
(1962) 11 PAT CK 0022
In the Patna High Court
Case No : A.F.A.O. No. 270 of 1961

Purusottam Gohil

APPELLANT

Vs

Rajapur Colliery Co. and Others

RESPONDENT

Date of Decision : 08-11-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1964 Patna 295

Hon'ble Judges : V. Ramaswami, C.J;N.L. Untwalia, J

Bench : Division Bench

Advocate : L.K. Choudhury and S.B. Sanyal, for the Appellant; Lal Narain Sinha and S.K. Mazumdar, for the Respondent

Final Decision : Allowed

Judgement

1. It appears that the appellant had instituted a title suit, namely. Title Suit No. 9 of 1951, against the respondents in the Court of the Subordinate Judge of Dhanbad, alleging that the road to his colliery had been blocked by the respondents and there had been subsidence of the road and the appellant, therefore, prayed for a declaration of his title to the road and for recovery of damages and certain other reliefs. The suit was decreed on the 28th August, 1951, in favour of the plaintiff. It was ordered in the decree that the defendants should provide an alternative route to the plaintiff within a period of two months from the date of the decree and it was further stated that on failure of the defendants to do this it will be open to the plaintiff to construct a road in accordance with the terms of the decree at his own cost and recover the same from the defendants through Court. The plaintiff also was granted a decree for damages to the extent of Rs. 1200/-.

The plaintiff put the decree into execution in Execution Case No. 13 of 1952. But the defendants had preferred an appeal before the High Court, being First Appeal No. 434 of 1951, and in that First Appeal the defendants prayed for stay of the execution proceedings. On the 29th. April, 1952, the High Court made an order

of stay of the execution on condition that the defendants should deposit Rs. 2000/- in the executing Court within a month from the date of the order. The deposit was duly made by the defendants and subsequently a further amount of Rs. 2000/- was ordered to be deposited by the High Court on the 24th August, 1957. The appeal was dismissed by the High Court on the 19th December, 1958, and thereafter the plaintiff-decree-holder applied before the executing Court for payment of the sum of Rs. 4000/- which had been deposited by the defendants in accordance with the direction of the High Court.

This petition was rejected by the Subordinate Judge, 1st Court, Dhanbad, on the ground that the order of the High Court did not by itself constitute a decree or order for payment of the money deposited by the judgment-debtors during the pendency of the appeal and as such the decree-holder has got to bring a separate suit for the amount claimed on account of the damages sustained by him as a result of the stay of execution. The decree-holder preferred an appeal to the District "Judge of Dhanbad, but the appeal has been dismissed.

2. The order of the High Court dated the 29th April, 1952, states as follows :-

"It transpires, however, during the course of hearing that the plaintiff has got another route by which he can go to his colliery other than the right of way which they are claiming. He, however, submits that this is merely a permissive route and it may be withdrawn even by the end of July. It seems, therefore, that if the stay order is made absolute, it cannot be said in the circumstances at present found that he has no other way of going to his colliery. The learned lawyer for the respondent also submits that he has purchased this premissive route by paying a certain sum of money which comes to about Rs. 600/- per year, which for 3 years would be Rs. 1800/- but in round figure Rs. 2000/-. The learned lawyer for the appellant says that he is prepared to deposit a sum of Rs. 2000/- in lieu of the purchase money paid by the respondent provided that the respondent is not permitted to withdraw this sum. There seems to be no objection to this at all. In fact, the parties have agreed to it. It is also submitted that should the permissive right be withdrawn, then the respondent will be permitted to move this Court for vacating the stay order. The position, therefore, is that the stay order is made absolute provided that the appellants deposit in Court a sum of Rs. 2000/-. Should the permissive route be withdrawn the respondents will be permitted to move this Court for vacating the stay order. This amount of Rs. 2000/- must be deposited within one month from the date of this order in the Court below."

The order of the High Court dated the 24th August, 1957, is to the following effect :-

"This is an application by the plaintiff-respondent with a prayer that the stay order be vacated or the appellants be asked to make a fresh deposit of Rs. 4000/- because the appeal is not expected to be disposed of until the next few years. By an order dated the 29th April, 1951, the appellants were asked to

make a deposit of Rs. 2000/- for three years and on that condition the execution of the decree was stayed. Unfortunately, the appeal has not yet been disposed of. It is, therefore, ordered, with the consent of Mr. S. K. Mazumdar, appearing for the appellants, that a further sum of Rs. 2000/- should be deposited by the appellants within a month from today, failing which the order staying the execution of the decree shall stand vacated without, further reference to a Bench.

It must also be made clear that the respondent shall not be entitled to withdraw the amount so deposited."

3. It was submitted by the learned Government Advocate on behalf of the respondents that the provision of Section 47 of the CPC has no application to this case and the remedy of the decree-holder-appellant was to recover the damages claimed on account of the stay of the execution of the decree by way of a separate suit and not in the proceedings for the execution of the decree itself. We are unable to accept this argument as correct. In our opinion the claim of the decree-holder for payment of the money deposited by the judgment-debtors in this case by the orders of the High Court dated the 29th April, 1952, and the 24th August, 1957, raises a question which relates to the execution, discharge or satisfaction of the decree arising between the parties to the decree within the meaning of Section 47 of the Code of Civil Procedure. The view we have expressed is borne out by the decision of the Madras High Court in *M.R.M.A. Subramania Chettiar Vs. The Hon'ble B. Raja Rajeswara Sethupathi Alias Muthuramalinga Sethupathi Avergal*, . In that case immovable property was given by the Judgment-debtor as security for the due performance of the decree pursuant to an order of the Court under Order 41, Rule 5 (3) of the Code of Civil Procedure, and it was held by Wallis, C. J., and Kumaraswami, J., that the property can be realised by the decree-holder in execution and no separate suit was necessary or maintainable for such realisation.

A similar view has been expressed by the Judicial Committee in *Sadasiya Pillai v. Ramalinga Pillai*, 2 Ind App 219 (PC) where security of immovable property given for mesne profits which were not awarded by the decree was held to be realizable in execution for such mesne profits instead of leaving the parties to recover them in a separate suit. In that case the defendant had during the pendency of the appeal executed certain security bonds to the Court in which he had undertaken to account in respect of subsequent mesne profits in the suit. It was held by the Judicial Committee that such obligation made the accounting in respect thereof "a question relating to the execution of the decree" within the meaning of Section II of Act XXIII of 1861, and in any case it estopped the defendant from saying that such mesne profits were not payable under the decree.

A similar view has been expressed by the Patna High Court in *Narottan Das and Others Vs. Krishna Prasad and Others*, . In that case a money decree was ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree. But

default was committed by the judgment-debtor in the payment of the instalments. It was held by the Division Bench in these circumstances that the hypothecated property can be sold in execution of the decree and a fresh suit was not necessary. The view that we have expressed is also borne out by a decision of the Madras High Court in *M. Desikachariar Vs. Ramachandra Reddiar*, where it was pointed out that an order in a stay petition pending an appeal relates to execution of a decree within the meaning of Section 47 of the Code of Civil Procedure. In the course of his judgment Subba Rao, J., has observed as follows at page 58 of the report:

"That an order on a stay petition relates to execution of a decree admits of no doubt. Indeed, in Section 244 of the Code of 1882 which corresponds to present Section 47, Civil Procedure Code, the words "as to the stay of execution thereof occur after the words "execution, "discharge or satisfaction of the decree" but those words have been omitted in Section 47 of Act V of 1908. But notwithstanding such an omission, Courts have held that the words were omitted as superfluous, for a plea that execution of a decree may be stayed is equivalent to the plea that the decree should not be executed, and, therefore, is a question relating to the execution of the decree. In *Subramania Pillai v. Kumaravelu Ambalam*, ILR 39 Mad 541 : (AIR 1917 Mad 310) an application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. When an argument was built upon the omission of the words "or to the stay of execution thereof in Section 47, Civil Procedure Code, the learned Judges remarked:

"We are not satisfied that the omission of these words in Section 47 of the present Code is any indication that matters relating to stay of execution are not within the section. The words omitted may have been regarded as superfluous".

When a similar argument was advanced in *Chidambaram Chettiar v. Krishna*, ILR 40 Mad-233 : (AIR 1918 Mad 1174) (FB), Abdul Railim, O. C. J., observed at page 237 (of ILR Mad): (at p. 1175 of AIR);

"No doubt Section 244 of the Code of 1882 specifically mentions "stay of execution" as a question to be decided by the Court executing the decree but the scheme of the corresponding S. 47 of the present Code is not to specify particular questions at all but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope." "

4. We are satisfied on a perusal of the orders of the High Court dated the 29th April, 1952, and 24th August, 1957, that there is no ambiguity with regard to the purpose for which the judgment-debtors made the deposit of Rs. 4000/-. It is clearly stated in the two orders of the High Court that the appellants were prepared to deposit a sum of Rs. 4000/- "in lieu of the purchase money paid by the respondent". It is true that the High Court observed in the course of its order

that the "respondent is not permitted to withdraw this sum". This obviously means that that prohibition upon the respondent in withdrawing the amount was a prohibition which operated only during the pendency of the appeal. Having examined the language of the two orders of the High Court we are satisfied in this case that the judgment-debtors made a deposit of Rs. 4000/- as compensation money to be paid to the plaintiff decree-holder for loss of right of way to his colliery for the period of the pendency of the appeal in the High Court. For these reasons we hold that the appellant decree-holder is entitled to withdraw the amount of Rs. 4000/- which has been deposited by the respondent-judgment-debtors in the executing Court. We wish, however, to make it clear that the appellant is not entitled to require the respondents to make a further deposit of Rs. 800/- in Court as prayed for in his petition dated the 25th August, 1960.

5. For these reasons we hold that this appeal should be allowed, the order of both the lower Courts should be set "aside and the appellant should be permitted to withdraw the amount of Rs. 4000/- lying in deposit in Execution Case No. 13 of 1952 in the Court of the Subordinate Judge, 1st Court, Dhanbad.

6. We accordingly allow this appeal, but there will be no order as to costs.