
(1952) 10 OHC CK 0010

Orissa High Court

Case No: Misc. Second Appeal No. 23 of 1950

Abdul Quddus

APPELLANT

Vs

Muhammad Jubbar and Others

RESPONDENT

Date of Decision: Oct. 14, 1952

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 15, 11 , 47
- Limitation Act, 1908 - Section 182(5)

Citation: AIR 1953 Ori 59

Hon'ble Judges: Narasimham, J; Mohapatra, J

Bench: Division Bench

Advocate: R.K. Das, for the Appellant; P.C. Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Mohapatra, J.

This is a judgment-debtor's miscellaneous second appeal arising out of proceedings u/s 47, Civil P. C., against the

judgment of Sri D. Das, District Judge Keonjhar-Balasore, confirming the order of Sri C.B. Rao, Munsif of Bhadrak. The decree under execution

is dated 14-3-48, Abdul Aziz and Muhammad Jubbar being decree-holders. They started execution in Ex. Case No. 447 of 1940, which was

struck off on 12-9-41. The second execution case was started on 29-10-1942 by Md. Jubbar and some of the heirs of the deceased decree-

holder Abdul Aziz who died after the first execution were struck off and before the starting of the second execution case. An objection was put

forth by the judgment-debtor in the second execution case that the execution case has to be dismissed as no succession certificate had been

produced by the legal representatives of the deceased decree-holder Abdul Aziz. The judgment-debtor's objection was upheld and the second execution case was dismissed on 16-1-43. The third execution case, that is, Exn. Case No. 330 of 1945, was again filed by the same party, that is, the surviving decree-holder and the legal representatives of Abdul Aziz. This was dismissed on 14-12-45 as the decree-holders had not filed the succession certificate. The present execution case was filed on 3-9-48 by Md. Jubbar and the Munsif ordered the execution to proceed in the absence of the succession certificate and directed the decree-holder to furnish security to the satisfaction of the Court before receiving the decretal amount for safeguarding the interest of the legal representatives of the deceased decree-holder Abdul Aziz.

2. Mr. B.K. Das, appearing on behalf of the Judgment-debtor-appellant, has taken up the first point that when in Ex. Case No. 198/42 u/s 47, Civil P. C. arising out of second execution on the objection filed by the judgment-debtor the learned Munsif rightly or wrongly found that the execution case could not proceed in the absence of the succession certificate and the order serves as *res judicata* to bar the present execution proceedings to be continued in the absence of a succession certificate. Indeed, the principles of "*res judicata*" underlying the provisions of Section 11, Civil P. C. do apply to the execution proceedings and an order passed as between the same parties in an earlier execution proceeding is binding on the parties and serves as "*res judicata*" in subsequent execution proceedings. But the present execution proceeding will not be hit by the mischief of "*res judicata*" on account of this special feature that while the second execution proceeding was started by Md. Jubbar and some of the legal representatives of the deceased decree-holder Abdul Aziz, the order that was passed was that the execution could not proceed in the absence of a succession certificate produced by the legal representatives. But in the present case, the execution has been started by Md. Jubbar mentioning the names of the legal representatives in the column other than that for the decree-holder and the Court has ordered the execution to start at the instance of the living decree-holder and has taken steps for the purpose of safeguarding the interests of the heirs of the deceased

decree-holder. The frame of the present execution case having been substantially and materially different from the second execution case, the principle of "res judicata" will not apply. While in the second execution case the legal representatives of the deceased decree-holder wanted to execute jointly with the other surviving decree-holder, the learned Munsif was justified in demanding succession certificate in order to continue the proceedings of the execution. But in the present case inasmuch as the surviving decree-holder alone wants to execute the decree and when the Court under the provisions of Order 21, Rule 15 took steps for the protection of the interest of the heirs of the deceased decree-holder, whoever they may be, the surviving decree-holder cannot be demanded to produce succession certificate, because he is certainly competent to execute the decree for himself and for the heirs of the deceased decree-holder, whoever they may be. For the reason, therefore, that the present execution case has been framed in such substantially different manner we are unable to hold that the present execution case is hit by the principles of "res judicata".

3. The second point raised by Mr. Das is that the present petition for execution is not in accordance with the provisions of Order 21, Rule 15, and as such, it is incompetent. The original petition for execution in the present case was filed by Md. Jubbar alone stating in the petition itself that the heirs of the deceased decree-holder are now colluding with the judgment-debtors, and as such, he is filing the petition for execution alone. But the petition is stated to be for himself and also for the benefit of the legal representatives of the deceased decree-holder. The legal representatives of the deceased decree-holder filed a petition to be allowed to join as decree-holders alone with the original decree-holder Md. Jubbar. That prayer was finally rejected and the Court ordered the original decree-holder to furnish security to the satisfaction of the Court before obtaining the decretal amount. Now when the petition itself mentions that it is for the benefit of the legal representatives of the deceased decree-holder, who are named in the petition, the Court has taken steps for the purpose of protecting the interests of the legal representatives of the decree-holder by

ordering the surviving decree-holder to furnish security, the present petition is in accordance with the provisions of Order 21, Rule 15 and the contention of Mr. Das must fail.

4. The third point taken up by Mr. Das is that when in the previous execution cases the succession certificate was not filed, the execution petitions must be held to be not in accordance with law and as such the previous execution cases cannot be taken to be steps-in-aid so as to save limitation of the present execution case. Of course, if the previous execution cases or even if the third execution proceeding itself is not in accordance with law then the present execution case is clearly barred by limitation. But we are afraid it is not possible for us to accept the contention of Mr. Das.

The matter seems to have been concluded by the decisions of most of the High Courts of India. We will first of all refer to the case reported in --

"Mst. Aisha Bibi v. Mahabir Prasad", 6 Pat 440. The case seems to be exactly on all fours with the present case. There also a previous application

for execution was dismissed on the ground that some of the original decree-holders had died and their heirs had not produced the succession

certificates. Their Lordships held that even though the previous execution case was dismissed on account of non-production of the succession

certificates, it was to be deemed as a petition in accordance with law and the previous execution case saves limitation. Their Lordships observed

that when the particulars required under the provisions of Order 21, Rules 11 to 14 have been fulfilled in the petition, the petition was in

accordance with law. In coming to this conclusion, their Lordships relied upon the decisions of the Calcutta High Court reported in --"Hafizuddin

Chowdhury v. Abdool Aziz", 20 Cal 755 , and of an earlier decision of the Patna High Court reported in -- Jogendra Prasad Narayan Sinha Vs.

Mangal Prasad Sahu, . This is also the view of the Bombay High Court as we get it in the case of --"Balkishan Shiwa Bakas v. Wagar Singh",

reported in 20 Bom 76. The decision reported in 6 Pat 440 was also accepted & followed in the case of --"Pilwasao v. Mst. Khairunnissa", in

AIR 1935 Nag 1, where it was observed: ""The want of succession certificate no doubt may deprive the applicants of their remedy, namely,

execution of the decree, but it cannot vitiate the application itself. Applications in execution are not always successful, nevertheless, they are treated as steps in aid of execution

5. Mr. Das has drawn my attention to the decision of the Patna High Court reported in -- Firm Johar Mal-Paran Ram Vs. Bindeswari Prasad

Singh and Others, , where the observations run to the effect: ""The words "in accordance with law" in Article 182(5), Limitation Act, are general

and cannot be construed to mean only in accordance with the Civil Procedure Code"". There the decision was clearly distinguishable. The decree

was against the father and it provided that the loan incurred by the father was not binding on the sons, and in spite of this, the decree-holder

applied for execution of the decree by the arrest of the sons. Manifestly, therefore, the Court was not at all competent to grant the relief prayed for

in the execution petition. As such, their Lordships were perfectly justified in coming to the conclusion that when the petition prayed for relief which

the Court absolutely had no power to grant, the petition could not be taken to be in accordance with law. The case reported in --"Mt. Aisha "Bibi

v. Mahabir Prasad" 6 Pat 440, was not placed before them but the case reported in --"Jogendra Prasad v. Mangal Prasad", 7 Pat LT 330, was

cited and their Lordships distinguished it on the ground mentioned above.

6. Mr. Das further relied upon the decision in the case of --"Sri Sri Kalyani Prasad Singh v. Mahadeo Roy", reported in 22 PLT 945, for the

proposition that if no succession certificate is produced by the person claiming to execute the decree in favour of the deceased person, the Court

has no power to proceed With the execution proceeding. The case is not applicable to the position before us, because the executing Court was

perfectly justified in dismissing the third execution case; but on that account alone, it cannot be said that the third execution petition was not in

accordance with law. There may be quite a good number of reasons for which the execution petition may be dismissed. But it cannot be laid down

that for whichever reason the execution is dismissed the petition is to be deemed as not in accordance with law.

7. On a review of the above decisions therefore, we are definitely of the view that in spite of the non-production of the succession certificate when

the petition itself was not defective on account of non-compliance of the provisions of Order 21, Rules 11 to 14, the execution petition was

maintainable in law, there being no vital defect in the petition, even though the Court could not grant the remedy, prayed for, on account of non-

production of the succession certificate. As such, the petition itself may be deemed to be in accordance with law. Ordinarily, it should be laid down

as a general principle that when the petition has complied with the provisions of the Civil Procedure Code, it will be deemed to be in accordance

with law. But there may be exceptions, such as when the petition prays for relief which it is not within the jurisdiction of the executing Court to

grant, or that when the executing Court has no jurisdiction to entertain the petition at all.

8. In conclusion, therefore, the three points taken by Mr. Das having failed, the appeal is dismissed with costs.

Narasimham, J.

9. I agree.