
(1960) 03 OHC CK 0003
In the Orissa High Court
Case No : Misc. Appeal No. 65 of 1954

Jagannath Ramanuj Raj Deb	Vs	APPELLANT
Sri Lakshmi Narayan Tripathy and Others		RESPONDENT

Date of Decision : 31-03-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1960 Ori 197 : (1960) 26 CLT 311

Hon'ble Judges : R.L. Narasimham, C.J;S. Barman, J;J.K. Misra, J

Bench : Full Bench

Advocate : L.K. Das Gupta and G.N. Sengupta, for the Appellant; H.G. Panda, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is an appeal by a judgment-debtor against the decision of the Subordinate Judge of Berhampur dated 17th September, 1954, over-ruling his objections u/s 47 of the Civil Procedure Code, to the execution of a compromise decree in original Suit No. 51 of 1933. That suit was brought before the Court of the Subordinate Judge of Berhampur by one Ghanashyam Deb claiming the Estate of Mandasa from one Jagannath Ramanuj Raj Deb who was alleged to be the adopted son of the previous Zamindar. The Estate was then included in the sub-division of Berhampur and was within the territorial jurisdiction of the Subordinate Judge of Berhampur (which was then a part of the Madras Presidency). When the Province of Orissa was formed with effect from 1st April 1936 Mandasa estate was separated from the Sub-division of Berhampur and included in the Sub-division of Chicacole in the Madras Presidency. As regards pending suits paragraph 20 of the Govt. of India (Constitution of Orissa) Order 1934, authorised the Governor-General in Council to issue appropriate directions. It reads as follows:

"20. Subject to the provisions of the last preceding paragraph, the Governor General in Council may after consulting the local Governments and High Courts

concerned, give such direction as he thinks proper as to the disposal of any cases pending on or shortly before the appointed day, in any court acting for an area any part of which is transferred by this order to Orissa and as to the courts in which proceedings by way of appeal or revision are to lie in cases decided by any such courts before the appointed day. The directions referred to in the aforesaid paragraph were issued by the Governor-General in Council in Home Department Notification No. F 210/36 Judl. dated the 1st April 1936 and they were as follows:

"1. Every proceeding pending on the appointed day before any court other than a High Court, in or in respect of, any area transferred by the said Order to Orissa, shall be continued as if the said order had not been made.

2. Any appeal or application for revision in respect of any proceeding so pending or of any decision made before the appointed day in any such Court in or in respect of any such area shall lie in the court which has appellate or revisional jurisdiction as the case may be, over the Court which would have jurisdiction to try such proceeding if the proceeding were instituted after the appointed day;

Provided that where the proceeding relates to any property situate partly within and partly without any area so transferred by the said Order to Orissa, any appeal or application, for revision shall lie as if the said order had not been made."

In pursuance of these directions the Subordinate Judge, Berhampur disposed of the suit on the 24th December 1936. An appeal against his decision was taken up before the High Court of Judicature at Madras (Appeal No. 355/37) but there, the parties entered into a compromise and a compromise decree was passed on the 14th February, 1941. The material terms of the compromise for the purpose of this litigation are contained in paragraph 4 of the decree which directed the respondent to pay to the appellant Rs. 75000/- in four instalments. The third instalment of Rs. 20,000/- was payable on or before the 3rd April 1942. The appellant-decree-holder assigned his rights to receive this instalment from the judgment-debtor to one Harihar Tripathy, predecessor in interest of the respondents in this appeal. Harihar Tripathy filed an execution case (E. P. No. 111 of 1942) in the Court of the Subordinate Judge, Berhampur, on the 18th July 1942 (See Ext. 2).

That application was dismissed by the learned Subordinate Judge on the 27th January, 1943 (Ext. 3) on the ground that as the Estate of Mandasa was transferred to Chicacole Sub-division of the Madras Presidency, the Berhampur Court had no jurisdiction to execute the decree notwithstanding the fact that the suit was heard and disposed of by that court. Neither party challenged the decision of the Subordinate Judge by way of appeal. In the meantime Harihar Tripathy died leaving the respondents as his legal representatives. They filed a second execution petition sometime in 1945 (Ext. 5) before the Subordinate Judge of Berhampur. That petition was dismissed for default by the learned Subordinate Judge on the 8th December 1945 (Ext. 6)--A third petition was then

filed by the transferee-decree-holders before the same Subordinate Judge on the same way (Ext. 7) in which it was prayed that the compromise decree may be transferred to the Court of the Subordinate Judge of Chicacole under Order 21, Rule 6 of the CPC for execution.

The learned Subordinate Judge, Berhampur, by his order dated the 15th December 1945 (Ext. 8) directed the transmission of the decree to the Court of the Subordinate Judge, Chicacole for execution. Before the latter court it was numbered as E. P. No. 12 of 1946 (Ext. 9). Thereafter on the 29th July 1946, the judgment-debtor filed an objection (Ext. 10) to the execution of the decree. The learned Subordinate Judge, Chicacole, by his order dated the 21st October 1946 (Ext. 11) over-ruled the objection and directed that execution should proceed. Against this order the judgment-debtor went up on appeal to the Madras High Court in A. A. O. 547 of 1947 (Ext. 12). One of the important points taken up in this appeal was that as the Berhampur Court had lost territorial jurisdiction over the property, consequent on the transfer of Mandasa estate from Berhampur Sub-division to Chicacole Sub-division, the Berhampur court had no jurisdiction to entertain the execution petition and transmit the same to the Court of the Subordinate Judge Chicacole under order 21 Rule 6 of the Civil Procedure Code. The learned Judges of the Madras High Court rejected this contention in the following terms :

"Unless the decree is transferred to the Court which has got territorial jurisdiction over the properties which are the subject matter of the decree, the court cannot execute the decree even though that is the proper court to which application for execution has to be filed. The decisions relied on by learned counsel, namely, Tilo Beharani v. Raghu Behara 1939 Mad LJ 340: (AIR 1939 Mad 463); and Sivala Ramamurthy Vs. Bulusu Gavaramma and Another, recognise the principle that when once a court which passed a decree has lost the territorial jurisdiction over the properties which formed the subject matter of the decree then the only court to which an application for execution can be made is the Court under whose territorial jurisdiction the properties are situate. There is no question of the Berhampur Court executing the decree in this case."

The appeal was accordingly dismissed with costs. While the appeal was pending in the Madras High Court, the Original Execution petition (E. P. 12 of 1946) was itself dismissed for non-prosecution on the 14th November 1946, but that does not affect the question at issue in this case.

2. While the appeal was pending before the Madras High Court the decree-holder filed another execution petition No. E. P. 11/1948 in the Court of the Subordinate Judge, Chicacole on the 27th April 1948 but that was stayed by the Madras High Court (Ext. 13).

3. On the 19th April 1951 the transferee decree-holder again filed another execution petition E. P. 59 of 1951 in the Court of the Subordinate Judge Berhampur (Ext. 16) with a prayer that the decree may be transferred to the

Subordinate Judge Chicacole for execution with a non-satisfaction certificate u/s 39 and under Order 21 Rule 6 of the Civil Procedure Code. The Judgment-debtor filed an objection u/s 47, CPC and the learned Subordinate Judge, by his order dated the 17th September 1954 dismissed his objections. The present miscellaneous appeal is directed against that order,

4. The main objection raised by the appellant judgment-debtor before the lower court may be summarised as follows:

(i) The compromise decree is not executable as it does not expressly say that on failure of the judgment debtor to pay any instalment the decree-holder would be entitled to proceed in execution for realisation of that instalment:

(ii) Execution of the decree is barred by limitation inasmuch as Ext. 2 (E. P. No. 11/1942) cannot be taken as a step in aid in view of the order of the learned Subordinate Judge, Berhampur, dated the 27th January 1943 (Ext. 3) to the effect that he had no jurisdiction to entertain the execution petition. Consequently, the execution petition filed in 1945 (Ext. 5) -- more than three years after the date on which the third instalment became payable viz. ,30th April 1942, must be held to be time barred.

(iii) In any view of the case the Berhampur Court had no jurisdiction even to entertain the execution petition inasmuch as the litigation related to an area which lay wholly in the Presidency of Madras, and the directions issued by the Governor-General in Council by virtue of the provisions of paragraph 20 of the Govt. of India (Constitution of Orissa) Order, 1936, had no application to execution petition.

5. In my opinion all these contentions are barred by res judicata. It is now well settled that Section 11 CPC is not exhaustive on the question of res judicata and that that principle applies to execution proceedings also. In Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, their Lordships of the Supreme Court reiterated this principle and further pointed out that even the principle of constructive res judicata is applicable to execution proceedings (see paragraph 20 of the decision). They also emphasised that even an erroneous decision on the question of law operates as res judicata between the parties.

6. The aforesaid three objections to the entertainability of the execution petition by the Subordinate Judge of Berhampur ought to have been taken by the judgment debtor in E. P. No, 12 of 1946 before the Subordinate Judge of Chicacole, and again before the Madras High Court when the, appeal, A. A. O. 547 of 1947 was heard. The objection as regards the jurisdiction of the Berhampur Court to entertain this petition was taken before that High Court and their decision (already quoted) clearly shows that it was overruled. It is not necessary to consider whether this view of that High, Court is correct or not. It is binding between the parties on the principle of res judicata.

7. The other two objections raised in this appeal, viz. that the decree is not

executable or that E. P. No. 12 of 1946 was barred by limitation as it was filed more than three years after the date on which the instalment was payable ought to have been raised in the execution petition itself. But Exts. 11 and 12 show that though some other objections were raised these points were not taken up. Hence the principle of constructive res judicata must apply.

8. This appeal must therefore, fail, partly because one of the main points taken up was decided against the judgment-debtor by the Madras High Court in A. A. O. 547 of 1947 (Ex. 12) and partly because the other points were not taken up before that High Court at that time.

The appeal is dismissed with costs.

Barman, J.

9. I agree.

Misra, J.

10. I agree.