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Jhumarlal and others Vs Tansukrai and others

Misc. Appeal (First) No. 2 of 1954

Court: Gauhati High Court

Date of Decision: March 29, 1957

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 37, 44, 48

Citation: AIR 1957 Guw 127

Hon'ble Judges: Sarjoo Prasad, C.J; Haliram Deka, J

Bench: Division Bench

Advocate: S.M. Lahiri, A.G. and N.M. Lahiri, for the Appellant; S.K. Ghosh, J.P. Bhattacharjee and N.M. Ganguly, for the Respondent

Final Decision: Allowed

Judgement

Sarjoo Prosad, C.J.
This appeal raises an interesting question of limitation.

2. It relates to an execution case filed by the decree-holders-appellants. The decree-holders obtained a money decree on 30-9-1944 against the

judgment-debtors-respondents in the Court of the District Judge at Jodhpur, then an independent Native State outside British India. The decree

was ex parte for a sum of Rs. 7,500/- with interest and costs. They levied execution of the decree at Jodhpur on 20-11-1944. In the said

execution case a sum of Rs. 4,670-11-0 was realised by way of rateable distribution and the execution case was dismissed on part satisfaction of

the decree on 24-2-1947.

The decree-holders then filed another execution case on 8-5-1950 in the Jodhpur Court, for realisation of the unpaid decretal dues. This

application for execution was reported to be in order and the case was registered on 2-11-1950 as Execution Case No. 80 of 1950. Evidently,

the application was presented beyond three years from the dismissal of the last execution case; but it is outside the pale of controversy now that

according to the law of limitation governing such cases at Jodhpur the execution case was not time-barred. The case continued to remain pending

in the Jodhpur Court for sometime and various orders appear to have been passed therein from time to time.

But eventually the decree-holders applied to the Court that a certificate of non-satisfaction in respect of the amount payable to be sent to the

District Court at Dibrugarh for execution of the decree, the judgment-debtors being residents within the jurisdiction of that Court for purposes of

their business and having property within its local limits. The Court issued a certificate of non-satisfaction as prayed for and dismissed the execution

case on 22-2-1952. The appellants then started the present execution, out of which this appeal arises, in the Court of the Subordinate Judge,

Upper Assam Districts at Dibrugarh. This execution case was registered on 19-7-1952.

3. The judgment-debtors have challenged the execution case on various grounds, but the main ground urged by them is the point of limitation. They

contend that the execution is time-barred under Art. 182, limitation Act, as it is beyond three years of the date of the decree. It is urged that

execution case No. 80 of 1950 itself was instituted on 8-5-1950 beyond three years from the dismissal of the first execution case on 24-2-1947,

and as such the decree could not be executed, according to the law of the limitation applicable to the Dibrugarh Court.

The decree-holders argue on the contrary that the said application for execution was in accordance with the law prevailing in the Native State of

Jodhpur and was within time; it was allowed to proceed as such and no objection was taken to the maintainability of the execution case en the

point of limitation there, when the Judge granted a certificate of non-satisfaction. Execution Case No. 80 of 1950 was therefore, according to law

and the validity of the execution case was no longer open to question before the executing ''Court at Dibrugarh.

The present execution case having been filed very much within three years of the date of the final order made in that earlier execution case, the

argument that this case is barred by time is futile. It is also contended that the application to obtain a certificate of non-satisfaction and for transfer

of the decree for execution to the Dibrugarh Court was a step in aid of execution and on this ground also, the execution case should not be held to

be time-barred. The learned Sub-Judge, who decided the matter, upheld the contention of the judgment-debtors and the view that the execution

case was time-barred found favour with him. The decree-holders have, therefore, preferred this appeal.

4. The whole question is reduced to this whether the second execution case No. 80 of 1950 levied by the decree-holders in the Court at Jodhpur

was an application made in accordance with law to the proper Court for execution of the decree. It cannot be gainsaid that the application was in

order as presented in the Jodhpur Court and was not barred by limitation according to the law applicable to such cases there. But it is argued that

according to the law of limitation prevailing here, that execution case was time-barred and therefore the decree-holders could not take any

advantage of that execution case in order to save the bar of limitation in the present instance. Section 44, Civil P.C. as it stood prior to the

amendment of 1951 authorised the Civil Courts in India to execute the decrees of any competent civil or revenue Courts in any Indian Native State

as if they had been passed by the Courts in India, or British India as it was then called. The section simply enabled the Courts in India to execute

such decrees as their own; but it cannot be suggested that these Courts on that account could ignore previous executions levied on such decrees &

their effect upon the execution cases filed before them if those previous executions were in order according to the laws applicable to the Courts by

which the decrees were passed or the execution levied.

Matters of procedure and questions of limitation are governed by the lex fori; that is to say, the law which is applicable to the forum which has

issued the decree in question or the forum where its execution is pending. It is, therefore, not open to the Court executing the decree in India to

ignore the previous executions or to question their validity provided those executions were in order and in accordance with the lex fori which

governed the Courts, which entertained them. It follows then that if, according to the law of limitation prevailing in the Jodhpur Court, the execution

case No. 80 of 1950 was in order and that Court, as found by the learned Subordinate Judge, held the execution case to be within time according

to the law of the Native State, it was no longer open to the judgment-debtors to canvass that question before the present executing Court. In order

to determine whether execution case No. 80 of 1950 was in accordance with law and made to the proper Court, one has to see whether it was so

in accordance with the lex fori applicable to the Jodhpur Court and on that principle it cannot be doubted that the said execution case was filed

within time, though if the same had been filed in the Dibrugarh Court according to the lex fori applicable to the latter Court, it would be out of time.

It is however argued for the respondents that it is for the Dibrugarh Court to determine whether the present execution case is maintainable

according to the law of limitation applicable here; it would be only so if it is within three years from the date of the final order in the last execution

case; but if the latter was barred according to Art. 182. Limitation Act, the present execution case would be equally barred. This argument

presupposes that the same lex fori, that is the Law of Limitation in British India, must be held to apply to both the execution cases and that at the

time when the decree-holders filed the execution case No. 80 of 1950 in the Jodhpur Court, they should have anticipated the possibility of the

present execution case and thus regulated the period of limitation for that execution accordingly.

If I may say so, the argument is on the face of it anomalous and unreasonable and does not merit approval. Besides, as I have already shown, the

lex fori may differ in each case. The respondents have also sought to support their contention by submitting that the words ""proper Court"" in Art.

182(5). Limitation Act, refer only to Courts in India and not to Courts within the Native States. There is however, no authority to support the

proposition. We know that the CPC provides for execution of decrees or even a foreign Court and Courts in the Native States; as such there is no

justification for restricting the meaning of the words ""proper Court"" in the Article only to Courts in British India.

5. In the present case, the parties are also bound by the orders passed in the last execution case even on the principle of constructive res judicata,

which does apply to execution cases: see Mungul Pershad Dichit v. Grija Kant Lahiri, ILR 8 Cal 51 (PC) (A); Ram Kirpal v. Rup Kuar, ILR 6 All

269 (PC) (B) and AIR 1949 302 (Privy Council) . In my opinion, the decision in Husein Ahmed Kaka v. Saju Mahamad Sahid, ILR 15 Bom 28

(D) is also a decision in point. In that case, the plaintiff had obtained a decree in the Rangoon Court on 3-5-1883. In December of that year the

judgment-debtor died and no satisfaction having been obtained under the decree, a notice was issued upon his legal representatives for execution

thereof.

The legal representatives did not appear to show cause as required by the law and the Rangoon Court directed the execution case to proceed. The

decree was later transferred for execution to an executing Court at Surat and an execution case started on 22nd April, 1887. Sargent C.J., who

delivered the judgment of the Court held that when a Court makes an order for execution of a decree and transmits the decree for execution to

another Court, the latter Court has no power to determine whether the execution is barred by limitation. The order for execution made by the

transmitting Court is binding on the parties until reversed on appeal. It would be, however, otherwise where the transmitting Court made no order

for execution and merely transmitted the decree and the certificate of non-satisfaction.

Here, it appears that the office reported execution case No, 80 of 1950 to be in order and various orders were passed by the Jodhpur Court in

furtherance of the execution proceedings. These factors indicate that the case had been entertained by the Court and as found by the learned

Subordinate Judge himself, the Jodhpur Court thus held that the execution case was within time according to the law prevailing there. That being

so, it seems to me that the principle of constructive res judicata would apply in the present circumstances and it was no longer open to question

that the execution case No. 80 of 1950 was within time.

6. The learned Subordinate Judge has however, relied upon a later decision of the. Bombay High Court in Nabibhai Vazirbhai Vs. Dayabhai

Amulakh and Others, in support of his judgment. In the case in question a decree was passed by the Baroda Court in 1909. The first application to

execute the decree was made in 1913, it being within time prescribed by the law in Baroda. The decree was transferred to the Ahmedabad Court

for execution in 1915. It was then contended by the judgment-debtor that no application to execute the decree having been made within three

years of its date the execution thereof was barred.

It was held that the decree was incapable of execution in the Ahmedabad Court having been barred according to the law of limitation in British

India which governed the case. The learned Judges there distinguished the decision of Sargent C.J. on the ground that in the case before them there

was no order of a competent Court binding on the parties directing execution of the decree. The case is, therefore, distinguishable on the point of

res judicata. It is important to observe that the learned Judges there recognised that suits and applications must be brought within the period

prescribed by the local law of the country within which the suit or the application is brought; that is to say, it is the lex fori which governs such

cases.

I, however, regret to observe with the utmost respect that in my opinion, they appear to have misapplied the principle to the facts in that case. If

the lex fori governs the institution of the execution case then certainly the execution case filed in the Baroda Court in 1913 was in time and as such

the application in the Ahmedabad Court in 1915 was also within time. The lex fori in the Baroda Court was not the same as to the lex fori in British

India and as such the lex fori prevailing in Baroda should have been taken to determine the legality or otherwise of the execution case pending

there. There was therefore, an obvious fallacy in applying the law of limitation in British India to defeat the execution case pending in the Baroda

Court in a retroactive fashion. While, therefore, accepting the principle adumbrated in that judgment I find myself unable, with much regret, to

agree to the correctness of its application to the facts in that case.

7. Mr. Ghosh has referred to certain other cases also to support his submission that it is the (Sept.) 1957 law of limitation in British India, which

should be held to apply to the execution pending in the Jodhpur Court and if according to the law prevailing here, the execution was out of time, it

should be of no avail to save limitation in the Courts in India. Similarly, the learned Advocate-General for the appellants has referred us to a

number of cases illustrating the proposition that the rule of limitation applicable to the execution of a decree depends upon the character of the

Court which passed the decree and not on the character of the Court, which executes it.

The cases are, for instance, the decisions in Tincowrie Dawn v. Debendra Nath Mookerjee, ILR 17 Cal 491 (F); Jogemaya Dassi v. Thackomoni

Dassi. ILR 24 Cal 473 (G); Sree Krishna Doss v. Alumbi Ammal. ILR 36 Mad 108 (H) and N.V. Ranganandham and Others Vs. M.

Ponnacharamma, . These are all cases where there was no conflict of lex fori and where the law of limitation in British India applied both to the

Court passing the decree and the Court executing it. The cases therefore, are clearly distinguishable and have no application to the point under

investigation in this case.

The decision in Sreenivasa Ayyangar v. Narayana Rao, ILR 45 Mad 1014: (AIR 1923 Mad 72) (J) appears to be more apposite. There a decree

was passed toy the District Court at Mysore in 1911 and an application was made in 1916 for transfer of the decree for purposes of execution to

the High Court of Madras on the original side. On 30-1-1919 the Chief Court of Mysore eventually transferred the case after contest by the

judgment-debtor; and an application for execution was filed in the Madras High Court On 8-1-1921. The judgment-debtor pleaded the bar of

limitation, while the decree-holder asserted that the application for transmission of the decree from the Mysore Chief Court to the Madras High

Court was a step in aid of execution. He also relied on the bar of res judicata.

The decree-holder"s contention prevailed and it was held that the execution case was not barred. This could only be on the principle that the law

of limitation prevailing in Mysore applied to the execution or to the step in aid of execution before the Mysore District Court or the Mysore Chief

Court and thus operated to save limitation under the Indian Limitation Act for execution of the decree in the Madras High Court. Mr. Ghosh has

placed reliance upon the decision in Jeewandas Dhanji v. Ranchoddas Chaturtahuj ILR 35 Bom 103 (K). Here a decree was obtained on 17-7-

1893 from the Amreli Court in the territory of the Gaekwar of Baroda and on 12-5-1884 an application for execution was made.

Thereafter, nothing appears to have been done until 10-7-1905 when a second application for execution was filed with a prayer for attachment of

judgment-debtor"s moveables and an order was made accordingly. Eventually, the decree was transferred for execution to the High Court of

Bombay and execution filed on 5-7-1909. It was held that the application being more than 12 years after the date of the decree was barred by S.

48 of the Civil Procedure Code. Their Lordships also held that there was ample authority for the proposition that an order by a Court passing a

decree for transmission of that decree for execution to another Court is not an order for the execution of the decree, nor is an application for

transmission an application for execution.

There can be no quarrel with the propositions laid down in this judgment. In fact, on the principles which I have indicated earlier, it follows that S.

48 will apply to the execution of a decree in the Courts in India and if the terminus a quo has been reached, the decree would become in

executable. Most of these cases have been elaborately reviewed in the decision in AIR 1947 206 (Oudh) . In that case, a decree for money was

passed on 25-1-1925 in the Chief Court of the then Indian State of Jaipur. The decree-holders obtained an order for transfer of the decree for

execution to the Court at Lucknow, situate in British India with a certificate of non-satisfaction.

On the 13th October, 1942, they made an application for execution of the decree before the Civil Judge, Lucknow. The judgment-debtor

objected to the execution on the ground that it was barred by limitation; and at any rate the decree had become a spent force under S. 48 of the

Civil Procedure Code. The objection was upheld. It was held that as the application had been tiled more than 12 years from the date of the

passing of the decree, S. 48 of the CPC applied to the case and the execution could not proceed.

The certificate of transfer in such a case could not be interpreted as implying a decision that the decree was capable of execution according to the

law in British India. These decisions, as I have indicated, do not affect the point before us. It is, therefore, unnecessary for me to refer to some of

the other cases to which a reference has been made by the learned counsel for the respondents. I hold that the present execution case is not barred

by limitation having been filed within three years of the final order in the execution case No. 30 of 1950, which was on an application made in

accordance with law to the proper Court for execution of the decree.

8. It is well known that the Jodhpur State has since acceded to the Indian Union: but it is unnecessary to examine the effect of the accession or the

application of the Part B States (Laws) Act, 1951 (Act III of 1951) for the purpose of deciding the question involved in this appeal. In any case, it

seems to me that it had to be determined whether the previous execution case was a valid execution in order to save limitation in this case: and the

operation of the Part B States (Laws) Act does not, in my opinion make much difference on that point. I need not therefore, detain myself to

examine the arguments of the learned Advocate-General on this aspect of the case.

9. There are, however two other objections of Mr. Ghosh on behalf of the respondents, which need consideration. He has argued that the decree

under execution was an ex parte money decree passed against the defendants, who admittedly reside within the local limits of the jurisdiction of the

Dibrugarh Court and carry on business there. The learned counsel contends that there is nothing to show that the defendants ever submitted to the

jurisdiction of the Jodhpur Court which was a foreign Court for their purposes and therefore, any decree passed against them by a Court to which

they owed no allegiance or obedience was not binding on them.

It is also denied that they ever submitted to the jurisdiction of that Court and they point out that the decree was ex parte. For these reasons, it is

urged that the decree is void and cannot be executed against the respondents. The point is one of fact, which had to be raised in the objections

filed in the Court below; but there was no such objection taken by the judgment-debtors. It also appears to us that there is little substance in the

contention put forward.

There is ample evidence on the record to indicate that both the decree-holders and the judgment-debtors belonged to a place called Didwana

within the jurisdiction of the Jodhpur Court and as such that Court had jurisdiction to pass a decree against these defendants. It may be that for

purposes of carrying on their business, they now reside at Dibrugarh and have properties there and it is for this reason that the decree in question

has been transferred to this Court. Their residence here, however, does not destroy the jurisdiction of the Court, which passed the decree, in view

of the fact that the parties had their permanent place of abode within the local limits of the jurisdiction of the Jodhpur Court.

The other point raised by Mr. Ghosh appears to be equally unfounded. It is contended that the decree in question was passed by the District Court

No. 2 of Jodhpur; the first execution case was also levied in the same Court, but execution case No 80 of 1950 was pending in the Court of the

Civil Judge. Merta, which granted the certificate of non-satisfaction. This point again was not raised in the Court below and no such objection was

taken earlier. Section 37 of the CPC contemplates that where the Court of first instance had 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, also fails within the definition: ""Court which passed a decree"".

The learned Advocate-General has referred to certain notifications of which judicial notice-could be taken showing that the Jodhpur State was

divided into three civil Districts consisting of Nagaur as one of those, which covered both Nagaur and Merta. He, therefore, argued that the

presiding officer of the Merta Court had as much jurisdiction to deal with the matter as the presiding Officer of the Nagaur Court. Perhaps, there is

strength in that contention, but it is unnecessary for us to decide about it in view of the fact that the point was never raised at any earlier stage and

in the absence of any definite materials on the point, we cannot permit the learned counsel for the respondents to raise these contentions for the first

time in appeal here.

10. It would thus appear that the decision under appeal is erroneous and the learned Subordinate Judge has acted illegally in holding that the

execution case was barred by limitation and in rejecting the same on that ground. The appeal must accordingly be allowed. The order of the

learned Subordinate Judge must be set aside and the application for execution should proceed according to law. As the point before us was not

altogether free from difficulty and there was some authority for the conclusion at which the learned Subordinate Judge arrived. I do not think, we

would be justified in granting any costs of this appeal to the appellants.

Deka J.

11. I agree.