

MANU/BH/0055/1956

Equivalent Citation: AIR1956Pat209

**IN THE HIGH COURT OF PATNA
FULL BENCH**

A.F.O.O. Nos. 99 of 1949, 34 of 1950 and 11 of 1951 and A.F.A.O. No. 247 of 1952

Decided On: 06.02.1956

Appellants:**Birendra Prasad Sukul and Ors.**
Vs.

Respondent:**Surendra Prasad Sukul and Ors.**

Hon'ble Judges/Coram:

Vaidynathier Ramaswami, Banerji and Chaudhuri, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: In No. 247/52: Ugrah Singh and R.P. Sinha, Adv.

For Respondents/Defendant: Kanhaiyajee, Adv.

JUDGMENT

Chaudhuri, J.

1. These are four Miscellaneous Appeals and they raise a common question of law. The first three appeals, namely, Miscellaneous Appeals Nos. 99 of 1949, 364 of 1950 and 11 of 1951 are miscellaneous First Appeals and they arise out of an execution proceeding. The fourth one, namely, Miscellaneous Appeal No. 247 of 1952 is a miscellaneous Second Appeal and arises out of an entirely different execution proceeding and is absolutely unconnected with the first three appeals.

2. The facts giving rise to the first three appeals, stated shortly, are as follows:

3. On 20-1-1940, Surendra Prasad Sukul Bhupendra Prasad Sukul and Raghabendra Prasad Sukul, obtained a final mortgage decree for sale for Rs. 50,028/3/6 against Birendra Prasad Subul and his two sons, Bijendra Prasad Sukul and Dhirendra Prasad Sukul, in mortgage suit No. 32 of 1929. This final decree was signed on 12-24940 and was put in execution on 23-1-1941, in execution case No. 9 of 1941, in the court of Subordinate Judge of Muzaffarpur by Surendra Prasad Sukul, one of the decree-holders, under Order 21, Rule 15, Civil P. C.

The question of valuation under Section 13, Bihar Money Lenders Act was raised in the execution case and was finally decided by this court on appeal from the order passed by the executing court. Thereafter, an application was made under Section 11, Bihar Money Lenders Act for permitting the judgment-debtors to pay the decretal dues by instalments. After certain other miscellaneous proceedings in the execution case, the matter again came to this court on appeal in Miscellaneous Appeal No. 379 of 1944. By that time the decretal dues came to be about Rs. 60,000/-.

It appears that the judgment-debtor, Birendra Prasad Sukul, had also a decree for Rs. 25,000/-against Surendra Prasad Sukul, one of the three decree-holders. This court, on 4-2-1946, in the above miscellaneous appeal, directed that the decretal dues of

the judgment-debtor Birendra Prasad Sukul, amounting to Rs. 25,000/- should be set off and the balance of the decree money should be paid by him in seven yearly instalments. It was further directed that the first two of these instalments will be of Rs. 6,000/- each payable on 15-7-1946 and 15-7-1947.

The third instalment was fixed at Rs. 4,000/- payable on 15-7-1948. The remaining instalments were to be of Rs. 5,000/- each payable on 15th July of each year, excepting the last instalment, by which the whole outstanding amount under the decree was to be paid on 15-7-1952. The further direction of this court was that the first three instalments will be appropriated by the other two decree-holders, namely, Bhupendra Prasad Sukul and Baghavendra Prasad Sukul and that after the three instalments were paid, the matter was to be placed before this court for further orders.

It was also directed that in case of default of any instalment, the decree was to be executable at once and the matter was to be placed before this court for suitable orders. There was, however, default in paying certain instalment and this court, on 10-9-1948, passed an order to the following effect:

"There having been a default in payment of an instalment, the decree has become executable under the orders of this court, dated the 4th February, 1946."

The decree-holder, Surendra Prasad Sukul, thereafter proceeded with the execution. An objection was filed on behalf of the judgment-debtor under Section 47, Civil P. C. on 24-3-1949, and the main contention that was raised in that objection, with which alone we are concerned in these appeals, was that the execution could not proceed without a fresh application having been made by the decree-holders. This objection was overruled by the executing court by its order dated the 31st March, 1949, and against that order the judgment-debtor has preferred Miscellaneous Appeal No. 99 of 1949 in this court.

On 10-8-1950, Dharendra Prasad Sukul, one of the sons of Birendra Prasad Sukul, filed an application under Section 47, Civil P. C. and Sections 13 and 14, Bihar Money Lenders Act and prayed that due to change in the circumstances since after the valuation was fixed on the previous occasion, a fresh valuation should be made. This application was rejected by the executing court by its order dated 7-9-1950, and against that order Dharendra Prasad Sukul filed Miscellaneous Appeal No. 364 of 1950 in this court.

The sale in the execution case was thereafter held on the same day, namely, 7-9-1950. Birendra Prasad Sukul thereafter, on 7-10-1950, made an application for setting aside the sale under Order 21, Rule 90, Civil P. C. As the security money was not deposited, the application stood rejected for default on 9-10-1950. Against this order Miscellaneous Appeal No. 11 of 1951 has been filed by Birendra Prasad Sukul. All these three appeals were made analogous.

4 . In Miscellaneous Appeal No. 247 of 1952 an objection was raised by the judgment-debtor to the execution of the decree after the default in payment of the instalment on the ground that the execution could not proceed without there being a fresh application. Other objections were also taken, but we are not concerned with them.

Both the courts below overruled these objections and the Judgment-debtor filed the

above miscellaneous Second Appeal in this court. Since, however, the point involved in this appeal was pending before a Division Bench in the above Miscellaneous Appeal No. 99 of 1949, this appeal was also referred to a Division Bench to be heard along with the said Miscellaneous Appeal No. 99 of 1949.

5. All these four appeals came to be heard by a Division Bench of this court and it was argued before their Lordships, on the authority of the case of -- 'Rampal Singh v. Udit Narain MANU/BH/0015/1942(A), that the executing court had no Jurisdiction to proceed with the execution without there having been made a fresh application for the same. Their Lordships doubted the correctness of the proposition laid down in that case, and, therefore, referred the following questions of law for decision by a Full Bench in the first three Miscellaneous First Appeals. The questions are;

1. Whether after an order for payment of a decree in instalments is passed by the executing court, that court loses jurisdiction over the execution case and can only assume jurisdiction after the filing of a fresh application for execution?

2. Whether the sale of the properties which took place in this case on 7-9-1950, after the issue of a fresh sale proclamation should be considered to be a nullity because there was no fresh application for execution by the decree-holder after default in the payment of the first two instalments?

As the decision of Miscellaneous Appeal No. 247 of 1952 was to depend on the answers to be given by the Full Bench to the questions formulated in the first three miscellaneous appeals, their Lordships considered that this miscellaneous appeal should also be heard and decided by a larger Bench and as this appeal was a Second Appeal, the appeal as a whole was directed to be heard and disposed of by the Full Bench.

Under the circumstances referred to above, this Bench has been constituted to answer the questions as formulated above and to decide Miscellaneous Appeal No. 247 of 1952. All these four appeals have, therefore, been heard together. The main argument has been advanced in the first three miscellaneous appeals by Mr. B.S. Chatterji on behalf of the appellants and Mr. Prem Lall on behalf of the respondents and that argument has been adopted by counsel appearing for both the parties in Miscellaneous Appeal No. 247 Of 1952.

6. Mr. Chatterji on behalf of the appellants has raised two contentions. They are: (1) that the final mortgage decree that was passed on 20-1-1940, was superseded by the order of this court in Miscellaneous Appeal No. 379 of 1944 and that the decree that has to be executed is a new decree passed by this court in that miscellaneous appeal and as such the executing court could not proceed with the execution on the original application made by the decree-holder for execution of the superseded decree unless a fresh application for execution of the new decree was made and (2) that, at any rate, there having been default in payment of the instalments, the executing court had no jurisdiction to proceed With the execution without there having been made a fresh application for execution. The argument, in my opinion, is misconceived.

7. The main principle of law is that a decree once passed is immutable, subject of course to review or to any subsequent order or decree which may be passed on appeal and subject only to one specific provision of Order 20, Rule 11 (2), Civil P. C. The final decree in the present case was passed, as already stated, on 20-1-1940.

This decree was not reversed or modified either on review or on appeal by the appellate court and that decree, therefore, became final.

The executing court or this court, in any appeal from a matter arising out of execution of that decree, could not reverse or modify the same. No doubt the decree that was passed in the year 1940 was directed to be paid in certain instalments under the provisions of the Bihar Money Lenders Act; that, however, does not attract the operation of Order 20, Rule 11 (2), Civil P. C. This rule contemplates a modification of the decree by making it payable by instalments with the consent of the decree-holder.

Under this rule a decree cannot be altered into an instalment decree without the consent of both parties. Therefore, the direction of this Court in Miscellaneous Appeal No. 379 of 1944 for payment of the decretal dues by instalments had not the effect of substituting a new decree for the original final mortgage decree. The decree that has to be executed is the original final mortgage decree that was passed in 1940.

Reliance was, however, placed on behalf of the appellants in the case of -- 'Hridoymohan Sanyal v. Khagendranath MANU/WB/0339/1929(B). In that case the decree holder obtained a money decree on 17-12-1913, which was put into execution from time to time. Ultimately, on 16-9-1922, a compromise was arrived at between the parties in the execution proceeding by which the decree holder gave up a part of his claim and agreed to accept only Rs. 350/- in satisfaction of the decree including cost.

The judgment-debtor paid Rs. 100/- in cash and the balance was agreed to be paid in certain instalments, the first instalment being due in October, 1923. It was further agreed that if there was default in payment of one of the instalments, the decree-holder will be entitled to realise the entire sum by way of execution against the property of the judgment-debtor. There having been default in payment of the instalment, an application was made for execution on 8-11-1926. The courts below dismissed the application on the ground that it was barred under the provisions of Section 48 of the Code of Civil Procedure as it was made more than 12 years after the date of the original decree passed in year 1913.

It was held by the High Court that the decree was adjusted by the compromise dated 16-9-1922, and the result of the adjustment was that the decree was extinguished. Even in the execution application the decree-holder sought to execute the instalment decree on compromise dated 16-9-1922.

It was held in those circumstances that -the decree-holder could proceed with the execution of the agreement and to recover money due under it in the usual way as in the case of the decree. That case has, therefore, no application to the facts of the present case where there has been no adjustment between the parties on compromise. The first contention raised by Mr. Chat-terji, therefore, fails as being without any substance.

8 . As regards the second contention, the question that has to be considered is whether the execution could proceed, after the default in the payment of instalments, on the basis of the original application itself or a fresh application for execution had to be filed in order to give jurisdiction to the executing court to proceed with the same. The Bench decision of this Court in 'MANU/BH/0015/1942(A)', is directly in favour of the appellants.

In that case the final mortgage decree was passed on 16-9-1936. An application for instalment under the Bihar Money Lenders Act was made on 27-10-1938, and it was directed to be put up on 19-11-1938. The sale, however, was fixed to be held on 14-11-1938, but on that date it was adjourned to 19-11-1938, the date fixed for the decision of the application for instalment.

The hearing of that application was adjourned to 21-11-1938, and the sale was ordered to be kept on hammer till then. On that date the court allowed the decree to be paid by instalments the first instalment being payable on 5-12-1938. It may be noted that the judgment-debtor waived all objections regarding the issue of fresh sale proclamation. He, however, failed to make the payment on 5-12-1938, and the executing court ordered that the case be, put up on the following day for sale at the usual time.

Thus, the properties were sold on 6-12-1938. An application for setting aside the sale was made on 3-1-1939, which was rejected by the court of the first instance and the judgment-debtor preferred an appeal to this Court. Dhavle J., who gave the judgment of the Court Harries C. J., agreeing, stated as follows:

"Could it possibly be said for instance that after three instalments had been paid by the judgment-debtors it would be open to the lower court if the judgment-debtors failed to pay the fourth instalment, to sell the properties at a day's or moment's notice for the balance still remaining due from them and to do so because the execution case was pending from before the order for instalments?"

In my opinion the question must be clearly answered in the negative. Once the order of instalments came into force, the right of the decree-holders to execute would arise on the occurrence of each default, and on such default it would be necessary for the decree-holders to apply to the court for execution for the amount outstanding at the time so as to give the court jurisdiction to proceed in the matter.

In my opinion, their Lordships laid down too no jurisdiction to sell the property on the 6th December as it did under its order of the 6th December without any application made by the decree-holders on the basis of the default of the judgment-debtors and without the usual sale proclamation and other formalities of an execution case."

In my opinion, their Lordships laid down too broad a proposition to be accepted as the correct view of the law on the subject. It is not clear as to how the order of the executing court, regarding payment of the decretal dues by instalments, as provided in the Bihar Money Lenders Act, could divest that court of the jurisdiction to execute the decree in the same execution case on the failure of the judgment-debtor to pay the instalments.

No authority has been cited in support of so wide a proposition of law enunciated by their Lordships. It may be noted that the order of their Lordships in that case could be divided into-two parts. The first part is that the court could not proceed with the execution without issuing, a fresh sale proclamation on the failure of the judgment-debtor to pay the instalment and sell the properties at a day's notice and the second part is that on such default the court could not proceed with the execution without there having been made a fresh-application for the same.

The views expressed by their Lordships on both these parts, in my opinion, are based on no legal reasoning and there is no authority to support them. The fact that the judgment-debtor waived the objection regarding issue of fresh sale proclamation itself suggests that the parties intended to keep the execution proceeding pending and that being so there could be no meaning in requiring the decree-holder to file a fresh application for execution.

The reason that their Lordships gave is that on such default it will be necessary for the decree-holder to apply to the court for execution of the amount outstanding at the time so as to give the court jurisdiction to proceed in the matter. But in my view, the correction of the amount may be made by way of amendment or by stating it in the fresh sale proclamation where it has to be issued and it is not at all necessary to make a fresh application for execution only for the purpose of showing the correct amount that has to be realised.

Fixing of instalments under the Bihar Money Lenders Act by an executing court, in my opinion, does not terminate the execution proceeding started by the decree-holder and the effect of the instalment order is only to keep the execution proceeding in abeyance till the satisfaction of the decree by payments in instalments or by proceeding with execution on default of such payments, Even as regards the issuing of fresh sale proclamation each case has to be decided on its own facts and it cannot be laid down as a general rule of law that on default being made in payment of an instalment, the executing court ceases to have jurisdiction to proceed with the execution unless a fresh sale proclamation has been issued.

Though in the case before their Lordships in 'MANU/BH/0015/1942(A)', the facts disclosed, not as a rule of law but as a rule of prudence, that the sale should not have been held on a day's notice only, but it could not be correct to say that in doing so the executing court acted without jurisdiction. With utmost respect to their Lordships I am unable to agree with their views and in my opinion that case was not correctly decided.

The view that I have taken gains ample support from a decision of the Privy Council in --'Oudh Commercial Bank Ltd., Fyzabad v. Bind Basni Kuer' MANU/PR/0003/1939 granted a mortgage to the appellant on 2-9-1899, who instituted a suit to- enforce the mortgage in 1911. A preliminary decree was passed on 31-10-1912, by the trial court and that decree was varied by the appellate court on 15-6-1950, by reducing the amount of the decree.

It appears that the estate of the judgment-debtor was taken over by the Court of Wards and as such the final decree that was passed in the suit on 22-1-1916, was passed against the Manager of the Court of Wards representing the judgment-debtor. It may be noted that the decree was passed by the Subordinate Judge of Mohanlalganj, Lucknow, before whom an application was made on 7-9-1916, for transfer of the decree for execution to the Subordinate Judge at Faizabad and on 3-7-1917, an application was made before the latter court for an order for sale. Due to some reasons, which, it is not necessary to notice here, the execution was stayed and the learned Subordinate Judge at Faizataad passed an order consigning it to records.

On 16-1-1922, the appellant made an application for restoration of the execution and in October, 1922, certain mortgage properties were sold by the Revenue Court in execution of the decree. On 18-11-1922, the sales were cancelled on agreement between the parties. According to the terms of that agreement, the judgment-debtor

was to pay certain sums by October, 1923, which he actually paid and on 3-4-1924, a further agreement was arrived at between them according to which half of the dues left unrealised was to be paid by 1-4-1925, and the rest by 1-4-1926.

The interest chargeable however, was increased to 8 per cent with half yearly rest from March, 1924. Under the said agreement certain mortgage properties were released from mortgage to enable the judgment-debtor to raise the money. Subsequently the time for payment was extended with the consent of the parties and the judgment-debtor made several payments in 1926. On 9-3-1927, there was final agreement between the parties according to which the amount then due was to be paid at the rate of 50,000 per year and the unrealised dues were to carry interest at 8 per cent per annum at half yearly rest.

It was further agreed that the proceeding for auction sale was to remain in abeyance and in default of payment of any instalment the execution was to proceed. This agreement was sent to the Subordinate Judge of Mohanlalganj for incorporating in the decree. There was, however, default in the payment and on 24-3-1930, an application was made to the Subordinate Judge of Mohanlalganj of transferring the decree to the Subordinate Judge of Faizabad for execution. The decree was accordingly transferred and on 19-3-1931, the appellant made an application before the Subordinate Judge at Faizabad under Order 21, Rule 10, Civil P. C., for the execution of the decree.

The courts below rejected the application as being barred under Section 48 of the Code of Civil Procedure. On appeal to the Judicial Committee their Lordships held that the execution of the decree was barred under that section inasmuch as the original application for execution was still pending and the application made in March, 1931, was only in continuation of the previous one. In view of this decision, the view taken by their Lordships in the case of 'MANU/BH/0015/1942' .

9. For the reasons given above I answer the questions referred to this Bench as follows:

(1) After an order for payment of a decree in instalment is passed by the executing court, that court does not lose Jurisdiction over the execution case and it cannot be said that it can only assume Jurisdiction after the filing of a fresh application for execution, and, (2) the sale of the properties which took place in this case on. 7-9-1950, after the issue of a fresh sale proclamation could not be considered to be a nullity for want of fresh application for execution by the decree-holder after default in the payment of the first two instalments.

10. The first three Miscellaneous Appeals will now be placed before a proper Bench for disposal.

11. Miscellaneous Appeal 247 of 1952 being a Second Appeal, has to be disposed of by us. The only question that has been pressed before us in this appeal, as already observed, is whether the execution was maintainable after default in payment of the instalments without a fresh application for execution having been made. I have answered that question in the above three appeals in favour of the jurisdiction of the court to proceed with the execution without any fresh application. This appeal has therefore, no merit and must be dismissed with cost.

Vaidynathier Ramaswami, J.

12. I agree.

Banerji, J.

14. I agree.

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