

(1945) 08 CAL CK 0011
In the Calcutta High Court
Case No : Appeal No. 113 of 1945

Radha Kissen Chamria and others

APPELLANT

Vs

Keshardeo Chamria

RESPONDENT

Date of Decision : 24-08-1945

Acts Referred:

Citation : (1945) 08 CAL CK 0011

Final Decision : Dismissed

Judgement

B. K. Mukherjea, J.—This appeal is on behalf of the judgment-debtors and it is directed against an order of the Subordinate Judge, First Court, Howrah, dated 25th April 1945, by which he restored an execution case previously dismissed for default. To appreciate the contentions of the parties it will be necessary to state certain earlier facts. On 21st June 1923, Durga Prosad Chamria who was the original decree-holder, commenced a suit in the Court of the Additional Subordinate Judge, Howrah, being Title Suit No. 61 of 1923, against appellants 1 and 2 and their mother, Anardeyi Sethani since deceased, claiming to recover a sum of Rs. 11,03,063 odd as the price of a landed property sold to the defendants. On 19th April 1926, the suit was decreed on the basis of a compromise, the material terms of which were, that the defendants would pay to the plaintiff a sum of Rs. 8,61,000 with interest thereon at 6 3/4 per cent. per annum with yearly rests. Out of this a sum of Rs. 4,25,000 together with some money which was then in the hands of a Receiver was to be paid immediately and the balance was payable in 18 monthly instalments of Rs. 35,000 each. It is not disputed that the initial payment was duly made and that the judgment-debtors paid a further sum of Rs. 5,25,000 in 15 monthly instalments from the date of the compromise. Thus, within June 1927, the amount paid under the compromise decree aggregated to Rs. 10,10,987, and annas odd.

2. On 10th August 1927, Anardeyi Sethani made an application under O. 21, R. 2, Civil P. C., for recording satisfaction of the entire amount that was paid. The application was resisted by the decree-holder, and the Court by its order dated

25th January 1928, allowed the application so far as the last three instalments were concerned but dismissed it with regard to the rest, on the ground that they were not certified within the period allowed by law. Anardeyi Sethani thereupon filed a suit in the Original Side of this Court for recovery of this sum of Rupees 9,00,000 odd the payment of which was not recognised by the executing Court together with interest due upon the same. She got a decree for the principal amount and also for interest amounting to Rs. 1,00,000 only although the interest due on that amount under the terms of the compromise decree exceeded Rs. 3,00,000 at that date. This decree was transmitted to the Howrah Court and its dues were set off against the amount due under the compromise decree in Title Suit No. 61 of 1928, which was then being executed by Durga Prosad in Title Execution Case No. 89 of 1929. On 10th October 1931 the judgment-debtors paid a sum of Rs. 1,93,712 towards the decretal dues and a further sum of Rs. 1,25,000 was paid on 14th November 1931. On 30th March 1932, the said execution case was dismissed on part satisfaction. It is not and cannot be disputed that if the decree-holder had not refused to certify the payment of Rs. 10,00,000 odd admittedly made by the judgment-debtors the decree would have been fully satisfied by the payments mentioned above. It is true that the judgment-debtors got a decree in the Original Side of this Court but the interest which they recovered fell far short of the interest that was chargeable by the decree-holder under the compromise decree and it was the stipulation for compound interest in the compromise decree that accounted for the rapid swelling of the decretal dues.

3. It appears that at about this time Durga Prosad was assessed to income tax amounting to about Rs. 3,38,000 by the income tax authorities. As he did not pay this amount, the income tax Officer filed a requisition before the Certificate Officer at Howrah in March 1933 under the provisions of the Public Demands Recovery Act. The Certificate Officer issued a certificate and in execution of that, the decree obtained by Durga Prosad in Title Suit No. 61 of 1923 mentioned above was attached on 1st April 1933. On 17th March 1934, the Secretary of State for India, to whom the tax was due applied to the Howrah Court under O. 21, R. 53, Civil P. C., for execution of the decree obtained by Durga Prosad. In the meantime, on 14th March 1933, Keshardeo Chamria, the sole respondent in this appeal, who is alleged to be an adopted son of Durga Prosad filed a suit against the latter in the Original Side of this Court for recovery of a large sum of money. Three days after this suit was filed and before the writ of summons was issued, there was a decree passed on consent and under the terms of the same the decree obtained by Durga Prosad in Title Suit No. 61 of 1923 was assigned to Keshardeo on certain terms and conditions. As stated already, the decree in Title suit No. 61 of 1923 was attached by the Secretary of State for India on 1st April 1933. On 28th April 1933, Keshardeo preferred a claim against the attachment which was rejected on 21st February 1934. On 5th December 1934, Keshardeo filed a suit in the first Court of the Subordinate Judge at Howrah for a declaration that he was a bona fide assignee of the decree and that the Secretary of State

had no right to attach the same in execution of the certificate against the assignor. This suit was decreed in favour of Keshardeo on 10th October 1936 and an appeal preferred against that decision to this Court by the Secretary of State for India was dismissed on 21st January 1941.

4. Meanwhile, in the execution proceedings that were started by the Secretary of State for India the judgment-debtors paid to the latter a sum of Rs. 1,60,000 on 28th May 1934. On 21st June 1934, a petition was put in by the judgment-debtors praying for recording an adjustment by way of satisfaction of the decree, under O. 21, R. 2, Civil P. C., the allegation being that the Secretary of State as the representative of Durga Prosad agreed to accept the sum in full satisfaction of the decree. The Subordinate Judge granted the prayer and held that the entire decree was satisfied by adjustment. On appeal to this Court, the order was set aside and it was held that the attaching decree-holder had no authority to enter into a compromise in regard to the claim of the original decree-holder. This judgment was affirmed by the Privy Council and their Lordships directed that only the sum of Rs. 1,60,000 which was paid by the judgment-debtors should be recorded and certified under O. 21, R. 2, Civil P. C. This judgment of the Privy Council was pronounced on 3rd June 1940. On 10th October 1936, the very day that the title suit of Keshordeo was decided in his favour he made an application for execution of the decree and this execution case was registered as Execution case No. 68 of 1936. On 12th October 1936, the sum of Rs. 1,60,000 which was lying with the Collector of Howrah was attached. The amount was actually deposited by the Collector on 4th July 1941 after the appeal preferred by the Secretary of State against the decision in Keshardeo's title suit was dismissed by this Court. On 17th July 1942, Keshardeo filed a supplementary petition praying that the execution might be proceeded with and laid his claim under the decree at Rs. 4,48,714.

5. The judgment-debtors raised objection to this petition and it was contended inter alia that the sum of Rs. 1,60,000, which was paid by the judgment-debtors to the Secretary of State for India on 28th May 1934 should cease to carry interest from that date. On 11th September 1942, the Subordinate Judge held that the interest would cease only from the date of attachment and not from the date of payment by the judgment-debtors to the Collector. Against that decision appeals were taken to this Court both by the decree-holder as well as the judgment-debtors and this Court held that the interest would cease to run only from 4th July 1941 when the money was actually deposited by the Collector in Court. It appears that after the judgment of this Court was pronounced on 22nd June 1943, the records went back to the executing Court on 3rd August 1943 and by an order made on that date the Court directed the parties to take necessary steps. On 4th September 1943, the decree-holder filed fresh accounts incorporating the amounts that became subsequently payable by the judgment-debtors on account of interest and costs. The order-sheet shows that again on 21st June 1944 certain other additional accounts were filed by the decree-holder and the Court directed these to be put up for orders on 28th June 1944. The

matter was adjourned on that date, and eventually it was put up for orders on 21st August 1944. On this last date also nothing was done and soon after this the records were again sent up to this Court in connection with an application for leave to appeal to the Privy Council made by the judgment-debtors. The Privy Council matter was disposed of sometime in February 1945 and on 28th February 1945 the records were received back by the Subordinate Judge.

6. In the meantime, the judgment-debtors paid a sum of Rs. 1,00,000 towards the decretal dues on 2nd February 1945, and another sum of Rs. 75,000 on 19th February 1945. On 2nd March 1945, after the records were received back by the Subordinate Judge he made an order directing the case to be put up for orders on 5th March 1945. The decree-holder was asked to take steps, if any, in the meantime. On 5th March 1945, the decree-holder prayed for time to take necessary steps, the ground alleged being that due to some emergent business the decree-holder was not able to give necessary instructions to his pleader and consequently was not in a position to take necessary steps in the execution case. On this application the case was adjourned to 10th March 1945, for orders and the decree-holder was directed to take necessary steps by that date positively. On 10th March 1945, the decree-holder again made an application for adjournment the ground being identically the same as was set out in the previous application namely that owing to unavoidable and emergent business necessary instructions could not be given to the pleader for taking further steps in the execution proceeding. The Court rejected that application and by the same order the execution case itself was dismissed on part satisfaction. Thereupon, on 19th March 1945, the decree-holder filed an application under S. 151, Civil P. C., to set aside the order of dismissal and restore the execution case. This application was allowed by the Subordinate Judge by his order dated 25th April 1945, and it is against this order that the judgment-debtors have come up to this Court on appeal. There is also an alternative application made by the appellants under S. 115, Civil P. C.

7. The learned Subordinate Judge does not find anything wrong in the order made by him on 10th March 1945, rejecting the decree-holders' application for further time, but he says that this order of rejection was not, through mistake, communicated to the pleader of the decree-holder and this mistake has led to failure of justice which justifies the setting aside of the dismissal order under S. 151, Civil P. C. The propriety of this reasoning has been severely attacked on behalf of the judgment-debtors in this appeal. Mr. Gupta, appearing for appellants, has argued, in the first place, that according to the practice obtaining in the District Courts it is the duty of the pleader to get himself informed of the order made on his application for adjournment. It is argued that even if the order had been communicated to the pleader it was not possible for him to take any farther steps in connection with the execution of the decree and consequently the order of dismissal was in every sense a right order which should not have been reversed by the Court in the exercise of its inherent powers. The second branch of Mr. Gupta's contention is that the Court could not, in law, exercise its

inherent powers in the present case having regard to the fact that a fresh application for execution would now be time barred under S. 48, Civil P. C. Lastly, it is said that the order made by the Court below was neither necessary in the ends of justice nor for preventing abuse of the process of the Court.

8. Dr. Pal, appearing for the decree-holder besides attempting to repel the argument of Mr. Gupta has taken a preliminary objection relating to the competency of the appeal and his contention is that the order complained of, which the Subordinate Judge made under S. 151, Civil P. C. cannot be challenged by way of appeal. The preliminary objection appears to us to have considerable substance. An appeal is a creature of statute and no appeal is given by the Code from an order under S. 151, Civil P. C. Section 151, Civil P. C., however, does not contemplate any particular form of order. It is a mere enabling section and enables the Court when the circumstances require, to exercise its inherent power for the ends of justice or to prevent abuse of the process of Court. If the order that is actually made by the Court in exercise of its inherent powers comes within the purview of S. 47, Civil P.C., as being an order made between the parties to the suit and determining any question relating to execution, discharge and satisfaction of the decree an appeal would certainly lie against that order. This proposition has been recognised in a series of cases and has not been disputed: vide 35 C. W. N. 105 Maharaja Sasikanta Acharjee Vs. Jalil Baksha Munshi and Others, Tarak Nath Roy Vs. Panchanan Banerjee and Others, . The question, therefore, is whether the order that has been made in the present case really comes within S. 47, Civil P. C. It seems to us that the primary point decided by the Court below in this case was as to whether in the circumstances of this case the previous order made by it on 10th March 1945 was justified or not and it is only the result of the order now made and not the order itself that has any bearing on the execution of the decree. It is difficult to say that the order by itself amounts to final determination of any question relating to execution, discharge and satisfaction of the decree and, in these circumstances, it would not be proper, we think, to hold that an appeal lies against the order. We would, therefore, dismiss the appeal as incompetent and proceed to consider the application filed by the judgment-debtors under S. 115, Civil P. C.

9. Now, it is settled law that the provisions of O. 9, Civil P. C., do not apply to execution proceedings. A decree-holder whose case is dismissed for default has his ordinary remedy by way of a fresh application made within the period of limitation. There are authorities which hold that the Court can in the exercise of its inherent powers which are recognised by S. 151, Civil P. C., restore an application for execution which was dismissed for default if it is satisfied that such powers should be exercised ex debito justitiae: vide 2 Lah. 66 Bholu v. Ramlal ("21) 8 A. I. R. 1921 Lah. 67 : 2 Lah. 66 : 60 I. C. 720 and 11 Lah. 93 Hari Singh v. Bulaqi Mal & Sons ("30) 17 AIR 1930 Lah. 20 : 11 Lah. 93 : 119 I. C. 494 though there are other decisions which have taken a contrary view : vide 4 Pat. L. J. 330 Ritu Kuer v. Alakhdeo Narain Singh ("18) 5 AIR 1918 Pat. 67 : 4 Pat. L. J. 330 : 47 I.C. 154 and 50 Mad. 67 Narayana Chettiar v. Muthu Chettiar

("26) 13 A. I. R. 1926 Mad. 980 : 50 Mad. 67 : 97 I. C. 1008. In view of the express provisions of S. 151, we cannot say that the Court is altogether incapable of exercising its inherent powers in regard to the restoration of execution petitions dismissed for default but at the same time we are of opinion that there must be clear justifying necessity for exercising such extraordinary powers and the legitimacy of its exercise must be tested with reference to principles which are well established by authorities. When the Court passes an order of dismissal inadvertently or without being aware of certain facts which ought to have been brought to its notice, it can certainly correct its own error in exercise of its inherent powers. But there is no justification for the exercise of such powers where the dismissal was due primarily to the negligence of a party. It has also got to consider whether the other side has or has not justice on his side or has acquired a valuable right under the law of limitation which it may not be just to override. Ordinarily, this Court would not interfere with the exercise of discretionary powers by the Court below, but it may do so if it is satisfied that the lower Court misdirected itself on a material point of law or fact or failed to advert to and consider such matters as are essential for the proper disposal of the case.

10. The entire decision of the learned Subordinate Judge rests on the basis that there was an omission on his part to apprise the decree-holder's pleader of the order rejecting the petition for further adjournment and he thinks that had that order been communicated to the pleader it might have been still possible for him to take some steps in the execution of the decree and thereby prevent the execution case from being dismissed for default. The ordersheet shows that the records of the case came back to the Howrah Court on 2nd March 1945 and the Subordinate Judge directed the decree-holder to take necessary steps, fixing 5th March 1945, as the date of hearing. On 5th March 1945, as has been said already, the decree-holder made an application for adjournment and pleaded that owing to other emergent work he was not in a position to give necessary instructions to his pleader. On that date the Court passed the order adjourning the further hearing of the case till 10th March 1945 and giving a peremptory direction that the decree-holder must take steps, if any, by that date. It is idle to suggest that the decree-holder's pleader was not aware of the order made on 5th March 1945. If he was not aware of this order it was due to gross and inexcusable negligence on his part. On 10th March 1945, the decree-holder, as stated already, applied for another adjournment. This adjournment petition was worded in almost the same manner as the previous application and no attempt was made by him to make out even a plausible excuse for not being ready on that date even after the peremptory order that was made on the last occasion. This application was dismissed by the Subordinate Judge and the Subordinate Judge nowhere says that the order of dismissal was wrong. The ground put forward by the Subordinate Judge in support of his order for restoration is that the order rejecting the adjournment petition should have been communicated to the pleader for the decree-holder but this was not done. We will assume that this

was an omission on the part of the Court. The question now is whether it was possible for the decree-holder to take any further steps in connection with the execution of the decree and thereby prevent the execution case from being dismissed for default. No evidence was taken by the learned Subordinate Judge on this point and even the pleader who was in charge of the execution case on behalf of the decree-holder was not examined. In para. 48 of the petition for restoration filed by the decree-holder it is stated as follows:

Your petitioner's said pleader on coming to know that the matter had been adjourned till 10th March 1945 asked your petitioner's instructions on the 10th. Your petitioner said that another application should be made for two weeks' time because this was a very heavy matter, interest had to be calculated, costs of the various proceedings had to be ascertained, the balance money had to be collected which is rather a pretty big sum, namely Rs. 3,00,000 and that the judgment-debtors had given their definite promise to settle by making payment of the full balance for which they said they were making arrangements.

11. This would indicate that the real difficulty in the way of the decree-holder was with regard to the calculation of the exact amount for which execution was to be levied. This, as the decree-holder said, involved a good deal of accounting and he was not ready with his figures on that day. This fact is corroborated by the statement in the petition for adjournment made on 10th March 1945, where it was expressly stated that the decree-holder could not give necessary instructions to his pleader for taking further steps in the matter. If really the decree-holder was not in a position to state on that day as to what was the amount due under the decree for which he wanted the execution to be levied and, if according to him, it required elaborate accounting for the purpose of arriving at the proper figure it was not possible for him to ask the Court to issue any process by way of attachment of the property on that date. It seems to us that the learned Judge should have considered this matter properly and he should have found on proper material as to whether the decree-holder could really take any steps after the application for adjournment was disallowed.

12. On behalf of the judgment-debtors a contention was raised before the Subordinate Judge that the decree had become more than 12 years old already and a fresh application for execution would now be barred under S. 48, Civil P. C. It was said that when the decree-holder had exhausted the statutory limit of time the justice was clearly on the side of the judgment-debtors and the Court should not override a lawful bar of limitation. The learned Subordinate Judge noticed the point in his judgment but did not consider it at all. We cannot lay down as a rule of law that a Court could on no account exercise its inherent powers in favour of a particular party if the other side has gained an advantage under the statute of limitation, but, it is perfectly true that this is one of the relevant matters which the Court should take into consideration in arriving at a decision on the point.

13. Lastly, it appears to us that there is some substance in the contention of Mr.

Gupta that while the Court below had looked to the loss which the decree-holder might sustain in case the execution case was not restored it failed to consider the other side of the picture namely that the judgment-debtors had already paid more than Rs. 17,00,000 when the principal amount payable under the decree was Rs. 8,61,000 only. It is true that a judgment-debtor cannot acquire merit by not paying the decretal dues and allowing interest to swell but as has been said already in the present case there are some exceptional features. With the exception of three instalments the entire decretal dues were paid by the judgment-debtors within 15 months of the date of the decree and the subsequent complications would not have arisen at all had not the decree-holder dishonestly refused to recognise the payments which the judgment-debtors had admittedly made.

14. On the whole we think that the Learned Judge has failed to advert to and consider all the relevant matters which are necessary for the right disposal of the case. The result, therefore, is that we allow the application under S. 115, Civil P. C., set aside the order of the learned Subordinate Judge and send the case back in order that it may be properly considered in the light of the observations made above and disposed of according to law. The parties will be at liberty to adduce evidence on such matters as the Court considers material. We make no order for costs in this application. The appeal is dismissed without costs.

Blank, J.

15. I agree.