
(1930) 08 CAL CK 0037
In the Calcutta High Court

Sreenath Chakravarti and Others

APPELLANT

Vs

Priyanath Bandopadhyaya and Others

RESPONDENT

Date of Decision : 26-08-1930

Acts Referred:

Bengal Tenancy Act, 1885 — Section 143
Civil Procedure Code, 1908 (CPC) — Section 39, 39(b)

Citation : AIR 1931 Cal 312

Hon'ble Judges : Mukerji, J; Mitter, J

Bench : Full Bench

Judgement

Mukerji, J.—The decree-holders obtained a decree for rent under the Ben-Ten. Act, from the 3rd Court of the Munsif at Bhanga on 6th July 1913. This Court was subsequently transferred to Gopalgunje and made the 2nd Court of the Munsif at that place. On 5th July 1925 the decree-holders applied for execution in the 2nd Court of the Munsif of Gopalgunje by attachment and sale of a piece of immovable property of the judgment-debtor which was situate within the local limits of the jurisdiction of the Alunsif, 1st Court, Bhanga, and had never been within the jurisdiction of the Munsif, 2nd Court, Bhanga. There was also a prayer for execution by attachment and sale of the judgment-debtor's moveables. After certain proceedings were taken it was found that the immovable property against which the decree-holders desired to proceed in execution lay outside the territorial limits of the Court in which the execution was going on, viz., the Gopalgunje Court and on that the Munsif of that Court on 18th February 1927 returned the execution application to the decree-holders for presentation to the proper Court. The decree-holders then refilled the execution application on 1st March 1927 in the 1st Court of the Munsif at Bhanga. The execution proceedings went on for some time in that Court but were eventually dismissed as not maintainable by an order dated 10th December 1927. The decree-holders preferred an appeal from that order with the result that the District Judge declared that:

all proceedings in the case after 18th February 1927 were taken without any

sanction of law

and he accordingly directed the Munsif, 2nd Court, Gopalgunje

to proceed under Order 21, Rules 5 and 6, Civil P.C., after taking an application from the decree-holders u/s 39, Civil P.C.

2. The decree-holders took proceedings accordingly with the result that the Gopalgunje Court on 17th August 1928 sent the decree for execution to the Munsif, 1st Const, Bhanga together with a certificate of non satisfaction. On the papers being received by the latter Court, the decree-holders on 27th August 1928 filed a fresh application for execution there.

3. The limitation governing the execution of this decree is that provided for in Schedule 3, part 3, Article 6, Ben. Ten, Act. The Munsif, 1st Court, Bhanga, as well as the Subordinate Judge on appeal, have held that the execution was barred inas much as the application for execution was not made to the proper Court earlier than on 27th August 1928. They held that the decree-holders were not entitled to call in their aid the first application for execution in the 2nd Court of the Munsif at Gopalgunje as that Court was not competent to execute the decree as against immovable property situate outside its territorial jurisdiction. The decree-holders have then preferred this appeal.

3. The reasons upon which the Courts below have proceeded may well be summarized more or less in their own words thus:

No Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction. Territorial, jurisdiction therefore is a condition precedent to a Court executing a decree The property over which the execution was sought to be taken all along remained within the jurisdiction of the 1st Court of the Munsif at Bhanga, and consequently the Gopalgunje Court could never have executed the decree in a way to affect that property.... In a case like this the substance and not the form of the matter must be looked to and considered from that point of view the application for execution in the Gopalgunje Court as, initially made was for the purpose of getting a transfer of the decree to the 1st Court of the Munsif at Bhanga, but it has been held in judicial decisions that an application to get a decree transferred to another for Court execution is not an application for execution.

4. These reasons will have to be referred to again in order to see how far they are correct and to what extent they bear upon the question which we have to determine.

5. A number of decisions have been cited before us on behalf of the appellants. One of those strongly relied on is Latch-man Pundah v. Muddan Mohan Shye [1881] 6 Cal. 513. In that case construing Section 649 of the Code of 1877 as amended by Act 12 of 1882 (Section 37 of the present Code) Garth, C.J., observed that the section: "which explains the meaning of the expression the

"Court which passed the decree" did not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made but merely includes another Court. He held further that on this meaning when a Court which has passed a decree has ceased to have jurisdiction to execute it the application for execution may be made either to that Court although it has ceased to have jurisdiction to execute the decree or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit,"

6. Field, J., said:

A Court does not cease to be "the Court which passed" merely by reason that the headquarters of such Court are removed to another place or merely because the local limits of the jurisdiction of such Courts are altered.

7. On this decision and upon the words of Section 37 itself it is clear that the Gopalgunje Court would be regarded as the Court which passed the decree. But that does not solve the question which arises for our consideration and which goes much deeper than what this decision deals with: that question is whether a Court which passes a decree can entertain an application for its execution in respect of immovable property which even at the time of the suit and the decree lay outside the territorial limits of its jurisdiction. The case of Kartic Nath Pandey v. Tiluhdhari Lal [1888] 15 Cal. 667 and other cases proceeding on the same lines with it have then been referred to on behalf of the appellants. But these decisions must be regarded as having been overruled by the Full Bench decision of this Court in the case of Prem Chand Dey v. Mohkada Debi [1890] 17 Cal. 699 (F.B.) in which it was definitely decided that territorial jurisdiction is a condition precedent to a Court executing a decree, and that a Court has no jurisdiction, in execution of a decree, to sell property over which it had no territorial jurisdiction at the time it passed the order of sale. This proposition has never been dissented from and has been reiterated in the more recent cases of Begg Dunlop & Co. v. Jagannath Marwari [1911] 39 Cal. 104 Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd., . It follows therefore that, 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 will not have jurisdiction to carry on such execution. But then the question before us is not whether that Court has jurisdiction to execute the decree, but whether it has jurisdiction to entertain the application; in other words whether an application for execution made in that Court, in such circumstances, will count as an application for execution for the purpose of limitation. For a determination of this question such decisions as Kali Pado v. Dina Nath [1898] 25 Cal. 315, Jahar v. Kamini [1901] 28 Cal. 238 Udit Narain v. Mathura [1908] 35 Cal. 974 or other decisions on similar lines are of not much assistance.

8. Now, at the outset, it may be observed that there is, as Field, J., pointed out in his judgment in the case of Latchman Pundah v. Maddan Mohun Shye:

a. distinction between the jurisdiction of the Court to execute the decree and the circumstances under which effective execution can be had.

9. Upon the decision of the Full Bench in the case of Prem Chand Dey v. Makhada Debi there is no legitimate reason why a Court which had no jurisdiction over a piece of immovable property for the purpose of the suit, should be regarded as having greater powers in execution of the decree than it possessed at the time of the institution of the suit itself. It would therefore seem at first sight, if the distinction noticed above is not borne in mind, that the 3rd Court of the Munsif at Bhanga, and for that reason the 2nd Court of the Munsif at Gopalgunje, had no jurisdiction to entertain the application for execution that was made on 5th July 1925. This would be in accordance with the view which Sadasiva Ayyar, J., was inclined to take at first in the case of Seeni Nadan v. Muthusamy Pillai [1919] 42 Mad. 821 before he changed his mind and agreed in the view of his colleagues on the Full Bench. He then said:

On principles recognized in Section 16, Civil P.C., it seems to me clear that no Court has any jurisdiction either to entertain an execution application for the attachment of property outside its jurisdiction or for the sale of immovable property outside its jurisdiction or to sell it in execution, even though it had jurisdiction at the time of the passing of the decree to pass such a decree.

10. These observations would have applied with all the greater force to a case like the present where the property against which execution was asked for lay entirely outside the territorial limits of the Court which passed the decree even at the time when the suit was instituted or the decree was passed. But when the distinction noticed above is kept in view one has to pause and consider further.

11. The history of the law of procedure relating to this matter, as pointed out by Wallis, C. J., in the Full Bench case of the Madras High Court cited above, throws a flood of light on this question. The question really is whether a litigant who has been authorized to bring a suit in a particular Court, and has obtained a decree in such Court, in his favour, is not entitled as of course to apply to that Court for execution. It would be convenient as regards this question to quote here a few passages from the judgment of the learned Chief Justice in that case. He observed:

Under the Code of 1859 it was open to the decree-holder to apply to the Court which passed the decree to execute it itself or to transmit it to another Court for execution, and such an application would have been sufficient for the purpose of saving limitation under Article 167 (now 182), Lim. Act of 1871. The question is when and how has the decree-holder been deprived of this right. In 1877 and again in 1882 the Code was repealed and re-enacted with some redrafting and rearrangements which included the insertion of the present Sections 37 and 38 in the Code of 1877. Now there is a well-known presumption that such redrafting and re-arrangements leave the substance of the law unaltered, and it follows that such a serious change as the abolition of the decree-holder's right to apply

in all cases to the Court which passed the decree in the first instance cannot be raised by implication, but should plainly and clearly appear on the language of the sections....

12. After noticing the decisions that dealt with the questions that arose up to 1908 the learned Chief Justice proceeded to observe:

This was the state of the authorities when the Code of 1908 was enacted, and we are told by Woodroffe and Ameer Ali that it was proposed to enact expressly that application might be made to either Court The jurisdiction of the Court which passed the decree was sufficiently recognized by the decisions as I have pointed out, and indeed had never been doubted up to that time and therefore there was no need to re-affirm it.... The words to be interpreted are "a decree may be executed by the Court which passed it" in Section 38 (223), a section first inserted in 1877 and merely declaratory of the existing law. These words again have to be interpreted in the light of Section 37, an interpretation clause reproduced from Section 649 of the Code....

13. (After dealing with Clause (a), Section 37):

We have however to deal with Clause (b), and where the decree-holder had a valuable right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission, and where the present Code provides expressly that a decree may be executed by the Court which passed it, the contention that this important right must be held to have been taken away because the provision in Section 37 that these words shall be deemed to include another Court appears to me to be altogether untenable.

14. Ayling, J. who concurred with the learned Chief Justice observed:

I am of opinion that the latter section (meaning Section 37) whatever it means by ceasing to have jurisdiction to execute, does not operate to exclude the Court which passed the decree, and to substitute for it another Court; and that it is still open to the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction.

15. In a later decision of the same Court *Siva Kanda Raju v. Raja of Joypore* AIR 1927 Mad. 627 the aforesaid Full Bench decision, which of course was followed, was referred to on behalf of one of the parties as otiose, because it laid down an obvious proposition, the proposition being that the Court which passed the decree has always the power to entertain an execution application and transmit it to the Court having territorial jurisdiction to execute it. *

16. We are of opinion that Section 38 of the Code should be read as conferring jurisdiction upon either Court-the Court which passed the decree (the expression being read in the light of the explanatory Section 37) as well as the Court to which the decree is sent for execution by such Court (in accordance with the powers conferred by the enabling Section 39). The difficulty and inconvenience of adopting a different construction has been pointed out by Wallis, C. J., in the

case already referred to. No small hardship will result from a different interpretation in a case like the present where in view of the provisions of the limitation law in which it is subject, no step-in-aid of execution would operate to save limitation. Even if an application for transfer of the decree had been made to the Gopalgunje Court within time, that would not have saved limitation on the ground of its being a step-in-aid of execution as the article applicable to the case takes no note of such a thing : the application for execution itself should have to be made within the time prescribed.

17. We may mention here in passing that a contention was put forward on behalf of the respondents that an application to a Court which passed the decree for the transfer of the decree to another Court for execution is not a step-in-aid of execution, and two cases were cited in support of this contention, viz. : Chutterput Singh v Sait Sumari Mal [1916] 43 Cal. 903 and the decision of the Judicial Committee in AIR 1927 73 (Privy Council) in which that case was approved. The contention does not arise because here there was no such application, and also because even if there was one, it would not have helped the decree-holders as the limitation law governing the case speaks of nothing about any step in execution. But as the contention has been put forward we desire to say that it has no force, that the authorities are the other way about, and that the two decisions on which reliance has been placed relate to decree passed "on the Original Side of the Court, which under the practice obtaining there are transferred for execution under ministerial orders. No question of a step-in-aid of execution arises under the article of limitation applicable to such decrees, but a question of revival, which such ministerial orders can never amount to. Of course a mere application to have a decree transferred to another Court is not an application for execution : Khetpal v. Tikam Singh [1912] 34 All. 396 but we do not think it has ever been held it is not a step-in-aid of execution : in fact it is the first aid that the Court which passed the decree is called upon to give to a decree holder who stands in need of it when execution has to be had in a different Court. To turn now to the theme itself, the construction we are inclined to put upon the sections to which we have referred, is not antagonistic to what has been said by the Judicial Committee in the case of Maharajah of Bobbili v. Narasaraju Veda Baliara AIR 1916 P.C. 16. that was held in that case was that after a decree had been sent by the Court which passed it for execution to some other Court and so long as it remains there any further application for its execution must be made to the transferee Court and the transferor Court has no jurisdiction to entertain any such application. It may be stated here that even after transfer, the transferring Court retains jurisdiction over the execution, though for certain specified purposes only. What they are, it is not necessary for our present purpose to say.

18. In the present case there was an application for execution filed within time in the Gopalgunje Court, which in view of Section 37, Clause (b) was the Court which passed the decree. When subsequently the decree was, on the decree-holders' application, transferred to the 1st Court of the Munsif at Bhanga,

accompanied by a certificate of non-satisfaction, there was in our opinion, nothing on the question of limitation to stand in the way of its execution. If no application for execution had been filed in the transferring Court but only an application for transfer, the decree-holder has to file an application for execution in the transferee Court under Order 21, Rule 10, Civil P.C. But where, as here, the application for execution was filed in the transferring Court before transfer of the decree, it is not necessary to file a fresh application for that purpose in the transferee Court: K. B. Dutt v. Tara Prosanna AIR 1924 Pat. 120.

19. To turn now to the reasons upon which the Courts below have proceeded and which have been summarized before, it appears to us that they are all correct, but they overlook the important consideration that the Court which passed the decree has the right to entertain an application for its execution, so long as it has not already transferred that decree to some other Court for execution.

20. The result is that in our judgment this appeal must succeed. We allow the appeal and setting aside the orders of both the Courts below, direct that the execution do proceed in accordance with law.

21. The decree-holders are entitled to their costs in this appeal, hearing-fee being assessed at 2 gold mohurs. In the Courts below each party will bear their own costs so far.

Mitter, J.

22. The question of law which falls for determination in this appeal by the decree-holders is whether an application for execution of a rent decree obtained by them against the respondents is barred by limitation? Both the Courts below have answered this question in the affirmative, the lower appellate Court remarking however that the matter was not free from difficulty. What we have to consider in this appeal is whether their conclusion is right.

23. The facts as found by the lower appellate Courts may be briefly stated thus: The appellants obtained a decree for rent in the 3rd Munsif's Court at Bhanga on 6th July 1923. That Court was transferred to Gopalgunje and became the 2nd Munsif's Court there. The appellants applied for execution on 5th July 1926 in the 2nd Munsif's Court Gopalgunje to which the business of the 3rd Munsif's Court at Bhanga had been transferred by Government notification, the 3rd Munsif's Court at Bhanga having been abolished. After certain proceedings had been taken on the application for execution in the Gopalgunje Court it appeared that the decree-holders could not proceed against the property described in the schedule to the application as the scheduled property was situated outside the jurisdiction of the Gopalgunje Court and was situate within the jurisdiction of the 1st Munsif's Court at Bhanga. On 18th February 1927 this application for execution was returned to the appellants for presentation to the proper Court. On 1st March 1927 the appellants refiled the petition for execution in the Bhanga Munsif's Court. On 10th December 1927 this Court held that the said application could not be entertained on account of some "inherent defects of procedure

adopted" and dismissed the said application.

24. The decree-holders preferred an appeal against this order and the appellate Court on 2nd March 1928 returned the application to the Munsif's Court at Bhanga with a direction that it should be sent back to the Court at Gopalgunje and that this latter Court should proceed under Order 21, Rules 5 and 6, Civil P.C. The Gopalgunje Court issued a certificate under Order 21, Rules 5 and 6 and the certificate was presented before the Munsif's Court at Bhanga.

25. A fresh application for execution was filed and the Bhanga Court held that the application for execution was barred by limitation and this view has been affirmed by the lower appellate Court.

26. Against the concurrent judgments of both Courts the decree-holders have brought the present appeal and it is argued before us that the application for execution filed before the Bhanga Munsif's Court should be treated as a continuation of the application of 5th July 1926. If it is so treated it is conceded that the decree-holders' application is in time and is not barred.

27. It will appear from the narrative of facts given above that the appellant has been bandied about from Court to Court to be told at the end of nearly three years from the date of his application that it is barred by limitation. This case is one illustration of what has been said on high authority that the difficulties of a decree-holder in India begins when he obtains his decree.

28. On the other hand it is contended broadly by the respondent that the Gopalgunje Court had no right to entertain the application for execution as it could not attach and sell the property in execution as the property was outside the jurisdiction of the Gopalgunje Court. It is not suggested to which Court he should have applied for execution except the Gopalgunje Court but it is said that he should have applied to the Gopalgunje Court in such a time for transfer of the said decree to the Court where the property sought to be attached and sold is situate that when it reached that Court and an application for execution was made to that Court that application for execution would be within three years from the date of the decree within the meaning of Article 6, Schedule 3, Part. 3, Ben. Ten. Act. Such an application was made in 1928 in the Bhanga Court beyond three years of the date of the decree and it is said therefore that the application is hopelessly barred.

29. In order to consider the soundness or otherwise of this contention it becomes necessary to examine some of the provisions of the CPC relating to execution of decrees.

30. u/s 38 of the Code:

a decree may be executed either by the Court which passed it or by "the Court to which it is sent for execution.

31. The Bhanga third Munsiff's Court had ceased to exist and consequently the

application for execution could be made to the Gopalgunje Court as that would be the Court which passed the decree for such a Court includes a Court:

which if the suit wherein the decree was passed was instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit : see Section 37, Clause (b) of the Code.

32. Gopalgunje second Court would be such a Court, for the rent suit could be instituted in that Court as the rent property falls within the pecuniary limits of the jurisdiction of Gopalgunje Court after the transfer of jurisdiction. The Gopalgunje second Court would be the Court which passed the decree within the meaning of Section 37 (b).

33. Therefore there can be no question that the application for execution would have to be made before the Gopalgunje second Court if the facts were not complicated by the circumstance that the application for execution asked for sale not of the holding in respect of which the rent decree was passed but some other property of the judgment-debtor situate within the jurisdiction of the first Munsif's Court at Bhanga. The argument of the respondent is that as the execution was sought against property outside the jurisdiction of the Gopalgunje second Court, that Court could not entertain an application for execution but only an application for transfer of the decree to the Bhanga first Munsif's Court and that therefore the Gopalgunje second Court was not the "proper Court" to receive the application for execution.

34. I am unable to accept this contention. To my mind the Gopalgunje second Court being the Court which passed the decree having regard to Section 37 (b) was the Court which could receive the application for execution and decide on any question as to whether the decree is barred by limitation etc., and then transmit the decree to the Bhanga first Court as it (Gopalgunje second Court) could not attach and sell property outside its jurisdiction. It has been held by a Full Bench of this Court in Prem Chand v. Mokhada that a Court which passed the decree had no jurisdiction to order the sale of property in execution outside its territorial jurisdiction, but this case is no authority for the proposition that the Court which passed the decree has no jurisdiction to entertain the application for execution. In my judgment the Court which passed] the decree (Gopalgunje second Court in this case) 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 the application to the Bhanga first Court for making and executing the order for sale. The Gopalgunje Court (the Court which passed the decree) does not function merely as a sort of post office for receiving application for transfer of decrees and for transmitting them to the Court within whose jurisdiction immovable property sought to be sold is situate for execution. As indicated before it could determine question as to the executability of the decree, e.g., limitation, apart from the question of attachment and sale of immovable property outside its jurisdiction. Order 21, Rule 28 of the Code lends support to this view. If an application for execution is made to the Court which

passed the decree that Court will transmit the same to the Court where immovable property sought to be sold is situate along with the other papers required by Order 21, Rules 5 and 6 of the Code and then the latter Court will make the order for sale and it will not be necessary in such a case to. have a fresh application for execution before the Court where immovable property sought to be sold in execution is. situate.

35. In the Full Bench case of *Seeni Nadan v. Muthusami Pillai*, it seems to have been held that the Court which passed the decree was still the proper-Court for execution although it had no-power to sell and attach property outside-its territorial jurisdiction. In the Madras-case a decree was passed for sale of mortgaged property and after decree and before sale the mortgage property was taken out of the jurisdiction of the Court which passed the decree and it was held that the application for execution could be made to the Court which passed the decree although the said Court had lost jurisdiction to execute it by the sale of the property. The following passage from the judgment of Sir John Wallis, the learned Chief Justice of Madras (as he then was) may be usefully quoted:

Power to transfer particular areas from one Court to another was given and has been freely exorcised, but it has never been suggested that the fact of such a transfer takes away the power of the Court which passed the decree to entertain applications for execution. The power of sending the decree to another Court if the Court itself was not in a position to execute it, has been found sufficient to meet the case That, it seems to me, was the scheme of the Code as held in *Panduranga Mudaliar v. Vythilinga Reddi* [1908] 30 Mad. 537, until 1908 when Section 150 then conferred upon the Court of the transferred area power to entertain the application in the first instance.

But this cannot be read as taking away from the Court which passed the decree the power which it then had according to the unbroken current of authorities for many years which the legislature must be taken to have recognized : *Seeni Nadan v. Muthusawmy Filial*.

36. To my mind there is a real distinction between jurisdiction to entertain an application for sale of property outside jurisdiction and jurisdiction to execute the decree by sale of such property. The case of *Girindra v. Jurawa Kumari* [1893] 20 Cal. 105 indirectly recognizes this distinction. In a recent Madras case *Wallace, J.* emphasized the distinction and observed:

Section 37 however does not forbid the view laid down in the Full Bench ease in *Seeni Nadan v. Muthusamy Pillai*, that although the Court which originally pished the decree has no jurisdiction to execute it because of the transfer of territorial jurisdiction it has power to entertain an execution application and transmit it to the Court having territorial jurisdiction to execute it.

37. In the present case the application for execution was made in July 1926, before the Gopalgunje Court. The Courts below have treated the application in substance as one for the transfer of the decree. In fact it was an application

under Order 21, Rule 12. Having received the application it was the duty of the Gopalgunje Court to send it for execution to the Bhanga first Munsif's Court having regard to the provisions of Section 39, Clause (b), Civil P.C. The CPC is made applicable to execution of decrees for rent u/s 143, Ben. Ten. Act.

38. I am not unmindful of the recent decision of the Judicial Committee of the Privy Council in the case of Bankim Behary Chatterjee v. Narain Das Dutt, where their Lordships have laid it down finally that an order made by a master on the original side of the Court on an application for transmission of a decree of the High Court to the Hooghly Court where immovable property was situate was a ministerial act and was not by itself a revival of the decree within the meaning of Article 183, Lim. Act. It could not be regarded as a judicial order in that case, as the master had no power to decide questions of limitation, etc., when dealing with an application for transmission of the decree. Can it be said that that case is authority for the proposition that the Court which passed the decree cannot deal with certain objections which may be raised to the application for execution by the judgment-debtor before the decree is sent to some other Court for execution u/s 39, Civil P.C.? I am extremely doubtful if it can be regarded as an authority for that proposition. The observations of the Judicial Committee should be understood with reference to the special practice prevailing in the original side of this Court.

39. For these reasons I agree with my learned brother that the appeal must be allowed.