
(1963) 09 AHC CK 0004
In the Allahabad High Court
Case No : Exc. F.A. No. 4 of 1959

Jugul Kishore and Another	Vs	APPELLANT
Gobardhan Lal and Others		RESPONDENT

Date of Decision : 18-09-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, Order 21 Rule 57, 44A, 47

Citation : AIR 1964 All 548

Hon'ble Judges : R.S. Pathak, J; Bishambhar Dayal, J

Bench : Division Bench

Advocate : J.N. Chatterji, for the Appellant; T. Rathore, for the Respondent

Final Decision : Dismissed

Judgement

Pathak, J.—These are two judgment-debtors' appeals arising out of execution proceedings.

2. Ram Samp Nanhumal and Madan Mohan Goverdhan Lal filed suit No. 389 of 1934 against Behari Lal and Jugal Kishore for money due on a promissory note in the High Court at Rangoon, and the suit was decreed on Sept 14, 1934. A decree for Rs. 21,247/- was drawn up by the Rangoon High Court which granted a certificate on July 23, 1936 to the decree-holders to execute the decree. On October 21, 1936, the decree-holders moved an execution application (Execution Case No. 120 of 1936) before the Court at Kanpur seeking execution of the decree by attachment and sale of two properties, 47/65 Swadeshi Bazar and 48/121 Generalganj, both situate in Kanpur. Shortly thereafter an order directing execution was passed upon that application, and on March 12, 1937 proceedings under Order 21, Rule 66 of the C. P. C. were commenced.

3. On February 16, 1938 Ram Sarup Nanhumal, one of the decree-holders died and on account of disputes between rival claimants his legal representative was not brought on record until 1943. Meanwhile, on February 26, 1938 the execution application was struck off for want of prosecution. This order was later

set aside on appeal and the executing Court was directed to proceed with the execution,

4. On June 2, 1943 both the properties were put to auction. The Swadeshi Bazar property was purchased by the decree-holder Madan Mohan Goverdhan Lal for Rs. 700/-, while the Generalganj property was auctioned for Rs. 12,000/- to one Rameshwat. The judgment-debtors filed objections, upon which the executing Court by order dated August 14, 1944, set aside the auction sale of the Generalganj property but maintained that of the Swadeshi Bazar property.

5. Aggrieved by the rejection of their objection to the sale of the Swadeshi Bazar property, the judgment debtors preferred an appeal (F. A. .F. O. No. 290 of 1944) to this Court, and succeeded in obtaining an ex parte order on November 14, 1944 staying delivery of possession. The stay application was finally disposed of on November 20, 1944, when an order was passed by this Court directing that delivery of possession would remain stayed subject to the Judgment-debtors depositing the decretal amount in monthly instalments of one thousand rupees each in the executing Court until the entire liability stood satisfied and further stipulating that upon default in payment of any instalment the stay order would stand discharged.

6. The judgment-debtors duly deposited nine instalments, but defaulted in paying the instalment due on November 1, 1945. On December 3, 1945 the default was condoned by this Court, and upon the judgment-debtors defaulting again immediately thereafter there was a further order on December 18, 1945 condoning that default. It seems that the judgment-debtors were unable to deposit the very next instalment again, and, therefore, on March 22, 1946 the decree-holder applied to the executing Court for delivery of possession of the auctioned property. That Court passed an order on March 22, 1946 directing the decree-holder to be put into possession, and possession was accordingly delivered. The First Appeal from Or. No. 290 of 1944 which was pending meanwhile in this Court, was dismissed on July 23, 1947.

7. Upon application by the decree-holder on July 23, 1946, the executing Court directed execution to proceed against the Generalganj property. It appears from the record that a direction was issued by the Court in August 1946 for sale of the property and a sale proclamation was drawn up. Objections filed by the judgment-debtors were dismissed on August 23, 1947. Finally on April 20, 1948 this property was sold for Rs. 17,400/-.

8. On May 25, 1948 the judgment-debtors filed an objection (Misc. No. 26 of 1948) which was rejected on December 6, 1958 giving rise to First Appeal From Order No. 34 of 1959 in this Court On April 30, 1949 the judgment-debtors filed further objections (Misc. No. 34 of 1949) and these were also dismissed on December 6, 1958 giving rise to Execution First Appeal No. 4 of 1959

9. The first contention advanced on behalf of the appellants is that the execution of the Burma decree in India is void because the decree was a foreign decree not

capable of execution in India. Stated so widely, the acceptance of the proposition would negative all that has been accomplished so far towards the recognition and enforcement of foreign judgments.

10. It is true that a judgment of a foreign Court, being the command of a foreign sovereign -- It is after all the voice of sovereignty speaking through the judicial agency -- cannot be enforced beyond the limits of his territorial sovereignty. A sovereign cannot command obedience outside his own realm. Ordinarily, therefore, there can be no direct execution of foreign judgments.

11. It cannot also be disputed that foreign Courts have not been accepted as Courts of Record in the English sense, and therefore the principle, traced to the English Common Law, that upon a suit being decreed the original cause of action is merged into the decree, does not apply to foreign judgments. It is for this reason that a party is entitled either to sue upon the foreign judgment or to bring a suit upon the original cause of action. *Hali v. Odber* 1809 11 East 118 and *in re, Henderson; Nouvion v. Freeman*, 1887-37 OD 244.

12. But over the years, legal writers and Courts, by covering various approaches to the problem, have attempted to provide a juristic basis for the recognition of foreign judgments. These attempt to reconcile the necessity of giving effect to foreign adjudication with the assertion of the sovereignty of national Courts. The several doctrines enunciated in this regard have their faithful adherents, but a rational basis in each case is not always easily discernible.

13. Among the earliest doctrines propounded in England was that based on the comity of nations. This principle according to Cheshire, means that "in order to obtain reciprocal treatment from the Courts of other countries, we are compelled to take foreign judgments as they stand and to give them full faith and credit." (A). It is not necessary to trace the reasons here, but this doctrine came to be recognised as inadequate and soon fell to the challenge of its critics.

14. According to Professor Gutteridge, the doctrine of an "acquired right" explains the reasons for the enforcement of a foreign judgment (B), and this is the doctrine to which Dean H. E. Read probably refers when he explains:

"The true basis upon which the Anglo-Dominion authorities place the recognition of a foreign judgment is that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district." (C)

15. Several decisions by the Courts in England have now accepted the view, pronounced in 1842, that the recognition of a foreign judgment is based on the assumption that it creates a new legal obligation. It proceeds from the concept that a foreign judgment creates by fiction a contract between the parties. See *Schibsby v. Westenholz* 1870 8 QB 155 at p. 159 per Blackburn, J.

16. Finally, the school led by Von Bar "attempts to harmonise the recognition of foreign judgments with the application of foreign laws, by calling attention to the relationship between law and judgment. A judgment, in his view, is a *lex*

specialise, a law regulating one single case". (D).

17. These are among the more prominent doctrines upon which the recognition and enforcement of foreign judgments have been sought to be justified.

18. Although legal jurisprudence appears to have abandoned the doctrines of comity based upon the rule of reciprocity, the requirement of reciprocal treatment has been made by statute in several countries, a practical prerequisite to the enforcement of foreign judgments. From the Judgments Extension Act, 1868 in England to the Administration of Justice Act, 1920 the principle of reciprocal treatment was consistently followed and later on attained full expression in the Foreign (Reciprocal Enforcement) Act, 1933 when the scheme was extended to the countries completely foreign in the political sense to the United Kingdom. (E).

19. In 1937, in our own country, Section 44-A was inserted in the CPC enabling decrees of any of the superior courts in the United Kingdom or of any reciprocating territory to be executed in British India by a district Court. The reciprocating territories were by definition confined to such Dominions of the British Empire as were notified by the Central Government

20. Consequent to the change in the constitutional position in 1937, Burma separated from India and with effect from April 1, 1937 became a separate British possession. By a notification made on March 27, 1939, Burma was declared to be a reciprocating territory for the purpose of Section 44-A. This position continued until Burma declared her independence in 1948 and left the British Commonwealth. Consequently, it was no longer possible to treat her as reciprocating territory, and by a notification of June 21, 1952 the Central Government cancelled the earlier notification declaring Burma to be a reciprocating territory, the cancellation having effect from January 4, 1948.

21. Meanwhile fundamental constitutional changes had taken place in India also, and upon the enactment of the Constitution of India she was proclaimed a sovereign democratic republic on and from January 26, 1950. It was, therefore, necessary to amend Section 44-A, and by the CPC (Amendment) Act, 1952 the definition of "reciprocating territory" in Sec. 44-A was enlarged to cover any country or territory outside India which the Central Government, may by notification in the official gazette, declare to be a reciprocating country, so that now the Code puts all countries or territories outside India on an equal footing.

22. We turn now to the next question which has been argued, before us. What is the date with reference to which the executability of a decree has to be determined? Is it the date when the decree was passed or the date when the execution application is made or even the date when orders are passed upon the execution application, or is it the date of the auction sale?

23. In *Dominion of India Vs. Hiralal Bothra*, , the Calcutta High Court held that the decree passed by the Jamalpur Court, when Jamalpur was still within the

Dominion of India, could not be executed by an Indian Court moved for the purpose on March 13, 1948 when Jamalpur fell within the territory of Pakistan as on the date of the execution application the Courts in India had no jurisdiction to execute a decree passed in Pakistan, This Decision was followed in *Golden Knitting Co. v. Mural Traders (India)* in Sind Market, Karachi AIR 1990 Mad 293, *Aswini Kumar Sinha v. Deputy Collector of Central Excise & Land Customs Shillong* AIR 1952 Gau 91 and *Said-Ul-Hamid v. Federal Indian Assurance Co. Ltd.*, New Delhi, AIR 1951 Punj 255. In *Chunnilal Kasturchand Vs. Dundappa Damappa*, , where a decree passed by a British Indian Court against a subject of an Indian State was sought to be executed in the territory of that State after it had ceded to the Dominion and had been completely merged in the Bombay Province, a Division Bench of the Bombay High Court held that although when passed the British Indian decree could not be executed in the Indian State, yet subsequently this obstacle to execution was removed upon cession and subsequent merger of that State.

The decision was arrived at on the basis that the relevant date for determining whether the decree was that of a foreign Court was not the date of filing the execution application but the date on which the Court was called upon to pass an order for execution. It observed that although generally the jurisdiction of the executing Court was to be determined by reference to the date on which the execution application was made, yet the executing Court was bound to consider the effect to subsequent events and, therefore, to ascertain the position obtaining on the date when it was called upon to pass orders on the execution application. This decision was approved of subsequently by a Full Bench of the same Court in *Bhagwan Shankar Vs. Rajaram Bapu Vithal*, . The Full Bench decision of the Bombay High Court was followed in *Moosakutty Hajee v. Pylotu Joseph* AIR 1952 TC 89 and also considered in *N.P.A.K. Muthiah Chettiar (died) and Others Vs. K.S. Rm. Firm Shwebo, Burma and Others*, . The latter decision was noticed with approval in *Punjab Cooperative Bank Ltd. v. Naranjan Dass Budwar* AIR 1981 P&H 369.

24. On the other side of the line is the decision in *Subbaraya Setty & Sons v. Palani Chetty & Sons* AIR 1952 Mys 69 where it was held that a decree passed by the Madras High Court could not be executed in Mysore even after that State had become part of the territory of India on the ground, inter alia, that the executability of the decree must be determined by reference to the date of the decree and not to the date of the execution application.

25. After giving our careful consideration, it appears to us that the question whether a decree is executable depends not upon the date when the execution application is filed or orders passed upon it, but must be determined with reference to the date on which the decree is passed in the present case the decree when passed was made by a court of competent jurisdiction. It was a decree which was enforceable in an appropriate court in British India. The Supreme Court in *Kishori Lal Vs. Sm. Shanti Devi*, had occasion to consider

whether an order u/s 488 of the Cr. P. C. made by a Magistrate at Lahore before the partition of the country could be executed after partition by a Magistrate at Delhi. Bose, J., who delivered the fragment of the Court, observed:

"We see no reason why an order which was competent and valid at the time it was made and which could have been enforced at Delhi should cease to be competent simply by reason of the partition."

and

"In the absence of a specific bar we hold that Order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could at that date have been enforced in an Indian Court, does not lose its effect by reason of the partition."''

26. The principle laid down in this decision that the effect of a judgment obtained before constitutional changes does not alter unless there is a specific provision to that end was affirmed by the Supreme Court in *Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others*, ,

27. Even if the executability of the decree be considered with reference to the date of the execution application or with reference to the date on which the orders were passed on the execution application, the decision must be against the appellant

28. Before the separation of Burma, an execution application was not only filed at Kanpur but an order directing execution was also passed upon it. Proceedings in execution of the decree had already commenced before April 1, 1937. The decree-holders were entitled to pursue the execution proceedings to their proper conclusion, of the Federal Court observed in AIR 1943 24 (Federal Court) .

"The true position is not whether there is an express provision permitting the continuance of pending proceedings, but whether there is any clear indication against the continuance of pending proceedings to their normal termination."

A principle which, in our opinion, would fully apply to the present case. It will also be noted that the decree-holder made an application for sale of the Generalganj property on July 23, 1946 and orders were passed upon it directing such sale in August 1946. Both these dates fall within the period March 27, 1939 to January 3, 1948 when Burma was notified as a reciprocating territory for the purpose of applying the provisions of Sec. 44-A. The fact that the sale itself was held on April 26, 1948 has, we think, no material effect upon the question before us.

29. Learned counsel urges that as there was no reciprocity between India and Burma from April 1, 1937 to March 26, 1939, the validity of the execution proceedings taken during this period and thereafter cannot be defended. In the view that we have expressed above, this contention must be rejected.

30. We are, therefore, clearly of the opinion that the execution of the decree

passed by the Rangoon High Court by the sale of the Swadeshi Bazaar and Generalganj properties at Kanpur was permissible in law.

31. We shall now pass on to the remaining contentions raised by the appellants.

32. Learned counsel for the judgment-debtors appellants contends that by its order dated December 18, 1945 this Court condoned all present and future defaults by the judgment-debtors in depositing the monthly instalments and, therefore, the order of the executing court directing delivery of possession to the decree-holder was wholly unjustified and contrary to law. This contention cannot be accepted. The order in question passed by this Court condoned the default in respect of a particular instalment only it is not possible to construe that order as condoning defaults which had not yet come into existence.

33. It is next contended that the amounts deposited by the judgment-debtors pursuant to the order of this Court made on November 20, 1944, were withdrawn subsequently by the decree-holder, and the decree should be considered AS having been satisfied. It is urged that under the terms of that order there was an adjustment between the parties. This contention is without substance. The instalments were deposited in court by the judgment-debtors on account of the terms of the interim order of this Court in the appeal then pending, the deposit of these instalments being merely a condition to the delivery of possession being stayed during the pendency of the appeal.

34. It is further urged that upon the Generalganj property having once been sold on June 2, 1943, the attachment terminated and before the property could be brought to sale again, there should have been a fresh attachment. This contention also has no force. Attachment ceases only upon the decree being fully satisfied. It certainly does not cease upon a sale which is subsequently set aside.

35. The last contention on behalf of the appellants is that the decree was executed by one decree-holder only whereas it should have been executed by the surviving decree-holder and the heirs and legal representatives of Ram Sarup Nanhulal. It is emphasised that in the certificate of transfer, the names of both the decree-holders have been mentioned. This contention must also be repelled. It is open to one of the several decree-holders to execute the decree on behalf of all, and nothing has been shown to us to prove that Madan Mohan Goverdhan Lal was not entitled to execute the decree.

36. We must, therefore, hold that the sale of the Swadeshi Bazar and Generalganj properties was valid and cannot be assailed on any of the grounds advanced by the appellants. Both appeals must, therefore, fail. Accordingly, Execution First Appeal No. 4 of 1959 and First Appeal from Order No. 34 of 1959 are dismissed with costs.