

(1945) 03 AHC CK 0004
In the Allahabad High Court
Case No : Application No. 32 of 1943

Raja Bajrang Bahadur Singh	Vs	APPELLANT
Thakur Suraj Narain Singh and Others		RESPONDENT

Date of Decision : 20-03-1945

Acts Referred:

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

Citation : (1945) 03 AHC CK 0004

Hon'ble Judges : Thomas, C.J; Ghulam Hasan, J

Bench : Division Bench

Advocate : M.H. Qidwai, for the Appellant; Ghulam Imam for Opposite-Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Thomas, C.J. and Ghulam Hasan, J.—This is a judgment-debtor's revision application u/s 115 of the Code of Civil Procedure from an order dated the 11th January, 1943, passed by the Civil Judge, Bahraich, restoring the decree-holder's application for execution under his inherent powers.

2. The decree was passed on the 10th December, 1929, in favour of the predecessor of the opposite-party No. 1 against the assests of Rani Itraj Kuar in respect of a debt contracted by her. Execution was sought against the applicant, who is the taluqdar of the Gangwal estate, and "two widows opposite-parties Nos. 2 and 3 who were possible heirs to the non-taluqdari property. After some small payments were made towards the decree, the balance payable to the decree-holder was Rs. 1,62-391.

3. On the 9th December, 1941, a day before the decree was to become time-barred the decree-holder applied for execution. On the 2nd May, 1942, the decree-holder was present with his Counsel Mr. Baldeo Prasad Pande, who applied for time to file papers showing the non-taluqdari property left by Rani Itraj Kuar. This application was allowed with- out any objection by the judgment-

debtors, and the 3rd June, 1942, was fixed for filing the necessary papers. On this date neither the decree-holder nor his Counsel was present. The Court thereupon re- corded the following order :

No paper has been filed by the decree-holder for which he took time and there is nobody present to-day on his behalf to prosecute this application. Let the application be consigned to records. Costs on decree-holder. The balance 1-62-391-7-3.

4. The decree-holder filed an application on the very next day, viz., the 4th June for setting aside the dismissal and restoring the execution application under Sections 141 and 151 and Order IX rule 9 of the Code of Civil Procedure. It was stated in this application that the decree-holder was a resident of Azamgarh, that he started from his house early enough to catch the train for Bahraich but when he reached Lakarmandi, he came to know that train timings had changed and the train had left before he got to the station. He thereupon sent one telegram to the Court and another to his Counsel Pandit Baldeo Prasad Pande. The latter had left for Gonda on professional work and did not get the telegram and could not attend to the case. The decree-holder himself arrived at Bahraich in the evening when he came to know that his application had been dismissed for default. The decree-holder prayed for restoration of the application as the decree was for a considerable amount and he had no other alternative but to ask for restoration, the decree having become time-barred. This application was filed through another counsel. The application was supported by an affidavit.

5. The application was opposed by the judgment-debtors who alleged that the decree-holder and the Counsel did not appear in the case because they had not obtained the papers for which time had been granted to them and the decree-,, holder took shelter behind the excuse that he missed the train. It was also pleaded that the dismissal could not be set aside u/s 151 of the Code of Civil Procedure. The learned Civil Judge framed the following issue :

How far is the decree-holder applicant entitled to have his execution application restored?

6. He held that the decree-holder had filed an affidavit in support of the allegations contained in the application and had also given evidence on oath. He had also filed two receipts of telegram showing that he had sent one telegram to his Counsel and another to Court. This telegram was sent from Ajudhiaghat and appears to have been received on the 3rd June, 1942, namely the day on which the application was dismissed. No time is, however, noted. It appears that this was received presumably after the application had been dismissed. The judgment-debtors gave no evidence and the learned Civil Judge believed the version given by the decree- holder ; in other words he accepted the plea put forward by the decree-holder that he was coming to Court on the 3rd June but he missed the train at Ajudhiaghat and not being able to get to Bahraich in time he sent a telegram praying for postponement of the case. As regards the

applicability of Section 151 the learned Civil Judge relied upon Jagdat Sinha v. Rajpal Kuar (1928) 6 O W N 896 as against the contrary decisions in Narayana Chettiar v. P. C. Muthu Chettiar A I R 1926 Mad. 980, Ramaraghavareddi v. Raja of Venkatagiri A I R 1927 Mad. 355 and Abdullah Khan v. Hari Chand Daulat Ram A I R 1936 Pesh. 191 and restored the application. In this connection the learned Judge also observed that the decree-holder was unavoidably prevented from appearance on the date of hearing, that he had no remedy left under the law to execute his decree which was for a large amount and that under the circumstances it would be hard and inequitable if the application was not restored. He set aside the order of dismissal and awarded Rs. 15 as costs to the judgment-debtors" Counsel.

7. The points have been raised before us on behalf of the judgment-debtor, firstly it is contended that the provisions of Order IX rule 9 being admittedly inapplicable to execution proceedings, the lower Court had no jurisdiction to set aside the dismissal u/s 151 of the Code of Civil Procedure. Secondly, it has been contended that even if the Court had the power to act u/s 151, it could not restore without coming to a definite conclusion that there was sufficient cause for the decree-holder's non-appearance on the day when the case called on for hearing. In this connection it is urged that the lower Court committed material irregularity in not taking into consideration the fact that the decree-holder was represented by at least two Counsel, Mr. Budh Sagar and Mr. Baldeo Pande, and there was no explanation whatsoever why they did not appear in the case. - Mr. Baldeo Pd. Pande had appeared on the 2nd May and knew of the next date of hearing.

8. Upon the first question there is no doubt that there is a conflict of authority among the various High Courts,, As far as this Court is concerned, there is the decision of Sir Louis Stuart, C. J. in Jagdat Sinha v. Rajpal Kuar¹. The head- note runs thus :

Order 9 rule 9 CPC does not apply to execution proceedings and where an application for execution is dismissed in default, the ordinary remedy would be to file another application for execution, there being no express provision for permitting restoration of an application so dismissed. Where, however, an application for execution has continued for a long time, steps have been taken and the matter is approaching completion when by an unfortunate accident the decree-holder's agent is unavoidably prevented from appearance on one day with the result that the application for execution is dismissed in default and a second application is: time-barred, the Court is justified in applying the provisions of Section 161 Civil Procedure Code and restoring the application.

9. The learned Chief Judge refused to interfere in revision with the order of the lower Court, which had restored the application u/s 151 of the Code of Civil Procedure, and in doing so was considerably influenced by the fact that unless the application was restored under the inherent powers the decree-holder had no remedy at all. He followed a Bench decision of the Lahore High Court (Sir Shadi

Lal C. J. and Wilberforce J.) in *Bholu Ram v. Ram Lal* (1921) 1 Lah. 66, where the learned Chief Justice observed :

Now, if the Court has an inherent power-to pass an order of dismissal, there is absolutely no reason why it should not possess a similar power -to set aside the dismissal if the ends of justice render it necessary to do so.

10. Both these cases were cases in which a second application for execution was time- barred. *Bholu's* case was followed in *Hart Singh v. Bulaqi Mai and Sons* (1930) 11 Lah 93.

11. In *Lalta Prasad v. Ram Karan*"a Bench of the Allahabad High Court held that apart from the provisions of Order IX rule 9 of the Code of Civil Procedure, the Court has got inherent power to restore the case for any other valid reason.

12. It was held by the Full Bench in *Muhammad Hanif v. Ali Raza* (1933) 55 All 891 : (1933) 2 A W R 694, that al- though the provisions of Order IX of the CPC could not be made applicable to execution proceedings by calling in the aid of Section 141 of the Code, yet an application to set aside its own previous ex parte order was entertainable by the Court under the inherent jurisdiction which the Court possessed and which was preserved by Section 151. In this case the decree was for a large sum and when the decree-holder applied for execution, the judgment-debtor pleaded that the decree had been adjusted out of Court under a private arrangement. On a certain date fixed for hearing of the application, the decree-holder was absent and his pleader stated that he had no instructions to go on with the case. The objection was heard ex parte and was allowed. The decree- holder's application to set aside the ex parte order was allowed by the Court under the provisions of Section 151. The previous cases of the Court in *Ram Chander Vs. Tej Singh and Others* and *Yudhishter Lal Vs. Fateh Singh and Another*, were followed.

13. A similar view was taken in *Harbans Singh v. Suresh Datta Tewari* AIR 1926 All. 624. The inherent power of the Court to restore an appeal dismissed for default was re- cognized in *Maung Saw v. Ma Bwin Byu* (1926) 4 Rang. 18. 18.

14. The following cases were relied upon for the judgment-debtors as supporting the contrary view :

1. *Gadi Neelaveni v. Marappareddigari Narayana Reddi* A I R 1920 Mad 640, 2. *Narayana Chettiar v. P. C. Muthu Chettiar*, 3. *Haddu Sahu Vs. Haji Zamal Noor Mahomed Saheb*, 4. *Ritu Kuwer v. Alakhdeo Narain Singha* (1918) 47 I.C. 154 (Pat), 5. *Abdullah Khan v. Hari Chand-Daulat Ram* 6. *Radha Mohan Datt, Silk Merchant Vs. Abbas Ali Biswas and Others* ..

15. The first Madras case was not an .execution case and the Munsif upon an application under Order IX rule 13 of the CPC while holding that it was not proved that the summons was not duly served or that the defendant was prevented by any sufficient, cause from appearing when the suit was called on for hearing, set aside the ex- parte decree upon the ground of hardship acting

presumably under his inherent powers. Under these circumstances the Full Bench held that the Court had no power apart from the provisions of Order IX rule 13 to set aside an ex parte decree made by itself. One of the learned Judges in dealing with the matter observed : In such a case several remedies were open to the aggrieved party. (1) He could bring a suit to set aside the decree on the "ground of fraud. (2) He could appeal against the decree itself and the appellate Court not being confined to the grounds mentioned in Order IX rule, 13, could set it aside if there was a miscarriage of justice.

(3). He could file an application for review.

(4) He could file an application as provided by rule 13 to show non-service of summons or sufficient cause for non- appearance.

16. In the second Madras case execution petition was dismissed for non-appearance of the decree-holder's pleader and on application was restored without notice to the opposite-party. In course of the judgment the learned Judges, with reference to the argument addressed to them by the decree-holder's Counsel that the Court should use its inherent power to restore the application, observed that the inherent power of the Court could not be exercised as the decree-holder could always file a fresh application upon the dismissal of the previous one and the fact that a fresh application would be barred by limitation would not give jurisdiction to the Court which it does not otherwise possess. They refused to follow the decision in *Bholu v. Ram Lal* without discussing the reasoning of that decision and followed the Patna case in *Ritu Kuar's* case it was held that Order IX did not apply to execution proceedings and therefore an application for execution which was dismissed for default could not be restored under Order IX. *Mullick J.*; who delivered the judgment, further observed that he was averse to the Courts' using their inherent powers for the purpose of restoring execution cases as the decree-holders and judgment-debtors had ample facilities for restoring cases dismissed for default and there was no reason why the extraordinary and vague jurisdiction u/s 151 should be restored to for supplementing those facilities.

17. The third Madras case was a single Judge case. All that was held there in was that Order IX rule 13 of the CPC does not apply to an application under Order XXI rule 58, as it is a proceeding in execution. There is a remark at the end of the short judgment that Courts have no inherent power to set aside orders of dismissal for default passed in respect of such applications. The remark is based on *Alagasundaram Pillai Vs. Pichuvier, . and Arunachalam, minor, by mother and guardian Periammai Vs. P.K.A.C.T. Veerappa Chettiar* through his authorised agent *S. Ramaswami Aiyar, .* In the first case two questions were decided. The first was that Order IX rule 9 does not apply to proceedings under rule 97 or rule 100 of Order XXI. Upon the second question the Full Bench held as follows:

It cannot be bid down as general principle tint an ordinary Civil Court has

inherent power to set aside its own order and to interfere in any case in which it thinks failure of justice has occurred when the aggrieved party has another remedy by which it, can be set aside, even though the remedy is not as summary or as cheap.

18. Wallace J. who wrote the judgment of the Full Bench observed :

The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But here the party has his remedy by way of suit.

19. The second case of "Arunachalam merely lays down that Order IX rule 13 does not apply to execution proceedings under Order XXI. Nothing is said in the judgment as regards the inherent powers of the Court.

20. The Peshawar case followed the view in *Narayana Chettiar v. P. C. Muthu Chettiar* and *Ritu Kuer v. Alakhdeo Narain Singha* as against the view of this Court in *Jagdat Sinha v. Rajpal Kuar*¹ and the Lahore High Court in *Bholu v. Ram Lai*⁶, The ground of the decision is that there is a remedy open to the decree-holder for putting in a fresh application and it is no business of the Court to relieve him against the bar of limitation if he has chosen to deprive himself of that remedy by putting the application on the last day of limitation. We are unable to hold that in such a case the decree-holder has any remedy at all. The carried is extinguished by the bar of limitation on expiry of the day when the execution application was filed. Supposing, however, the execution application had been filed a year before and the proceedings went on in Court for a considerable time by no means a rare occurrence until the last day of limitation when the decree- holder happened to be absent and the application was dismissed for default. In this case also the decree-holder has no remedy left, although it may be that his conduct during the execution proceedings may have been perfectly free from blame and the proceedings may have dragged on owing to the dilatory tactics of the judgment- debtor.

21. The last case has no application. It deals with a regular suit and not execution proceedings and lays down that a Court" has no jurisdiction under Order IX rule 13 to set aside the ex parte decree against "the defendant unless the two conditions laid down therein are satisfied.

22. Upon a review of the cases referred to above, we are of opinion that although Order IX does not govern execution proceedings, the Court has jurisdiction to restore an execution application dismissed for default under its inherent powers, even\\ though a fresh application has become time- barred.

23. Upon the merits of the matter, we can see no ground for interference with the order passed by the lower Court. Of the two Counsel, Mr. Budh Sagar after filing the application for execution did not appear for the decree-holder on any of the hearings. The decree-holder was present in person on all the hearings except on the 2nd May when Mr. Baldeo Prasad Pande appeared for him for the first time. The fact that he had left for Gonda was not denied by the judgment-

debtors. It was not alleged by them that the Counsel was present in Bahraich and deliberately abstained from attending the Court. Though the learned Civil Judge did not specifically deal with the fact of Counsel's absence, there is no reason for thinking that he did not take this fact into consideration. The papers for which the hearing was fixed were not ready and even if Counsel had been present he could have done no more than ask for an extension of time. Indeed the decree- holder in his telegram did ask for postponement and had the telegram been received by the Court before passing the order of dismissal, the Court would in all probability have granted further time subject to the payment of costs. As against the Counsel's absence for which no explanation was required or offered, the Court appears to have been overborne by other considerations in restoring the application. If the Court had jurisdiction as indeed we hold it had, we must take it that the jurisdiction was exercised upon a consideration of all the circumstances of the case and sitting in revision it is not possible for us to say that the learned Civil Judge committed any irregularity, much less material irregularity, in the exercise of his jurisdiction. Accordingly we hold that the order passed by the lower Court is not open to question.

24. The revision application fails and is dismissed with costs.