

Ghanashyamdas Kejriwal Vs. Smt. Durga Devi and ors.

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Court : Orissa

Decided On : Oct-14-1963

Reported in : AIR1964Ori88; 30(1964)CLT9

Judge : G.K. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 5, 8 and 10

Appeal No. : M.A. No. 80 of 1961

Appellant : Ghanashyamdas Kejriwal

Respondent : Smt. Durga Devi and ors.

Advocate for Def. : P.K. Dhal, ;B.K. Behera and ;S.C. Jena, Advs.

Advocate for Pet/Ap. : G.R. Rao and ;K.S.R. Murty, Advs.

Disposition : Appeal allowed

Judgement :

G.K. Misra, J.

1. The judgment-debtor is the appellant. A decree was passed on 4-12-1952 by the Subordinate Judge, Raipur, in the State of Madhya Pradesh. After certain executions had. been levied, the Subordinate Judge, Raipur, sent the decree directly to the Munsif, Titiligarh in the district of Bolangir in the State of Orissa, on

8-8-1955. After transfer of the decree, the decree-holders did not file any execution case before the Munsif of Titalagarh, who sent a certificate on 17-8-1958 to the Subordinate Judge, Raipur, under Section 41, Civil Procedure Code stating that the execution case was barred by time.

Meanwhile, on 2-8-1958 another application had been filed by the decree-holders before the Subordinate Judge, Raipur, for transfer of the decree to the District Judge, Bolangir, which was despatched on 11-8-1958 to the District Judge, who received and transferred it to the Munsif, Titilagarh on 25-8-1958. The present execution case was filed before the Munsif, Titilagarh on 14-2-1959. Various objections were raised under Section 47 Civil Procedure Code. The Courts below have overruled these objections. This miscellaneous appeal has been filed against the order of the learned District Judge, dated 15-7-1961.

2. Mr. Ranga Rao raises two contentions :

(i) Under Order 21, Rules 5 and 8, the Munsif Court at Titilagarh has no jurisdiction to execute the decree unless it is transferred to it by the District Judge of Bolangir. As the decree was directly transferred by the Subordinate Judge, Raipur, on 8-8-55 to the Munsif of Titilagarh, the latter had no jurisdiction to execute the decree, and the proceeding pending before the Munsif, Titilagarh from 8-8-55 to 17-8-1958 was without jurisdiction, and the present application is barred by time.

(ii) Assuming that the aforesaid proceeding before the Munsif, Titilagarh, was not without jurisdiction, the Subordinate Judge, Raipur, had no further jurisdiction to entertain the application dated 2-8-1958 for transfer of the decree to the District Judge Bolangir, as the decree previously transferred was pending execution before the Munsif of Titilagarh, till 17-8-1958 when the Certificate under Section 41, Civil Procedure Code was despatched.

3. It is conceded by Mr. Dhal that if the proceeding pending before the Munsif of Titilagarh, from 8-8-1955 to 17-8-1958 was without jurisdiction, then the present application for execution would be barred by time. It is, therefore, necessary to examine if the proceeding was without jurisdiction. On this point there is sharp conflict of authorities.

One view is that the words used in Order 21, Rules 5 and 8 are mandatory and do not leave any room for exercise of discretion in the matter by the Court which passed the decree. On receipt of the decree, the District Judge may choose to execute the decree himself and may not send it to any Subordinate Court at all. Until the District Judge has, passed an order of transfer under Rule 8, no Subordinate Court has any jurisdiction in the matter. The best exposition of this view is to be found in *Sachindra Kumar v. Usha Prova De*, AIR 1949 Cal 690. *Durgaprasad v. Hari Shankar*, AIR 1950 Assam 163 and *Syed Mohammad v. Syed Zainuddin Hasan Mirza*, AIR 1957 Pat 654 advocate the same view.

The other view is that the case is not one of lack of inherent jurisdiction, territorial or pecuniary, over the subject-matter. It is merely one of irregular assumption of it, the irregularity consisting in non-compliance with the procedure prescribed for the transmission of the Certificate. If the judgment-debtor allows the proceeding in the transferee Court to go without objection, he must be taken to have waived it. The best exposition of this view is found in *Bhagwan Singh v. Barkat Ram*, AIR 1943 Lah 129. This has been approved and followed in *Inderdeo Prosad v. Deonarayan Mahton*, AIR 1946 Pat 301, *Radheyshiam v. Firm Sawai Modi Basdeo Prasad*, AIR 1953 Raj 204 (FB) and *Gau'ri Shankar v. Firm Dulichand Laxmi Narayan*, AIR 1959 Madh Pra 188. It is not necessary to refer to other authorities in support of one view or the other.

4. Section 38, Civil Procedure Code enacts 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(1) enumerates various conditions subject to which the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court. Sub-section (2) of Section 39 lays down that the Court which passed a decree may of its own motion send it for execution to any Subordinate Court of competent jurisdiction. Section 40 prescribes that where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that State. Under Section 41, the Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure. Under Order

21, Rule 5, where the Court to which a decree is to be sent for execution is situated in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed. Order 21, Rule 8 prescribes that where the copies of the decree are filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

There is no dispute that under these rules, the Subordinate Judge, Raipur, should have transmitted the decree for execution to the District Judge, Bolangir, on 8-8-1955, and that it was open to the District Judge, Bolangir, either to execute it himself, or to transfer it to the Munsif of Titilagarh, for execution.

5. There is no dispute that if the decree was transmitted through the District Judge to the Munsif, Titilagarh, the Munsif's Court would have both territorial and pecuniary jurisdiction of the subject-matter, and that there would be no lack of inherent power in jurisdiction. The difference of opinion lies in this that the Lahore view construes the provisions in Order 21, Rules 5 and 8 in the matter of sending a decree for execution to the Court of the District Judge as nothing more, than a matter of mere procedure and that by the transfer the District Judge does not confer any jurisdiction on the subordinate Court which it has by virtue of Section 39, Civil Procedure Code. The Calcutta view, on the other hand, construes Rule 8 as conferring jurisdiction on the Court of the Munsif, Titilagarh, only when an order of transfer is made by the District Judge. I am inclined to accept the Calcutta view in preference to the Lahore view. The basic assumption in the Lahore view rests on the argument which may be quoted..

It is conceded however that if the certificate be sent to the District Judge, Delhi, he, in normal course would have transferred it for execution to the Senior Subordinate Judge, who is competent to deal with suits and execution applications of this class and value.

This contention, which was accepted, overlooks the position that the District Judge has jurisdiction over the entire district and that the Judge has the option given to him of executing the decree himself and may not transfer it at all to the Subordinate Court though normally he does so. This view enunciated in *Debi Dial*

Sahu v. Moha-raj Singh, ILR 22 Cal 764 was accepted in AIR 1949 Cal 690. The Lahore view is not questionable to the extent it lays down that the Subordinate Court to whom the decree is directly transferred does not lack inherent jurisdiction over the subject-matter both in respect of pecuniary and territorial jurisdiction. It, however, overlooks one., important principle regarding absence of jurisdiction that the Subordinate Court may lack jurisdiction on the non-fulfilment of the condition precedent that is attached to it by a statute. In Nusserwanjee Pestonjee v. Meer Mynodeen Khan, 6. Moo Ind App 134 (155) (PC) their Lordships of the Judicial Committee observed --

'The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction for if they be not complied with the jurisdiction does not arise.'

The Lahore view ignored this principle. On this principle alone, the Munsif Court at Titilagarh had no jurisdiction.

6. Jang Bahadur v. Bank of Upper India Ltd., AIR 1928 PC 162 has been relied upon in support of the Lahore view. This case dealt with an altogether different set of facts. In that case before a certificate was issued under Section 41, Civil Procedure Code the judgment-debtor died. Under Section 50, Civil Procedure Code where a Judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased. The decree-holder, without making an application to the Court which passed the decree applied for substitution before the transferee Court. An objection was raised that the transferee Court had no jurisdiction to allow the application for substitution. Their Lordships observed that this involved a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter in the transferee Court continues until a certificate under Section 41, Civil Procedure Code is issued. If there is non-compliance with such procedure, the defect might be waived, and the party who

has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings. The decision is distinguishable and is not applicable to a case of construing the absence of jurisdiction under Order 21, Rules 5 and 8.

7. Mohanlal v. Benoy Kishna, AIR 1953 SC 65 is also distinguishable. The discussion was with reference to non-compliance with Order 21, Rule 6 which lays down that the Court sending a decree for execution shall observe certain formalities like sending a copy of the decree and the non-satisfaction certificate etc. Their Lordships observed :-

'..... there is authority to the effect that an omission to send a copy of the decree of an omission to transmit to the Court executing the decree the certificate referred to in Clause (b) does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21, Rule 90 and as such cannot be made a ground for setting aside a sale in execution. Order 21, Rule 90 does not relate to any question of jurisdiction. It clearly refers to the procedure and throws no light on the construction of Order 21, Rule 5 and Rule 8 Civil Procedure Code.'

8. In support of my conclusion I would mention three other decisions which have not been referred to at the Bar. In Subramanya Ayyar v. Swaminatha Chettiar, AIR 1928 Mad 746 a very forceful and clear exposition of law was made. The following passage may be extracted from the judgment of Ramesham, J., at p. 751 :

'The question is whether in the circumstances of the case, the Subordinate Court of Tanjore can be regarded as a Court competent to make the order so as to make the matter res judicata. If both the Courts are situated in the same district, seeing that the transfer might be made directly from the first Court to the second Court, without the intervention of any superior Court, it may be said that the objection by reason of the language of Section 38 or, in other words, by reason of the irregularity that the decree had not been formally sent to the second Court which has territorial jurisdiction is not fatal to the competency of the second Court to pass the order. In such a case, in spite of the irregularity, an order directing execution

after notice may make the matter *res judicata*, but where, as in this case, the transfer cannot be made directly to the second Court and it can only be made first to the district Court of Tanjore and the district Court may either execute the decree itself or may send it to the Sub-Court (vide Order 21, Rule 5, Civil Procedure Code), the irregularity cannot be overlooked as a mere irregularity. It seems to me that the irregularity amounts to a want of jurisdiction of the Sub-Court of Tanjore and to trespass upon the powers of the superior Court namely, the District Court of Tanjore. If the regular procedure had been observed the Sub-Court of Negapatam would have transferred the decree to the district Court of Tanjore. What would have happened then one does not know. The district Court might have chosen to execute the decree itself and never have sent the decree for execution to the sub-Court of Tanjor or it might have so sent; but unless it is so sent, the sub-Court cannot execute the decree, and an attempt by it to so execute it really amounts to trenching upon the power of the superior Court and it amounts to clutching at the jurisdiction which the sub-Court has not and may never have. Under such circumstances the objection is not one of territorial jurisdiction and that there can be no *res judicata* because the subordinate Court of Tanjore is not a competent Court to pass any order and therefore the objection may be taken at a later stage.'

This decision lays down in unmistakable terms that non-compliance with the provisions of the first part of Order 21, Rule 5 amounts to a mere irregularity and not to want of jurisdiction as both the Courts are situated in the same district under the jurisdiction of one District Judge. But the non-compliance with the provisions of the Second part of Order 21, Rule 5 read with Rule 8 results in want of jurisdiction. Any order passed by the transferee Court in violation of those provisions is nullity and without jurisdiction. This decision is a direct authority in support of the appellant's contention. It was followed in *Balakrishnayya v. Linga Rao*, AIR 1943 Mad 449 at p. 453 which was approved as laying down good law in *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87. Their Lordships of the Supreme Court at p. 94 observed :

'We agree with the decision in AIR 1943 Mad 449.'

It however expressed no opinion on the point at issue in this case. To avoid confusion, it must however, be noted that both AIR 1943 Mad 449 and AIR 1956 SC 87 deal with cases coming within the purview of the first part of Order 21, Rule 5 involving a question of transferring a decree within the same district. On the facts of those cases, their Lordships came to the conclusion that the order passed by the transferee Court in the same district in an execution application, without a transfer order being previously made by the Court which passed the decree, was an irregular assumption of jurisdiction and not a total absence of it, and that if the objection to it was not taken at the earliest opportunity, it must be deemed to have been waived and could not be raised at any later stage of the proceedings.

9. The result of the aforesaid discussion is that the Munsif at Titilagarh had no jurisdiction to execute the decree. Even on the Lahore, view, the judgment-debtor had not waived the objection against the transmission of the decree for execution directly to the Munsif, Titilagarh, on 8-8-1955. After receipt of the decree in Titilagarh Court, no application for execution was filed under Order 21, Rule 10, C. P. C. The decree was merely lying in the Munsif's Court, at Titilagarh, after the transfer and the decree-holder took no steps for execution. There was no occasion or scope for the judgment-debtor to raise any objection against the jurisdiction of the Titilagarh Court as no execution was levied. In any view of the matter, the present application for execution is barred by time.

The Second contention raised by Mr. Rao need not be considered.

10. In the result, the appeal succeeds. The Execution application is barred by time and is dismissed. In the circumstances, parties to bear their own costs throughout.