

(1954) 05 PAT CK 0005
In the Patna High Court
Case No : A.F.O.O. No. 284 of 1951

Kedarnath Khetan

APPELLANT

Vs

Jainarain Ram Lundia and Others

RESPONDENT

Date of Decision : 15-05-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32(1), Order 21 Rule 6, Order 41 Rule 25, Order 41 Rule 27, Order 45 Rule 15

Citation : AIR 1954 Patna 497 : (1955) 3 BLJR 68

Hon'ble Judges : Sinha, J; Banerji, J

Bench : Division Bench

Advocate : A.K. Sen and Nand Lal Untawalia, for the Appellant; P.R. Das, K. Dayal and S. Mustafi, for the Respondent

Final Decision : Allowed

Judgement

Sinha, J.—This appeal arises out of an objection to the execution of a decree against the plaintiffs, of whom the appellant is one, in a suit for specific performance of contract.

2. On 29-2-1936, a partnership firm known as Marwari Brothers", consisting of, amongst others, Jainarain Ram Lundia, Gobardhan Das, Badri Prasad and Bisheshwar Nath (after his death, Madan Lal), forming one group known as the "Bettia Group" and of the plaintiffs, namely, Kedar'nath Khetan and Firm Surajmal Sagarrnal, known as the "Padrauna Group", forming the other group, was brought into existence with the object of promoting a company for starting a sugar mill in Champaran and to secure a managing agency for that partnership firm. The capital of this firm was Rs. 8,00,000/-, consisting of 800 shares of Rs. 1000/- each. Gobardhan Das and his brother, Badri Prasad had 100 shares; Jainarain had 150 shares and Madan Lal had 100 shares. Thus the total shares owned by this Bettia Group was 350. The plaintiffs owned the remaining 450 shares.

In pursuance of the agreement, a sugar mill was started and incorporated as a

private limited company under the name of "Ganga Devi Sugar Mills Limited" with the capital of Rs. 8,00,000/- mentioned above. The parties fell out, and it was agreed that the Bettia group would sell their 350 shares to the plaintiffs and also their seven annas share in the firm Marwari Brothers. In August, 1941, a suit was instituted by the plaintiffs in the original side of the Calcutta High Court for specific performance of the contract to sell their shares mentioned above.

In 1944, the suit was decreed, and the decree directed specific performance of the contract in respect of 269 shares only out of 350 shares, because some of the partners, it was found, had not entered into the agreement for selling their shares, and for transference of six annas four pies share in the Marwari Brothers on payment of the entire consideration money, Rs. 2,45,000/-, which was the price agreed upon for sale of the 350 shares and seven annas share in the Marwari Brothers. There were two appeals filed against this decree, one by Jainarain Ram and Madan Lal and another by Gobardhan Das. Out of these 269 shares, 150 shares belonged to Jainarain, 100 shares to Madan Lal and 19 shares to Gobardhan Das. The appeal filed by Jainarain and Madan Lal (Appeal No. 5 of 1945) was dismissed, and Appeal No. 3 of 1945, by Gobardhan Das, was allowed.

In effect, the appellate decree directed specific performance in regard to 250 shares only belonging to Jainarain and Madan Lal and their five annas share in the Marwari Brothers on payment of the entire consideration money aforesaid. There was a further appeal by Jainarain and Madan Lal to the Privy Council, which was ultimately transferred to and heard by the Federal Court, and, on 6-5-1949, the appeal was dismissed. The judgment of the Federal Court is reported as -- AIR 1949 211 (Federal Court) .

Madan Lal died during the pendency of this appeal, and his mother and heiress, Dhupeshwari Devi, was substituted in his place. The respondent Jainarain Ram Lundia applied for execution of the decree to the Court of the Subordinate Judge at Motihari, after getting the decree transferred to that Court under the provisions of the Code of Civil Procedure, on his own behalf as also on behalf of Dhupeshwari Devi. Objection was taken by the appellant, one of the plaintiffs, to the executability of the decree on several grounds, amongst which the following need be mentioned :

(1) that, in accordance with the decree, the plaintiffs did tender to the defendants' solicitors, on 7-9-1944, the price for the 269 shares of the said Ganga Devi Sugar Mills Limited and six annas four pies share in the Marwari Brothers;

(2) that the defendants wrongfully failed and neglected to perform the said decree; that, pending the appeal before the Federal Court, the said firm of Marwari Brothers was dissolved by an agreement between the partners thereof, including the plaintiffs and the defendants; and that as, during the subsistence of the firm of Marwari Brothers, the defendants took no steps to perform their part

of the decree, the defendants are no longer in a position to fulfil their obligations and, therefore, the execution was not tenable;

(3) that even Jainarain Ram has not offered to transfer 250 shares in terms of the said decree and, in fact, there could be no offer for transfer of 100 shares standing in the name of Madan Lal because Jainarain alone was the applicant; and

(4) that the executing Court had no jurisdiction to execute the decree because the decree of the appellate Court, namely, of the Federal Court, was not sought to be executed which was the only decree capable of execution.

A rejoinder petition was filed by the respondent Jainarain Ram on several grounds. One was that, he, through his solicitors, sent several letters to the solicitors of the plaintiffs showing their readiness to comply with the terms of the decree and asking the plaintiffs to fulfil their obligations. The plaintiffs paid no heed -- thus showing that the plaintiffs were given sufficient opportunity and they wilfully defaulted in the performance of the decree.

Another objection was that soon after the decree of the Calcutta High Court, when the matter was still "sub judice", the plaintiff-appellant removed the names of the petitioner Jainarain and Madan Lal from the register of share-holders without the consent and behind the back of the decree-holders; that petitioner respondent No. 1, Jainarain Ram Lundia, and other decree-holders were and are always ready to perform their part of the decree and they requested the objector to make payment and get a deed of assignment executed in terms of the decree, that the objector had taken possession of the shares decreed and was appropriating the dividend and the profits.

There is no denial, however, of the fact that the plaintiffs duly tendered the price to the solicitors of the defendants after the decree of the Calcutta High Court or of the fact that, during the pendency of the appeal before the Federal Court, the said firm of Marwari Brothers was dissolved by an agreement between the partners, including the plaintiffs and the defendants, and that the firm no longer existed. The applicant Jainarain examined two witnesses to prove that letters were sent by the defendant's solicitors to the solicitors of the plaintiffs asking the plaintiffs for payment of their clients' dues, and the plaintiff also examined one witness to prove that he had no information about any such letters received by his solicitors from the defendants' solicitors.

3. The Court below has failed to consider the objections raised by the appellant on the ground that, as transferee Court, it had no option but to issue the order of attachment sought in the application for execution under Order 21, Rule 32, Civil P. C., and further that the objection, in regard to want of jurisdiction in the Court because the decree of the Federal Court was not sought to be executed, was a mere technicality. It further held that if the appellant had any objection, that should have been taken before the "mother Court", and it observed that the appellant should get the differences settled by the proper Court within three

months" time from the date of the order, namely, 11-7-1951. The appellant has come up to this Court in appeal.

4. The submissions made before this Court can be conveniently considered under four heads:

- (1) the powers of the transferee Court executing the decree;
- (2) facts necessary for the application of Order 21, Rule 32, Civil P. C.;
- (3) nature of the decree in suits for specific performance of agreement and obligations, if any, of the decree-holder executing such a decree, and
- (4) the jurisdiction of the Court below to execute the decree.

5. Section 42, Civil P. C., lays down in unequivocal terms that the Court executing the decree sent to it shall have the same powers as if it had been passed by itself. Once the decree is transferred for execution, the Court executing the decree on such transfer has all the powers as if it were executing its own decree, and the Court below was entirely in error in thinking that it had no option taut to attach the property, and if any objections we're raised in regard to the attachment, those objections must be decided by the Court which passed the decree.

Under Order 21, Rule 5, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed the decree is to send it to the District Judge of the district in which the decree is to be executed; and Rule 6 provides that the Court sending the decree for execution to another Court shall send (a) a copy of the decree, (b) a certificate setting forth that satisfaction of the decree has not been obtained, and (c) copy of any order for the execution of the decree or, if no such order has been made, a certificate to that effect.

Rule 10 provides that application for execution shall be made to the Court which passed the decree or to the Court to which the decree has been transferred under the provisions of this Code. Now, in this case all these requirements of the law have been complied with and, therefore, the Court below was fully competent to deal with the points of objection raised to the executability of the decree," and the Court below has entirely misconceived the scope of its own powers as the executing Court.

6. Order 21, Rule 32, Sub-clause (1) reads as follows:

"Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both."

Under this clause, a decree for specific performance of a contract has to be enforced by detention in civil prison of the person against whom the decree is passed or by the attachment of his property or by both, if he has had an opportunity of obeying it and has wilfully failed to obey it. Under this clause, therefore, before the decree could be executed, it has to be proved that the appellant had an opportunity of obeying the decree and he has deliberately and consciously failed to obey it. The question whether the appellant had an opportunity or not to obey the decree or whether he wilfully disobeyed it is a question of fact and must be decided on the facts of each particular case.

This matter should have been, therefore, decided by the Court below, and this Court should have, in ordinary course, sent back the case on remand for a finding in regard to those questions of fact, in order that it has the advantage of considering the view of the first Court on the evidence in regard to those facts. The record, however, discloses that there is the evidence of only two witnesses on behalf of the respondents and one witness on behalf of the appellant. The appellate Court having the same powers as the original Court (S. 107, Civil P. C.), it may decide those questions for itself to avoid unnecessary delay in the disposal of the case which has already taken more than three years.

7. Before I consider this matter, I think, it is necessary to set out some relevant extracts from the decree on appeal to the Calcutta High Court:

(1) it is declared that the agreement entered into between the parties ought to be specifically performed and carried into execution;

(2) upon payment and/or tender to the defendants appellants Jainarain Ram and Madan Lal of the sum of Rs. 2,45,000/- with interest, the plaintiffs are entitled to 250 shares belonging to those defendants in the Ganga Devi Sugar Mills Limited and five annas share belonging to them in the Marwari Brothers;

(3) it is ordered and decreed that the plaintiffs be at liberty to tender to Messrs. C. C. Basu, attorneys of the said defendants, the sum of Rs. 2,45,000/- with interest as aforesaid in respect of 250 shares--the serial numbers of shares are mentioned-- and five annas share in the Marwari Brothers;

(4) against payment or tender by the plaintiffs of the sum of Rs. 2,45,000/- with interest, the said defendants and all proper parties do execute in favour of the plaintiffs proper deed or deeds of transfer or assignment of the said 250 shares aforesaid and the five annas share in the Marwari Brothers; and

(5) such deed or deeds of transfer or assignment be settled by the Registrar of this Court, in case the parties differ about the same, and to be executed by him for and on behalf of the party or parties refusing or neglecting to do so on the same being tendered to him or them.

I have given the substance of the extracts in the decree, and they are not quotations from it. The appellant, in his application of objection u/s 47. Civil P. C., mentioned the fact that the plaintiffs had tendered the said sum of Rs.

2,45,000/- to the defendants" solicitors on 7-9-1944, the decree having been passed by the original side on 14-8-1944, that is to say, within less than a month from the date of the decree. The applicant for execution, namely, Jainarain, did not deny in his rejoinder application and this fact is conceded before this Court.

It is true that since then there was no fresh tender, and it is also true that the tender was made of the price for the transfer of 269 shares in the Ganga Devi Sugar Mills Limited and six annas four pies share in the Marwari Brothers, but it does show the willingness on the part of the plaintiffs to perform their part of the decree. The appellate Court modified that decree to the extent that the price was to remain the same while the number of shares was reduced from 269 to 250 in the Ganga Devi Sugar Mills Limited and six annas four pies share was reduced to five annas, in the said Marwari Brothers.

The solicitors for the defendants, therefore, if they had so liked, should have demanded a clarification from the plaintiffs or their solicitors as to whether the tender made by them should be taken to be still subsisting in view of the modifications made by the appellate Court. There is no such evidence on record. When the matter was pending before the Federal Court in appeal, it is alleged by the appellant and it has not been denied by the respondents, that the firm Marwari Brothers was dissolved by an agreement between the partners thereof, including the plaintiffs and the defendants, and that firm did no longer exist. In the absence of any denial of that fact, I must proceed on the footing that the firm Marwari Brothers was dissolved during the pendency of the appeal in the Federal Court.

If that firm stood dissolved, it became impossible for the defendants to transfer any share which they had in that firm of Marwari Brothers. In spite of no denial of that fact in the rejoinder application, the defendant Jainarain, in his application for execution, expressed his and other defendants' readiness to convey to the plaintiffs the 250 shares in the Ganga Devi Sugar Mills Limited and five annas share in the Marwari Brothers. This expression of willingness cannot, therefore, be taken to have been made in good faith.

8. Mr. P. R. Das, on behalf of the respondents, filed an application during the course of the hearing of this appeal on 14-4-1954, mentioning the fact that his clients had recently come to know that, on 14-9-1950, the Ganga Devi Sugar Mills Limited purported to sell all its lands, hereditaments and premises and all other machineries and properties belonging to it to North Bihar Sugar Mills Limited, and that the document of sale was countersigned by Messrs. Marwari Brothers, the Managing Agents of the Company.

It was further said that the defendants were under the impression that the said deed of sale had been filed in the lower Court; that that deed of sale should be sent for from the Court below and that the said deed of conveyance, a copy of which was filed along with the application, should be admitted as additional evidence by this Court, to show that the allegation of the appellant in his

application u/s 47, Civil P. C., to the effect that the firm Marwari Brothers stood dissolved during the pendency of the Federal Court appeal must be wrong. An application of rejoinder to this application was filed, and it is denied that the firm Marwari Brothers, of which the respondent Jainarain and the said Madan Lal were partners,

"could or did countersign the said sale deed. The said firm, of which the respondent Jainarain and the said Madan Lal were partners, was dissolved as aforesaid and thereafter new firm was formed without them with the same name."

I do not see how this application for fresh evidence could be allowed at this stage. In the very first application of objection filed by the appellant on 20-3-1951, it was disclosed that the firm of Marwari Brothers stood dissolved during the pendency of the Federal Court appeal and since then the defendants had had enough time to deny or refute that allegation. Evidence also was gone into and both parties led oral and documentary evidence and it was not suggested till this application was filed that the same firm of Marwari

Brothers, of which Jainarain and Madan Lal, the plaintiffs and others were partners, was still subsisting.

It may be that the name of Marwari Brothers was allowed to continue with changed partners and, therefore, it ceased to be the same firm as it was. I am not deciding this question as to whether, in fact, the old firm of Marwari Brothers was dissolved during the pendency of the Federal Court appeal or it continued long after it and is still subsisting, but, for purposes of this appeal, it must be held that, upon the materials on record, the firm Marwari Brothers, of which the defendants and the plaintiffs were partners, was dissolved during the pendency of the appeal in the Federal Court.

The true test for the admission of additional evidence is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced (Arjun Singh alias Puran Vs. Kartar Singh and others,). I am not inclined, in the circumstances, to admit fresh evidence in the shape of a plain copy of the sale deed or to send for the original from the Court below. If it had been filed already in the Court below, it should have been brought on the record formally and exhibited in the case. No such attempt was made to bring that document on record. The application, therefore, must be rejected. On a consideration of the facts mentioned above, in my view, the defendants are not in a position to carry out the terms of the decree.

9. Attempt has been made to show that the appellant removed the names of the petitioner Jainarain and Madan Lal from the register of share-holders without the consent and behind the back of the decree-holders; that the objector, namely, the appellant, has taken possession of the shares decreed and is appropriating the dividend and profits, and further that the appellant had also transferred the

shares in suit since after the decree of the Federal Court. Apart from these allegations having been made in the rejoinder application, there is not a little of evidence on record to support them.

10. The defendants have led evidence to show that their solicitor had sent letters, copies of which are marked Exhibits A to A(2), to the solicitors of the plaintiffs requiring the plaintiffs to pay the price. These copies of the letters purport to have been addressed to Messrs. Khaitan and Company. These letters, which are supposed to be office copies, do not bear the signatures of the sender or of some one on their behalf. These letters are sought to be proved by one Paresch Chandra Dey, witness No. 1 for the Opposite Party, a clerk of Charu Chandar Basu, Solicitors. He says that these letters were not typed in his presence. He also says that these three letters were typed by three different persons whose names he has given. These typists have not been examined. He has also proved the acknowledgments (Exhibits B to B(2)) (entries in peon's books) to be in the hand of Nand Lal Mitter, whose handwriting he says, he knew.

These entries in the peon's books show that certain letters were sent to Messrs. Khaitan and Company on the dates mentioned and were received by one Nand Lal Mitter. This witness, however, never saw Nand Lal Mitter writing anything. Even if this witness is competent to prove exhibits B series, in my opinion, the entries are not sufficient to show that they refer to the letters in question. Another witness on their behalf is Mohan Lal, Munib of the defendants, and he is resident of Ramnagar in the district of Champaran. He has come to prove the entries in the said peon's books (Exhibits B to B(2)).

He says that they were entered by one Radha Govind Biswas, who, he says, is the despatcher of the said solicitor, meaning thereby the solicitor of the defendants. He says in his examination-in-chief that the solicitor of the opposite party, namely, the defendants, sent three letters to the applicant, meaning thereby the appellant himself. If the letters were sent to the appellant himself, it is not possible to understand how these letters were received by Nand Lal Mitter, despatcher of the solicitors of the appellant. This witness was not summoned. Apart from it, he says that he himself went to the house of the solicitors for the plaintiff and that the entries in the peon's books were made in his presence on the different dates.

He says that he saw the house where the letters were delivered, but he could not say in which direction that house faced. He also said that he remembered the number of the house as 2B, Old Post Office, and that the office was on the third floor. He further claimed to have gone up by stairs though there was lift, which was not working. He had to Confess that he did not know the man, who received the letters, from before and that he made enquiry about his name when he had gone with the first letter. It is to be mentioned that the office of the solicitors, Khaitan and Company, is located in 1B, Old Post Office, Calcutta, and not 2B, as the witness says. It is difficult to believe this witness, and I think he has come to depose to facts which he did not know himself.

These letters and the peon's books were proved to show that demand was made by the defendants upon the plaintiffs for payment of the price. This could have been very easily proved by the production of the original letters sent to Messrs. Khaitan and Company, and I suppose that if such letters were, in fact, sent to Messrs. Khaitan and Company, it would not have been difficult to get these letters produced and brought on record. The respondents made no efforts for the production of those letters from the solicitors to whom, as alleged, their solicitors had sent these letters.

The appellant was asked to produce, and he readily said that he had no such letters with him. Even if letters, of which exhibits A series are the copies, had been sent to the solicitors they must be with them and not with the plaintiffs. Besides these witnesses, no reliable and responsible man of the firm of defendants' solicitors has come to depose that such letters were, in fact, sent. On these grounds, no reliance could be placed upon the evidence showing that any demand was made upon the plaintiffs- I should not be misunderstood as saying that in a decree for specific performance of contract a demand is necessary to be made upon the party against whom execution is sought: all that is necessary is that that person must have an opportunity and that person should have wilfully disobeyed the decree.

In view of the fact, however, that he did tender, as provided for in the decree itself, the price to the solicitors of the defendants, it must be held that the plaintiff was ready to fulfil the obligations cast upon him by the decree and in view of his allegation, which for the purposes of this appeal I take to be correct, that the firm of Marwari Brothers was dissolved during the pendency of the appeal in the Federal Court, it is likely that the plaintiff did not make a fresh tender knowing full well that even if he did, the defendants were not in a position to fulfil their obligations under the decree. That being the position, in my opinion, it cannot be held that there was any wilful default on the part of the appellant to obey the decree although he may have had an opportunity of obeying it.

On the facts and circumstances discussed above, I am not in a position to hold that there was wilful default to obey the decree on the part of the plaintiff, within the meaning of Order 21, Rule 32, Civil P. C. Mr. Das has relied upon the case of -- "Durga Das Nundi v. Dewaraj Agarwalla" 33 Cal 306 (C), where the case was of failure to abide by an order of injunction and the question raised was whether the person against whom the injunction was given by the Courts should have a notice issued to him before action u/s 260 of the former Code-- Order 21, Rule 32 of the present Code--could be taken and it was held that it was competent to the Court to take action without service of previous notice because the party in default must have known the order of injunction. That case, therefore, in my opinion, has no application here.

11. Turning now to the other question in regard to the nature of a decree in a suit for specific performance of contract it must be held that the obligations under such a decree are mutual & con-current and that both the parties to the

decree are in the position of decree-holders and judgment-debtors; in other words, the plaintiff is both a decree-holder and a judgment-debtor, and the defendant is likewise a judgment-debtor and a decree-holder. It has been held that the covenants to transfer and to pay the price are concurrent --"Imperial Banking and Trading Co. v. Atmaram Madhavji" 2 Bom HCB 246 (D).

The same matter has been described in a different way as "the payment and the conveyance are two acts to be done interchangeably--they are simultaneous acts" in -- "Margravine of Anspach v. Noel" (1316) 56 ER 114 (E). In a recent case of the Calcutta High Court in -- Heramba Chandra Maitra Vs. Jyotish Chandra Sinha and Others, , it was laid down that a decree for specific performance operates in favour of both parties, and a defendant is as much entitled to enforce it as the plaintiff. The question is as to the obligations of the party to the decree who wants the execution.

Upon the authorities already mentioned, if each of the parties is entitled to execute the decree, it is apparent that the party who wants the decree to be executed must be in a position to deliver the goods, namely, that he should also be able to perform what the decree directs him to do. If he is not, for one reason or the other, then he is not a person who should be entitled to execute the decree. The decree must be executed as a whole or none at all; in other words, the decree for specific performance of contract can be executed only if the parties to it are in a position to fulfil their respective obligations. The matter may be different and other considerations might arise if it is found that on account of fraud or other wrongful act of one of the parties, the other party is rendered incapable of performing his part of the decree.

No such case is made out here. The dissolution of the firm of Marwari Brothers was the result of agreement between the parties and cannot be said to be the result of any wrongful act on the part of the plaintiff or plaintiffs. If the plaintiff is directed to pay the price under the decree, he will be entitled to the deeds of sale in respect of the shares in the Ganga Devi Sugar Mills Limited and five annas share in the Marwari Brothers. The defendant, as has been shown already, is not in a position to convey any share in the Marwari Brothers. Therefore, it has become impossible for him to perform that part of the decree and, in that view of the matter, in my opinion the decree has become incapable of execution.

12. The last question is as to the jurisdiction of the Court below to execute the decree. It is conceded that after the appellate Court decree the trial Court decree merges in the appellate Court decree and that this decree of the appellate Court alone is capable of execution. In the present case, therefore, the only decree capable of execution is the decree of the Federal Court which only affirmed the decree of the appellate Court. Under Order 45, Rule 15, Civil P. C.,

"Whoever desires to obtain execution of any order of the Supreme Court (to be read as Federal Court in this case) shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be

executed, to the Court from which the appeal to the Supreme Court was preferred"

and that

"such Court shall transmit the decree or order of the Supreme Court to the Court which passed the first decree appealed from..... and the Court to which the said decree or order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees....."

The original side of the Calcutta High Court which had passed the first decree has transferred the decree for execution to the District Judge of Champaran, who, in his turn, has sent it for execution to the Subordinate Judge of Motihari. This transfer, therefore, is in accordance with the provisions of the CPC (O. 21, Rules 5 and 6). There is no complaint that any of the provisions of the Code relating to transfer of a decree for execution has not been followed except of course the omission to send copy of the decree of the Federal Court, which aspect shall be considered presently.

No objection was raised in the Court below that the provisions of Order 45, Rule 15, Civil P. C., were not followed, and I would, therefore, presume that the copy of the decree of the Federal Court must have been transmitted in the usual course (Order 45, Rule 15) to the original side of the Calcutta High Court, which had passed the decree in the first instance. In my opinion, therefore, there is no merit in the contention that the provisions of Order 45, Rule 15, were not complied with.

13. The other objection is that, as the copy of the decree of the Federal Court was not sent for execution to the Motihari Court along with the certificate under Order 21, Rule 6, Civil P. C., which required a copy of the decree also to be sent, the Court had no jurisdiction to execute the decree. The copy of the decree of the Federal Court was filed later on during the pendency of the execution proceeding. The question is whether omission to send a copy of the decree along with the certificate is fatal to the execution case in the circumstances mentioned above.

The application for execution mentions the dates of the three decrees, including the date of decree of the Federal Court, with a note that the appeal to the Federal Court was dismissed. The position in law being well settled that it is the decree of the ultimate Court of appeal in cases where appeals have been filed against the original decree, which is capable of execution because the decree of the first Court merges in the decree passed on appeal, there can be no doubt that what was intended to be executed was the decree of the Federal Court specially when the result and the date of the Federal Court decree were mentioned in the application for execution.

All other documents required by Order 21, Rule 6, to be sent to the transferee

Court were sent, the most important of which were the certificates, viz., the certificate of non-satisfaction (Rule 6(b)) and the certificate or the order for execution (Rule 6(c)). Besides these documents, a copy of the appellate decree, which was affirmed by the Federal Court, was also sent. In my opinion, therefore, in the circumstances, the omission to send the copy of the Federal Court decree was a mere irregularity and did not affect the jurisdiction of the transferee Court to execute the decree which was conferred upon the latter Court because of the order of transfer and the certificate of non-satisfaction sent by the Court which passed the decree in the first instance.

Mr. Sen referred to the case of -- Ekram Hussain Vs. Mt. Umatul Rasul and Others, , and Mr. Das has referred to the cases of -- Girwar Narayan Mahton and Others Vs. Kamla Prasad and Others, and -- Mt. Bhagwanta Kuer and Another Vs. Dewan Zamir Ahmad Khan and Others, , but in none of these cases the questions raised in the present case were considered and, therefore, no useful purpose will be served in considering them in any detail. In the circumstances mentioned above and in view of the substantial compliance with the provisions of the Code, as laid down in Order 21, I am not prepared to hold that the executing Court had no jurisdiction to execute the decree. This point, therefore, has to be decided against the appellant.

14. Upon the findings at which I have arrived, I must hold that the order of the Court below was wrong which is hereby set aside and the execution case dismissed. The appeal is, therefore, allowed, but in the circumstances, without costs.

Banerji, J.

15. I agree.