

Jhagaroo Vs. Kamli

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Court : Allahabad

Decided On : Jan-21-2011

Judge : Sibghat Ullah Khan, J.

Appeal No. : WRIT - C No. - 30128 of 1991

Appellant : Jhagaroo

Respondent : Kamli

Advocate for Def. : S.C.; B. Narain Singh; H.N. Singh, Advs

Advocate for Pet/Ap. : A.N. Bhargava, Adv

Judgement :

1. Respondent No.1, Smt. Kewali instituted a suit against the petitioner, which was registered as O.S. No.124 of 1979, claiming therein that she was legally wedded wife of the petitioner Jhagaroo and she must be paid maintenance for herself and for her son from the petitioner, Ram Lal, who is respondent No.2 in this writ petition. The petitioner pleaded that respondent No.1 was not his legally wedded wife and one Smt. Susheela was his wife. It was also pleaded by the petitioner that the suit was not maintainable before the Munsif and family court had exclusive jurisdiction to try the suit. The suit was decreed by Munsif Mohamadabad, Ghazipur. Appeal filed from the same being Civil Appeal No.209 of 1982 was also dismissed on 18.12.1985. In para-7 of the writ petition, it has been stated that second appeal is pending in this High Court, however no number of the same has

been given.

2. Thereafter respondent No.1 filed execution application before the Court which had passed the decree i.e. Munsif Mohammadabad, Ghazipur, which was registered as Execution Case No.5 of 1986. In the execution case petitioner filed objections under Section 47, Section 151 and Order XXI Rule 29, C.P.C. which was registered as Misc. Case No.13 of 1989. In the objections, petitioner reiterated his contention of bar of jurisdiction. It was further alleged in the objections that Smt. Shushila had filed a case in the form of Suit No.35 of 1988 against the petitioner in the family court. The learned Munsif, Mohammadabad, Ghazipur rejected the objections of the petitioner through order dated 09.01.1990. Against the said judgment and order, petitioner filed Civil Revision No.3 of 1990, which was dismissed by A.D.J./ Special Judge on 03.08.1991, hence this writ petition.

3. As far as bar of jurisdiction is concerned, it was raised in the suit as well as in civil appeal hence it could not again be raised in execution. In this regard reference may be made to Bharmappa Nemanna Kawale and another v. Dhondi Bhima Patil and others, AIR 1997 SC 122 and "P.V. Jose v. Kanickammal" AIR 2000 SC 2688.

4. However, as noticed in the order dated 27.09.2010, when arguments were heard and judgment was reserved, learned counsel for the petitioner had argued only one point and that was relating to Order XXI Rule 29, C.P.C. as amended by Allahabad High Court, which is quoted below:

"29. Stay of execution pending suit between decree-holder and judgment-debtor.-- Where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court, on the part of the person against whom the decree was passed, or any person whose interests are affected by the decree, or by any order made in execution thereof, the Court may, on such terms as to security or otherwise, as it thinks fit, stay

execution of the decree until the pending suit has been decided:

Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing."

(underlining supplied)

5. From the bare reading of the above provision, for the purposes of this case it is quite clear that the suit must be pending before the court which passed the decree in the earlier suit which is being executed. The suit by Sushila Devi (Suit No.35 of 1988), on the basis of pendency of which proceedings for execution of decree pending before Munsif Mohammadabad Ghazipur, who had also passed the decree (in O.S. No.124 of 1979) was being sought, was pending before different Court i.e. Family Court (para-6 of writ petition). In this regard reference may be made to "Shaukat Hussain v. Bhuneshwari Devi" AIR 1973 SC 528, para-6 of which is quoted below:

"6. Order XXI, Civil Procedure Code deals generally with the execution of decree and orders. That order is divided into several topics, each topic containing a number of rules. The first four topics cover rules 1 to 25 and the fifth topic, namely, stay of execution comprises 4 rules, namely, Rules 26 to 29. A perusal of these rules will show that the first three rules i.e. Rules 26 to 28 deal with the powers and duties of a Court to which a decree has been sent for execution. Under Rule 26, that Court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the Court of first instance or the appellate Court. It will be seen, therefore, that under Rule 26 the transferee Court has a limited

power to stay execution before it. Moreover, under sub-rule (2) if any property is seized by it in the course of execution, it may even order the restitution of the property pending the result of the application made by the judgment-debtor to the Court of the first instance or to the appellate Court. Rule 27 says that any such restitution made under sub-rule (2) of Rule 26 will not prevent the property of the judgment-debtor from being retaken in execution of the decree sent for execution. Rule 28 provides that any order of the Court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution. And then we have Rule 29 which deals with a different situation. The rule is as follows :

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed the Court may, on such terms as to security or otherwise, as it thinks fit stay execution of the decree until the pending suit has been decided."

6. It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the Court in which the suit is pending may stay the execution before it, if that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the Court of Munsif 1st Gaya and there was also a suit at the instance of the judgment-debtor against the decree-holder in that Court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such Court. The words "such Court" are important "Such Court" means in the context of that rule the Court in which the suit is pending. In other words, the suit must be one not only pending in that Court but also one against the holder of a decree of that Court. That appears to be the plain meaning of the rule."

7. Accordingly, there is no substance in the argument of learned counsel for the petitioner. Writ petition is therefore dismissed.

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