there was sufficient cause for restoration of the execution case. Therefore, in this civil revision interference with the findings of fact recorded by the learned Subordinate Judge is unwarranted.

Considerable argument was advanced by the learned counsel appearing for the parties as to whether an order of restoration of an execution case should be passed u/s 151 of the Code or under Rules 105 and 106 of Order 21 of the Code as amended by the Civil P.C. (Amendment) Act No. 104 of 1976. For the purpose of easy reference Rules 105 and 106 are quoted below : --

"105. Hearing of application.-- (1) The Court, before which an application under any of the foregoing rules of this order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite-party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex

parte and pass such order as it thinks fit.

106. Setting aside orders passed ex parte, etc.-- (1) The applicant, against whom an order is made under Sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under Sub-rule (3) of that rule or under Sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under Sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under Sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from that date when the applicant had knowledge of the order."

The legislative intention in introducing these - two rules to the Civil P.C. was that owing to the inapplicability of the provisions of S. 141 to execution proceedings, Order 9 of the Code did not apply to them with the result that the court found it difficult to decide the circumstances in which an application for execution can be dismissed for non-appearance or if a court has dismissed an application for non-appearance, where the Court in the absence of any specific provisions relating to restoration of the execution proceeding, can restore such application. Because of such difficulty of non-application of Order 9 to execution proceedings, Rule 106 in particular was inserted to give jurisdiction to the executing courts similar to Rules 9 and 13 of Order 9 for restoration of cases and for setting aside orders passed ex parte therein. It is to be remembered that because of absence of provisions, such as, Rules 105 and 106 of Order 21, courts in India used to take resort to their inherent powers u/s 151 of the Code for restoration of execution cases or setting aside ex parte orders passed therein according to demands of justice. See AIR 3953 SC 23.

Keshardeo v. Radha Kissen Chamria. But now that Rule 106 of Order 21 has found place in the Code the difficulty experienced by the courts earlier has been completely obviated and in exercise of their jurisdiction conferred by Rule 106 of Order 21 the Courts in suitable, cases and for justifiable reasons can restore an execution proceeding and set aside an ex parte order passed therein. In this view of the matter, even if the opposite party made the petition for restoration of the execution case u/s 151, it shall be deemed to be one under Order 21, Rule 106 of the Code. It is needless to reiterate that wrong quotation of a provision of law will not disentitle a party to a relief which he is entitled according to law nor can it be denied to him for that reason, because, it is the court which dispenses justice has to apply the correct provision of law in suitable and just cases so as to deliver the relief to a party who is entitled to it. In the aforesaid premises, I

hold that the learned Subordinate Judge exercised his jurisdiction according to law in restoring the execution proceeding. The second point urged by the learned counsel for the petitioners is equally unsustainable.

6. It "is true that when, by lapse of time, a valuable right has been acquired by a party, the same should not be set at naught lightly. But, this principle has got no application to the facts of the present case even though, as pointed out by the learned Subordinate Judge, after dismissal of the execution case on 22-4-81, it was not possible on the part of the opposite party to levy fresh execution because of the bar provided in Article 136 of the Limitation Act. An execution case dismissed for default can be restored under Order 21, Rule 106 of the Code and once restored, the bar of limitation vanishes because, the case reverts to its original number and is brought back to the date on which it was dismissed for default. An illustration will make the point amply clear. "A" instituted a suit on 1-1-1980 against "B" on the basis of a promissory note dt. 1-1-1978. The suit was dismissed for default on 1-1-1982. It was restored to its original number under Order 9. R. 9 of the Code on 1-1-1984. On 1-1-1984 "A" could not institute a fresh suit on the basis of the promissory note by operation of Article 19 of the Limitation Act. But when the court passes an order of restoration the question of limitation is not at all relevant and the suit gets a new lease of life. I am, therefore, satisfied that the question of limitation as raised by the learned counsel for the petitioner has no bearing to the facts of this case. The third and the last point is also untenable.

7. Before parting with the case I note with distress that this execution case instituted on 25-4-1972 is still going on although the judgment-debtors belong to Puri town itself. The reason for long pendency of the proceeding is not far to seek. It should be the duty of the learned Subordinate Judge to dispose of the proceeding as early as possible. It is said that it is easy to get a decree, but difficult to execute it. The myth should be exploded by the executing courts by paying personal attention to the execution proceeding and by thorough scrutiny of the ministerial actions.

8. For the reasons stated above, I do not find any merit in the civil revision which is accordingly dismissed. Hearing fee is assessed at Rs. 50/-.