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(1958) 02 AHC CK 0020

Allahabad High Court

Case No: Ex. Second Appeal No. 2236 of 1951

Bhagwati Prasad Bajpai — APPELLANT

Vs

Jai Narain Hanuman Das — RESPONDENT

Date of Decision: Feb. 11, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 48, Order 21 Rule 52, 38
- Limitation Act, 1908 - Article 182

Citation: AIR 1958 All 425

Hon'ble Judges: R.N. Gurtu, J; D.N. Roy, J

Bench: Division Bench

Advocate: S.N. Misra, for the Appellant; S.N. Verma, for the Respondent

Final Decision: Dismissed

Judgement

R.N. Gurtu, J.
This execution second appeal arises in the following circumstances:

Firm Jai Narain Hanuman Das had obtained a decree against firm Hira Lal Bajpai and others on 22-5-1942 in suit No. 147 of 1940 from the court of the Munsif, Kanpur. On 23-11-1942, the decree-holder firm filed an execution application seeking execution of the decree passed in its favour against some money which had been deposited by (sic. in favour of) the judgment-debtor, firm Hira Lal Bajpai and others, in the court of the insolvency Judge, Bara Banki.

It appears that firm Hira Lal Bajpai and others, the judgment-debtor, was itself a creditor of Devi Dayal and others. The amount payable by Devi Dayal and others to firm Hira Lal Bajpai and others being outstanding, firm Hira Lal: Bajpai and others made an application, numbered as Insolvency Case No. 31 of 1939, against Devs Dayal and others in the court of the Insolvency Judge, Bara Banki presumably to have them declared insolvents.

During the pendency of that insolvency application, Devi Dayal and others had deposited Rs. 15,000/- on 21-4-1942 in the insolvency court in order that the claim of Hira Lal Bajpai and others against them might be satisfied. This was the sum against which firm Jai Narain Hanuman Das, the decree-holder in the present execution appeal, sought execution of its decree, when the said decree-holder firm made its execution application on 23-11-1942. The prayer contained therein was as follows:

"Guzarish hai ki madyun ka rupia pata zail men takhminan Rs. 10,000/- jama hai woh qurq kar ke decreedar ko dilaya jave aur parwana qurqi banam Insolvency Judge, Bara Banki sayal ko (pata) dasti ata farmaya jave. Aur yeh zar majtama khandan mushtarka firm Hira Lal Bajpai ke haq men jama hai .....".

2. The execution court, upon this application (numbered as execution case No. 419 of 1942) sent an order of attachment to the Insolvency court and thereafter had a notice sent to the judgment-debtor, firm Hira Lal Eajpai and others, which notice was served on it.

3. It appears that thereupon certain parties Interested in the insolvency proceedings (not firm Hira Lal Bajpai and others) preferred an appeal to the Chief Court, Oudh against some order of the Insolvency Judge which affected this sum of Rs. 15,000/-. The executing court thereupon directed the application dated 23-11-1942 of firm Jai Narain Hanuman Das to be consigned to the record room, permitting the said firm to have it revived when the appeal in the Chief Court was decided. This consignment order was passed on 13-2-1943.

4. Later on another execution application was made by firm Jai Narain Hanuman Das on 2-5-1947 to the Munsif Kanpur. That application is not on the record but it appears from the relevant order sheet that the court had directed some amendment to be made in the application in order that it might comply with the legal requirements and there was also a direction that a copy of the order of the Chief Court in the appeal, to which a reference has been made above, should be filed. Apparently the order of the court was not carried out and this second application was struck off on 30-10-1947.

5. Then the last i.e., the present execution application dated 16717-7-1948 was presented by firm Jai Narain Hanuman Das, the decree-holder to the Munsif Kanpur. It was numbered as execution case No. 308 of 1948 in original suit No. 347 of 1940.

6. The judgment-debtor, firm Hira Lal Bajpai and others, entered appearance. The objection on behalf of the judgment-debtor was that this last execution application was time-barred. The contention advanced was that the first application of the decree-holder, firm Jai Narain Hanuman Das, made on 23-11-1942 was not an application in accordance with law because it asked the execution court to execute the decree against certain moneys which were not within the jurisdiction of the executing court and, therefore, the first application could not be deemed to be a step-in-aid of the execution and limitation was not saved.

The submission further was that inasmuch as the first application was not a step-in-aid of execution, the second application, which had been dismissed for default, was not within three years of the passing of the decree and that it could not be treated as being within limitation either and, therefore, the present application was also time-barred. The learned Munsif, the executing court, held that the first execution application was not contrary to law, nor was the second application barred by time.

It also held that none of the three execution applications in this case was barred by time or was illegal or invalid in the eye of law. The view of the executing court also was that it could give relief under Order XXI, Rule 52, C. P. C., as asked for by the first application, that the attachment already ordered on that execution application and made by the Bara Banki Court pursuant thereto was effective and that inasmuch as the first execution application was not finally disposed of, the second application, although it had a prayer similar to that contained in the first application, could be considered to be an application to revive the first application and since the present and last application was made within three years of the dismissal for default of the second application, the execution court was of the view that it was not beyond time. The objection of the judgment-debtor was, therefore, dismissed.

7. Upon appeal, the court below has come to the conclusion that the present (the last) application can be regarded, as an application to revive the execution proceedings initiated by the first execution application, dated 23-11-1942 which was still pending under the orders of the executing court passed on the first application. It treated the present and last application as being an application made during the pendency of the first application and as one which could revive the first and, accordingly, it dismissed the appeal.

8. This is an execution second appeal by the judgment-debtor. The contention is re-advanced that the first execution application was not in accordance with law. The submission is that the moneys sought to be attached by means of the first execution application were outside the jurisdiction of the court of the Munsif, Kanpur and, therefore, the decree-holder should have applied for transference of the decree for the purpose of its being executed by a court having territorial jurisdiction over the area within which the Insolvency Court, Bara Banki where the money lay was situate.

It is, therefore, contended that the application dated 23-11-1942, being an execution application and not an application for transfer of the decree, was not competent and consequently it could not be revived, nor could it serve as a step-in-aid of execution.

9. We will now proceed to examine the contention referred to above.

10. Although the CPC does not specifically provide that execution cannot be had against property situate outside the jurisdiction of the executing Court to which an application is made yet it has been recognised that the rule of territorial jurisdiction which governs suits also governs execution of decrees though there are exceptions

to that rule.

11. In (Raja) Promothanath Malia Vs. H.V. Low and Co., , the position has been stated as follows:

"Now, while there does not appear to be in the Code any express provision to the effect that immovable property shall only be sold by the Court within whose territorial jurisdiction it is situate, and, while it cannot be contended that there are not exceptions to this principle, it has frequently been held that the course contemplated by the Code is that sales of immovable property in execution shall be carried out by the local courts.

The leading case on this point is Prem Chand Dey v. Mokhoda Debi ILR Cal 699 (FB) (B). Following that case, in Eegg, Dunlop and Co. v. Jagannath Marwari ILR Cal 104 it was said "These provisions of Section 38, read along with those of Section 39, plainly indicate the acceptance by the legislature of the general principle that no court can execute a decree in which the subject-matter of the suit or of the application is property situated entirely outside the local limits of its jurisdiction."

12. In Sri Rajah Satrucherla Sivakanda Raju Bahadur Garu Vs. Sri Sri Sri Ramachandra Deo Maharajulam Garu, Rajah of Jeypore and Others, the position is summarised as follows:

"The proposition generally laid down in the reported authorities is that a court has no power to sell property outside its territorial jurisdiction. Territorial jurisdiction is a condition precedent to the court selling property". Again in the recent case of Ambika Ranjan Mujumdar Vs. Manikganj Loan Office, Ltd., , it was said "Where it is necessary, in execution of a decree for money, to sell properties not within the local limits of the jurisdiction of the court which passed the decree, the sale of the properties can only be effected by the court within the local limits of which the property is situate."

It has, however, been pointed out in the aforementioned case that the aforesaid dicta however have a primary, though not exclusive reference to an execution, which takes the form defined in Clause (b) of Section 51 of the Code of Civil Procedure, namely, execution "by attachment and sale or by sale without attachment of any property".

The learned Judges were of the view that the rule, as indicated by them, did not affect the right of the Court to appoint a receiver in connection with the execution of a decree in respect of property outside the jurisdiction of the executing court.

13. In Veerappa Chetty v. Ramaswamy Chetty ILR Mad 135 : 37 Mad LJ 442 : AIR 1920 Mad 505 (P), their Lordships of the Madras High Court have held that a court to which execution of a decree is transferred has no jurisdiction to order either the sale or attachment of immovable properties in execution, if at the time of the order such court had no territorial jurisdiction over the immovable properties.

14. In Khirod Chandra v. Panchu Gopal AIR 3939 Pat 532 (G), the same view has been expressed. The words of Atkinson J., in another Patna case. Bank of Bengal v. Sarat Chandra Mitra 4 Pat LJ 141: AIR 1918 Pat 126 (H), were approved in this case. In 4 Pat LJ 141 : AIR 1918 Pat 126 (H), referred to above, Atkinson J., observed as follows:

"Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limitations. That is to say, the jurisdiction of Courts is circumscribed by and co-extensive with its territorial limits.

Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or custody of another, also outside the jurisdiction, such property sought to be attached in aid of the executing Court can only be reached by a regular method of procedure which has been prescribed by the rules of the Civil Procedure Code, and similar codes which prevail in all countries, viz., the decree of the executing Court, must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being."

It is, therefore, clear that the rule is well established that the sale of property cannot be effected by an executing court, if the property is outside its jurisdiction. It is also clear that generally the rule of territoriality is recognised in the case of execution proceedings as in the case of suits. It is also recognised that there may be exceptions to that rule.

15. Now when a decree is put into execution, the aid of the court is sought, in the first instance, by the decree-holder either for the purpose of getting the property of the judgment-debtor into the court''s custody at once or for the purpose of securing, in the first instance, an order which has the effect of immobilising the judgment-debtor''s property.

Once that has been done, the next step is to secure a divesting of the judgment-debtor''s interest in such property and of getting the property vested in the decree-holder directly or getting the decree satisfied by the vesting of the property in others by its sale and having the sale proceeds appropriated towards the satisfaction of the decree. A court to which an application is made for execution has to issue processes for execution under Order XXI, Rule 24, C. P. C., for the execution of the decree and to entrust its officer with the execution of the process issued.

As an officer of the Court cannot normally function outside the court''s jurisdiction, the taking of the aid of the court, where the property is situate, would normally become necessary and, therefore, it appears that a provision has been made in the Code to enable a decree to be transferred to the court where the property lies in order that that court may directly, by issue of its own processes, make the said property available for the execution of the decree instead of one court asking the

other to assist in the execution of its own processes.

Section 39 of the CPC provides for the transfer of decrees in the circumstances mentioned in that section and when once a decree is transferred, the transferee court has all the rights of the transferring court u/s 42 of the Code. There is, therefore, clearly a great convenience in the provision for sending a decree for execution to the court within whose territorial jurisdiction the property is situate.

Where, however, attachment and sale of property is required, the rule seems to have become absolute that a decree shall be transferred for execution. In the case of immovable property, Order XXI, Rule 3 of the Code which states that where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts any one of such courts may attach and sell the entire estate or tenure clearly leads to the implication that except in the case of a single tenure, property must be sold by the court within whose jurisdiction the immovable property lies.

16. So far as Section 39 of the CPC is concerned, this section also by its Sub-section (1) (b) seems to indicate that where a property is to be sold and it happens to be outside the jurisdiction of the court which passed the decree, there should be a transfer of the decree. A money decree is eventually satisfied by the sale of the judgment-debtor''s property and not by an assignment thereof to the decree-holder as such but in a case where the decree is for specific performance of a contract to sell, in which case the property itself is transferred by the court in satisfaction of the decree.

17. Now it has already been mentioned that the appointment of a receiver falls outside the general rule of territoriality, even so far as sale of property is concerned through the receiver. See the ruling reported in (Raja) Promothanath Malia Vs. H.V. Low and Co., .

18. Another case where the rule of territoriality has been given a go-by is when Order XXI, Rule 48 is applicable and where there is to be an attachment of salary or allowances of public officers or servants of Railway Company or local authority. In such a case, even though the judgment-debtor or the disbursing officer is not within the jurisdiction of the court, an order can issue under Order XXI, Rule 48 of the Code.

19. In Gyarsilal v. Shankar Rao AIR 1950 Nag 46 (I), it was pressed that a case to which Order XXI, Rule 52 applied was another case where the general rule of territoriality did not apply. This contention was repelled. The Court quoted the cases mentioned by me hereinabove and said that there were no words in Order XXI, Rule 52 as in Order XXI, Rule 48 which indicated that the rule of territoriality was not applicable. The Court proceeded to observe as follows:

"There are no words in Order 21, Rule 52 (C. P. C.) which permit attachment of property outside the jurisdiction of the executing court as are found In Order 21, Rule 48, Civil Procedure Code. The words in the latter provision are-- ''whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court''s jurisdiction.''

These words show that whenever the legislature wanted that a Court should have jurisdiction to attach property outside its territorial jurisdiction it has used words to that effect. Absence of such words from Order 21, Rule 52, Civil P. O., goes to support the view that this provision is not an exception to the general rule, and there is nothing in the words of that provision which goes against that view."

Inasmuch as it has been conceded that there is no express provision in the Code that decrees cannot be executed against property outside the territorial limits of the executing court''s jurisdiction and inasmuch as the rule of territoriality is not absolute but exceptions are recognised and since the cases, which lay down that the rule of territoriality applies also to execution, are practically all cases where attachment and sale was asked for of the property in question, in our view, it is open to us to consider whether despite the lack of such words as are to be found in Order XXI, Rule 48 of the Code, the language of Order XXI, Rule 52 does not entitle us to come to the conclusion that for the purpose of proceeding under Order XXI, Rule 52 it is not necessary for the court, which passed the decree, to send it for execution by transfer so that the money held in custody by a court outside its jurisdiction should be attachable and made available for satisfaction of the decree under that order and since Order XXI, Rule 52 runs as follows :

"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a court any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

20. It is to be observed that under this rule, the attachment is made by a notice to the court or officer requesting that such property and interest or dividend becoming payable thereon may be held subject to the further orders of the court from which the notice is issued. The Court, in such a case, does not issue such a Process as is contemplated by Order XXI, Rule 24 for execution.

It does not issue a process which has to be enforced by its officer who has to report the reasons why the process has not been executed (as is required by Order XXI, Rule 25 of the Code). Merely a notice is sent. Therefore, the mode of attachment is a distinctive mode. There is an analogous provision in Section 46 of the Code

empowering the issue of a precept directly by the court, which passed the decree, to the executing court within whose jurisdiction the property lies to attach such property and the executing court is then bound to attach such property, the attachment being effected not as a result of the latter''s own volition to attach but as a result of the precept which has come and which that court is bound to carry out.

In this way, indirectly, the court, which passed the decree, attaches property which is outside its jurisdiction using the executing court, which has jurisdiction, as its instrument. In this indirect way, the court, which passed the decree, enforces an attachment of property outside its own jurisdiction. So it cannot be said that the court, which passed the decree, has no right to make any orders with respect to property outside its Jurisdiction and its only power is to transfer the decree under the Code of Civil Procedure.

21. The Code apparently also treats the case of property held in custody by a court or by an officer on a footing somewhat different from that of property held in private custody by private parties. The Code treats money, in which the judgment-debtor has an interest but which is dis-bursable by an officer, on a separate footing under Order XXI, Rule 48.

Likewise, by Order XXI, Rule 52, the court places the property belonging to a judgment-debtor in the custody of a court or of a public officer on a separate basis. Now when property or money is in the custody of a public officer or a court, the judgment-debtor has no possession over the same.

It is already in the custody of either a court or a public officer. No question arises in such a case of getting the property out of possession of either the judgment-debtor or of other persons who have custody of the property and no question arises of preventing such other person of persons from handing over possession of such property and the judgment-debtor receiving or taking the property from them.

The property is already in the custody of an officer or court and the processes, whereby the attachment has to be effected in other cases, are not necessary and all that is necessary is that an order or request be sent to such officer or court intimating that he or it should withhold the money from the judgment-debtor or not deal with the property until further directions of the court.

The court which passed the decree and to which the execution application has been made, therefore, is in no position of difficulty regarding the taking into possession of such property. All that it has got to do is to tell the court or the officer concerned to hold on to the property. For the purpose of obtaining eventual custody of the property through the channel of such public officer or court, the court which passed the decree really does not need the assistance of an executing court functioning for the territorial jurisdiction of the Court, which has the custody of the property.

Therefore, the intervention of an executing court within whose jurisdiction the property lies does not seem necessary. The processes which a transferee executing court normally would issue for the purpose of effectively reducing the judgment-debtor''s property to its own possession or securing its immobility are not at all necessary in a case governed by Order XXI, Rule 52, C.P. C.

Moreover, Order XXI, Rule 52 makes a special provision that any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property, by virtue of any assignment, attachment or otherwise, shall be determined by that court. Thus Order XXI, Rule 52 empowers the custody court to exercise some of those powers which the transferee executing court would normally exercise for Order XXI, Rule 58 of the Code empowers an investigation by such court of claims to such property.

It seems to us, therefore, that the provisions of Order XXI, Rule 52 are of such a nature that they place property in the custody of a court or of an officer, outside the normal current of execution and inasmuch as there is no express provision in the Code prohibiting the attachment of property by the court, which passed the decree acting on the execution side, where the property is beyond its jurisdiction and inasmuch as there is no necessity for the intervention of a transferee court in a case where Order XXI, Rule 52 is applicable, we are of the view that a direct attachment can be levied under Order XXI, Rule 52 by the Court which passed the decree acting on its execution side against property which is beyond its jurisdiction but is in the custody of a court or an officer. We consider that Order XXI, Rule 52 should be placed on a footing analogous to Order XXI, Rule 48 of the Code and should be taken out of the general rule of territoriality which has been engrafted into the Code by judicial decisions.

It seems to us obvious that once the custody court determines the question of title or priority arising between the decree-holder or any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, the custody court can comply with the request of the court which had asked the custody court to attach the property in its custody and send the said property to the court from which the request had come, if the property is movable and if it is not movable, to put that court''s agent in possession thereof.

Then if it became necessary in the latter case for such property to be sold, the decree itself might be transferred to an execution court having a territorial jurisdiction or the sale might be caused to be effected through the custody court. We do not see why at any rate upto the point of attachment by request, as is contemplated by Order XXI, Rule 52 of the Code, the requesting court cannot deal, directly, with the custody court without the necessity of an intervention of any executing court within whose jurisdiction the property in custody lies.

In a case where the custody court has merely money or movables which can be sent to the requesting court, there would be no difficulty at all. As soon as the property came within the jurisdiction of the requesting court, the court could deal with it as it can deal with any other property within its jurisdiction. Also the proceeds of sale of property can be remitted by the custody Court itself on request of sale by it. In our opinion, therefore, the order of attachment sent to the court below was legal and an application could be made under Order XXI, Rule 52 of the Code to the court which passed the decree itself for execution.

It must not be overlooked that the only effect of attachment under Order XXI, Rule 52, C. P. C., is in the first instance to prevent the court or officer who holds the property of the judgment-debtor from dealing with that property. A mere attachment without more would not result in the property or the assets being received by the executing court within the meaning of Section 73 of the Code.

We see no reason to hold that the court which passed the decree on its execution side is barred from making the attachment under Order XXI, Rule 52, C. P. C. We might also add that notice of the first execution application had been given to the judgment-debtor and he did not raise any objection to that application. The attachment, therefore, continued and the application remained consigned to the record room and it is not still finally disposed of.

Inasmuch as there was no objection to the attachment effected in this case under the application dated 23-11-194-2 aforesaid, which is still pending and undisposed of, we think that the judgment-debtor is now barred from challenging the validity of the said attachment order. If the order had been challenged at once, it might have been vacated and the decree-holder could have then filed a fresh application in execution against other property or might have asked for the transference of the decree.

The order of consignment is dated 13-2-1943. It is within one year of the decree and the requisite steps could have been taken to beep the decree alive as three years had not then run out. In a case where the judgment-debtor did not object to the confirmation of sale by a court having no territorial jurisdiction to sell the property, It was held that he was estopped to do so later by contending that the sale was a nullity. See the decision in Khirod Chandra Ghosh Vs. Panchu Gopal Sadhukhan and Others, .

22. For all the reasons recorded above, we do not think that the first application dated 23-11-1942 was not according to law or that it was incompetent. That application is still pending. The present execution application cannot, therefore, be beyond time and can be executed. We may note that on 19-11-1948 the decree-holder also brought to the notice of the court that he had received nothing from the firm Hira Lal Bajpai directly or from the Insolvency court either.

It is clear, therefore, that the intention of the third application for execution made by the decree-holder was both to revive his first application and to get execution also against other property within the jurisdiction of the Munsif''s court i.e., of the court that passed the decree. The last application may, therefore, be treated both as an application to revive the first application, as has been done in similar circumstances in other cases by this Court, and for execution against further property within jurisdiction. The courts below were, therefore, right in dismissing the judgment-debtor''s objection dated 19-2-1949.

23. The appeal has no force and it is accordingly dismissed with costs.