

Masrab Khan Vs. Debnath Mali Alias Abhu Mali and ors.

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Court : Kolkata

Decided On : Aug-11-1941

Reported in : AIR1942Cal321

Appellant : Masrab Khan

Respondent : Debnath Mali Alias Abhu Mali and ors.

Judgement :

B.K. Mukherjea, J.

1. This appeal is on behalf of the decree-holder and it is directed against an appellate order of the Subordinate Judge, third Court, Mymensingh, dated 5th August 1939, reversing the order of the Munsif, First Court, Kishoreganj, made in a proceeding under Section 47, Civil P.C. The material facts lie within a narrow compass and are not disputed. The appellant obtained a mortgage decree against the defendants-respondents in the Court of the First Munsif at Kishoreganj and the decree was made final on 7th December 1932. The first application for execution was made on 3rd December 1935 and it was filed in the Court of the Second Munsif at Kishoreganj and not in that of the First Munsif which passed the decree, the ground alleged being that subsequent to the passing of the decree the particular area where the mortgaged property was situated was assigned to the Munsif, Second Court, under Section 13(2), Bengal Agra and Assam Civil Courts Act. This application was dismissed for default on 10th December 1935. The

present application for execution was presented in the court of the First Munsif on 15th November 1938.

2. The whole controversy centres round the point as to whether the first application for execution was an application made to the proper Court within the meaning of Article 182, Clause (5), Limitation Act. If it was, limitation would run from 10th December 1935 when the final order was made in the proceeding, and the present application would be in time. If not, the application must be held to be time-barred. The trial Court decided this point in favour of the decree-holder. The lower appellate Court has decided against him. The sole point for our consideration in this appeal is whether the view taken by the lower appellate Court is right. To determine this point it is necessary first of all to turn to the relevant provisions of the Code of Civil Procedure. Under Section 38 of the Code, a decree can be executed by the Court which passed the decree or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree', and Clause (b) of that section lays down that the expression shall be deemed to include '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 was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.'

3. The only other relevant provision is contained in Section 150, Civil P.C., which runs as follows:

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.

4. The decree holder can succeed in saving limitation in the present case, if he can make out either of two alternatives, namely that the Court of the Second Munsif of Kishoreganj was a Court which passed the decree within the meaning of Section 37(b), Civil P.C., or that the business of the Court of the First Munsif was transferred to that of the Second Munsif as contemplated by Section 150 of the

Code. So far as the first, alternative is concerned, it is conceded by Mr. Roy who appears for the decree-holder that the Court of the First Munsif of Kishoreganj not only had not ceased to exist, but it was quite competent even now to entertain an application for execution of the decree which was passed by it. He contends, however, that as it could not sell the property which was no longer within its territorial jurisdiction, it must be deemed to have ceased to have jurisdiction to execute the decree within the meaning of Section 37(b), Civil P.C., and as a mortgage suit in respect of the same property would now have to be instituted in the Court of the Second Munsif, that Court must be regarded as the Court which passed the decree as contemplated by Section 37(b).

5. Mr. Roy's contention in substance is that the application for execution could be filed either in the Court of the First Munsif or in that of the Second Munsif, and in support of his contention he relies upon certain decisions of our Court which are to be found in *Lutchman Pandeh v. Muddun Mohan* ('81) 6 Cal. 513 and *Jahar v. Kamini Debi* ('01) 28 Cal. 238. In *Lutchman Pandeh v. Muddun Mohan* ('81) 6 Cal. 513, there was a mortgage decree passed by the Court of the Munsif at Manbazar on 5th December 1876. On 5th December 1879, an application was made to the same Court which was then sitting at Burrabhazar for execution of the decree. In the meantime the particular area in which the mortgaged property was situated had been removed from the Munsif of Manbazar to the Munsif of Katra. Objections were raised that the application for execution had not been made to the proper Court and that the execution creditor was bound to apply to the Munsif of Katra within whose jurisdiction the mortgaged property then was. This contention was given effect to by both the Courts below, but their decision was reversed on second appeal by a Division Bench of this Court, which held that the application for execution was rightly made to the Court of the Munsif at Manbazar. The decision itself is of no assistance to Mr. Roy, for, it would only support the contention that the Court of the First Munsif of Kishoreganj was still the proper Court to which his client could apply for execution of the decree. Mr. Roy, however, relies on certain observations made by Garth C.J. in course of his judgment, which were to the effect that the Court of the Munsif of Katra could also be regarded as a Court which passed the decree within the meaning of Section 649 of the old Civil Procedure Code, which corresponds to Section 37 of the

present Code. In construing Section 649 (now Section 37), Civil P.C, the learned Chief Justice observed as follows:

This clause which explains the meaning of the-expression 'the Court which passed the decree' does not exclude the Court which originally passed the decree, as being a Court to which the application should be made, but only includes another Court ; and I take the meaning of the clause to be this that when the Court which passed the decree had ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it had ceased to have jurisdiction to execute the decree, or to the Court which, if the suit wherein the decree was passed were instituted at the time of making the application to execute it, would have jurisdiction to try the suit.

6. As it was not necessary to decide for purposes of that case as to whether the Katra Court was a competent Court to which the application for execution could properly be made, these observations could rank only as obiter, though, coming from such a high authority, they are entitled to the greatest respect. It is pertinent, however, to point out that Field J., who sat with the learned Chief Justice did not endorse that view of the law, and, on the other hand, expressly held in course of his judgment that the Court at Manbazar did not cease to have jurisdiction to execute the decree within the meaning of Section 649 (now Section 37), Civil P.C., by reason of the alteration of the local limits of its jurisdiction. Speaking for ourselves, we find it somewhat difficult to accept the interpretation which Garth C.J. put upon Section 649, Civil P.C. It seems to us that the word 'includes' as used in the section, though it extends the meaning of the expression 'Court which passed the decree' in one sense, does in another sense restrict it, and that 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.

7. Thus, when a decree is passed in exercise of appellate jurisdiction as contemplated by Clause (a) of Section 37, it cannot be said that the word 'include' would not exclude the appellate Court which passed the decree; and that both the

original and the appellate Courts are proper Courts for execution, to either of which an application for execution of the decree could be made. Similarly, to bring a case within the purview of Clause (b) of the section, it is essential that the Court which originally passed the decree has ceased to exist or to have jurisdiction to execute it, and then only can the other Court, which would be entitled to try the suit if it was then instituted, be regarded as the Court which passed the decree. The other Court is substituted for and not added to the original Court. If the original Court has ceased to exist, no question arises of applying to it for purposes of execution. If it still exists, but has ceased to have jurisdiction to execute the decree, it is a contradiction in terms to say that it still remains a competent Court for purposes of execution. We cannot imagine how an application for execution could be made to the original Court, if it had ceased to have jurisdiction to execute the decree.

8. A distinction indeed has been drawn in some cases between executing a decree and entertaining an application for its execution (vide *Sreenath Chakravarti v. Priyanath Bandopadhyay* : AIR1931 Cal312 and it has been said that even if the original Court cannot execute the decree in the sense that it cannot do it effectively by selling a property which is beyond its territorial jurisdiction, it can certainly entertain the application itself and then transmit the decree for execution to another Court. In our opinion, the expression 'jurisdiction to execute it' as used in Section 37(b), Civil P.C., 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. This was the view taken by Field J. in *Lutchman Pandeh v. Muddun Mohan* ('81) 6 Cal. 513, and in that view we respectfully agree.

9. But even assuming that the view taken by Garth C. J. is the proper view to take, it is well settled by decisions of this Court, including that in *Jahar v. Kamini Debi* ('01) 28 Cal. 238, upon which Mr. Roy himself relies, that a case like this, where

there was a mere redistribution of civil business by the District Judge under Section 13(2) of Act 12 of 1887, does not come within the purview of the rule enunciated by the learned Chief Justice. Under Section 13(1), Bengal, Agra and Assam Civil Courts Act, it is the Local Government which can by notification in the official gazette fix and alter the local limits of the jurisdiction of any civil Court under the Act. The local limits thus fixed by the Local Government determine the jurisdiction of the Courts. Clause (2) of Section 13 then provides that if the same local jurisdiction is assigned to two or more Subordinate Judges or to two or more Munsifs, the District Judge may assign to each of them such civil business cognizable by the Subordinate Judge or Munsif as the case may be as, subject to any general or special orders of the High Court, he thinks fit.

10. An order under Section 13(2), Civil Courts Act, does not effect a transfer of jurisdiction. It merely distributes, as a matter of convenience and with reference to certain local areas, the civil business amongst two or more Courts each of which has jurisdiction over the whole area. In such cases neither of the Courts would lose the jurisdiction which it acquired under Section 13(1) of the Act. This was the view taken by Sir Francis Maclean C.J. and Banerjee J. in *Kalipada Mukherji v. Dinanath* ('98) 25 Cal. 315, which was followed by another Division Bench in *Jahar v. Kamini Debi* ('01) 28 Cal. 238. The same view was accepted by the Patna High Court in *Jagannath Prosad Singh v. Sheonandan Sahay* ('21) 8 A.I.R. 1921 Pat. 152.

11. In the present case, it is not disputed that the redistribution of local areas was made by the District Judge of Mymensingh under Section 13(2), Civil Courts Act. This was only an arrangement for distribution of civil business in that particular sub-division. It cannot and has not disturbed or in any way curtailed the jurisdiction of the First Munsif of Kishoreganj over the entire area as determined by the Local Government under Section 13(1), Civil Courts Act. It may be contended that the Court of the Second Munsif, also having jurisdiction over the same local area could entertain an application for execution of the decree. The answer is given by Banerjee J. in *Kalipada Mukherji v. Dinanath* ('98) 25 Cal. 315. The competency of the Second Munsif was not affected by the order under Section 13(2), Civil Courts Act, but it was affected by Section 38, Civil P.C., which lays down that a decree

could be executed only by the Court which passed it or the Court to which it was sent for execution. It is not necessary to say anything further with reference to the case in *Jahar v. Kamini Debi* ('01) 28 Cal. 238 which was relied on by Mr. Roy. That case followed the opinion of Garth C. J. in *Lutchman Pandeh v. Muddun Mohan* ('81) 6 Cal. 513, but expressly laid down that Section 649 (now Section 37), Civil P.C., would not apply when there was no transfer of jurisdiction under Section 13(1), Civil Courts Act, but only a redistribution of business under Clause (2) of Section 13 of the Act. This decision, therefore, far from supporting the contention of Mr. Roy is decidedly against him. Our conclusion, therefore, is that the Munsif, First Court of Kishoreganj did not cease to have jurisdiction to execute the decree by reason of the order of the District Judge under Section 13(2), Civil Courts Act, and the Court of the Second Munsif could not consequently be regarded as the Court which passed the decree within the meaning of that section.

12. The other point that requires consideration is as to whether the decree-holder can invoke the provisions of Section 150, Civil P.C., in his favour. Here also, we think that our answer must be in the negative. It was held by Chatterjee and Chotzner JJ. in *Md. Kazem Ali v. Niamuddin Ahamed* ('22) 9 A.I.R. 1922 Cal. 41, which was followed later on in *Jitendra Nath Pal v. Birendra Kishore Roy* : AIR1938 Cal193 , that an assignment of business under Section 13(2), Bengal, Agra and Assam Civil Courts Act, is not a transfer of business within the meaning of Section 150, Civil P.C. In our opinion, this view is right. The effect of the order made by the District Judge in this case under Section 13(2), Civil Courts Act, would be nothing else than that all business arising from a particular area subsequent to the order of the District Judge would have to be done by the Second Munsif and not by the First Munsif. There is nothing to show that the decree passed by the First Munsif or the execution thereof was transferred to the second Munsif. It is not also a case where on the removal of a particular Court all the pending cases were transferred to another Court. In these circumstances, we think that the decree-holder cannot have the advantage of Section 150, Civil P.C., and it cannot be said that the Court of the Second Munsif was competent to entertain the application for execution which was presented to it in December 1935. The result, therefore, is that we affirm the decision of the lower appellate Court and dismiss the appeal. There will be no order as to costs in this appeal.

Biswas, J.

13. I agree.

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