
(1922) 06 PAT CK 0025
In the Patna High Court

Kamal Nain Singh

APPELLANT

Vs

Maharaja Bahadur Kesho Prasad Singh

RESPONDENT

Date of Decision : 13-06-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95

Citation : AIR 1922 Patna 310 : 68 Ind. Cas. 638

Hon'ble Judges : Das, J; Coutts, J

Bench : Division Bench

Judgement

Coutts, J.—This appeal arises out of all application for execution. Maharaja Bahadur Kesho Prasad Singh obtained a rent decree against one Ram Khelawan Singh on 29th October 1914. After the decree had been obtained Ram Khelawan died and on 7th April 1916 the decree holder took out execution against his three sons, Dwarika Singh, Kamal Nain Singh and Murli Singh. In the execution petition Kamal Nain Singh was described as a manor and Murli Singh as a minor under the guardianship of his eldest brother Dwarika Singh. The properties of the three brothers were sold on 31st October 1916 and purchased by the decree holder, and on 5th December 1916 the Bale was confirmed. On 7th September 1918 an application to set aside the sale was made by the three brothers on the ground that Kamal Nain Singh was a minor at the date of the sale and that Murli Singh was not properly represented by his brother Dwarika Singh, Toe application was successful and on 4th February 1920 the sale was set aside. On 9th October 1920 the decree-holder filed the application for execution with which we are now concerned. The execution was against Kamal Nain Singh, who was by this time admittedly major, Dwarika Singh, and Murli Singh minor represented by Dwarika Singh. Kamal Nain filed an objection on the ground that the application for execution was barred by limitation inasmuch as the first application made on the 7th April 1916 was not an application in accordance with law. The Executing Court overruled the objection finding that the application made on 9th October 1920 was an application in continuation of the first application of 7th April 1916, that Art. 181 of the Limitation Act applied and limitation accordingly ran from the

date on which the sale was set aside, namely, the 4th February 1920, Against this decision the decree-holder appealed to the District Judge who has held that the application with which we are now concerned is an application in continuation of the previous application. He has, however, found that Art. 181 of the Limitation Act does not apply but that although Art. 182 applies limitation runs from the date on which the decree-holder applied for delivery of possession, as this was the last step taken in aid of execution and as this application was made on the 5th February 1918 the present application is not barred. The judgment-debtor has again appealed to this Court.

2. It is admitted by the learned Vakil for the appellant that if the present application is an application in continuation of the first application for execution limitation will run from the date of setting aside the sale and, consequently, the present application is within time. But he contends first that the present application cannot be treated as an application in continuation of the first application; and, secondly, that if this is so, the present application is barred because an application for delivery of possession is not a step-in-aid of execution and that limitation must run at latest from the date of the confirmation of the sale, namely, the 5th December 1916.

3. With regard to the first point, in my opinion, the present application for execution cannot be treated as an application made in continuation of the first application, it has been held that where a previous application for execution has been dismissed because of a successful application made under Order XXI, Rule 90, a subsequent application for execution is an application in continuation of the previous application; but I can find no case in which, where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment-debtors has been treated as an application in continuation of the previous application. It seems to me that in the present case the first application for execution was ab initio a bad application and, consequently, the subsequent application cannot be an application made in continuation.

4. I now come to the second point and the real question here is whether an application for possession after confirmation of sale made by a decree-holder-auction-purchaser is a step-in-aid of execution. There is much divergence of opinion in the different High Courts on this point. In Calcutta in the cases in which the question directly arose it has been decided that such an application is a step-in-aid. I may refer to the case of *Sariatoola Molla v. Raj Kumar Roy* 27 AC 709 : 4 CWN 681 : 14 Ind. Dec. (N. S.) 466 In the Allahabad High Court the question has been directly considered in three cases, *Moti Lal v. Makund Singh* 19 AC 477 : (1897) AWN 117 : 9 Ind. Dec. (N. S.) 308 *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 AC 82 : 5 MLT 185 : 6 ALJ 71 and the latest decision in the case of *Babu Ram v. Fearey Lal* 50 Ind. Cas. 143 : 17 ALJ 496 : 41 AC 479 In the case of *Moti Lal v. Makund Singh* 19 AC 477 : (1897) AWN 117 : 9 Ind. Dec. (N. S.) 308 it was held that such an application was a step-in-aid. In the case of

Bhagwati v. Banwari Lal (3), which is a Full Bench decision, three Judges held that it was not a step-in-aid and two Judges that it was. But in the case of Babu Bam v. Pearey Lal 50 Ind. Cas. 143 : 17 ALJ 496 : 41 A. 479 it has been held by a Division Bench of the Allahabad High Court that the question was not definitely before the Full Bench in the case of Bhagwati v. Banwari Lal 1 Ind. Cas. 416 : 31 AC 82 : 5 MLT 185 : 6 AIJ 71 and they have confirmed the decision arrived at in the case of Moti Lal v. Makund Singh 19 AC 477 : (1897) AWN 117 : 9 Ind. Dec. (NS) 308 In Bombay and Madras the decisions appear to be that such an application is a step in-aid. So far as this Court is concerned, the point has never definitely been decided but the principle was considered in the case of Abdul Gani y, Raja Ram 35 Ind. Cas. 468 : IPLJ 232 : 20 CWN 829 : 3 PLW 62 (FB) a Full Bench decision of this Court, and if we accept the principle of that decision, there can be no doubt that such an application is not a step in-aid of execution. The question in that case was whether an appeal lay from an order under Order XXI, Rule 95, CPC when the decree-holder was the auction purchaser, and, in that case, following the majority of decisions in the Calcutta High Court, this Court has held that an appeal does not lie. The reason for this is that the question is either one not relating to the execution, discharge or satisfaction of the decree or because it is not a question arising between the judgment-debtor and the decree-holder as such but between the judgment debtor and the auction purchaser as such. If we apply this principle to the question of whether an application made by a decree-holder auction-purchaser for delivery of possession is a step-in-aid of execution the answer must, in my opinion, certainly be in the negative and this is exactly what we would expect from the wording of the rule itself. Order XXI, Rule 95, applies to an application made by the purchaser and an application made by the purchaser cannot, in my opinion, possibly be read as an application by a decree-holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. As soon as the sale is confirmed, the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree holder even if he happens to be the auction purchaser but is an application by the auction-purchaser as such and has consequently nothing to do with the execution of the decree. I have not specifically referred to the cases in the Calcutta High Court because they have all been referred to in the Full Bench decision of this Court in the case of Abdul Gani v. Raja Ram 35 Ind. Cas. 468 : IPLJ 232 : 20 CWN 829 : 3 PLW 62 (FB)

5. For the reasons I have given I would set aside the order of the learned District Judge and that of the Subordinate Judge and would decree this appeal with costs.

DAS, J.

6. I agree.