

---

**(1963) 02 KAR CK 0006**

**In the Karnataka High Court**

**Case No :** Execution First Appeal No. 38 of 1962

Vandse Gopalakrishna Shanabhogue

APPELLANT

Vs

Trasi Gavisandraya Laxman, Shanbhogue and Sons

RESPONDENT

---

**Date of Decision :** 21-02-1963

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 37, 37 (b), 38, 39  
Madras Civil Courts Act, 1873 — Section 10, 5

**Citation :** AIR 1964 Kar 34

**Hon'ble Judges :** T.K. Tukol, J; K.S. Hegde, J

**Bench :** Division Bench

**Advocate :** G.S. Ullal, for the Appellant; K. Subba Rao, for the Respondent

---

## **Judgement**

Hegde, J.—This appeal raises an interesting question of law as regards the scope of Section 37(b) of the Code of Civil Procedure, to be referred to hereinafter as the "Code", on which judicial opinion is sharply divided.

2. Till 1-8-1961, there was only one Subordinate Judge's Court in the District of "South Kanara and that Court was located" at Mangalore. On 1-8-1961, a new Subordinate Judge's Court was established at Udipi by the State Government, in exercise of its powers conferred by Section 5 of the Madras Civil Courts Act, 1873 (Madras Act III of 1873), to be referred to hereinafter as the "Act" as in force in the Madras Area, as per Government Order No. HD. 38 CAD 51 dated 30-6-1961. By the Notification dated 24th July 1961, issued in exercise of the powers conferred by Section 10 of the Act, the Government fixed that the local limited over which the Court of the Subordinate Judge at Udipi shall have jurisdiction, shall comprise the Taluks of Coondapur, Udipi issued in exercise of the powers conferred by the and Karkala of the South Kanara District. By means of another Notification of the same date, Act, in modification of the previous Notifications on the subject, the Government directed that the Subordinate Judge's Court at Mangalore shall with the effect from 1-8-1961, cease to exercise jurisdiction over the local limits comprising the Taluks of Coondapur, Udipi and Karkala of the

South Kanara District.

3. The decree under execution is a money decree. It was passed on 19-7-1961 by the Court of the Subordinate Judge at Mangalore. The decree holder straightaway levied execution of the decree in the Court of the Subordinate Judge at Udipi. The same was resisted by the judgment-debtors, on the ground that the Subordinate Judge's Court at Udipi has no jurisdiction to execute the decree. The trial Court rejected that contention. The aggrieved judgment-debtors have come up in appeal to this Court.

4. The sections of the "Code" that bear on the point under consideration are: Sections 37 38 39 and 150. Section 38 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 39 deals with transfer of decrees for execution. For our present purpose, Section 37 is the most important Section. That Section reads:

"The expression "Court which passed a decree" or words to that effect, shall, in relation to the execution of decrees, unless there is anything 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 the 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 instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

4a. On an analysis of Section 37, it is seen that the following Courts come within the expression "Court which passed a decree".

1. The Court of first instance which actually passed the decree.

2. The Court of first instance in the case of appellate decree.

3. Where the Court of first instance has ceased to exist, the Court which would have jurisdiction to try the suit at the time the execution petition is filed and

4. Where the Court of first instance has ceased to have jurisdiction to execute the decree, the Court which at the date of execution, would have had jurisdiction to try the suit.

5. Apart from the Courts mentioned above the only other Court which can execute a decree is the Court to which the decree is sent for execution". This is so because of Section 38 read with Section 39 of the "Code". Our attention has not been invited to any provision in the "Code" conferring jurisdiction on any other Court to execute the decree.

6. There is no doubt that the Court which actually passed the decree, can at all times execute the decree unless it has ceased to exist or it has ceased to have jurisdiction to execute the same. This much is plain from the language of Section

38 read with Section 37. This question has now been put beyond the pale of controversy by the decision of the Supreme Court in *Merla Ramanna Vs. Nallaparaju and Others*, . This is what Venkatarama Ayyar J. who spoke for the Court observed in that case (paragraph 12 of the judgment):

"And 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. Vide: *Seeni Nadan v. Muthuswamy Pillai* ILR 42 Mad 821 : AIR 1920 Mad 427; *Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others*, and *Jagannath v. Ichharam* AIR 1925 Bom 414".

But His Lordship refrained from pronouncing on the question whether the Court to which the subject matter of the decree has been transferred can on its own authority execute the decree. This is what His Lordship observed while dealing with that question:

"There is a long course of decisions in the High Court of Calcutta that when jurisdiction, over the subject-matter of a decree is transferred to another Court that Court is also competent to entertain an application for execution of the decree. Vide: *Lutchman v. Maddan Mohun* ILR 6 Cal 513; *Jahar v. Kamini Devi* ILR 28 Cal 238 and *Udit Narain v. Mathura Prasad* ILR 35 Cal 974. But in *Ramier v. Muthukrishna Ayyar* ILR 55 Mad 801 : AIR 1932 Mad 418 a Full Bench of the Madras High Court has taken a different view, and held that in the absence of an order of transfer by the Court which passed the decree, that Court alone can entertain an application for execution and not the Court to whose jurisdiction the subject matter has been transferred.

This view is supported by the divisional in *Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others*, . It is not necessary in this case to decide which of these two views is correct, because even assuming that the opinion expressed in ILR 55 Mad 801 : AIR 1932 Mad 418 is correct, the present case is governed by the principle laid down in *Venkamamidi Balakrishnayya Vs. Nannapaneni Linga Rao*, .

It was held therein that the Court to whose jurisdiction the subject matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer, and that if it entertains an execution application with reference thereto, It would at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings."

From the foregoing, it is clear that that decision has left open the controversy whether the Court to which the subject matter of a suit has been transferred can entertain an application for execution of a decree made by another Court in a suit instituted prior to the transfer of the subject matter of the suit to that Court. Therefore, it has become necessary to examine that question afresh.

7. It may be noted that in the present case, we are dealing with a money decree. Therefore, the decision relating to mortgage decrees may not be strictly relevant. But, the principle enunciated in those decisions do bear on the point under consideration in this case as well. The real question for decision is whether the newly established Subordinate Judge's Court at Udipi gets jurisdiction to execute a decree passed by the Court of the Subordinate Judge at Mangalore if the suit in which the decree was made had been instituted at Udipi after the establishment of the Court in that place, it has jurisdiction to try the same, without the same being sent to that Court for execution u/s 39. As seen earlier, the jurisdiction of the Court which actually passed the decree to execute the same is not lost merely because a new Court is established which Court if it had been in existence on the date of the suit would have had jurisdiction to try the same. No assistance can be taken from Section 37 in support of the contention that the new Court also has jurisdiction to execute the decree. Therefore, we have to see whether Section 38 lends any support for that contention. That Section speaks of two classes of Courts: (i) the Court which passed the decree and (ii) the Court to which the decree is sent for execution, evidently u/s 39. The decree under scrutiny was not sent by the Mangalore Court to the Udipi Court for execution. Therefore Sections 38 and 39 are of no assistance to the respondent. The only other relevant provisions are Sections 24 and 150. In this case, there was no transfer of the proceedings u/s 24. This leaves us with Section 150. That Section says:

"Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

The decree under execution was the "business" of the Mangalore Court. Was that business transferred to the Court of the Subordinate Judge at Udipi? To answer this question, we must refer to the language of the relevant Notifications. From those. Notifications, it cannot be said that any pending "business" of (the Court at Mangalore was transferred to the Udipi Court. The Notification establishing the Udipi Court merely says that:

"The Government of Mysore hereby fixes that the local limits over which the Court of the Subordinate Judge at Udipi (to be established with effect from the first day of August 1961 in pursuance of the G. O. No. HD 38 CAD 61 dated the 30th June, 1961) shall have jurisdiction, shall comprise the Taluks of Coondapur, Udipi and Karkala of the South Kanara District".

That notification does not expressly transfer any pending "business" from the Mangalore Court to the Udipi Court. Such a conclusion cannot also be drawn as a necessary implication. Similarly the Notification altering the jurisdiction of the Mangalore Court only says that:

"The Subordinate Judge's Court at Mangalore, shall with effect from the first day of August .....; cease to exercise jurisdiction over the local limits comprising the Taluks of Coondapur, Udipi and Karkala of the South Kanara District."

8. Therefore, the language of the Notifications in question does not lend support to the contention that any "business" pending in the Court of the Subordinate Judge at Mangalore was transferred to the Court of the Subordinate Judge at Udipi.

9. What appears to have influenced the Court below in holding that it has jurisdiction to entertain the execution petition is that according to the Notifications referred to above, the Court at Mangalore would have no jurisdiction over the areas included within the jurisdiction of the Court at Udipi. But, this view overlooks the fact that before that Court could have jurisdiction, it must be held that the Court which actually passed the decree has ceased to have jurisdiction to execute the same. There is nothing in the two Notifications referred to earlier to suggest that the Court at Mangalore has ceased to have jurisdiction to execute the decree.

10. For the reasons mentioned above, we are of the opinion that the Udipi Court is not competent to execute the decree. That much appears to be clear from the provisions noticed earlier.

11. As mentioned in the beginning, decided cases are not unanimous on the point in issue. The conclusion reached by us earlier is supported by the decision of a Special Bench of the Madras High Court in ILR 55 Mad 801 : AIR 1932 Mad 418. Therein a mortgage decree was passed by the District Munsiffs Court at Melur; subsequently there was a notification by the High Court in re-arranging the jurisdiction. The result was that the properties in suit went in the jurisdiction of the District Munsiffs Court at Madura Taluk: the plaintiff therein made an application to the latter court to execute the decree without getting the transfer of the decree for execution from the Melur Court though that court continued to exist. The Special Bench held that the Madura Taluk Court could not entertain the application to execute the decree without its transmission from the Court at Melur. It further held that the Notification effecting the change of jurisdiction for future cannot be interpreted as effecting a transfer of past business u/s 150.

The same view was taken in Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others, . Therein B. K. Mukherjee J. (as he then was) speaking for the Bench observed that the word "include" as used in S. 37 though it extends the meaning of the expression "Court which passed the decree" in one sense, does in another sense restrict it, and the effect of the word is to exclude, under the circumstances specified in Clause (a) and Clause (b) of the Section, the Original Court and substitute for it another Court which for purposes of the Section is to be regarded as the only Court which passed the decree. The Bench dissented from the view taken by Garth, C. J. in ILR 6 Cal 513.

It was further held in that decision that the expression "jurisdiction to execute it"

as used in Section 37(b) does mean and include the competency of the Court to entertain an application for execution of the decree, even if in the circumstances of a particular case a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it; it Still remains the competent Court for purposes of execution, though the decree-holder might have to apply for transmission of the decree to another Court for the purpose of obtaining the relief which he wants. Now we may consider the cases that have taken the contrary view. The basis for that view is, some of the observations made by Garth C. J. in ILR 6 Cal 513. In that case the only question that arose for decision was whether the Court which actually passed the decree had jurisdiction to execute the decree despite the establishment of a new Court having jurisdiction over the subject matter of the suit. On that question both the learned Chief Justice as well as Held, J. who was the other Member of the Bench agreed that that Court had jurisdiction to execute the decree. The learned Chief Justice in his judgment went further and observed that when a Court that 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 suits wherein the decree was passed were instituted at the time of making application to execute it, would have jurisdiction to try the suit. With great respect to the learned Chief Justice, we are of the view that the learned Chief Justice erred in thinking that ceasing to have jurisdiction over a territory is the same thing as ceasing to have jurisdiction to execute the decree. This point is clearly brought out in the judgment of Field J. This is what that learned Judge says on that point:

"It has been contended, that because the Immovable property included in the decree is now situated within the jurisdiction of the Katra Munsiff, therefore, the application for the execution of the decree must be made to the Katra Munsiff's Court because if a suit were now to be brought in respect of such Immovable property, such must be instituted in the Katra Munsiff's Court. It appears to me that this contention is untenable, for the Court which passed the decree has not ceased to exist or ceased to have jurisdiction to execute it".

The opinion of the learned Chief Justice noticed above is clearly obiter and is plainly opposed to the language of Section 37(b).

12. Next we come to the decision in ILR 28 Cal 238. In that decision, it was held that the provisions of Section 649 of 1882 (same as the present Section 37) are permissive, if after a Court has passed a decree, the local jurisdiction in respect of the subject matter of the suit is transferred by an order of the Local Govt., to some other Court, the application for execution of the decree may be made either to the Court which passed the decree or to the Court to which the local jurisdiction has been transferred. While coming to that conclusion, the Court purported to follow the decision in ILR 6 Cal 513 overlooking the fact that the observations of Garth, C. J., in that case were merely obiter, and that his opinion was not shared by his brother Judge Field J. This is what the Court observed in

that case:

"The case of ILR 6 Cal 513 seems to us more appropriate in dealing with the terms of Section 649 C. P. C. It was there held that the terms of that law were permissive and, applying that judgment to "he facts of the present case, the Munsiff of Nawabganj did not cease to have jurisdiction in the matter of execution of the decree, but that the decree might also be executed by the Munsiff of Malda."

The above decision was followed by another Bench of the Calcutta High Court in ILR 35 Cal 974. In that case, the learned Judges were of the opinion that the question that fell for their decision was not *res integra*. This is what their Lordships observed therein:

"The question is not *res integra* so far as this Court is concerned. In ILR 6 Cal 513 Sir Richard Garth the then Chief Justice and Mr. Justice Field held, in a case much similar to the present, that the words "the Court, which passed the decree" did not exclude the Court, which originally passed the decree, but merely included another Court, namely, the Court which had jurisdiction to execute the decree on the transfer of jurisdiction. The learned Judges put a wide and convenient construction on the following words in Section 649, namely "the Court, which passed the decree to be executed, has ceased to exist or to have jurisdiction to execute it."

"The same view was taken in another case in this Court, in ILR 28 Cal 238. Prince and Hill, JJ. were of the opinion that ILR 6 Cal 513 was correctly decided and that application for execution could be entertained either by the Court which passed the decree or the Court which at the time of the application had local jurisdiction with respect to the subject matter of the suit."

The Sind Commissioner's Court in *Naraindas v. Saindad* AIR 1944 Sind 173 took the view that where there is a transfer of territorial jurisdiction, jurisdiction should not be limited only to future proceedings; the Court to which the territorial jurisdiction is transferred should also have jurisdiction to execute decree passed earlier. In arriving at that decision the learned Judges were greatly influenced by the decisions of the Calcutta High Court referred to earlier and also by the fact that such an interpretation would add to the convenience of parties. Evidently, the attention of the learned Judges had not been invited to the decision of the Calcutta High Court in *Masrab Khan Vs. Debnath Mali alias Abhu Mali and Others*, .

13. The last decision that was brought to our notice on the point under consideration is\_ the decision of G. D. Khosla, J. (as he then was) in *Kasturi Rao and Another Vs. Mehar Singh and Another*, . In that case the learned Judge thought that jurisdiction to execute a decree cannot be confined to competence to entertain an execution application: the execution of a decree entails much more than the entertainment of an application and the issue of a notice to the judgment-debtor, the execution involves the delivery of possession of sale of

immovable property; this cannot be done unless the property lies within the territorial jurisdiction of the executing Court and if after the passing of the decree or at any subsequent stage the property ceases to be within the territorial jurisdiction of the executing Court then it can be said that for all practical purposes the Court has ceased to have jurisdiction to execute the decree and when that happens the condition laid down in Section 37(b) is fulfilled: hence where the territorial jurisdiction of a Court is transferred to another court, the transferee Court is competent to entertain directly an application for execution of the decree passed by the first Court where the territorial jurisdiction of the first Court is altered the decree will have eventually to be executed by the second Court, and it is a question of pure formality that the application should in the first instance be filed in the Court of "he first instance. With great respect to the learned Judge we feel compelled to say the conclusions reached by the learned Judge derives no support from the language of the relevant provisions.

14. For the reasons mentioned above, we are firmly of the opinion that the Court of the Subordinate Judge at Udipi has no jurisdiction to entertain the application for execution of the decree unless the decree is transmitted to it u/s 39 of the "Code". The Subordinate Judge's Court at Mangalore still retains its jurisdiction to execute the decree as the Court which passed it.

15. We do not think that the ratio of the decision in AIR J943 Mad 449 has any bearing on the facts of the present case.

16. For the reasons mentioned above, this appeal is allowed and the order of the lower Court is set aside. The execution petition is dismissed.

17. In the circumstances of the case, we direct the parties to bear their own costs both in this Court as well as in the Court below.

18. Appeal allowed.