

(1991) 10 OHC CK 0019

In the Orissa High Court

Case No : Civil Revision No. 726 of 1987

Rajendra Prasad Bose

APPELLANT

Vs

Late J.R. Bose represented by his legal representatives
Monimala Bose and Others

RESPONDENT

Date of Decision : 13-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 37, 38, 39

Citation : (1992) 2 OLR 22

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : M.K.C. Rao, A.K. Rao and M. Sampat, for the Appellant; R. Ch. Motianty and R.K. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—This is a revision u/s 115 of the CPC by the decree-holder against an order dated 24-9-1987 passed by the learned Subordinate Judge, Cuttack, in Execution Case No. 52 of 1987 dropping the Execution Case holding the same as not maintainable and directing the decree-holder to take certificate of non-satisfaction of the decree to the Court of Subordinate Judge, Balasore, within whose jurisdiction the property is situate, for execution of the decree.

2. A preliminary decree for partition of property located in the districts of Cuttack, Puri and Balasore was passed on 19-2-1955 by the Subordinate Judge, Cuttack, in Title Suit No. 64 of 1949. Pursuant to a partial final decree passed on 27-8-1963 in respect of the residential houses at Cuttack and Puri possession was taken in Execution Case No. 10 of 1963. Another partial final decree for mesne profits was passed on 11-7-1973 and in Execution Case No. 80 of 1984 properties located in the districts of Cuttack, Puri and Balasore were attached. Another partial final decree was passed on 28-7-1981 in respect of the remaining properties situate in the districts of Cuttack and Balasore. Execution Case No. 101 of 1986 was dropped as the properties were situate at Balasore. Execution

Case No. 52 of 1987 was filed on 14-5-1987 and the impugned order dropping the execution case as not maintainable and directing the decree-holder to take certificate of non-satisfaction of the decree to the Court of Subordinate Judge, Bafasore, where the property is situate, for execution of the decree was passed. Aggrieved by the -said order, the decree-holder has filed this revision.

3. The submissions of Shri M.K. C. Rao, the learned counsel for the petitioner, are three-fold. Firstly, the Court which passed the final decree in respect of the properties located in the districts of Cuttack, Puri and Balasore had also jurisdiction to execute it. It failed to exercise jurisdiction by dropping the execution proceeding holding the same as not maintainable. Secondly, the decree-holder not having moved the Court by an application for transfer of the decree to the competent Court at Balasore for execution, the executing Court had no jurisdiction to direct the decree-holder to take a certificate of non-satisfaction of the decree to the Court of the Subordinate Judge, Balasore. for execution. Thirdly, simultaneous execution in two Courts, namely, in the Courts at Cuttack and Balasore, is not permissible in lay;

4. Shri R. K. Mohanty, the learned counsel for the opposite parties, has on the other hand submitted that the Court which passed the decree continues to have jurisdiction to execute the decree but may for convenience and by way of expediency transfer the decree to another subordinate Court within whose jurisdiction the property is located for execution and simultaneous execution is not prohibited under law and having regard to the suo mow jurisdiction vested in Court by Sub-section (2) of Section 39 of the Code of Civil Procedure, an application by the decree-holder is not essential.

5. Divergent views have been expressed by the High Courts on the question whether territorial jurisdiction is a condition precedent to a Court executing a decree.

6. A Full Bench of the Calcutta High. Court in Prem Chand Dey v. Mokhada DebiILR (1890) Cal. 699, held that the rule, of territorial jurisdiction also governed execution proceedings, observing :

"So for as the Procedure Code is concerned execution of a decree is only, a continuation of the suit and there appears no legitimate reason why a Court in the later stage of a sujt should, have greater powers than it possessed at its institution. But however that may be, a comparison of Section 223 (Sections 38 and 39 of the present Code) with the last paragraph of Section 649 (Section 37. of the present Code) seems, to us to indicate, that territorial jurisdiction is a condition precedent to a Court executing a decree."

This decision has been followed by various High Courts as an authority for the proposition that territorial jurisdiction is a condition precedent to a Court executing a decree and if before or during execution it was divested of jurisdiction over the territory in which the property is located, it is the transferee Court having territorial jurisdiction over the territory that acquires jurisdiction to

execute the decree but not the original Court which has lost territorial jurisdiction, (See *Yamarti Venkatachallam v. Yamarti Sithayamma*, AIR 1917 Mad 272. in *Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd.*, , it was held ;

"Where it is necessary in execution .of a decree for money to sell properties not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the properties can only be effected by the the Court within the local limits of which the property is situate."

In *Sreenath Chakravarti and Others Vs. Priyanath Bandopadhyaya and Others*, , it was held :

"... even if an application is made to a Court which passed the decree, to execute it in respect of property outside its territorial limits, that Court wilt not have jurisdiction to carry on such execution. ..."

Therein, it was further held that the Court which passed the decree had jurisdiction to entertain the application for execution but it should not itself order the sale of the property outside its Jurisdiction but should transfer that application to the Court having jurisdiction over property to be sold for making and executing the order for sale. In *Khirod Chandra Ghosh Vs. Panchu Gopal Sadhukhan and Others*, , it has been held that an executing Court cannot sell a property which is situated outside its jurisdiction and the observation of Atkinson, J. in the case of *Bank of Bengal v. Sarat Chandra Mittra* AIR 1918 Pat 126, was quoted with approval. Atkinson, J. said :

"Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decree is restricted by its territorial limitations. That is to say, the jurisdiction of Courts is circumscribed by and co-extensive with its territorial limits.....the decree of the executing Court, must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being."

A Full Bench of the Madras High Court in *Vasireddi Srimanthu and Ors. v. Devabbaktuni Venkatappayya and Anr* AIR 1947 Mad 347, held ;

"Section 39 is clear and unambiguous in its meaning and effect", a Court passing a decree must have territorial jurisdiction in respect of property against which it can order execution, if it has not got that jurisdiction, it cannot order execution and must send the decree for that purpose to the Court competent to do so....." and proceeded to observe that to this rule there were two exceptions, (a) where a suit is to obtain relief respecting compensation for or wrong to, immovable property situate within the jurisdiction of different Courts, Section 17 allows a suit to be instituted in any Court within whose territory any portion of the property is situate, the Court which passes the decree in respect of outlying properties has also jurisdiction to execute its decree, (b) where immovable property forming one estate is situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell such estate, as

provided under Order 21, Rule 3 of the Code of Civil Procedure. The aforesaid exceptions in their Lordship view fortified their conclusion that a Court passing a decree has territorial jurisdiction in respect of property against which execution can be made. The decision in *Gyarsilal s/o Jagannath v. Shankar Rao and Ors.* AIR 1950 Nag 46, was rendered following the Full Bench decision of the Calcutta High Court in *Prem Chand's case* (supra) and another decision of the High Court in *(Raja) Promothanath Malia Vs. H.V. Low and Co.,* where Ghose, J. observed :

"In other words, in ordinary circumstances, territorial jurisdiction is a condition precedent to a Court executing a decree," and the following statement of law in *Chitale and Annaji Rao's CPC 14th (944) Edn. Vol.1* was quoted with approval;

"6. Territorial jurisdiction-As a general rule territorial jurisdiction is a condition precedent to a Court executing a decree, and neither the Court which passed the decree nor the Court to which it is sent for execution can execute it in respect of property lying outside its territorial jurisdiction."

In the case of *Maharaj Kishore Khanna v. Raja Ram Singh and Anr.* AIR 1954 Pat 164, it has been held ;

".....the jurisdiction of a Court in enforcing execution of a decree is restricted by its territorial limits, If a Court desires to seize or attach property of a judgment debtor outside its jurisdiction it can only reach the property by means of the recognised legal procedure, viz., the decree to be executed must be transferred to the Court within whose local limits the property sought to be attached is for the time being situate....."

In *Bhagwati Prasad Bajpai v. Jai Narain Hanuman Das* AIR 1958 All 425, it is said :

"Although the CPC does not specifically provide that execution cannot be had against property situate outside the jurisdiction of the executing Court to which an application is made, yet it has been recognised that the rule of territorial jurisdiction which governs suits also governs execution of decrees. Thus, the sale of property cannot be effected by an executing Court, if the property is outside its jurisdiction." But the Court recognised that there are certain exceptions to the rule, like proceedings governed by Order 21, Rule 3, Rule 48 and Rule 52. In *Manganese Ore (India) Ltd. Nagpur v. M/s. Mangilal Rungta,* Calcutta AIR 1981 Delhi 114, *Prem Chand's case* (supra) was followed and it was observed ;

".....territorial jurisdiction is a condition precedent to a Court executing a decree and neither the Court which passed the decree nor the Court to which it is sent for execution can execute it in respect of property lying outside its territorial jurisdiction."

The same view was taken by a Division Bench of Bombay High Court in *Shaba Yeshwant Naik Vs. Vinod Kumar Gosalia and Others,* .

7. The contrary view has been, amongst others, taken in the following case.

A Special Bench of Madras High Court in *Ramier v. Muthu Krishna Ayyar and Ors.* AIR 1932 Mad 418, following the decision of the Full Bench of that very Court rendered in *Seeni Nadan v. Mathaswamy Pillai* AIR 1920 Mad 427, held ; ,

"The Court which passed a decree can execute its own decree whatever changes in jurisdiction may happen after the passing of the decree."

This view, their Lordships observed, was supported apart from the Full Bench decision in *Seeni Nadan's* case by a long series of decisions of that very Court references to which were made by them. In *Dasrath Prasad Singh and Another Vs. Baijnath Prasad Singh, , Untwalia, J.* (as he then was) observed ;

"The proper Court to execute the decree was the Court which had passed it, and, that simply because a new Court created in the year 1945 got territorial jurisdiction in regard to the property in question was no ground to hold that the Court which passed the decree had no jurisdiction to give delivery of possession.""

A Full Bench of Punjab High Court in *Rahar Singh and Anr. v. Kasturi Ram and Ors.* AIR 1962 Pun 394, taking note of the general principle of law that no Court can execute a decree when the subject matter is situate outside its local jurisdiction and as a general rule, territorial jurisdiction is a condition precedent to a Court executing .: , decree and no Court can execute it in respect of property which lies outside its territorial jurisdiction, has observed that the aforesaid principle is subject to exceptions, namely, where a suit is filed in Court by virtue of Section 17 of the CPC then the decreeing Court can execute the decree although a portion of the immovable property is situated outside its jurisdiction. The provisions contained in Order 21, Rule 3 and Order 21, Rule 48, inter alia, are held to be the other exceptions to this general rule. But, the Full Bench has observed :

"There is no provision in the Code which takes away the jurisdiction of a Court to execute a decree passed by it (Under Section 38). Section 37 which purports to explain the term "the Court which passed the decree" does not exclude the decreeing Court but only empowers certain other Courts to execute them in certain specified circumstances....."

In a well discussed judgment, a Full Bench of Rajasthan High Court in *Tarachand and Ors. v. Misrimal and Ors.* AIR 1970 Raj, observed ;

""There can be no doubt that u/s 38, a decree may be executed by the Court which passed it. There is no reason to be unduly oppressed by the doctrine that lack of territorial jurisdiction makes an order or judgment a nullity (doctrine which is no doubt applicable in international law) and to hold that u/s 39 it is incumbent for the Court which passed a decree to send it for execution to another Court in cases provided in Clauses (a), (b) and (c) of Section 39(1) C. P. C. and thus to infer that Section 38 is dependent on Section 39 to such an extent that the Court which passed a decree cannot proceed to execute it in the

circumstances mentioned in Clauses (a) and (c) of Section 39(1) and if it does so the order passed by the Court which passed the decree in taking any action in the matter provided in these clauses is to be struck down as nullity."

Their Lordships differed from the view taken by the Full Bench of the Madras High Court in Vasireddi's case (supra). The same view has also been taken in Chithraru Jathavedan Nambooripad Vs. Gopala Pillai Chandrasekharan Nair, .

8. Part 1 of the CPC deals with place of suing. Section 16 provides that suits for recovery of immovable property, for partition of immovable property, for foreclosure, sale or redemption, for determination of any other right to or interest in immovable property for compensation for wrong to immovable property and for recovery of movable property actually under distraint or attachment shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Provided that suit to obtain relief respecting, or com" pensation for wrong to, immovable property, held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Section 17 provides that suits may be instituted in any Court within the local limits of which any property is situate. Section 18 provides that where there is uncertainty as to within the local limits of the jurisdiction of which two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, may entertain and dispose of the suit. Section 19 provides for jurisdiction in suits for compensation for wrong to person or movables and Section 20 deals with residuary cases providing that such suits may be instituted in a Court within the local limits of whose jurisdiction the defendants each of the defendants, actually and voluntarily resides, r carries on business, or personally works for gain, etc, or the cause of action, wholly or in part, arises. The provisions contained in Part II of the Code deal with execution of decree. The relevant sections for the present purpose are Sections 37, 38 and 39, which reads as under:

"37. Definition: of Court which passed a decree.-The expression "Court which passed a decree," or words to that effect. shall in relation to the execution of decrees, unless there-is any thing repugnant in the subject or context, be deemed to include,

(a) Where the decree to be executed has been passed in the exercise of appellate Jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to- exist or to have jurisdiction to execute it, the- Court which, if the suit wherein the decree was passed was instituted at the- time of making the application for the execution of the decree, would have Jurisdiction to try such suit.

Explanation-The Court of first instance does not cease to , have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the Jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree is would have jurisdiction to try the said suit.

38. Court by which decree may be executed-A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

39. Transfer of decree-(1) The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court of competent jurisdiction.

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the Jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court,

(2) The Court which passed a decree may of its own motion send It for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section a Court shall be deemed to be a Court of competent jurisdiction i.e. at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decrea was passed. "

9. The explanation to Section 37 was inserted with a view to setting at rest the doubt created by conflict of decisions as to whether the Court of the first instance ceases to have jurisdiction to execute a decree on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree an area has been transferred from the jurisdiction of that Court to the jurisdiction of another Court and whether that Court to which the subject-matter has been transferred, could on its own authonty. that is to say, without any formal order of transfer by the Court which passed the decree, execute the decree. Section 38 contains the general provision of law. Section 39 lays down the condition for transfer of a decree to another competent Court for execution. Section 39 is an enabling provision and is not in derogation of the provisions contained in Section 38. It does not curtail the ambit and scope of the general

principle. It permits transfer of a decree in the contingencies stated in Clauses, (a),(b),(c) and (d). Section 39 contains principle of expediency for the convenience of the Court executing a decree and parties- the decree-holder, the judgment-debtor and even third parties who may lay claim to the property in respect of which execution is sought. The legislature deliberately used the expression "may" both in Sub-Sections (1) and (2) which should not be construed as "shall" or "must" casting an obligation on Court to transfer. The provision is directory in nature and not mandatory. It is not incumbent on the Court which passed the decree to send it for execution to another Court because it has ceased to possess or does not possess territorial jurisdiction either over the person or over the property of the judgment debtor. It was held by the Full Bench of the Rajasthan High Court in Tarachand's case (supra) ;

"The word "may" cannot be construed as "shall" or "must", and it was also observed ;

"Section 39 has been enacted for the purpose that it will be more convenient for a Court which passed a decree to get it executed by a Court within local limits of whose jurisdiction the person resides or the property is situated in cases- mentioned in Clauses (a) to (c), but it does not debar a court which passed a decree itself to execute if the circumstances of the case so warrant or it has the means to do so."

10. I do not agree with the contrary view "the word "may" used, in Section 39 does not mean that it is in the discretion of the Court which passed the decree either to execute the decree itself or to send the application for execution to another Court where the property against which execution is sought is situated outside the Jurisdiction of the Court which passed the decree " taken in Hari Das Basu Vs. National Insurance Company, Ltd., . I would with respect follow the view taken in Tarachand's case (supra) for if "may" is construed as "shall" or "must", then the impact and scope of Section 30 would stand curtailed by Section 39. No doubt, Section 39 vests discretion in the Court in the matter of transfer of a decree for execution to another competent Court. But the discretion so vested has to be judiciously exercised having regard to all facts and circumstances, namely, conveniences of the Court and of the parties, expediency, the difficulties that would be faced by the Court and the parties, etc.

11. I should now refer to a decision of the Supreme Court in Merla Ramanna Vs. Nallaparaju and Others, , where Venkatarama Ayyar, J. approving the decisions of the Full Bench of the Madras High Court in Seeni Nadan's case (supra) 3rd other cases observed ;

"...it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court."

12. The next contention of the counsel for the petitioner that simultaneous execution in Courts at Cuttack and Balasore is impermissible, is untenable, it has

been held by a Full Bench of the Patna High Court in Radheshyam and Ors. v. Devendra AIR 1952 Patn 213, that there can be simultaneous execution of a decree. The same view has been taken by a Full Bench of the Punjab High Court in Mehar Singh's case (supra). It is well established that it is open to the decree holder to try for execution of his decree simultaneously in various Courts provided the relief claimed is not identical. The same view has been taken by a Full Bench of the Mysore High Court in S. Sundara Rao v. B. Appaih Naidu AIR 1954 Mys. 1 (FB) and a Division Bench of the Allahabad High Court in Bhagwan Das v. Gomti Bai and Anr. AIR 1962 All 619 In Premalata Agarwai v. Lakshman Prasad Gupta and Ors. it has been stated :

"Simultaneous execution proceedings in more places than one can be allowed in exceptional cases by imposing proper terms so as to avoid hardship to the judgment-debtors," I am, therefore, of the view that simultaneous execution of decree is permissible under the Code unless the reliefs sought in the execution application are not the same or identical. I respectfully differ from the view taken by the Calcutta High Court in Kusum Kamini Debi Vs. Sailesh Chandra Chakravarty and Others, that.-there is no provision in the CPC under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piecemeal in different Courts or in the same Court. I would rather say that there is no provision prohibiting simultaneous execution.

13. The last contention of the counsel for the petitioner is that in the absence of an application seeking transfer of execution of a decree to the Court of Subordinate Judge, Balasore, it was not open to the executing Court to transfer. An application is a condition precedent to the exercise of jurisdiction, it is argued and the counsel has complained that on the contrary the decree-holder's application filed u/s 151 of the CPC objecting to the transfer was not disposed of by the Court. On perusal of the record, I am of the view that there is no substance in this grievance. The decree-holder was heard on the petition on 13-8-1987 and also on 21-8-1987 and the impugned order was passed on 24-9-1987.

14. As regards his contention that in the absence of an application the Court could not have exercised jurisdiction u/s 39. I may simply observe that the Court has also been vested with suo motu jurisdiction under the Sub-section (2). which reads as under:

"8. 39 (2). The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent Jurisdiction."

Convenience of the decree-holder alone is not the sole consideration, for transfer. That may be one of the considerations. Convenience and difficulties of the Court executing the decree, the hard ships that may be faced by the parties" and the third parties also in the course of execution are also legitimate factors. That is why, suo motu jurisdiction has been vested in the Court to judiciously exercise its discretion and direct transfer having regard to the facts and circumstances of

the case. So, the contention that in the absence of an application by the decree-holder the Court cannot transfer the decree for execution to another subordinate Court, is unsustainable.

15. Having answered the questions, I now take up the order passed by the Court. The learned Subordinate Judge dropped the Execution Case as not maintainable and directed the decree-holder to take a certificate of non-satisfaction of the decree to the Court of the Subordinate Judge, Balasore, if he so desired. That was not the proper order to be passed. The Execution Case does not get disposed of on transfer of the decree for its execution to another Subordinate Court. It remains pending and the decree is transferred in accordance with the provisions contained in Order 21, Rule 5 and the procedure is set out in Rule 6. Hence, to the extent that the learned Subordinate Judge said that the Execution Case was dropped and therefore was not maintainable, is unsustainable. He should have directed transfer of the decree to the Court of the Subordinate Judge, Balasore, for its execution and thereafter he should have taken steps in accordance with the provisions contained in Order 21, Rule 6.

16. All the contentions of the learned counsel for the petitioner having failed, I see no merit in this revision application which is dismissed. But, the learned Subordinate Judge is directed to act in accordance with the directions contained hereinbefore. There would be no order as to costs.