

(1956) 03 PAT CK 0004
In the Patna High Court
Case No : A.F.O.O. No. 212 of 1950

Nehar Ganguli and Others

APPELLANT

Vs

Rai Anath Nath Basu and Others

RESPONDENT

Date of Decision : 21-03-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 38, 39

Citation : AIR 1956 Patna 269

Hon'ble Judges : Rai, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : G.C. Mukharji and S.S. Rakshit, for the Appellant; R.P. Katriar and Lalit Bihari Sinha, for the Respondent

Final Decision : Allowed

Judgement

Kanhaiya Singh, J.—This is an appeal by the decree-holders against an order dated 3-7-1950 passed by the Subordinate Judge of Gaya in Rent Suit No. 1 of 1946 directing the recall of a decree transferred to the Calcutta High Court for execution.

2. The facts which gave rise to the proceedings in which the said order was passed may be shortly stated as follows: The decree-holders-appellants obtained a decree on contest for arrears of rent for a sum of Rs. 14,600/127- with costs in respect of a mokarrari tenure against the respondents, the mokarraridars, on 19-7-1946, in Bent Suit No. 1 of 1946 in the Court of the 1st Subordinate Judge, Gaya,

The decree-holders executed the decree in Execution Case No. 66 of 1947 by attachment and sale of the tenure in question. The respondents objected to the execution on various grounds but unsuccessfully. Subsequent to the said decree, the decree-holders obtained two other decrees for rent and cess in respect of the said mokarrari tenure for a total sum of Rs. 22,900/- and odd. The rent for subsequent period also accrued due, and the decree-holders had to file another

suit for recovery of rent about Rs. 52,000/-.

In the meantime, in December, 1949, the Bihar Government issued a notification published in the Bihar Gazette of December, 1949, for taking over the management of the estate of the respondents along with other estates under the Bihar State Management of Estates and Tenures Act, 1949. The consequence of the taking over of the management of the estate by the State was that the tenure in question would no longer be available for satisfaction of the decrees obtained by the decree-holders. Apprehending that they would be absolutely without any remedy against the respondents for realisation of the decrees in case the management of the tenure was assumed by the State, they applied for transfer of the decree to the Calcutta High Court for execution on 10-12-1949. On 31-1-1950, the application was allowed and the decree was transferred to the Registrar of the Calcutta High Court for execution. This order was passed ex parte without notice to the respondents, and it is the legality of this order which is challenged in this appeal.

On 2-5-1950, the appellants levied execution of the decree on the Original Side of the Calcutta High Court in Execution Case No. 11 of 1950, and in execution of the decree moveable properties worth about Rs. 12,000/- belonging to respondents 1 and 2 were attached on 12-5-1950. On 18-5-1950, the respondents appeared before the Calcutta High Court and filed objection disputing the legality of the attachment and the executability of the decree. Their objection was first heard on 19-5-1950 and the respondents obtained adjournment.

In the meantime, on 29-5-1950, they filed an application before the Subordinate Judge, 1st Court, Gaya, to recall the order of transfer on the ground inter alia, that the order was without jurisdiction and illegal and liable to be set aside. They also obtained an ad interim order of stay of the proceedings in execution pending in the Calcutta High Court. This application was heard by the Subordinate Judge, and by his order dated 3-7-1950, he recalled the decree from the Calcutta High Court.

In the opinion of the learned Subordinate Judge the order transferring the decree to the Calcutta High Court was illegal, as it was passed ex parte without notice to the judgment-debtors before transmission. It is against this order that the present appeal has been filed.

3. Mr. G. C. Mukharji, appearing for the appellants, argued that the order recalling the decree which was transmitted to the Calcutta High Court in due process of law was illegal and without jurisdiction. On the other hand, Mr. R. P. Katriar on behalf of the respondents contended that the learned Subordinate Judge "was right in recalling the order, because the order transferring the decree to the Calcutta High Court for execution was wholly illegal as the order was made without affording the judgment-debtors an opportunity of being " heard. There appears to be no warrant in law for hearing the judgment-debtors before

transferring the decree to another Court for execution.

Section 39, Civil P. C. provides for transfer of decree, and Sub-section (1) lays down that on fulfilment of any of the four conditions specified therein, "the Court which passed a decree may, on the application of the decree-holder send it for execution to another Court". Sub-section (2) enacts that the Court which passed a decree, may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

The Court, therefore, which passed a decree may transfer the decree either suo motu or on the application of the decree-holder. When the transfer is made on the application of the decree-holder, one or other of the conditions laid down in Clause Clauses (a) to (d) of Sub-section (1) must be satisfied. When the Court orders transfer of the decree for execution on its own motion, the fulfilment of the conditions specified in ,Sub-section (1) is not necessary. But, in such a case the transfer cannot be made to any Court other than a subordinate Court of competent jurisdiction. In the matter of transfer of the decree the judgment-debtor has no voice, and, I think, rightly.

This provision has been enacted entirely for the benefit of the decree-holder to facilitate speedier and fuller satisfaction of the decree. Subject to any contract, or directions of a Court of law, it is for the decree-holder to decide the venue of the execution and the property which may be taken in satisfaction of the decree.

The judgment-debtor cannot legitimately impose any limitation or restriction upon the power of the decree-holder to obtain satisfaction of the decree in the manner provided by Sections 38, 39, Civil p. C. It is for this reason that none of these sections provides for hearing the judgment-debtor before transferring the decree for execution to another Court. In the case of *Narain Das Dutt and Another Vs. Banku Behari Chattopadhaya and Others*, a Division Bench of the Calcutta High Court observed as follows:

"The point is that Section 39 of the Code does not require notice to be given to the judgment-debtor before a decree is transmitted to another Court, while Order 21, Rule 10 expressly provides that if the decree has been transmitted to another Court, the application for execution shall be made to that Court and in cases where notice under Order 21, Rule 22 has to be given that Rule provides that the notice shall be issued by the Court executing the decree.

Under the scheme of the Code, the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of execution.

Orders of transmission are treated as quasi-administrative orders and on the original side are made by the Registrar who is not vested with jurisdiction to decide such objections. But if the Code be followed the nature of an order of this

kind should be the same whether it is made by an Officer of the Court or by a Judge."

An appeal against this decision was taken to the Privy Council, and their Lordships of the Privy Council affirmed the decision of the Calcutta High Court. The judgment of the Judicial Committee is reported in AIR 1927 73 (Privy Council) Following the aforesaid Privy Council case, the Madras High Court also held in *Vengu Chetti v. Valjee Kanjee & Co.* AIR 1936 Mad 99 (C) that the act of transmitting a decree for execution is a ministerial act and that such an order can be passed even ex parte.

Mr. Katriar relied upon the case of *Lakshman Hari Kanhere Vs. V.G. Virkar*, and *Gurudas Adhya Vs. Jnanendra Narain Bagchi and Others*, (EX In both these cases the transfer of the decree for execution was made on certain conditions. If the Court attaches certain conditions to the execution of the decree in the transferee Court, then it is manifest that before the imposition of those conditions, the judgment-debtor should be given opportunity to prefer objections, if any.

In my opinion, these decisions are not authority for the proposition that the order for transfer of execution to another Court without hearing the judgment-debtors is a nullity and without jurisdiction. The transfer of a decree, as pointed in the case of *Narain Das Dutt (A)* above referred to, is a quasi-administrative order and may be passed ex parte without notice to the judgment-debtors. The contention of the learned Advocate for the respondents that the transfer of the decree without notice to the judgment-debtors was illegal must be overruled.

4. It was next contended by Mr. Katriar for the respondents that simultaneous execution of the decrees in two different Courts should not have been ordered without hearing the judgment-debtors. It will be seen that when the decree was transferred to the Calcutta High Court for execution, an execution in respect of the same decree was pending before the Court of the 1st Subordinate Judge. It is now well settled that there cant be simultaneous execution of decrees in more than one Court.

In the case of *Ram Sumran Prasad v. Ram Bahadur* AIR 1923 pat 224 (F), the Patna High Court has held that a Court is competent to allow a decree-holder to prosecute two concurrent applications for execution of the same decree. When law does not provide for notice to the judgment-debtor before transmission of the decree, it does not appear how the pendency of an execution case will render such notice legally imperative. The propriety of an order is entirely different from the legality of it.

It is one thing to say that it would be proper to hear the judgment-debtors before ordering simultaneous execution of the decree in order to protect them against unnecessary harassment and a quite different thing to maintain that the order passed for the transfer of the decree involving simultaneous execution without notice to the judgment-debtors is wholly without jurisdiction and illegal especially when no prejudice of any sort has accrued to the judgment-debtors.

The respondents have not shown in this case how this simultaneous execution of the decree has at all prejudiced them.

As a matter of fact, the execution in the Gaya Court has to all intents and purposes become infructuous by reason of the mukarrari tenure in question having vested in the State under the Bihar Land Reforms Act. In absence of prejudice, it is not open to the judgment-debtors to object to the simultaneous execution of the decree or to the order transferring the decree for execution to another Court during the pendency of another execution. The reason is that it is open to the judgment-debtors to take whatever objections they deem proper with respect to the execution, satisfaction and discharge of the decree in the transferee Court.

In fact, the judgment-debtors did appear before the Calcutta High Court and raised objections. In my opinion, the order of the learned Subordinate Judge transferring the decree to the Calcutta High Court for execution without notice to the judgment-debtors was not illegal and without jurisdiction, although execution was pending at that time in his Court.

5. In my opinion in this particular case the learned Subordinate Judge acted illegally in recalling the transfer of the decree which had been legally made, when execution had already proceeded in the Calcutta High Court and attachment of moveables had been effected which would have to be lifted in case the order recalling the decree is allowed to stand, to the great harassment of the decree-holders.

6. The result is that the order of the learned Subordinate Judge dated 3-7-1950, recalling the transfer of the decree is set aside, and the appeal is allowed with costs.

Rai, J.

7. I agree.