

(1984) 05 GAU CK 0008
In the Gauhati High Court
Case No : Civil Revision No. 48 of 1983

Mustt. Rahima Khatun and Others

APPELLANT

Vs

On the death of Samser Ali his L. Rs. Mustt. Amrun Nahar
and Others

RESPONDENT

Date of Decision : 21-05-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 47

Citation : AIR 1985 Guw 40

Hon'ble Judges : T.S. Misra, C.J

Bench : Single Bench

Advocate : B.K. Das and A.H. Saikia, for the Appellant; S.R. Bhattacharjee and H.A. Sarkar, for the Respondent

Final Decision : Allowed

Judgement

T.S. Misra, C.J.—This revision is directed against an order dt. 27th Jan. 1983 passed by learned Munsiff No. 1 at Dhubri in Title Execution Case No. 42 of 1981 dismissing the execution proceedings. The facts giving rise to this petition are these.

2. The present petitioners filed a Suit No. 393 of 1979 in the court of Munsiff No. 1 Dhubri against one Samser Ali for ejectment from the premises detailed and described in the schedule of the plaint on the ground of default in payment of rent. The suit was contested by Samser Ali. The trial Court decreed the suit whereupon an appeal was filed by Samser Ali in the court of Assistant District Judge, who on appraisal of evidence concurred with the findings reached by the trial Court and dismissed the appeal. The judgment and decree passed by the trial Court were affirmed. Samser Ali then preferred a revision petition u/s 115, C.P.C. before this Court being Civil Revision No. 56 of 1982. That revision petition was heard on 3rd Sept. 1982 and was dismissed by this Court by a judgment and order dt. 3rd Sept. 1982, holding that Samser Ali, the defendant was a defaulter. This Court granted three months" time for vacation of the suit premises. The

premises were however, not vacated during that period. Hence on the expiry of three months the present petitioners filed an application being Title Execution Case No. 42 of 1981 in the court of Munsiff No. 1 at Dhubri to execute the decree. The present opposite parties then filed a petition being No. 5821 on 19th Nov. 1982 seeking dismissal of the execution proceedings on the ground that the decree passed in Civil Revision No. 56 of 1982 was a nullity inasmuch as, it was passed against Samser Ali, who had died on 2nd Sept. 1982. The application was opposed by the decree-holder but the executing court dismissed the execution proceedings on the ground that the decree was a nullity, hence not executable. The decree-holder being aggrieved has, preferred this revision petition.

2. I have heard the learned counsel for the revisionist as also the opposite parties who are the legal representatives of deceased Samser Ali.

3. It was not disputed before me that Samser Ali had died on 2nd Sept. 1982. The Civil Revision Petition No. 56 of 1982 filed by Samser Ali against judgment and decree passed in Title Appeal No. 49 of 1981 was heard by a learned single Judge of this Court on 3rd Sept. 1982. The counsel for Samser AH as also the counsel for the plaintiff-decree-holder were present before the Court at the time of hearing of the revision petition and were in fact heard. This Court after hearing the learned counsel for both the parties declined to interfere with the judgment and decree passed by the court below and rejected the revision petition on merits by a judgment and order dt. 3rd Sept, 1982. It appears that the learned counsel for Samser Ali did not inform the learned single Judge of this Court on 3rd Sept. 1982 at the time of hearing of the revision petition that Samser AH had already died a day before, that is, on 2nd Sept. 1982. The learned counsel for the decree-holder opposite parties also did not inform the Court of this Fact. Maybe, the counsel for both the parties were not aware of the death of Samser Ali which had occurred only on the preceding day. The legal representatives of Samser Ali, deceased, had also not appeared before the Court on 3rd Sept. 1982 to convey the information about the death of Samser Ali. Quite obviously, they must have been in the mourning. This Court therefore could not derive from any source whatsoever the information with regard to the death of Samser Ali. As a matter of fact, the learned counsel for both the parties appeared before the Court when the revision petition was taken up for hearing, submitted their arguments and after hearing them the learned single Judge dismissed revision petition on merits.

Thereafter the decree-holder proceed to execute the decree and it is in the execution proceedings the legal representatives of the deceased Samser Ali filed an objection to the execution of the decree stating that Samser Ali had died on 2nd Sept. 1982; hence the decree passed by this Court on 3rd Sept. 1982 was a nullity and therefore not executable. This objection was filed by the legal representatives on 19th Nov. 1982, that is, on the 78th day of the death of Samser Ali. The executing court below accepting the contention of the legal representatives of Samser Ali, dismissed the execution petition. It held that the

decree passed by this Court in revision petition was a nullity and as the decree of the court below had merged into the decree passed by this Court into the revision petition, the execution of a decree which was a nullity could not be made.

The learned counsel for the decree-holder petitioner submitted that the view taken by the executing court was erroneous and the court below had failed to exercise its jurisdiction to execute the decree. At any rate, the court below has acted illegally in rejecting the execution petition. The submission was that the trial court had decreed the suit against Samser Ali, when he was alive. Thereafter Samser Ali filed an appeal in the court of the Assistant District Judge. That appeal was decided on merits and dismissed by the learned Assistant District Judge when Samser Ali was alive. Thereafter Samser Ali himself filed the revision petition in this Court. He was the sole petitioner before this Court. The revision petition was heard and was dismissed after hearing the learned counsel for both the parties on 3rd Sept. 1982. The learned counsel submitted that the order dt. 3rd. Sept 1982 passed by this Court in Civil Revision No. 56 of 1982 in its revisional jurisdiction was not a decree, inasmuch as, the revisional application is not an original proceeding, that this Court having declined to modify or set aside the decree passed by the courts below the same remained in operation and could hence be executed and that as the legal representatives of Samser Ali did not approach this Court to have the order passed in the revision petition set aside and to have them substituted in the revision petition and to seek its re-hearing it was not open to them to challenge the validity of the decree under execution. The learned counsel for the present opposite parties, on the other hand, submitted that the decree passed by the courts below had merged in the decree passed by this Court in the revision petition and as the decree passed by this Court was against a dead person, it was a nullity and the executing Court had rightly declined to execute the same.

4. Now, in order to appreciate the rival contentions of the parties, it would be appropriate to bear in mind the distinction between appeal and revision. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of revision whatever power the revisional authority may or may not have, it has no power to review the evidence unless the statute expressly confers on it that power; that limitation is implicit in the concept of revision. The Supreme Court elaborated the point in *Sri. Raja Lakshmi Dyeing Works and Others Vs. Rangaswamy Chettiar*, by observing (at p. 1254 of AIR) :

"Ordinarily, appellate jurisdiction involves a re-hearing, as it were, on law as well as fact and is invoked by an aggrieved person. Such jurisdiction may, however, be limited in some way as, for instance, has been done in the case of second appeal under the C.P.C., and under some Rent Acts in some States. Ordinarily, again, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without its being invoked by a party. The extent of

revisional jurisdiction is defined by the statute conferring such jurisdiction. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice, Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa."

5. Two things are required to constitute the appellate jurisdiction, namely, the extent of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter.

6. In *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, it was observed as under (at p. 4) :

"Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only . one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not therefore, consider that the principle of merger of orders of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal."

7. In the case in hand it would be seen that the revision petition was filed by Samser AH u/s 115 C.P.C. He was the sole defendant-petitioner. He had died on 2nd Sept. 1982. This Court was not informed of the death of Samser Ali either by his counsel or by his legal representatives or by any other person. The learned counsel for both the parties made their submissions before the Court and argued the case. After hearing the learned counsel for both the parties, this Court without having any knowledge of the death of Samser Ali dismissed the revision petition. In other words, this Court declined to interfere with the judgment and decree passed by the appellate Court below. Obviously the revision petition was decided on the assumption that all the parties to the petition were alive. In fact no mention was made before the learned single Judge hearing the revision petition that Samser Ali was dead. The legal representatives of Samser AH filed an application before the executing court contending that as the decree passed by this Court in revision petition was against a dead person it was a nullity and hence not executable. This application as pointed out hereinabove was filed by them on the 78th day of the death of Samser Ali. They did not file any application before this Court to set aside the judgment and order passed in the revision petition and to bring them on record as legal representatives of Samser Ali, the deceased. The revision petition was filed by Samser Ali and if his legal representatives had desired to prosecute the revision petition, they could have

filed an application before this Court for getting themselves substituted in place of Samser Ali. They did not do so; even after knowing that the revision petition filed by Samser Ali had been dismissed by this Court on 3rd Sept. 1982, they did not approach this Court soon after knowing the fact of dismissal of the revision petition or even within a reasonable time. On the other hand, they filed an application before the executing court contending that the decree passed by this Court in revision petition was a nullity because, it had been passed against a dead person.

Of course, no period of limitation has been prescribed for filing an application for bringing on record the legal representatives of a deceased petitioner in a revision petition. Article 120 of the Limitation Act 1963 provides a period of 90 days for an application for impleading legal representatives of a deceased plaintiff or appellant or a deceased defendant or respondent. The question whether Article 120 applies to proceedings in revision does not arise in the instant case, because the legal representatives of the sole petitioner, Samser Ali did not file any application before this Court for their substitution in his place either within 90 days or thereafter, though they had full knowledge of the fact that the revision petition filed by Samser Ali in this Court had been dismissed on 3rd Sept., 1982 as is evident from their application which they had filed before the executing court.

8. The revisional jurisdiction u/s 115 of the C.P.C. can be invoked suo motu as also by an application filed by the aggrieved party and if it appears that the subordinate Court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. In the revision petition filed by Samser Ali u/s 115 of C.P.C., this Court was not satisfied that there existed any ground as aforementioned warranting interference with the judgment and decree passed by the appellate court below. The death of Samser Ali did not in any way make the judgment of this Court invalid inasmuch as it was passed in a revision u/s 115 of the C.P.C., in which the High Court can even suo motu call for the records and dispose of it after examining them and satisfying itself that the order of the subordinate court did not suffer from any infirmity specified in Section 115 of C.P.C. In my view the death of Samser Ali did not affect the revisional power of this Court u/s 115 of the C.P.C. and therefore the validity of the judgment passed in revision could not be challenged before the executing court.

9. Further, it was not open to the legal representatives of Samser Ali, who are the present opposite parties to contend that the decree passed by the appellate court below had merged in the decree passed by this Court in the revision petition. On the one hand they contended that the order and decree passed by this Court in revision was a nullity and, on the other hand, it is submitted that the decree of the appellate court had merged in the decree passed in the

revision. The fallacy in the argument is obvious. If the decree passed by this Court in revision was nullity, the appellate Court's decree would not merge in it. A thing can merge in the other if the other exists. There cannot be merger in a non-existing thing. A decree which is a nullity is non est, as if it does not exist; and if it does not exist the decree of the subordinate court will not merge in it. The principle of merger of orders of inferior courts in those of superior courts is no doubt applicable in the case of revision as in the case of appeal. But the order of the inferior court will not merge in the order of superior court which is non est or in other words, which is a nullity. The Court below, therefore, fell in error in applying the principle of merger while holding that the decree passed by this Court in revision petition was a nullity. I have, however, already held that the death of Samser Ali did not in any way make the judgment of this Court passed in revision petition invalid. That revision was filed u/s 115 of the C.P.C. The records of the Court below had been called for by this Court and were before it. This Court suo motu could dispose of the revision petition after examining the records. This Court did exercise its power u/s 115 of the C.P.C., examined the record and came to be satisfied that there was no ground for interference with the lower court's order. The death of Samser AH in these circumstances did not affect the revisional power of this Court. The decree was, therefore, executable. Moreover, even if the order passed by this Court in revision petition was a nullity, then the appellate court's decree did not merge in it and could not become extinct. Hence too the decree was executable. The legal representatives of Samser Ali did not choose to pursue the revision by having that order set aside and get the revision petition restored. They did not seek the re-hearing of the revision petition at any point of time. Viewed from any angle, it cannot be accepted that the decree was not executable. The impugned order passed by the court below is, therefore, not sustainable and is liable to be set aside.

10. In the result, the petition is allowed and the impugned order is set aside. The court below is directed to proceed with the execution in accordance with law. However, in the circumstances of the case, the parties shall bear their own costs in this Court.