

(1947) 09 PAT CK 0004
In the Patna High Court

Kishun Dutt and Others

APPELLANT

Vs

Gulabchand Prasad and Others

RESPONDENT

Date of Decision : 16-09-1947

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1948 Patna 113

Judgement

1. The question involved in this civil revision is whether a decree-holder has an absolute right to withdraw an execution case, without leave of Court, at any stage of the execution proceedings, while leaving unaffected his right to take out a fresh execution.

2. The facts giving rise to it, shortly stated, are: The petitioners 1st party (Nos. 1 to 8) decree-holders, obtained a decree for sale in a mortgage suit against the petitioners 2nd party (Nos. 9 to 13) and the opposite parties. The opposite party No. 1 is admittedly a subsequent purchaser of some interest in the mortgage property in execution of a money decree against one Ajodhya Prasad, one of the members of the joint family of the petitioners 2nd party, since deceased. The mortgage decree was put into execution in 1941 and the execution proceeding dragged on for two years till 6-11-1948 when sale of the mortgaged properties commenced. As the bids were not considered acceptable, it was adjourned to 8-11-1948, the 7th being a Sunday. On 8th November, a judgment-debtor, one of the petitioners 2nd party, and the decree-holders, alleging that they had come to an amicable settlement, the former paying to the latter a sum of Rs. 1000, in part satisfaction of Abe decree, applied that the sale should not be further proceeded with and the execution case should be dismissed on part satisfaction. It was asserted that this arrangement was reached in order to enable the judgment-debtors to pay the decretal amount, amicably, out of Court, and thereby to save their valuable properties from being sold away.

3. The executing Court, however, on the objection of the remaining judgment-debtors, particularly opposite party No. 1, declined to accede to this joint prayer

and allowed the sale to proceed. The highest bid offered for the property, lot No. 1, was Rs. 51,700, a sum adequate to satisfy the decree which was in the neighbourhood of Rs. 40,000. Sale of property lot No. 2, was not held as no longer necessary. The highest bidder, however, failed to deposit the earnest money and the identical property .No. 1 was re-sold on 9-11-1943, for a sum of Rs. 52,500. The aforesaid joint petitioners, however, repeated their prayer, by another application, on 9-11-1943, asking for re-consideration of the order passed on the previous date, or, in the alternative, to adjourn the sale for some time in order to enable them to move this Court. This petition too met the same fate as its predecessor and the sale did take place, as stated already on 9-11-1943. The validity of this sale is the subject-matter of consideration in this civil revision and the same is sought to be set aside as ultra vires the executing Court and the execution case to be dismissed on part satisfaction, as prayed in the Court below.

4. It is contended by the petitioners that the learned Court below had no jurisdiction to sell the property after the decree-holders applied to withdraw the execution case. The civil revision came for hearing before Fazl Ali, C.J. and Beever J. The petitioners, in support of their contention, relied upon the decision in Ram Prasad Rai v. Mahesh Kant Chowdhury AIR 1922 Pat. 525, where it was held in the different circumstances of that case that the decree-holder had the right to withdraw the execution petition at any moment he liked. The view as formulated in that decision was that though Order 23, Civil P.C., did not in terms apply to execution proceedings, it was a right inherent in a party, which sets the law in motion, to withdraw the proceedings from the Court. Their Lordships, after hearing the parties, were not inclined to accept the Correctness of the ruling cited. They, therefore, referred the case to a larger Bench, and that is how the matter has come before this Bench of three Judges. The questions referred to the Full Bench are: (1) Has decree-holder an absolute right to withdraw an execution case with or without the permission of the Court? (2) If so, has he the right, with or without the permission of the Court, to take out fresh execution of the same decree? (3) Is the answer to question (1), or question (2), affected by the fact that a sale has begun before the decree-holder applies to withdraw the execution case, and (4) Does the fact that the decree under execution is a mortgage decree for sale affect the answer to the previous question?

5. The decision embodying the proposition, already referred to in Ram Prasad Rai v. Mahesh Kant Chowdhury A.I.R. 1922 Pat. 525, has been expressed in the following terms:

The Munsif's order (rejecting the decree-holder's application to dismiss the execution case) was certainly without jurisdiction and not sanctioned by any provisions of the Civil Procedure Code. Execution was taken by the decree-holder and the powers of the Court with respect to that execution were invoked by the decree-holder. The application was made under Order 21, Rule 1, and the nature of the relief and the mode for the enforcement of that relief were expressly

stated by the decree-holder: vide Rs. 10 and 11 of Order 21. The decree-holder expressly prayed for the execution of the decree and for the sale of the property of the judgment-debtor. He had the right to withdraw the execution petition at any moment he liked. No doubt Order 23, which relates to the withdrawal and abandonment of a claim does not apply to the execution proceeding but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he does not want to claim any relief in respect of the execution. The party which sets the law Court in motion has a right to withdraw the proceedings from the Court. Therefore, the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary.

6. Almost the same question came twice for Consideration before the Calcutta High Court, and. the decisions of that Court are just to the contrary. One of the decisions is Sital Chandra Bose Vs. Ramesh Chandra Mitter and Others, . The particular facts of that case-stating as much of them as are relevant--are that on 9-2-1938, there was an order of the Court executing a money decree to issue a proclamation fixing 19-4-1938 for sale. On the date fixed, that is, the 19th of April, the decree-holder put in a petition asking for permission to bid at the sale, and that was allowed. On the same date, on an application of the judgment-debtor, to which the decree-holder assented, two weeks' time was allowed, and the sale was put off until 8-5-1938. On that date an order was recorded directing the Nazir to conduct the sale and report. The next order was:

Received Nazir's report. One Srimati Raj Lakshmi Mitter purchased the property at Rs. 32000. Put up tomorrow for acceptance of the bid.

(The judgment-debtor then applied for and gained some more time to deposit the decretal money before final acceptance of the bid.) The last order recorded on an application of the judgment-debtor was:

He (judgment-debtor) is permitted to deposit the decretal amount before the acceptance of the bid and the bid is pending for Court's acceptance.

7. At this stage, that is, before the bid was finally accepted, the decree-holder filed an application withdrawing from the execution proceedings and asking to dismiss the same on non-satisfaction. The learned Judge, however, was of opinion that he ought not to allow the decree-holder to withdraw because a third party had entered on the scene and had acquired a position, if not an interest, which had to be taken into consideration. Later the executing Court accepted the bid. The order refusing the decree-holder's application for withdrawal was the subject-matter of revision before the Calcutta High Court in the above-mentioned case. While disposing of the application, Costello J. formulated the proposition in the following terms:

No question of jurisdiction and, indeed, no question of the propriety of the Judge's order can possibly arise, unless it can be argued successfully that a decree-holder has an absolute and indefeasible right to withdraw from execution

proceedings at any stage no matter that the situation may be.

Thereafter the learned Judge considered the decision in *Ram Prasad Rai v. Mahesh Kant Chowdhury* AIR 1922 Pat. 525 and distinguished the same with the following observations:

but it is quite obvious on a perusal of the judgment that although taken out of its context that seems a categorical statement that a decree-holder has the right to withdraw an execution petition at any moment he likes, it is clear enough that the learned Judge was dealing with the particular facts of the case then before him and not making a generalization.

8. The point of distinction between the decision of this Court just referred to and the case before Costello J. was that in the latter case some third person had come on the scene and had acquired either a position or an interest which would be prejudicially affected by withdrawal of the execution case, if given effect to. Thereafter Costello J. addressed himself to discuss whether the third party, in the case before him, had acquired any interest or not before acceptance of his bid and held that the Court below had jurisdiction to decide whether it was an interest or not, and then decided the case in the following manner:

I have said that in the present instance the learned Judge rightly or wrongly took the view that a third party had acquired an interest. We are not concerned to enquire whether that was a right or whether it was a wrong view of the matter. Obviously, if the learned Judge took the view that there was somebody who had made a bid which he himself intended to accept, it was open to him to come to the conclusion that the decree-holder ought not to be allowed to withdraw at that particular stage. If the learned Judge was wrong in coming to the conclusion, as he may have been, that this lady had acquired some legal interest as regards the property, that is not a matter which is a fit subject for review in proceedings taken u/s 115 of the Code.

This decision, therefore, amounts to pronouncing unambiguously a complete negation of the decree-holder's free and unlimited right of withdrawal and in favour of the Court's powers to refuse such a prayer in the interest of justice and fair play.

9. If the decision be taken to be an authority for what it actually decides, the dictum laid down may be expressed in the following terms: that where a third party has been found to have acquired some sort of interest or other or even a position in further progress of the execution proceedings, it would not be beyond the jurisdiction of the executing Court to refuse to accede to the decree-holder's prayer for withdrawing the same. Unmistakably, however, there are observations in the judgment of the learned Judge which go much beyond that and support the view that the decree-holder has no absolute and indefeasible right to withdraw from execution proceeding at any stage, no matter what the situation may be.

10. The other case of the Calcutta High Court, in which the point under consideration had Come up, is the case in *Kenaram Bakshi v. Kailash Chandra Dutt* (13) 18 CriLJ 53. In that case the sale proceedings went to the extent of bids having been offered, the decree-holder himself being the highest bidder. The decree-holder first of all wanted to withdraw the bid and that not being allowed, filed an application to withdraw the execution case which was granted. The judgment-debtor appealed to the District Judge against the order of withdrawal and the District Judge set aside the order and sent the case back to the Subordinate Judge for holding some enquiry as to whether the bid was authorised, and if not, to complete the sale in favour of the next highest bidder. Then the matter came before the High Court and the High Court held:

The decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option. If he was permitted to do so, the judgment-debtor might be needlessly harassed and as a result prejudiced.

The ratio of this decision seems to be that, granting the decree-holder a right to withdraw, he cannot do so at such a stage of the execution proceedings when such withdrawal would result in injury or injustice to either the judgment-debtor or to some other person who has appeared on the scene and has acquired some interest or position in the execution proceedings.

11. The decision of their Lordships of the Judicial Committee in *Thakur Prasad v. Fakir Ullah* (95) 22 I.A. 44 (not cited at the bar) deserves examination in support of the contention that the decree-holder has an unobstructed and unlimited right of withdrawing an execution case from the Court at any time he likes. In this case the decree-holder applied for execution. He did not actively prosecute that application and on a certain date fixed for the case, his pleader stated that the case might be struck off for the time being. An order was accordingly made striking the case off the list, for default. When the decree-holder made a second application for execution, the question arose whether the application which had been struck off the list for default should be treated as a nullity and non-existent, and in that view, whether the later application for execution being beyond three years from the date of a still earlier application, would be barred by time. The learned Subordinate Judge treated the impugned application as affording a fresh starting point of limitation. An appeal Was taken against this order to the Allahabad High Court, and the Court, following a previous decision in *Sarju Prasad v. Sita Ram* (88) 10 All. 71, held that the principle of Section 373 (corresponding to Order 23, Rule 1 was properly applicable to execution proceeding and that where a decree-holder was represented in an execution proceeding by a pleader who Came into Court and said:

At present I am not desirous to proceed with this application owing to error in its form, and I ask that it may be struck off;

and if he did not ask the sanction of the Court to put in a fresh application, he was in no better position than a pleader who appears for a plaintiff in a suit and

says the same thing, in which case Section 373 would admittedly apply. The Subordinate Judge, who felt bound by *Sarju Prasad v. Sita Ram* (88) 10 All. 71, distinguished the case before him on facts having construed the order of dismissal of the execution case as amounting to the withdrawal with permission to bring a fresh execution case. Their Lordships of the Judicial Committee, while holding that the Subordinate Judge had given a very reasonable account of the meaning of the order, said that they would not further examine the question for their decision must be rested on the more general ground that the ruling in *Sarju Prasad v. Sita Ram* (88) 10 All. 71 was erroneous. Their Lordships phrased their reasons for the decision in the following terms:

And it is clear, both from the Code and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution. Under these enactments a course of practice has grown up in India. Whether, it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Sarju Prasad v. Sita Ram* (88) 10 All. 71.

12. It is now to be considered whether in view of the dictum of the Privy Council as quoted above, it can be correctly held that the decree-holder can withdraw an execution case at any stage at his option with a right to bring another execution case according as it suits his own convenience. It has to be borne in mind that on the particular facts of the case before their Lordships neither the judgment-debtor nor any other third person had appeared in the execution case nor were any such in any way, prejudiced with regard to their interest, in the execution proceeding. All that was held in that case was that the decree-holder after having defaulted in further prosecution of the execution case started by him, or after withdrawing the execution case without the leave of the Court to institute further execution, is not debarred from starting successive execution cases one after the other. But the question whether in cases where the execution has advanced to a stage in which to permit the decree-holder to withdraw would seriously prejudice either the judgment-debtor or any other person who has come to the scene on invitation by the Court at the instance of the decree-holder, has not been decided there. That it would be beyond the jurisdiction of the Court to prevent the execution case from being withdrawn, or being allowed to be dismissed, was not before the Privy Council; nor their Lordships had to consider a case in which nothing remains to be done by the decree-holder for further progress of the execution till its termination, and, therefore, any default on the part of the decree-holder would not stand in the way of the execution being proceeded with, nor if, in such circumstances, the Court can proceed with the execution case to prevent injustice to the other parties concerned, the decree-holder's withdrawal notwithstanding. Though in the various provisions of the CPC governing the procedure applicable to execution cases as distinguished from the procedure

applicable to suits, there are implications permitting a succession of applications for execution notwithstanding their in fructuousness brought about by the decree-holder's ipse dixit, there is nothing in any of such provisions permitting the decree-holder to have his own way in prosecution of an execution case even to the extent of abusing the process of the Court to the great hardship and injustice to others. As the law permits a succession of applications for execution under certain circumstances, similar is the case with suits in certain prescribed circumstances, When a plaintiff allows his suit to be dismissed for default in the absence of the defendant either before or after his appearance in the case, he is not prevented from instituting another suit on the same cause of action. If, under Order, 23, Rule 1, the plaintiff is required, in order to preserve his right to institute a fresh suit, to take leave of the Court, it is because he has to withdraw the suit as against one or more defendants. Occurrence of the words "as against one or more defendants" in the rule is significant. If the plaintiff withdraws his suit before the defendant appears certainly he is not required, in order to enable himself to institute another suit on the same cause of action, to get leave of the Court. The facts of the cases of the Calcutta High Court, above referred to like the present case, afford some of the instances of serious prejudice or harm to the judgment-debtor in one case and to a third party in the other.

13. In the case before us the execution had reached a stage where the decree-holder had nothing further to do for its prosecution but what remained to be done was to be done by the Court and by the auction-purchaser. There was nothing in respect of which the decree-holder could default. The property No. 1 which had been auctioned had fetched a price of Rs. 51,000 odd, an amount more than the decretal amount, with the result that in the event of the bid being accepted or the sale being confirmed, the judgment-debtors were to reap the benefit of the release of property No. 2 from sale. The decree-holders had in that case, nothing to lose. The executing Court has found very rightly that the petition for dismissal of the execution case is not a bona fide one. It would no doubt amount to an abuse of the process of the Court to permit the decree-holder to nullify the entire proceeding to the serious prejudice of the judgment-debtors or any one of them and the bidders who have already appeared on the scene. In such a case it is to be seen whether there is anything in the Code which prevents the Court from exercising its own inherent power and jurisdiction to prevent injustice resulting from abuse of its process.

14. We are definitely of opinion that there is nothing in the Code or in the general principles of law and procedure which will make such an order, as has been passed in this case, without the jurisdiction of the executing Court.

15. With regard to Ram Prasad Rai v. Mahesh Kant Chowdhury AIR 1922 Pat. 525, it can be well said that it is clearly distinguishable on facts. From the report it appears that the decree-holder's application to dismiss the execution case was filed before the sale commenced and that dismissal did not involve any detriment to the interest either of the judgment-debtor or of any third party. There was no

finding that the decree-holder's application was other than bona fide. The decision cannot be taken to be an exposition of the whole, law on the subject. It is a decision on its own facts.

16. Mr. L.K. Jha for the petitioners further contended that sale of mortgage property by Court is not made by way of a decree for its satisfaction but of enforcement of mortgage contract and, as such, it is beyond the competence of the Court to hold a sale against the wishes of the mortgagee. This proposition, even if correct, is quite foreign to the point at issue, namely, who will control the process of the Court in the matter of an execution sale in a mortgage-decree-the Court or the decree-holders. Reliance is placed in support of the contention on the case in *Jwala Prasad Vs. Sheikh Chuttan and Another*, . The question that came up for decision in that case was whether the proviso to Section 60, Civil P.C., applied to sale, in execution of mortgage-decree. The determination of the question, according to their Lordships who decided the case, turned upon the meaning of the words "not liable to such attachment or sale" in the proviso as compared with the words "liable to attachment and sale" occurring in the main section. Walsh J. expressing the majority view held "such attachment or sale" in the proviso must mean the same thing as "attachment and sale" as used in the section, the word "such" taking away the distributive force of "or." In this view it was held that as no attachment is necessary in the case of a mortgage-decree, the proviso does not apply to such sales. By way of finding out if there could be any justification for such distinction Walsh J. said sales in mortgage cases owed their origin to contract of parties while in case of money-decrees the source was order of the Court. While so holding Walsh J. said:

This is not to say that the procedure is not, after decree, for the execution side. Any question which may arise relates to the satisfaction of the decree and is, therefore, within Section 47.

17. The question that is before us relates to procedure rather than to the origin of the tide passed by such sale. The ruling is no authority for the proposition that the Court derives its power and jurisdiction to sell from the contract as between the parties, and that the decree-holder is in control of the proceedings and not the Court. Walsh J. made it clear in the passage already quoted that the distinction in the origin of the two kinds of sales did not affect the nature and character of the proceedings set on foot for carrying them out. The ruling cited does not help the petitioners' case to any extent whatsoever.

18. In this view of the matter, the difference between a sale in execution of a mortgage-decree and a sale in execution of a money-decree in relation to a question of limitation, as pointed out by Chatterji J. in *Sri Thakurji Ramji, Lachhmanji and Jankiji v. Mathura Prasad* AIR 1941 Pat. 354 is of no relevance.

19. In short, the position is that the decree-holder cannot have an absolute and unrestricted right of withdrawing an execution case without leave of the Court.

20. In the result we are of opinion that the order passed by the executing Court

refusing to dismiss the execution case does not suffer from lack of jurisdiction nor is it vitiated by any illegality or irregularity in assumption or exercise of jurisdiction. The civil revision must be dismissed with costs.

21. In consideration of what we have said before, we answer the questions referred to us in the following manner: Question No. 1 is divisible into two parts. One part is whether the decree-holder has the absolute right of withdrawal without leave of Court and the answer to this will be in the negative. The answer to the other part, namely, whether he has such right with leave of the Court will be in the affirmative. Question No. 2--Yes, he has such a right but subject to the orders, if any, passed by the Court in the previous proceeding at the time of dismissal or withdrawal, as the case may be. Question No. 3--The decree-holder will have no such right to. withdraw the execution case after commencement of the sale except under orders of Court. Question No. 4--Answer to this question will be in the negative.