
(1922) 10 PAT CK 0006
In the Patna High Court

Triloke Nath Jha and Others

APPELLANT

Vs

Bansman Jha and Others

RESPONDENT

Date of Decision : 30-10-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1923 Patna 22 : 72 Ind. Cas. 938

Hon'ble Judges : Das, J;Adami, J

Bench : Division Bench

Judgement

Das, J.—The question involved in this appeal is whether the execution of the decree is barred by limitation. On the 20th July 1917, the plaintiff sought to execute the decree which they had obtained on the 29th March 1917. On the 21st February 1918 certain properties belonging to the judgment-debtors were sold and the decree-holders themselves purchased those properties. The sale-proceeds not being sufficient to satisfy the decree, the decree-holders presented another application for execution of the decree on the 29th March, 1921. The lower Court has come to the conclusion that the application of the 29th March 1921 is barred by limitation.

2. The application of the 29th March 1921 is apparently barred by limitation; but it is pointed out on behalf of the appellants that there was an application on their behalf on the 25th March 1918 for confirmation of the sale which, as I have said, took place on the 21st February 1918 and that there was a further application on their behalf on the 8th July 1918 for delivery of possession. It is urged on behalf of the appellants that each of these applications was an application to take some step-in-aid of execution and that in this view the application of the 29th March 1921 is not barred by limitation. So far as the application of the 25th March 1918 is concerned, I am clearly of opinion that that application does not save limitation. No doubt, it was held in the case of Gobind Pershad v. Rung Lal 21 AC. 23 : 10 Ind. Dec. 648, that an application for confirmation of sale is an application to take some step-in-aid of execution; but, so far as I am aware, that

case has never been followed in the Calcutta High Court. The case of Gobind Pershad v. Rung Lal 21 A.C. 23 : 10 Ind. Dec. 648 was decided on the 22nd of June 1893; but on the 7th April 1893 it was held by Ameer Ali, J., in the case of Panchanan Chowdhury v. Nrisingha Prasad Roy 6 Ind. Cas. 264 : Cri.L.J. 356, that an application for confirmation of sale is not an application to take some step-in-aid of execution. The case of Panchanan Chowdhury v. Nrisingha Prasad Roy 6 Ind. Cas. 264 : Cri.L.J. 356 was not brought to the notice of the learned Judges who heard the case of Gobind Pershad v. Rung Lal 21 C. 23 : 10 Ind. Dec. 648. In the later case of Umesh Chandra Dass v. Shib Narain 31 C. 1011 : 9 C.W.N. 193, it was held by the Calcutta High Court that such an application is not an application to take some step-in-aid of execution. It was pointed out in the last mentioned case that such an application, not being made by a decree-holder as such but by an auction-purchaser can in no sense be regarded as an application by the decree-holder. It was, also pointed out that no application is, as a matter of fact, required for the purpose of having the sale confirmed. The decisions of the Calcutta High Court do not support the contention of Mr. Sen and I hold that the application of the 25th March 1918 was not an application to take some step-in-aid of execution.

3. I now come to the application of the 8th July 1918 which was an application for delivery of possession. There is some difficulty in deciding this point, not because there is any difficulty inherent in the point itself, but because the cases actually deciding this particular point are all in favour of Mr. Sen's contention. So far as I know, the point has been discussed by the Calcutta High Court on three different occasions and on each occasion the Calcutta High Court came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. Sariatoolla Molla v. Raj Kumar Roy 27 C. 709 : 4 C.W.N. 681 : 14 Ind. Dec. (N.S.) 466, is the earliest of these cases. The learned Judges thought that such an application was an application to make the execution final and complete and they followed the, decision of the Allahabad High Court, in the case of Moti Lal v. Makund Singh 19 A. 477 : (1897) A.W.N. 117 : 9 Ind. Dec. 308. It is useful to point out that the decision of the Allahabad High Court in Moti Lal v. Makund Singh 19 A. 477 : A.W.N. (1897) 117 : 9 Ind. Dec. (N.S.) 308 has been reversed by the Full Bench of the Allahabad High Court in the case of Bhagwati v. Banwari Lal 1 Ind. Cas. 416 : 31 A. 82 : 6 A.L.J. 71 : 5 M.L.T. 185 . The case of Sariatoolla Molla v. Raj Kumar Roy 27 C. 709 : 4 C.W.N. 681 : 14 Ind. Dec. 466 was followed by Holmwood and Sharfuddin, JJ., in Pran Krishna v. Juramoni 1 Ind. Cas. 430 : 13 C.W.N. 694. It is somewhat difficult to appreciate the reasoning of the learned Judges deciding the case of Pran Krishna v. Juramoni 1 Ind. Cas. 430 : 13 C.W.N. 694 but they appear to have thought that the. order u/s 319 of the CPC being a judicial order, the application which resulted in that order must be considered to be an application to take some step-in-aid of execution. The point was again debated in Annada Prasanna Sen v. Somoruddi Mirdha 54 Ind. Cas. 839 : Cri.L.J. 135 : 23 C.W.N. 926. Newbould, J. thought that he was conclusively bound by the

decisions of the Court and he accordingly came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. Cuming, J., arrived at the opposite conclusion and he" thought that such application could not be regarded as an application to take some step-in-aid of execution. The decisions of the Calcutta High Court undoubtedly support the" view that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. In Bombay and in Madras a similar view has prevailed: See *Sadasihv Mahadu v. Narayan Vithal* 11 Ind. Cas. 987 : 35 B. 452 : 13 Bom. L.R. 66 *Lakshmanan Chettiar v. Kannanmal* 24 M. 185 although eminent Judges in Madras have thought that if the matter were *res integra* they might have decided the point adversely to the decree-holder. See *Kattayat Pathumayi v. Raman Menon* 26 M. 740 : 13 M.L.J. 237; *Sandhu Taraganar v. Hussain Sahib* 28 M. 87 : 14 M.L.J. 474. In Allahabad the view at one time found favour that an application by a decree-holder to be put in possession of the property purchased by him is an application to take some step-in-aid of execution see *Moti Lal v. Makund Singh* 19 A. 477 : A.W.N. (1897) 117 : 9 Ind. Dec. 308; but the Full Bench decision of that Court in the case of *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 6 A.L.J. 71 : 5 M.L.T. 185, has undoubtedly overruled the case of *Moti Lal v. Makund Singh* 19 A. 477 : (1897) A.W.N. 117 : 9 Ind. Dec. 308, and other cases based on that case. If we had to decide the case merely on the authorities which were placed before us we would be obliged to hold that the application of the 8th July 1918 was an application by the decree-holder to take some step-in-aid of execution and that it consequently saved limitation.

4. But it seems to me that there are numerous decisions of the Calcutta High Court which cannot be reconciled with the three decisions to which I have referred and upon which Mr. Sen relied. It was held in the case of *Ananda Mohan Roy Hara Sundari*, that neither an application by a decree-holder to receive poundage fee from him in respect of the judgment-debtor's property purchased by himself nor an application by him to be allowed to set off the purchase-money against the decree instead of plying it into Court is an application to take some step-in-aid of execution. It may be pointed out that a poundage fee is a fee calculated upon the price for which the property sells and is payable by the decree-holder after the sale and before taking delivery of the property. Now, if an application by the decree-holder asking the Court to receive a poundage fee is not regarded as an application to take some step-in-aid of execution, it is difficult to understand how an application to be put in possession of the property purchased by him can be regarded as an application to take some step-in-aid of execution. It was pointed out in that case by the late Chief Justice of the Calcutta High Court that when the sale of the property attached in execution has been completed and the purchase-money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. In the case of *Bhimal Das v. Ganesha Koer* 1 C.W.N. 658 it was held that no appeal lies from an order refusing the application of the decree-holder to

be put in possession u/s 318, the question not falling u/s 244. Now, in order to establish that an application by the decree-holder to be put in possession of the property purchased by him is an application to take some step-in aid of execution, it must be established, first, that the application is in fact by a decree-holder; and, secondly, that the application relates to the execution of the decree. If these facts are established then the question involved in the decision of such an application would undoubtedly be a question between the parties to the suit and relating to the execution of the decree and would consequently fall u/s 47 of the Code of Civil Procedure. The decision in *Bhimal Das v. Ganesha Koer* 1 C.W.N. 658 accordingly denies the validity of the arguments upon which we are invited to hold that an application by a decree-holder to be put in possession of the property is an application to take some step-in-aid of execution. Indeed, if the arguments of Mr. Sen be right, then the case of *Bhimal Das v. Ganesha Koer* 1 C.W.N. 658 was wrongly decided, and it may be pointed out that that case was decided on the view that the execution was at an end with the sale of the property, and that no question relating to execution was involved in an application to be put in possession of the purchased property by the decree-holder.

5. The case of *Bhimal Das v. Ganesh Koer* 1 C.W.N. 658 was followed by Brett and Mookherji, JJ., in *Mahomed Mosraf v. Habil Mia* Cri.L.J. 749 and this is the view which has been accepted by the Full Bench of this Court in *Abdul Gani v. Raja Ram* 35 Ind. Cas. 468 : 1 P.L.J. 232 : 20 C.W.N. 829 : 3 P.L.W. 62 (F.B.). No doubt, it was not decided by this Court in the case cited that an application by a decree-holder to be put in possession of the purchased property is not an application to take some step-in-aid of execution but it seems to me that such a decision is involved in a decision that no appeal lies from an order under Rule 95 of Order XXI of the Code of Civil Procedure.

6. It is necessary to deal with an argument which was advanced to us by Mr. Sen on behalf of the decree-holder. He argued that a proceeding in execution cannot be said to be completed in a case of sale until he has obtained the proceeds and the benefit of the sale held in execution of the decree; and just as an application by a decree-holder who is not the auction-purchaser to obtain payment of purchase-money is an application for taking some step-in-aid of execution, so also an application to be put in possession of that which represents the money where the decree-holder himself purchases and consequently no money passes, ought to be regarded as an application to take some step-in-aid of execution. Now, the point to be decided is whether an application by a decree-holder, when he is not the auction-purchaser, to obtain payment of purchase-money is an application for taking some step-in-aid of execution. So far as the Calcutta High Court is concerned, it has invariably held that such an application is not an application to take some step-in-aid of execution. See *Hem Chunder v. Brojo Soondury Debee* 8 C. 89 : 10 C.L.R. 272 : 4 Ind. Dec. (N.S.) 57 ; *Fazale Iman v. Metta Singh* 10 C. 549 : 5 Ind. Dec. (N.S.) 368; *Ganga Pershad v. Debi Soondari* 11 C. 227 : 5 Ind. Dec. (N.S.) 910. A useful test to apply would be this

supposing the decree-holder purchaser is unable to obtain possession, would it entitle him to take out further execution for tint portion of the money which is represented by the property purchased by him of which he is unable to obtain possession? If the fact that he is unable to obtain possession would re-open the execution proceedings, then there might be something to be said in favour of the view that execution is not complete until he obtains possession of the property; but it is well established that, though the decree-holder purchaser is unable to obtain possession, that would not entitle him to take out further execution for that portion of his purchase-money which is represented by the property purchased by him. It seems to me that execution comes to an end with the sale of the property and that whether or not the auction-purchaser obtain possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Mr. Justice Banerji pointed out in the case of *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 6 A.L.J. 71 : 5 M.L.T. 185 that if the decree-holder purchases the property but docs not obtain possession that circumstance would not entitle him to take out execution of the decree which has already been satisfied. It seems to me that the argument advanced before us by Mr. Baikuntha Nath Mitra on behalf of the judgment-debtors must prevail. The argument is founded on principle and is covered by the decision of this Court in *Abdul Gani v. Raja Ram* 35 Ind. Cas. 468 : 1 P.L.J. 232 : 20 C.W.N. 829 : 3 P.L.W. 62 (F.B.) which is binding on us.

7. I would dismiss this appeal with costs.

Adami, J.

8. I agree.