

(2022) 04 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : Civil Miscellaneous Petition Main (Original) Nos. 234, 235, 236 Of 2020

M/S Himland Housing Private Limited Through And Others APPELLANT
Vs

M/S Akash & Associates At Ff 17, Cross River Mall And Others RESPONDENT

Date of Decision : 04-04-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 6, 39, 39(1), 39(2), 39(3)

Citation : (2022) 04 SHI CK 0006

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : G.D. Verma, B.C. Verma, R.K. Gautam, Rishab Chandel

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J

1. Since common question of facts and law is involved in these petitions, therefore they were taken up together for consideration and are being disposed of by a common judgment.

2. Brief facts of the case are that the respondents filed civil suit No. 230 of 2017 for recovery against the petitioners and the same was ordered to be decreed by learned District & Sessions Judge, Shahdra (Delhi) Karkardooma Courts (Delhi) vide judgment dated 23.8.2017, for a sum of Rs. 5,00,000/- alongwith interest thereon @ 6% with effect from 26.3.2014 till the date of realization. The respondents filed execution petition in the Court of learned District Judge, Solan. The petitioner filed objections but the same were dismissed by the Court below constraining the petitioner to file the instant petitions.

3. It is vehemently contended by Mr. G.D. Verma, learned Senior Advocate assisted by Mr. B.C. Verma, Advocate that since the order passed by learned District Judge, Solan is without jurisdiction, therefore, the same deserves to be set aside on this ground alone. It is contended that execution petition was filed for recovery of Rs. 5,00,000/- + interest, the same was maintainable only before

the Court of First Instance i.e. Civil Judge (Jr./Sr. Divn) and therefore, on this ground alone the execution petition ought to have been dismissed.

4. On the other hand, Mr. R.K. Gautam, learned Senior Advocate assisted by Mr. Rishab Chandel Advocate would make twofold submissions. Firstly, that it is settled law that the Higher Court will always possess the powers as possessed and conferred upon the lower Court and secondly since the petitioners had failed to raise objections regarding pecuniary jurisdiction before the Court below, therefore it has waived off its right to raise such contention in the instant petition.

5. I have heard learned counsel for the parties and gone through the material placed on record.

6. Section 39 of the Code of Civil Procedure, amended from time to time, reads as under:

39. Transfer of decree.

(1) The Court which passed a decree may, on the application of the decree - holder, send it for execution to another Court 1[of competent jurisdiction],-

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

2[(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]

3[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]

7. It would be noticed that it is only after the amendment carried out in the year 1976 when it is provided that the transferee Court must be a Court of competent jurisdiction. What necessitated the amendment was the conflict of judgments of various Courts regarding Section 39, as it existed at that time. In Shamsunder

Vs. Anath Bandhu, 1910, ILR 37 Calcutta 574, Durga Charan Vs. Uma Tara, 1889, ILR 16 Calcutta 465 and Firm Ganesh Das Vs. Amulak Chand, AIR 1940, Calcutta 161, it is held that the decree cannot be transferred to a Court, if the amount of value of the decree exceeded the pecuniary jurisdiction of that Court, whereas in Abdulla Saheb Vs. Ahmed Hussain Saheb, AIR 1914 Madras 206, a contrary view was expressed and it was held that the decree sent on the application of decree-holder under Section 39(1) of the Code of Civil Procedure could be executed because Section 39(1) of the CPC did not contain any such limitation. The High Court of Madras took a view that there could not be any embargo on the jurisdiction of the Court to execute the decree transferred to it.

8. Yet again a contrary view was taken in Mt. Anchahi Vs. (Firm) Brij Mohan La, AIR 1936, Patna 177, Matrumal Vs. Madan Lal, Rustomjee Vs. Mahadev, AIR 1940 Bombay, 277, wherein it was held that the value of the suit in which the decree was passed must be within the pecuniary jurisdiction of the Court, to which the decree was proposed to be sent.

10. Having regard to the uncertain position that prevailed as to execution of a decree transferred by the Court which has passed it to another Court, the Law Commission of India took a serious note of it and made a recommendation for amendment to Section 39 of the Act in its 27th Report (C.P.C) December 1964. While dealing with Section 39, the Law Commission has recommended thus:

1. At present, there is a conflict of decisions on the question whether (i) the transferee Court must be a Court of competent pecuniary jurisdiction; and (ii) if so, whether the competence should be judged with reference to the decree or the suit.

2. One view is, that provisions of this Section are controlled by Section 6 and a decree cannot be transferred under Sub-section (1) for execution to another Court if the amount or value of the decree exceeds its pecuniary jurisdiction. See the under mentioned cases.

The contrary view was taken in a Madras case, where the decree was sent on the applications of the decree-holder. Section 39(1), it was said, does not contain any such limitation, though Section 39(2) does.

3. It has also been held, that the value of the suit in which the decree was passed must be within the pecuniary limits of the jurisdiction of the Court to which the decree is proposed to be sent. See the under-mentioned cases.

For a different view, to the effect that the decretal amount determines pecuniary jurisdiction, see the under mentioned cases.

4. See also the discussion about the Section in a recent Supreme Court case.

5. It is considered, that the position should be made clear and that the transferee Court must have pecuniary competence to deal with the suit in which the decree was passed; amount of the decree is immaterial, as pecuniary

jurisdiction of a Court is ordinarily judged with reference to the nature of the claim in the suit, and not the nature of the relief decreed. Hence the amendment.

11. In Section 39(1) of C.P.C., the following words 'competent jurisdiction' came to be inserted by Central Amendment Act, 1976 (104/1976) . The Object and Reasons stated in support of this amendment are also relevant for our purpose. The Object and Reasons are as follows:-

"Section 39 of the Code provides for the transfer for execution of a decree by the Court which passed the decree to another Court. There is a conflict with regard to this Section as to whether -

- i) the transferee Court must be a Court of competent pecuniary jurisdiction; and
- ii) If so, whether the competence should be judged with reference to the decree or suit. The Section is being amended to clarify" the position by providing that the transferee Court must have pecuniary competence to deal with the suit in which the decree was passed."

12. Thus it is clear that the object with which the Law Commission recommended for the amendment of Section 39 of the C.P.C., and the object with which the Section 39 of C.P.C., came to be amended was only to remove the conflict that was prevailing among the Decisions of the various High Courts on the question as to whether the transferee Court should have pecuniary jurisdiction to try the claim involved in the suit or the sum for which the decree is passed.

13. Therefore, it is clear from the Objects and Reasons, referred to above, that the words 'competent jurisdiction' came to be inserted in Section 39 of the C.P. Code only to make it clear that the transferee Court must have pecuniary competence to deal with the suit and nothing else. When the very object of inserting the words 'competent jurisdiction' is to clarify the aforesaid position and it only relates to competence of a pecuniary jurisdiction of a transferee Court to deal with the suit, Sub-section (3) of Section 39 which is added by the very same amendment Act 1976 (104/1976) and which is only intended to explain the words "competent jurisdiction" inserted in Sub-section (1) of Section 39 of the C.P. Code cannot be construed in a different way. Therefore, Sub-section (3) of Section 39 of the C.P. Code can only be read as meaning that a Court shall be deemed to be Court of competent jurisdiction if at the time of making application for transfer it had the pecuniary competence to try the suit.

14. Cases are not wanting where in between the date of making an application for transfer of a decree and passing an order transferring the decree, transferee Court ceasing to have jurisdiction to try such suit in which decree is passed due to reducing the quantum of pecuniary jurisdiction. Therefore, one of the objects of Sub-section (3) of Section 39 in explaining the words "competent jurisdiction" is to ensure that the pecuniary competence of the transferee Court must be judged with reference to the date of the application made for transfer. If Sub-sections (1) and (3) of Section 39 are read keeping in view the objects and

reasons for introducing the amendment and the object of the Law Commission in making such a recommendation, there will not be any difficulty in coming to the conclusion or to put it in other words, there is no escaping from the conclusion, that the amendment, is only intended to provide, and it provides, that the transferee Court must have pecuniary jurisdiction to try the suit at the time the application for transfer of a decree is made.

15. In so far as the contention of the respondents regarding waiver of jurisdiction is concerned, I find the same to be unsustainable for it is more than settled that the jurisdiction upon a Court lacking pecuniary jurisdiction cannot be conferred by consent of parties. In other words, the Court not vested with jurisdiction cannot exercise the same.

16. In view of the aforesaid, I find merit in these petitions and the same are accordingly allowed. Since the execution petition No. 87-S/10 of 2018 itself is not maintainable, therefore, the same is ordered to be dismissed and the consequential order passed by the Executing Court, dated 4.1.2020 is also ordered to be set aside. However it is made clear that this order shall not prevent the Decree Holder from resorting to such remedy, as may be available to it, under the law. The pending application(s), if any, are also disposed of.