
(1932) 02 PAT CK 0003
In the Patna High Court

Sheshaiyer Rajamanner Aiyer

APPELLANT

Vs

Madanmohan Patnaik

RESPONDENT

Date of Decision : 03-02-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 41

Citation : 139 Ind. Cas. 843

Hon'ble Judges : Macpherson, J; Fazl Ali, J

Bench : Division Bench

Judgement

Fazl Ali, J.—This is an appeal by the decree holder against the decision of the Subordinate Judge of Cuttack dismissing his application for the execution of a decree on the ground that it is not capable of execution.

2. It appears that the decree in question was passed by the Munsif of Berhampur on the 16th February, 1922. Subsequently it was transferred to the Subordinate Judge of Cuttack for execution and some property belonging to the judgment-debtor was sold and purchased by the appellant. On the 18th February, 1925, the appellant applied for delivery of possession and possession was delivered to him. On the 31st October, 1924, the execution case was dismissed on part satisfaction and it appears that an intimation of this fact was sent to the court at Berhampur on the 3rd November, 1924. On the 31st October, 1927, the appellant made another application for execution to the Subordinate Judge of Cuttack, but his application was returned to him by the learned Subordinate Judge who was of the opinion that it could not be executed without there being a fresh certificate of transfer from the court at Berhampur. The appellant accordingly applied at Berhampur on the 10th December, 1927, for the transmission of the decree but this application was dismissed for default. On the 7th July, 1928, he filed a fresh application at Berhampur for the transfer of the decree which was granted. The decree was received by the District Judge of Cuttack on the 4th of December, 1928, and was sent by him to the Subordinate Judge of Cuttack for execution. On the 16th April, 1929, the present application was filed by the decree-holder.

3. The view taken by the learned Subordinate Judge is that as the first application for execution was disposed of on the 31st October, 1924, and the subsequent application for transfer was made on the 10th December, 1927, the execution is barred and the decree cannot be executed. The appellant tried to save limitation by contending before the learned Subordinate Judge that his application for delivery of possession made on the 18th February, 1925, was a step-in-aid of execution. This contention was, however, overruled on the ground that it had been definitely decided by this Court in 72 Ind. Cas. 938 Triloke Nath Jha v. Bansman Jha 72 Ind. Cas. 938 : A.I.R 1923 Pat. 22 : 1 Pat. L.R. 6 : 2 Pat. 249 : (1923) Pat. 300 : 5 Pat. L.T. that an application for delivery of possession by the decree-holder auction purchaser is not a step-in-aid of execution.

4. The point which is raised now in appeal by the decree holder is that the application for execution filed by him before the Subordinate Judge of Cuttack on the 31st October, 1927, was an application made to the proper court in accordance with law. It is contended that the Subordinate Judge of Cuttack would continue to have the jurisdiction to execute the decree until a certificate was transmitted by it to the court which passed the decree as required u/s 41 of the Civil Procedure Code. Now as a proposition of law it is true that the court to which a decree is sent for execution retains its jurisdiction to execute the decree until a certificate is transmitted to the court which passed the decree u/s 41 of the Code of Civil Procedure. In *Abda Begum v. Muzaffar Husen Khan* 20 A. 129 : A.W.N. 1897 218 it was held that the court to which the decree is transferred for execution will retain its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the court which sent the decree or has executed it so far as the court has been able to execute it within its jurisdiction and has certified that fact to the court which sent the decree, or until it has failed to execute the decree and has certified that fact to the court which forwarded the decree. The same view was held in *Manorath Das v. Ambika Kant Bose* 1 Ind. Cas. 57 : 13 C.W.N. 533: 74 Ind. Cas. 149; *Vithu Daulata Pati v. Ganesh Ramchandra* 74 Ind. Cas. 149 : 25 Bom. L.R. 453 : AIR 1923 Bom. 396 and *Muhammad Ibrahim v. Chattoo Lal* 94 Ind. Cas. 365 Pat. : (1926) Tat. 86 : 7 Pat. L.T. 461 : AIR 1020 Pat. 274.

5. Before, however, the appellant can succeed on this point, it is necessary for him to show that no certificate was transmitted in this case by the Subordinate Judge of Cuttack u/s 41 of the Civil Procedure Code. It is contended by the learned Advocate for the respondent that the question whether a certificate required by Section 41 was transmitted by the Subordinate Judge of Cuttack to the Court of Berhampur or not is a question of fact and the appellant should have asked the court below to investigate it. Not having done so in the court below, the matter cannot, it is contended, be investigated by this Court. It is to be remembered, however, that the appeal from the order of the court below to this Court lies on question of fact as well as on questions of law and although, as a rule, this Court will be reluctant to investigate fact for the first time in appeal, yet there is nothing in law to prevent such facts being investigated when the

interests of justice¹ so require. The decree Which is sought to be executed is for a Substantial amount and the appellant should not be allowed to be defeated on a mere technical ground.

6. The learned Advocate for the respondent raises two further contentions. It is said in the first place that as the application for execution which was presented by the appellant to the Subordinate Judge of Cuttack on the 31st October, 1927, was returned to him by the Subordinate Judge to be re-filed and as it was never presented to the Subordinate Judge again, that application has to be regarded as not being presented at all. The question, however, to be considered is whether assuming that this application is not an "application made to the proper, court in accordance with law", it may still not be regarded as a step in aid of execution. It appears to me that if the Subordinate Judge of Cuttack still retained jurisdiction to execute the decree, the mere fact that an application which was properly made to him was returned by him under a misapprehension will not prevent the making of the application from being tantamount at least to a step-in-aid of execution.

7. The second question urged by the learned Advocate for the respondent is that as both the courts at Cuttack and Berhampur appear to have proceeded on the assumption that a certificate u/s 41 had been transmitted by the Cuttack Court after the first execution had been dismissed on part satisfaction, the matter is res judicata and cannot be opened, again. It is true that it has often been held that orders passed at one stage of the execution may be res judicata at a subsequent stage; but in this particular case the question as to whether a certificate was actually sent u/s 41 by the Subordinate Judge of Cuttack to the court at Berhampur or not will never specifically be raised or decided and I do not think that it is too late yet to investigate it. The fact, however, that both the courts have proceeded on the assumption that a certificate u/s 41 had been transmitted on the former occasion may be taken into consideration, if no other evidence is available to show whether a certificate was in fact transmitted, or not. In my opinion the best course would be to send the case back to the lower Court in order to enable it to come to a final decision after ascertaining whether a certificate as required by Section 41 of the Code of Civil Procedure, had already been transmitted to the court of Berhampur or not.

8. It may be mentioned here that in the Register of execution cases there is a note in the remarks column that an intimation was sent on the 3rd January, 1924 to the court of Berhampur. The question, however, remains as to whether the intimation referred to in the Register was the same as a certificate required by Section 41 of the Code of Civil Procedure.

9. I would, therefore, set aside the order of the court below and remand the case to that court for disposal according to law in the light of the remarks made above. Both the parties will be allowed to offer evidence which will be confined only to the question of certificate. Costs will abide the result.

Macpherson, J.

10. I agree.