
(1974) 02 PAT CK 0010
In the Patna High Court
Case No : Civil Revision No. 1055 of 1972

Smt. Ramkumari Debi	Vs	APPELLANT
Tarkeshwar Nath Pandey and Others		RESPONDENT

Date of Decision : 05-02-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 29

Citation : AIR 1975 Patna 110

Hon'ble Judges : Shiveshwar Prasad Sinha, J

Bench : Single Bench

Advocate : R.M. Mishra and Sabitri Mishra, for the Appellant; Nawal Kishore Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Shiveshwar Prasad Sinha, J.—This is an application by the decree-holder in Title Suit No. 63 of 1970 and is directed against an order dated the 17th of July, 1972 passed in Execution Case No. 20 of 1971, staying delivery of possession of a house standing in plot No. 465, Khata No. 67 of village Kairiya, police station Kahalgaoon, district Bhagalpur.

2. The petitioner had obtained an ex parte decree in the aforesaid Title Suit No. 63 of 1970 from the Court of the Subordinate Judge, Bhagalpur, on the 30th of January, 1971. Thereafter, she levied execution of the decree, which was numbered as Execution Case No. 20 of 1971 of the aforesaid Court. The opposite parties in this petition, as judgment-debtors, tiled Miscellaneous Case No. 56 of 1971 for setting aside the ex parte decree on the ground that they had no notice of the suit and the service of the summons, etc., were all suppressed. This miscellaneous case was dismissed for default on the 10th of September, 1971 and the judgment-debtors filed a petition for its restoration and also another petition under Order 9, Rule 13 of the CPC (hereinafter to be referred to as the Code) for the purpose of setting aside the ex parte decree. It appears that the petition for restoration as well as the petition under Order 9, Rule 13 of the Code

was a composite sort of a petition and it was registered as Miscellaneous Case No. 117 of 1971. This Miscellaneous Case No. 117 of 1971 was dismissed on merits on the 22nd of May, 1972. Naturally, thereafter, the plaintiff applied for proceeding with the Execution Case No. 20 of 1971 and for delivery of possession of the house. This application was filed on the 30th of May, 1972. On a petition filed by the judgment-debtors, however, delivery of possession was stayed till the 11th of July, 1972. In the meanwhile the judgment-debtors filed a title suit being Title Suit No. 193 of 1972 of the Court of the Subordinate Judge, Bhagalpur, for a declaration that the ex parte decree obtained in Title Suit No. 63 of 1970 was by fraud and not binding. The decree-holder, on the other side, pressed for delivery of possession to be made in her favour, if necessary, under police protection. Thereafter the impugned order was passed staying delivery of possession. This order, as I have stated above earlier, has been passed in the execution case.

3. Mr. Mishra appearing for the petitioner assailed the order on two grounds:

(i) That the order had been passed without notice to the petitioner and had thus prejudiced the decree-holder's cause.

(ii) That the impugned order was not in accordance with Order 21, Rule 29 of the Code inasmuch as the order had been passed not in the suit but in the execution case.

4. Mr. Nawal Kishore Prasad Sinha appearing for the opposite parties has replied that neither of the two grounds of contention had any merit, the order had been passed with due notice to the petitioner and, although the order had been passed in terms of Order 21, Rule 29 of the Code, it was immaterial whether the order was passed in the execution case or in the title suit. He, therefore, submitted that the petition being devoid of any merit should be dismissed.

5. The first ground of contention raised by the learned Counsel for the petitioner loses its strength by reason of what the petitioner has herself stated in paragraph 16 of her petition before this Court. Therein it is stated that:

"That no adequate opportunity was given to the petitioner to show cause in Ex. Case No. 20 of 1971 as to why the prayer made by the judgment-debtors on their petition dated 11-7-1972, should not be granted, as a result of which no rejoinder could be filed by the petitioner to the judgment-debtors' application, although formally the lawyer of the parties were heard and the Counsel for the petitioner had opposed the same."

If the lawyers for the parties have been heard and the Counsel for the petitioner has had opportunity to oppose, I do not see as to how there was any prejudice caused to the petitioner.

Mr. Mishra submitted that the lawyer for the petitioner could not be thoroughly ready with the case even though he might have opposed the judgment-debtors' petition. No such fact has been stated in the petition and, consequently, I cannot go upon such a statement. In my opinion, therefore, the contention that the

order was passed without notice and thereby caused prejudice to the petitioner must be rejected,

6. The second contention has also no merit. According to Mr. Mishra, the learned Counsel for the petitioner, an order in terms of Rule 29 of Order 21 of the Code could only be passed in the suit and not in the execution case. Since the impugned order had been passed in the execution case, it was an illegal order. He tried to support his contention by referring to two decisions: (i) *Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others*, and (ii) *Bhawani Sahay v. Mt. Sugan-dho* AIR 1953 MP 181 I will refer to these decisions at the appropriate place.

Order 21 of the Code deals generally with the execution of decrees and orders and is divided into several sub-heads, one of them being "Stay of execution". Rules 26 to 29 fall within this sub-head. Rules 26 to 28 deal with powers and duties of a Court, to which a decree has been sent for execution. Under Rule 26 the Court, to which a decree has been sent for execution, may stay execution. Sub-rule (2) of Rule 26 empowers the executing Court to pass an order of restitution of property or person of the judgment-debtor, which has been seized under an execution. Sub-rule (3) of Rule 26 deals with the Court's power to require security from the judgment debtor for making an order of stay of execution. Rule 27 empowers the executing Court to retake the property or person of the judgment-debtor in execution of the decree after discharging the order of restitution. Rule 28 says that the order of the Court, which passed the decree, or of the appellate Court shall be binding upon the Court to which the decree was sent for execution. Thus Rules 26 to 28 are cases in which the functions of the executing Court, so far as they concern the stay of executions, are laid. Rule 29, however, visualises a different situation, namely, where there is a suit against the holder of a decree of such Court and also a decree in execution of such Court, in that event Rule 29 says which I may quote in extenso:

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

Now, the question which Mr. Mishra has raised is as to which of the two Courts should grant the stay; should it be in the suit or should it be in the execution proceeding? Referring to the decision reported in 1972 PLJR 535 *Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others*, which is a decision of the Supreme Court of India, Mr. Mishra has submitted that this judgment supports his point, namely, that the order of stay must be passed in the suit and not in the execution case.

In this case the Supreme Court has considered the import of the expression "such Court" in Order 21, Rule 29 of the Code in the context of the question as to whether a transferee executing Court was "such Court" or only the Court

which passed the decree within the said expression, in that provision.

The facts in the case before the Supreme Court were that the Court which passed the decree was the Subordinate Judge, Gaya, exercising Small Cause Courts power and the decree passed by this Court had been transferred for execution to the Court of Munsif I, Gaya, before whom the judgment-debtor had filed a suit for setting aside the decree passed by the Small Cause Courts Judge. The Munsif stayed the execution of the decree. It is in this context that their Lordships considered the question as to whether in terms of Order 21, Rule 29 of the Code "such Court" would include the transferee executing Court. Their Lordships answered the point in the negative, holding that the Munsif, before whom the decree had been transferred for execution, was incompetent to stay the execution of the decree. The support which Mr. Mishra sought from this decision is not forthcoming in the context of the facts and the decision of the Supreme Court, which I have slated above.

Similarly, the decision reported in AIR 1953 MP 181 (supra) also does not lay the proposition which is propounded by Mr. Mishra. All that this decision says is that it is the Court, in which the suit is pending, that has jurisdiction to pass an order under Order 21, Rule 29 of the Code. It does not further say that the order of stay must be passed in the suit and not in the execution case.

In a Bench decision of the Rajasthan High Court reported in *Hansraj Vs. Satnarain and Others*, , Chief Justice Wanchoo, as he then was, was seized with the argument that an order under Order 21, Rule 29 of the Code can only be passed in execution proceeding and cannot be passed by a Court, before whom the subsequent suit is filed. His Lordship observed firstly that no authority was cited in support of this contention and that in any event the language of Order 21, Rule 29 did not support this contention. It was observed that:

"All that is required for the application of Order XXI, Rule 29 is (1) that the suit should be pending in any Court against the holder of a decree of that very Court, (sic) and that the suit should have been filed by the person against whom the earlier decree was passed. In such a case, it is open to the Court to stay execution of the decree until the pending suit has been decided on such terms as to security or otherwise as it thinks fit."

Further on, their Lordships observed:

"The reason for this is that the Court is the same, and it is immaterial in our view whether the application is made on the execution side, or on the original side."

7. In my opinion, the decision of the Rajasthan High Court correctly expounds the import of the provisions of Order 21, Rule 29 of the Code. It is immaterial whether the application for stay is made on the execution side or on the original side. All that is necessary is that the order of stay must be passed by "such Court", namely, by the Court which passed the decree and in which the suit was pending. The second contention raised on behalf of the petitioner is also invalid

and must, therefore, be rejected.

8. Mr. Mishra then submitted that the decree-holder will be kept out from the usufruct of her decree notwithstanding the fact that her necessity for the house was greater than that of the judgment-debtors. Sitting in revision, I cannot go into this question but all that I can observe is that, if the parties agree amongst themselves, they can certainly make proper adjustments so as to suit their respective interests.

9. The civil revision application is dismissed but, under the circumstances of the case, without costs.