

Harit Krishna Deb Vs. Anil Krishna Deb

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Court : Kolkata

Decided On : Mar-17-1950

Reported in : AIR1950Cal370

Judge : Lahiri and ; Guha, JJ.

Acts : Limitation Act, 1908 - Schedule - Article 182 and 182(5); ; Code of Civil Procedure (CPC) - Section 47

Appeal No. : A.F.O.O. No. 49 of 1946

Appellant : Harit Krishna Deb

Respondent : Anil Krishna Deb

Advocate for Def. : Pal, ; Paresh Nath Mukherjee, ; Jahnabi Ch. Das Gupta and ; Pashupati Ghose, Advs.

Advocate for Pet/Ap. : A.C. Gupta, ; A.C. Mukherjee and ; Ganga Narayan Chandra, Advs.

Disposition : Appeal allowed

Judgement :

1. This appeal by the decree-holder arises out of an order under Section 47, Civil P. C. by which his application for execution has been dismissed as barred by limitation. The facts material for the purposes of the present appeal are as follows :

2. On 15th September 1936, the appellant obtained a decree in an administration suit and he put that decree into execution on 15th September 1939 in Title Execution Case No. 71 of 1939. The judgment-debtor filed an objection under Section 47 raising the question of the maintainability of the execution and this objection gave rise to Miscellaneous Case No. 54 of 1940. This case was dismissed by the executing Court by an order dated 17th June 1940. Thereafter the judgment-debtor intimated to the Court that he proposed to file an appeal to this Court against the order of dismissal and prayed for stay of execution. This prayer was granted for a limited period but eventually the executing Court wanted to proceed with the execution as no order for stay of execution had been received from the High Court. The decree-holder was called upon to take steps which he did not do with the result that execution case No. 71 of 1939 was dismissed for non-prosecution on 31st August 1940.

3. On 21st November 1940, the judgment-debtor filed an appeal to the High Court against the order of the executing Court dated 17th June 1940, and this appeal was registered and numbered as F. M. A. 307 of 1940. By a judgment dated 20th August 1942, this Court upheld the order of the executing Court dated 17th June 1940 but gave certain directions to the executing Court and made an order with regard to costs. On 9th September 1943, when the record of the case was received back by the executing Court from this Court, the executing Court directed the decree-holder to take steps in the execution case but as the decree-holder failed to do so, the execution case was eventually dismissed on 2nd December 1943.

4. On 18th August 1945, the decree-holder started the present execution case which was registered as Title Execution Case No. 22 of 1945. The judgment-debtor filed an objection under Section 47, Civil P. C. on the ground that this execution case having been filed more than three years from the dismissal of the first execution case on 31st August 1940, it was barred by limitation. The decree-holder maintained that the starting point of limitation was not 31st August 1940, but 2nd December 1943, when the first execution case was finally dismissed after the decision of the High Court in F. M. A. 307 of 1940. The learned Subordinate Judge has upheld the contention of the judgment-debtor and dismissed the

execution case as barred by limitation. In dismissing the application for execution the learned Subordinate Judge has found that the starting point of limitation is 31st August 1940, and not 2nd December 1943, and that all the proceedings taken by the executing Court after the return of the record on the decision of F. M. A. 307 of 1940 were without jurisdiction.

5. Against this decision, the decree-holder has filed the present appeal and in support of this appeal Mr. Gupta has argued in the first place that the final order in the previous execution case under Article 182, Clause (5), Limitation Act, was the order made by the High Court in F. M. A. 307 of 1940 on 20th August 1942, and the present application being within three years of the date it cannot be said to be barred by limitation. The learned Subordinate Judge repelled this contention on the ground that the order of the High Court was not an order in the execution case itself but an order in a proceeding under Section 47, Civil P. C. Dr. Pal appearing for the respondent has tried to support that reason and has argued that an order relating to an executions case is not an order in the execution itself. The previous objection filed by the judgment-debtor related to the maintainability of the execution case itself and if that objection succeeded, the execution case would be dismissed on that ground and it could not be said that the order did not relate to the execution case. We therefore did not see any reason to hold that the order would not relate to the execution case if the objections of the judgment-debtor were overruled. By its judgment dated 20th August 1942, this Court held that the objection of the judgment-debtor had no substance and that there was no bar to the maintainability of the execution case. We are inclined to think that the order made by this Court in F. M. A. 307 of 1940 was an order in the execution case itself and the decree-holder was entitled to apply within three years from the date of that order. The first point raised by the appellant must therefore succeed.

6. Mr. Gupta has argued in the second place that the order of the High Court in F. M. A. 307 of 1940 superseded the order of dismissal dated 31st August 1940, and the executing Court was perfectly right in starting the execution case afresh on 9th September 1943, after the arrival of the record in that Court and the real order of dismissal of the previous execution case was the order dated 2nd December 1943. In the concluding portion of the judgment of this Court in, F. M. A. 307 of

1940 there is the following direction

'the costs of this appeal will abide the ultimate result, the hearing fee in the High Court being assessed at 3 gold mohurs.'

This direction, according to Mr. Gupta, relates to the first execution case which was ordered to proceed.

7. Dr. Pal has argued that this direction should be held to apply to a future execution case that might be started by the decree-holder and he has further argued that as the order of dismissal dated 31st August 1940, was made before the filing of the appeal to this Court, the order of this Court cannot be held to apply to the order of dismissal dated 31st August 1940. The concluding portion of the order of this Court which we have already quoted shows that this Court contemplated the passing of further orders by the executing Court at least with regard to costs. We do not think that the order as to costs related to the result of a future execution case that might be started by the decree-holder. The second part of Dr. Pal's argument that the order of dismissal dated 31st August 1940, was not affected by the order of this Court as it was passed before the filing of the appeal is also unacceptable because this Court clearly directed that the costs of this Court should abide the result of the execution case which meant that the executing Court should make a further order as to costs on receipt of the record from this Court. For these reasons, the executing Court was perfectly justified in calling upon the decree-holder to take further steps by its order dated 9th September 1943, and in dismissing the execution case on 2nd December 1943, on the decree-holder's failure to do so. We cannot agree with the Subordinate Judge that the orders of the executing Court beginning from 9th September 1949, and ending with 2nd December 1943, were without jurisdiction. The decree-holder was therefore entitled to file a second application in execution within three years from 2nd December 1943 which was the final order made in the previous execution case.

8. In the result this appeal is allowed with costs throughout the order of the Court below is set aside and the execution case ordered to proceed according to law.

