

Bonbehari Roy Vs. Dhirendra Nath Roy

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Court : Kolkata

Decided On : Jun-02-1955

Reported in : AIR1956Cal132,60CWN52

Judge : S.R. Das Gupta and ;Mallick, JJ.

Acts : Indian Independence (Legal Proceedings) Order, 1947 - Section 4; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 17

Appeal No. : A.F.O.O. No. 154 of 1953

Appellant : Bonbehari Roy

Respondent : Dhirendra Nath Roy

Advocate for Def. : Hemendra Chandra Sen and ;Ajay Kumar Basu, Advs.

Advocate for Pet/Ap. : Apurba Charan Mukherjee, ;Pravash Chandra Basu, Advs.

Disposition : Appeal dismissed

Judgement :

Mallick, J.

1. This appeal is directed against an order dismissing an objection taken by the judgment debtor under Section 47, Civil P. C. against the execution of a decree

passed by the Jessore Court and transferred to the Court of First Subordinate Judge, Alipore for execution. The respondent who was & zamindar obtained a decree from the Jessore Court for the recovery of putni rent of a state included in Jessore Collectorate against a number of puttandars including the appellant.

On 21-5-1946 the decree was transferred to Alipore Court for execution. 'On 31-5-1946 the decree-holder started execution against 6 judgment debtors but not against the appellant by filing a tabular statement in the Court of the said Subordinate Judge at Alipore. This was numbered as Misc. Case No. 15 of 1946. The proceedings against the said 6 judgment debtors were, however, compromised and two solenamas dated 11 and 18-7-1949 were filed recording the said compromise.

After having finished with the said 6 judgment-debtors, the decree-holder intended to proceed against the judgment debtor No. 1 the present appellant and with that object the decree holder filed a petition on 25-7-1949 before the said Subordinate Judge stating that he wished to proceed in Misc. Case No. 15 of 1946 against the judgment debtor No. 1 and asked for attachment and sale of certain properties belonging to the said judgment debtor No. 1 as set out in the Schedule.

It was not a fresh application under Order 21 B. 2, Civil P. C. but was an application in the said execution case being Misc. Case No. 15 of 1946. The learned Subordinate Judge overruled all the objections and granted the relief prayed for by the decree-holder. Against that order an appeal was taken to this Court being F. M. A. No. 38 of 1950. The appeal was heard by a Division Bench of this Court consisting of Sen and Chunder JJ. Their Lordships dismissed the appeal on 20-2-1951 with the following observations:-

'We treat the application of the respondents for relief against appellant as a prayer for amendment of the execution petition filed in Misc Case No. 15 of 1946 and we see no reason why we should refuse to allow the execution petition to be so amended. The respondent shall amend his petition for execution in Misc. Case No. 15 of 1946 by adding the name of the judgment debtor No. 1 in the appropriate column & by stating the manner in which execution should be levied against him in the appropriate column.' Thereupon on the petition of the decree holder, the

original tabular statement filed on 31-5-1948 was amended by the order of the learned Subordinate Judge dated 7-6-1951 whereby the name of judgment debtor No. 1 was included in the 9th column of the tabular statement and the 11th column was also amended by adding a prayer for attachment and sale of properties belonging to judgment debtor No. 1.

2. In 1950 East Bengal State Acquisition and Tenancy Act, 1950 was passed whereby the Government of East Pakistan purported to acquire all zamindaries. Under the Act not merely the zamindary but all arrears of rent due to the zamindars including decrees obtained therefor vested in the State.

The decree sought to be executed being a decree for the recovery of patni rent of an estate situate in Touzi No. 243 of Jessore Collectorate would prima facie be hit by the mischief of the Act. Thereupon the judgment debtor No. 1 filed a petition under Section 47, Civil P. C. in the pending execution case contending that by reason of the East Bengal State Acquisition and Tenancy Act, 1950 the decree is no longer executable at the instance of the decree-holder.

The learned Subordinate Judge dismissed the application on the finding that the decree in execution could not have vested in the Government of East Pakistan. Against this order of dismissal the present appeal has been filed by judgment debtor No. 1 Bonbehary Roy.

3. Mr. Hemendra Chandra Sen the learned Advocate appearing for the respondent decree-holder concedes that decree in execution would vest in the Pakistan Government under the Act, if the execution proceeding was pending anywhere in East Pakistan. But he contended that after the creation of two Dominions by the Indian Independence Act, the present execution case was pending in a court of the Indian Union and the East Bengal Legislature has no extra territorial Jurisdiction to legislate on property which is now situate in Indian Union belonging to a citizen of the Indian Union.

The right given by the Indian Independence Act and/or the orders passed by the Governor-General thereunder cannot be affected by the Unilateral Act of one Dominion. The right of property in the decree and the right to execute the decree

transferred to this Court for execution remains therefore, unaffected by the East Bengal Act above referred to.

Mr. Apurba Charan Mukherjee the learned Advocate appearing for the appellant though originally attempted to argue that the decree-holder is divested of his right to execute the decree gave up the point ultimately and did not dispute the above contention of Mr. Sen. By reason of the attitude taken by Mr. Mukherjee the point of dispute before us has been narrowed down.

4. The ground on which Mr. Mukherjee urged that the order complained of should be set aside is that a decree passed by a Court in the territory now included in the Dominion of Pakistan is not executable in a court of Indian Union unless proceeding is pending in a court of Indian Union immediately before the appointed day which is 15-8-1947.

There must be a pending proceeding in an Indian Court immediately before the appointed day otherwise the Indian Court will have no jurisdiction to entertain the proceedings. In the present case, it is urged, that execution proceeding so far as judgment debtor No. 1 is concerned was initiated by the application on 25-7-1949 i.e. long after the appointed day.

Hence as against his client no proceeding was pending immediately before the appointed day and as such the Court of Subordinate Judge of Alipore is not competent to execute the decree of Jessore Court against judgment debtor No. 1. According to Mr. Mukherjee it is immaterial that the decree was transferred to this Court on 21-5-1946 or that execution proceeding was started in this Court on 31-5-1946 against other judgment-debtors and both these dates are prior to the appointed date.

What is material is the date in which decree-holder sought to proceed against judgment-debtor No. 1 and this date is 25-7-1949 when the decree-holder sought to proceed against judgment-debtor No. 1 in execution - which date is admittedly after the appointed date. Mr. Mukherjee contended that on this ground the learned Subordinate Judge should have allowed his client's petition under Section 47, Civil P. C. and dismissed the execution, case.

5. Relevant portions of Sections 2 and 4, Indian Independence (Legal Proceedings) Order, 1947 on which the above argument is based read as follows :

'Section 2 (1) In this Order, 'appointed day' means the fifteenth day of August, 1947. 'Section 4 (1). All proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued In that court as if the said Act had not been passed, and that court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day.'

6. It follows from the above that unless a proceeding is pending immediately before the appointed day, the Court will have no jurisdiction to execute the decree of a Court which has now fallen within the territory of another Dominion.

In the present case the decree sought to be executed was transferred to this Court on 21-5-1946 and in fact execution was started on 31-5-1946 and in consequence was pending in this Court though not against the present judgment-debtor. Would this be sufficient to comply with the provisions of Section, 4 of the Act? No authority on the point has been cited to us by the learned Advocates appearing for the parties and the point has to be decided as a point of first impression.

7. Under Section 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. Under Section 39 of the Code, the Court which passed a decree may send it to another Court for execution. Order 21, Rule 6 lays down the procedure to be followed when the decree is to be transferred to another court for execution:

The transferor court is directed to send to the transferee court a copy of the decree, a certificate of non-satisfaction and a copy of any order for execution if any. Under Order 21 Rule 7 the transferee court on receipt of a copy sent as aforesaid shall cause such copies and certificates to be filed. Thereafter on the petition of the decree-holder, execution proceeding is Initiated. It is the application for execution to the transferee court which initiates the proceedings in execution. The receipt of the decree by the transferee court is a ministerial act.

After receipt of a copy of the decree the transferee court shall cause the same to be filed. When the decree is filed the transferee court is vested with jurisdiction to deal with the decree i.e. to proceed to execute it if so required by the decree-holder. Filing of the decree does not amount to initiation of execution proceedings but does vest jurisdiction to the transferee court to deal with and execute the decree.

Filing of the decree in the transferee court is the first step to be taken before the decree can be executed by the transferee court, It, therefore, may be considered in a broad sense to be a part of the execution proceeding. In any event after the decree has been filed the decree becomes pending to be executed even though no execution proceeding has been started yet by filing a tabular statement.

I would give a liberal and wide interpretation to the word 'pending proceedings' in Section 4, Indian Independence (Legal Proceedings) Order 1947 so as to cover not merely execution proceedings pending on the appointed date but also decree which has been filed on or before the appointed day but in respect of which execution petition had not been filed on the appointed day.

8. In the present case, before the appointed day not merely the decree of the Jessore Court had been filed in the Court of Subordinate Judge, Alipore but in fact execution proceedings had started: on 31-5-1946 though against the other judgment debtors. In such execution proceeding the decree-holder in law was competent to proceed against the present judgment-debtor and his property by amending the execution petition.

The decree was, therefore, before the Court in the process of execution from before the appointed day and hence in my judgment there was a 'pending proceeding' in the Alipore Court within the meaning of Section 4 of the Order, so as to give jurisdiction to the Subordinate Judge of Alipore to execute the decree not merely against the judgment-debtors against whom execution was pending on the appointed day but also against other judgment debtors who can be brought in later on by way of amendment of the tabular statement.

9. The present ease can however be disposed of in a much simpler way. Execution proceeding was started on 31-5-1946. We have seen that by its judgment & order D/- 20-2-1951 in F. M. A. No. 38 of 1950 this Court directed the decree-holder to amend the execution petition D/- 31-5-1946 by adding the name of the judgment-debtor No. 1 in the appropriate column and by stating the manner in which execution should be levied against him in the appropriate column.

Thereupon on the petition of the decree-holder the Alipore Court by its order dated 7-6-1951 ordered amendment of the petition as indicated above whereby execution was sought not merely against the judgment-debtors Nos. 15 to 21 but against the judgment-debtor No. 1 as well. The result of this amendment is that even as against the judgment debtor No. 1 the execution proceeding is deemed to be pending from 31-5-1946 i.e. the date of the original petition for execution.

In law therefore the execution petition even against the judgment debtor No. 1 was pending from-before the appointed date and the Subordinate Judge of Alipore had full jurisdiction to proceed in execution of the decree of the Jessore Court. Clearly the consequence of the amendment was not realised when the F. M. A. No. 38 of 1950 was argued in this Court. Possibly the judgment-debtor could have argued the point now urged before us at that time against allowing amendment of the original execution petition.

The amendment however having been effected, it is no longer open to the judgment-debtor to contend that the application for execution against the judgment-debtor No. 1 has been Initiated on 25-7-1948 i.e. long after the appointed day. The argument of Mr. Mukherjee becomes untenable, in any event, on this ground.

10. The result is the appeal falls & is dismissed. In the circumstances of this case we make no order for costs.

S.R. Das Gupta, J.

11. I agree.

