

MANU/BH/0076/1952

Equivalent Citation: AIR1952Pat213

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

A.F.O.O. No. 309 of 1948

Decided On: 11.12.1951

Appellants:**Radheshyam and Ors.**
Vs.
Respondent:**Devendra**

Hon'ble Judges/Coram:

David Ezra Reuben, Syed Jafar Imam and Das, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Adityanarayan Lall, Adv.

For Respondents/Defendant: Bhabananda Mukherji, Adv.

JUDGMENT

David Ezra Reuben, J.

1. This is a reference in an appeal from an original order of the Subordinate Judge, First Court, Chapra, dismissing an execution petition on the ground of limitation. The question referred to the Full Bench is:

"Whether, where a decree has been transferred for execution to another Court and the latter Court has not sent a certificate under Section 41, Civil P. C., an application for execution made to the former Court 15 an application to the 'Proper Court' within the meaning of Article 182 (5) of the Limitation Act?"

The decree sought to be executed is a money decree for Rs. 5000 with future interest passed by the Additional Civil Judge, Banaras, on the 13th of August 1934. The decree was transferred for execution to the Subordinate Judge, first Court, Chapra. I give below the relevant dates after this order of transfer:

"2-9-36. An application for execution of the decree was filed before the Subordinate Judge, First Court, Chapra.

15-4-40. The execution case was dismissed as infructuous.

22-3-41. The decree-holders again applied for execution before the Subordinate Judge, First Court, Chapra.

26-8-41. The execution case was dismissed as infructuous.

23-3-41. The decree-holders applied for execution in the Court of the Additional Civil Judge, Banaras."

The order-sheet of the Banaras Court is somewhat obscure as to what happened after

this. It appears from the order of reference that the Banaras Court directed the decree-holders to produce the certificate of non-satisfaction under Section 41 of the Civil P. C. from the Chapra Court. Finally, on the 3rd of November 1944, the execution was dismissed, one of the grounds of dismissal being the failure to produce the certificate of non-satisfaction. On the 30th of July 1946, the Banaras Court, on an application of the decree-holders, again transferred the decree for execution to the Chapra Court (apparently, in the meantime the Chapra Court had sent the non-satisfaction certificate to the Banaras Court), and on the 12th of August 1946 the decree-holders, applied for execution in the Chapra Court, On the objection of the judgment-debtor, Subordinate Judge dismissed the application as time-barred, holding that the final order on the application for execution filed on the 23rd March 1944 did not save limitation as the Banaras Court, in the absence of the certificate of non-satisfaction, had no jurisdiction to entertain the execution petition. He based his decision on 'RAMESHWARLAL v. TILOKECHAND' 23 Pat 729 and 'BHISHUNDEO NARAIN v. RAGHUNATH PRASAD', 19 Pat 354. Their Lordships have made this reference because they felt doubtful about the correctness of these decisions.

2. I reproduce below the relevant portion of Article 182 (5) :

"Description of application:

For the execution of a decree or order of any civil Court not provided for by Article 183 or by Section 48 of the Civil P. C., 1908 (V (5) of 1908) Period of Limitation:

Three years; or, where a certified copy of the decree or order has been registered, six years. Time from which period begins to run:

* * * * *

5. (Where the application next hereinafter mentioned has been made) the date of 'the final order passed on an application made' in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order.

* * * *

Explanation II: 'Proper Court' means the Court whose duty it is to execute the decree or order."

The words in square brackets (here in single inverted commas) were substituted in 1927 for the word "applying".

3. For answering the question which has been referred to us, we have to consider two points:

1. Whether, after transferring a decree for execution by another Court and before receiving the certificate of non-satisfaction, the transferor Court retains any power to execute the decree? That is to say, does the Court which passed the decree divest itself of its power to execute the decree by transferring the decree for execution by another Court?

2. Whether, supposing the answer to the first point is in the affirmative, the execution petition filed before the Banaras Court was for a relief which that Court had the power to grant?

4. As regards the second point, we are under a difficulty, as the particulars of the relief asked for in the petition of the 23rd March 1944 do not appear from the order of reference and the execution petition is not before us.

5. For the consideration of the first point it is necessary to examine the provisions in the Code of Civil Procedure.

6. Naturally, the Court, whose duty it ordinarily is to execute a decree, is the Court which passed that decree. There may be circumstances, however, in which a Court finds it difficult to execute its decree. For instance, the judgment-debtor may not have enough property within its jurisdiction to satisfy the decree, or the judgment-debtor may be outside the jurisdiction of the Court so that a warrant against his person cannot be executed against him ('KRISHNA PRASAD v. BIDYA NANDA' 3 Pat L J 95). Section 38 of the Code, therefore, provides that a decree may be executed "either by the Court which passed it or by the Court to which it is sent for execution". There is nothing in the terms of the section to exclude the jurisdiction of the decreeing Court where the decree has been transferred for execution. Section 39 of the Code provides for the transfer and defines the circumstances in which it may be made. It speaks of sending "it" (the decree) for execution to another Court but I do not take this to indicate that the transfer divests the transferring Court of its power to execute the decree. As I shall show later there can be simultaneous executions of a decree. Therefore, the sending of the decree to another Court does not necessarily mean that the decreeing Court does not retain any portion of its power to execute the decree. Under Clause (b) of Sub-section (1) of Section 39 the decree can be transferred for execution if the judgment-debtor

"has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree."

It does not require the decreeing Court to execute the decree against the judgment-debtor's property within its jurisdiction before transferring the decree for execution. Thus, it is possible, that, after an order for transfer has been made, there may be property of the judgment-debtor within the jurisdiction of the decreeing Court against which the decree-holder may wish to proceed. Also, there is the possibility of the judgment-debtor acquiring property within the jurisdiction of the decreeing Court after the order for transfer has been made or of property of the judgment-debtor within the jurisdiction of the decreeing Court being discovered after the order of transfer was made. The absence of an express provision restraining the decreeing Court from proceeding against such property is, therefore, noticeable.

7. Section 41 provides that the transferee Court shall certify to the transferor Court the fact of execution in its Court or, where it has failed to execute the decree, the circumstances attending such failure. On the face of it, the section merely lays a duty on the transferee Court. Obviously, this is intended to be the final act of the transferee Court in respect of the execution of the decree, and it has been held that on the sending of the certificate the power of the transferee Court to execute the decree ceases ('MUHAMMAD IBRAHIM v. CHHATTO LAL' 5 Pat 398; 'SHESHAIYAB RAJAMANNER v. MADANMOHAN', 11 Pat 513).

8. Section 42 defines the powers of the transferee Court which are to be "the same powers in executing such decree" as if the decree had been passed by itself. What is thus given to the transferee Court is "the 'same' powers" as that of the "transferor Court and not "the powers of the transferor Court." The section, therefore, cannot be

read as meaning that by the transfer the transferor Court is deprived of its power to execute the decree.

9. That the transferor Court does not by its order of transfer divest itself entirely of its powers in respect of the execution of the decree appears from Section 46 which empowers the transferor Court to issue a precept to any other Court which would be competent to execute the decree to attach any property of the judgment-debtor specified in the precept and lying within, the Jurisdiction of the Court. The attachment made by that Court in pursuance of the precept will continue for two months and the period may -be extended by the decreeing Court. It will continue without such an order of extension if in the mean time the decree has been transferred to the attaching Court for execution and the decree-holder has applied for the sale of the property. The intention is clear. The judgment-debtor is to be prevented from disposing of his property before the decree-holder can get the decree transferred and take steps in the proper Court for execution against the property. This intention would be defeated if the fact that an order of transfer under Section 39 has been made and a certificate under Section 41 has not been sent deprives the decreeing Court of the power to issue a precept. The terms of the section do not indicate that the power of the Court is dependent on there being no subsisting order of transfer under Section 39.

The system of precepts was introduced by the Civil Procedure Code of 1908. Previous to this, the Judicial Committee in 'SABODA PROSAD MULLICK v. LUCHMEEPUR SING DEOGUR', 14 Moo Ind App 529, had supported an order of a decreeing Court in East Burdwan sending the decree for execution to three different Courts, and directing two of them to attach the property of the judgment-debtor in their respective jurisdictions and await the result of execution in the third Court. The introduction of a special provision for the issue of precepts does not mean that it is no longer open to the decreeing Court to pass such an order. The general terms in which the decreeing Court is empowered to transfer the decree for execution and the wide powers given to it by Order XXI Rules 26 and 28 to the terms of which I shall refer below, suggest that such an order can still be passed. All that the new provision does is that it provides a more speedy method by which the decreeing Court can prevent the judgment-debtor from avoiding payment of his dues under the decree. The limitation of the effect of the precept to two months and the requirement about the transfer of the decree provides an argument in favour of the possibility of simultaneous executions in two Courts. The legislature does not wish the judgment-debtor to be unnecessarily harassed and requires the decree-holder to show his good faith by taking prompt steps for the transfer of the decree to the Court to which the precept has issued and by filing within the time prescribed an execution petition in that Court. If before the decree could be transferred to that Court it had to be recalled from another Court to which it had been previously transferred, the period prescribed would have been longer so as not to interfere with the completion of execution proceedings in the first transferee Court.

10. Another section by which power in respect of the execution of the decree is expressly retained in the transferor Court is Section 50. This provides that, in case a judgment-debtor dies before the decree has been fully satisfied, the decree-holder may apply to the decreeing Court "to execute" the decree against the legal representative of the judgment-debtor. It is noticeable that the application is one "to execute" the decree. That is to say, the decreeing Court does not by the order of transfer part with its jurisdiction to execute the decree. It has been argued by Mr. Bhabananda Mukherji for the respondent-judgment-debtor that the death of the

judgment-debtor retransfers to the decreeing Court the jurisdiction to execute the decree because the transferee Court by the death loses its jurisdiction to execute the decree. 'JANG BAHADUB v. BANK OF UPPEB INDIA LTD⁵⁵ Ind App 227 (P C), furnishes the answer to this argument. In that case, the application for permission to execute against the legal representative was through mistake filed before the transferee Court and had been allowed by it. If on the death of the judgment-debtor the transferee Court lost its jurisdiction to execute the decree, this order would have been of no avail to the decree-holder. Their Lordships of the Judicial Committee, however held that the transferee Court did not lose its jurisdiction, that the requirement that the application should be filed before the transferor Court was a matter of procedure and not of jurisdiction, and that the mistake in procedure, having been acquiesced in by the judgment-debtor, did not invalidate the proceedings.

11. Order XXI, Rule 6 prescribes the procedure to be adopted by the transferring Court in sending its decree for execution by another Court. It does not call for comment. Order XXI. Rule 10, which deals with the filing of an application for execution is of some importance. It provides that, where the decree-holder desires to execute the decree, he shall apply

"to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court than to such Court or to the officer thereof."

In some decisions, stress has been laid on the word "than" as indicating that if a decree has been sent for execution to another Court, the application for execution can be filed only before that Court. With respect, I am unable to agree. The rule is concerned with defining the decree-holder's right to ask for the execution of his decree. Ordinarily, he must go for the purpose to the Court which passed the decree. In certain circumstances, however, he can go to another Court, namely, the Court to which the decree has been transferred for execution. This is all that the rule means. The effect of the word "then" is not intended to go back beyond the alternative word "or". It relates merely to the existence of the circumstances in which the decree-holder may apply for execution to a Court other than the decreeing Court. Section 51 of the Code prescribes several modes in which a decree-holder may proceed against his judgment-debtor for realising his decree. Supposing his decree is one for the realisation of money, he may proceed by attachment and sale of the judgment-debtor's property, or by the appointment of a receiver or, in the existence of appropriate circumstances, by the arrest and detention in person of the judgment-debtor, under Order XXI, Rule 21, the Court may in its discretion refuse execution "at the same time" against the person and property of the judgment-debtor. This implies that the decree -holder may with the permission of the Court proceed against the judgment-debtor in more modes of execution than one. Such execution is expressly contemplated by Order XXI, Rule 30; to give the word "then" in Order XXI Rule 10, the effect sought to be given to it is inconsistent With what appears from this to be the general Scheme of the Code, viz., subject to the control of the Court to facilitate the task of the decree-holder in recovering his legitimate dues from his judgment-debtor.

12. Order XXI, Rules 26 and 28 are of importance as showing that the transferee Court retains Jurisdiction in respect of the execution of the decree and as furnishing a reply to the contention that simultaneous executions in different Courts will enable the decree-holder to proceed in fraud of the judgment- debtor Rule 26 empowers the transferor Court to stay execution proceedings in the transferee Court or to pass "any

other order relating to the decree or execution which might have been made by the transferor Court 11 execution had been issued thereby or if application for execution had been made thereto. Under Rule 28, any such order of the transferor Court is binding upon the transferee Court. Under these provisions, the proceedings in execution before the transferee Court are entirely under the control of the transferor Court, and the transferee Court seems in the matter of execution of the decree to be merely the agent of the transferor Court. This control of the transferor Court would extend to all executions of the decree which might be going on simultaneously and, since there would be one Court controlling them, there is no danger of the decree-holder being able to act in fraud of the Judgment-debtor. The control thus given to the decreeing Court seems to me to be a strong argument in favour of the possibility of simultaneous executions in several Courts. Under Section 42 the transferee Court has the same powers as regards execution as the transferor Court. If the legislature intended that the transferee Court would be the only one empowered to execute the decree during the subsistence of the transfer, the wide power given to the transferor Court by Order XXI Rules 26 and 28 would have been unnecessary.

13. The possibility of simultaneous executions of a decree in more Courts than one was recognised by their Lordships of the Judicial Committee in 'SARODA PROSAD MULLICK'S CASE', 14 Moo Ind App 529 (supra). The decree in that case was obtained in the zilla Court of East Burdwan. As the property of the judgment-debtor in that zilla did not realise on sale the amount of the decree, the decreeing Court directed a copy of the decree and a certificate of the Court with specification of the properties in Zillas Murshidabad, Hoogli and Dinajpur to be sent to the Judges of each of these three Districts, directing the Judge of Murshidabad to proceed to attachment and sale of the properties within his jurisdiction, and the Judges of Hoogli and Dinajpur to attach the specified properties within their respective jurisdiction under S. 235 of the Code of Civil Procedure, 1859. The proceeds of the sale of the Murshidabad property was small, in consequence, she applied again to the East Burdwan Court, and, on completing the execution proceedings in Dinajpore, became a purchaser of the judgment-debtor's properties in Dinajpur. The validity of this sale arose for consideration in the appeal which went to the Judicial Committee. Under the Code of 1859, there was no provision for a precept, and the Judicial Committee held the order of transfer to the three Zillas to be a transmission of the decree for execution with a direction that the first process of execution, namely, by attachment, should take place in all, and that further proceedings under the attachment should not be taken in Hoogli and Dinajpur until the result of the completed execution in Murshidabad was known. The" decided that the decreeing Court had acted within its power and that the sale in Dinajpur was valid.

14. The decisions the correctness of which has been doubted are largely based upon a decision of the Judicial Committee reported in 'MAHARAJAH OF BOBBILI v NARASARAJU', 43 Ind App 238. The decree under execution in that case was obtained in the Court of the District Judge of Vizagapatam in April 1904. In September 1904, it was sent to the Court of the Munsif of Parvatipur for execution against property within the jurisdiction of that Court. It remained unexecuted in that Court till August 1910. On December 13th, 1907, the decree-holder applied to the District Judge of Vizagapatam for the execution of the decree. No conclusive action was taken on this application. The decree-holder again filed an execution petition before the District Judge on April 27th, 1910. The question arose whether limitation was saved by the execution petition of December 13th, 1907. Their Lordships of the Judicial Committee gave their reasons for holding that it did not in these words:

"As the decree of April 5, 1904, had by order of the Court of the District Judge been sent on September 30, 1904, to the Court of the Munsif of Farvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until August 3, 1910, and as the petition of December 13, 1907, was for 'execution of the decree by sale of the immovable property of the respondents which was within the local limits of the jurisdiction of the Munsiffs Court, their Lordships, having regard particularly to Sections 223, 224, 228 and 230 of the Civil P. C., 1882, are satisfied that when that petition of December 13, 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the 'decree by sale of the immovable property which had been' attached by the Court of the Munsif should have been made, & that proper Court to which that appln. should have been made was the Court of the Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of April 27, 1910, was, when made, time-barred under Article 182 of the First Schedule of the Indian Limitation Act, 1908, as no application had been made within three years in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree."

The italics (here single quoted) are mine. The case was decided strictly on its own facts. The defect which prevented the petition of December 13, 1907, from forming a new source of limitation was that it related to property in the jurisdiction of the Munsif of Parvatipur, to whom the decree stood transferred for execution. The decision is no authority for the proposition that by the act of transfer the transferring Court parts entirely with its power to execute the decree. The words "so far as it could be executed by that Court" indicate that the Munsif of Parvatipur got only a limited jurisdiction. The word 'that', which I have placed in italics (here single quoted), also points to the same conclusion. The jurisdiction given to the Munsif being a restricted one, it does not seem reasonable to infer that by sending the decree to him for execution the District Judge parted with his own power of executing the decree himself outside the jurisdiction of the Munsif.

15. The earliest reported Patna case in which the point arose is '*JNANENDRA NATH v. JO -GENDRA NARAIN*'² Pat 247. The decree, obtained in Calcutta, had been transferred to Pakaur for execution. A petition was filed after this in the Calcutta Court for the issue of a sealed warrant in connection with the decree. Subsequently another execution case was instituted in Pakaur and the petition filed in Calcutta was relied on as saving limitation. Das, J., with whom Adami, J. agreed, rejected the contention observing briefly that on a consideration of Sections 38 and 39 of the Code there can be simultaneous execution in two Courts, and that the Judicial Committee had taken that view in '*MAHARAJAH OF BOBBILI'S CASE*'⁴³ Ind App 238 P C.

16. In following this decision in '*KAMAKHYA NARAIN SINGH v. KALIPADO DUTTA*' MANU/BH/0205/1938, Wort, J. referred to Section 38 of the Code and Order XXI, Rule 10, the latter of which provisions in his opinion makes it clear that the transferee Court has exclusive jurisdiction to execute the decree. He took the same view of the effect of '*MAHARAJAH OP BOBBILI'S CASE*'⁴³ Ind App 238 P C, as was taken by Das, J. It does not appear if his attention was drawn to the decisions of other Courts in which that decision has been understood in the manner I have set out above ('*MAHADUM BEG v. MUHAMMAD MEERA SAHIB*', MANU/TN/0489/1927

AIR1928 Mad 493 (2); 'KANTI NARAIN v. MADAN GOPAL AIR 1935 Lah 465; 'MAKKHAN LAL v. BHAGWANA KUER', 1936 All L J 277 and 'MUTHU RAMA REDDI v. MOTILAL DAGA', ILR (1938) Mad 326.) Regarding 'SARODA PROSAUD MULLICK'S CASE', 14 Moo Ind App 529 P C, his Lordship observed that it merely applied the principle laid down in Section 46 of the Code of 1908. With respect I would submit that at that time there was no provision in the Code for the issue of precepts, and what the decreeing Court had done was to send the decree to three different Courts for 'execution'. Manohar Lall, J. delivered a concurring judgment relying on the decision in 'JNANENDRA NATH GHOSH'S CASE', Pat 247, and treating 'MAHARAJAH OF BOBBILI'S CASE' as applying to the facts of the case before him.

17. The point again arose in 'BISHUNDEO NARAIN 'MISSIR'S CASE', 19 Pat 35 Meredith J. (as he then was), with whom Wort, J. agreed accepted without discussion the decision in 'MAHARAJAH OP BOBBILI'S CASE', 13 Ind App 238 P C, as authority that without the certificate of non-satisfaction the transferor Court cannot entertain a petition for execution of the decree. The observation was made 'obiter', and it was held on another ground that limitation was saved.

18. In 'RAMESHWAR LAL'S CASE', 23 Pat 729, B.P. Sinha, J. (as he then was) made a reference to a Division Bench, doubting the correctness of the decision in 'KAMAKHYA NARAIN SINGH'S CASE', MANU/BH/0205/1938. The facts were that the decree passed by a Court at Bhagalpur was transferred to Madhipura for execution. Before the sending of certificate of non-satisfaction to the Bhagalpur Court the decree-holder applied to it for execution against the person of the judgment-debtor. In a subsequent execution case in Madhipura the question arose if the execution petition in Bhagalpur was available to save limitation. The Division Bench answered the question in the negative. Chatterji, J. who delivered the judgment of the Court pointed out in the course of it that 'MAHARAJAH OF BOBBILI'S CASE', 13 Ind App 238 P C, proceeded mainly on the ground that the District Judge of Vizagapatam had no jurisdiction to sell the property which had been attached by the Munsif of Parvatipur and that other High Courts in India had placed an interpretation on that decision different from the view taken by this Court hitherto. Relying, however, on Order XXI, Rule 10 and; the observation of the Privy Council in 'MAHARAJAH OP BOBBILI'S CASE', that the Munsif of Parvatipur was "the Court whose duty it then was to execute the decree so far as it could be executed by the Court" he was not prepared to hold that the previous decisions of the Patna High Court were incorrect. I have already made my comments on the provisions of Order XXI, Rule 10. As regards the observation of the Privy Council I would suggest with respect that it supports the contrary view. Their Lordships of the Privy Council do not say that after the transfer of the decree it was only the Munsif of Parvatipur who could execute it. They carefully qualify their observation by adding "so far as it could be executed by that Court". That is to say, the authority of the Munsif to execute that decree operated to the extent of his ordinary jurisdiction to execute a decree. To that extent it was not open to the decreeing Court to entertain a petition for execution. It does not follow from this that the decreeing Court had not the power to execute the decree: outside the limits of the ordinary jurisdiction of the Munsif of Parvatipur. In this view I am supported by the observation of the Privy Council in 'JANG BAHADUR'S CASE', 55 Ind App 227 P C.

"Under Clause (c) of Section 39, sub-s. 1 of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated.

On such transfer the former Court does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding, and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (Section 41)."

The effect of the transfer under Section 38 is to give the transferee Court authority to execute the decree to a limited extent. If it is held that at the same time it completely divests the decreeing Court of its power to execute the decree, it takes away the decree-holder's right to simultaneous execution, a right he undoubtedly had before the transfer. I do not see why, in the absence of clear statutory provision, we should hold that to be the effect of the provisions of the Code relating to the transfer of decrees.

19. In 'DARSANSINGH v. BALDEODAS', 25 Pat 145, Meredith J. (as he then was) expressed a view which was not consistent with that expressed by him in 'BISHUNDEO NARAIN MISSIR'S CASE' 9 Pat 354. Again his observations were made 'obiter', the case being disposed of on the finding that the certificate of non-satisfaction was sent before the application was made to the transferor Court. The decree under execution was passed by the High Court at Calcutta and had been transferred to Bhagalpur. It was contended that in the absence of certificate under Section 41 of the Code of Civil Procedure the Calcutta High Court had no jurisdiction to pass an order for execution by the appointment of a receiver. In repelling this contention Meredith J. distinguished 'MAHARAJAH OF BOBBILI'S CASE' 43 Ind App 238 P C, on the ground that the application before the District Judge of Vizagapatam related to property in Parvatipur and he relied among "other authorities on Jang Bahadur's case.

20. The question next arose in 'KRISHNA v. GANGA PRASAD' 25 Pat 790, in which the lead-ing judgment was delivered by Dalziel, J. His Lordship did not think it necessary to consider the correctness of the Patna view as to the real effect of 'MAHARAJAH OF BOBBILI'S CASE' 43 Ind App 238 ,P C, in view of the plain wording of Order XXI, Rule 10, which had been relied on in the previous decisions in 'KAMAKHYA NARAIN SINGH'S CASE', MANU/BH/0205/1938 and 'RAMESHWARLAL'S CASE', 23 Pat 729, . He distinguished the decision in 'DARSAN SINGH'S CASE' 25 Pat 145, on the ground that the point of limitation was not raised in it. The other member of the Bench, B.P. Sinha, J. (as he then was), was evidently still doubtful of the correctness of the view taken in the earlier Patna cases, for he confined his concurrence to "the order proposed". It appears that, having failed to convince his brother Judge in this case and his reference to the Division Bench in 'RAMESHWARLAL'S CASE' having been unfruitful, he did not care to press his view.

21. The view that the decreeing Court does not by an order of transfer under Section 39 of the Code divest itself entirely of its jurisdiction to execute the decree has been taken in several re-ported decisions of other High Courts. In the light of what I have said above I need not do more than refer to the decision of the Full Bench in 'KANTI NARAIN'S CASE' AIR 1935 Lah 465, which contains a careful analysis of a large number of relevant decisions.

22. For the reasons which I have given, I am of the opinion that the transferor Court retains jurisdiction to execute the decree except to the extent that jurisdiction to execute the decree has been given to the transferee Court.

23. This brings me to the second point which I have formulated. To save limitation the application for execution or to take a step in aid of execution must be made to the "proper Court". This expression is defined in the explanation to Article 132 as the Court whose duty it is to execute the decree or order. The term "the Court whose duty it is to execute the decree" occurs in Order XXI, Rule 1 of the Civil P. C. relating to payment of money due under a decree and Order XXI, Rule 2 relating to the certification of the payment or the adjustment of a decree made outside the Court. The Code does not in express terms lay on any Court the duty of executing a decree. Such a duty necessarily follows from the provisions empowering certain Courts to execute the decree read with the provisions entitling the decree-holder to apply to them for execution. When a person applies to a Court for a relief which that Court is empowered to grant and establishes his right to that relief, the Court is bound to grant it. The definition in Explanation II has been characterised as a loose one by Fazl Ali, J. in a case in which the application made to the transferor Court was not for execution but for taking a step in aid of execution, 'DWARKADAS GOBINDRAM FIRM v. SALIGRAM REKHRAJ FIRM', 17 Pat 617. His Lordship observed:

"Now once it is held that the Court which has transferred the decree to another Court has the power to recall the execution proceedings from that Court, the application made by the decree-holder on 4-3-1932 must be held to be a step-in-aid of execution made in accordance with law before the proper Court. The expression 'proper Court' has been somewhat loosely defined in Explanation II of Article 182 'as the Court whose duty it is to execute the decree', It was contended before us on behalf of the appellant that this definition was wide enough to include a Court which has transferred a decree for execution to another Court. In view, however, of the authorities on the subject it appears to me to be not permissible to give to this expression the wide meaning attributed to it on behalf of the appellant. But if the Court which has transferred the decree has the power to execute it after it has been recalled, it must be held that the Court at Wardhra was the "proper Court" for dealing with the application which was made by the decree-holder in this case on the 14th March 1932. In my opinion the application of the decree-holder dated the 14th March 1932 was made to a proper Court and it saves limitation."

A similar difficulty was felt in 'KANDASAMI CHETTIAR V. GOKULDAS MADANJI & CO (1941) 1 Mad L J 837, where the saving application relied on was one filed to the decreeing Court to transfer a decree to a Court to which it had already been transferred for execution. Their Lordships took a slightly different view. Referring to 'MUTHU RAMA REDDI V. MOTILAL DAGAJR (1938) Mad 326, with approval, they observed :

"A very similar question has been dealt with by a Bench of this Court in 'MUTHU RAMA REDDI v. MOTILAL DAGAJR. The facts are not of course precisely similar, for the question there dealt with was an application asking for a decree to be transmitted to an entirely new Court, but the principles upon which the learned Judges have based their decision clearly apply to the present case. They have analysed various provisions of the Civil Procedure Code and have held that when a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction for some specific purposes which are set out by them. Article 182 defines the 'proper Court' as the Court whose duty it is to execute the decree or order, and in spite of the transmission of the decree

to another Court there still remains the duty in the transmitting Court to take certain measures in execution, it is obvious, it seems to us, that it is the proper Court within the meaning of this definition."

24. It is not necessary to consider this point here as the reference has been made to us on a petition for execution filed in the transferor Court. On my finding above, the Court which passed the decree, after it has sent it for execution to another Court, still retains the power to execute that decree to the extent that the jurisdiction to execute it has not been transferred to the other Court. It does not follow, however, that it is therefore a proper Court for all execution petitions filed before it for the execution of the decree. The relief asked for must be a relief which it can grant. For example, the Court of the District Judge of Viza-gapatam was for this reason held not be the proper Court in 'MAHARAJAH OF BOBILI'S CASE', 43 Ind App 233 P C. As the petition for execution is not before us and we do not know what was the nature of the relief asked for, we cannot give a more definite reply.

25. For the reasons set out above, I would answer thus the question which has been referred to the Full Bench. Where a decree is transferred for execution by another Court, the transferee Court gets jurisdiction to execute the decree to the limits of its jurisdiction to execute its own decrees. The transferee Court retains this jurisdiction until it sends a certificate under Section 41 of the Code. Outside the limits indicated the transferor Court retains the power to execute the decree. Whether an application for execution of the decree filed to the transferor Court before the sending of the certificate under Section 41 is an application to the "proper Court" within the meaning of Article 182(5) of the Schedule to the Limitation Act depends on the relief applied for. If it is one which the transferor Court can grant, the application is made to the "proper Court."

Syed Jafar Imam, J.

26. I have had the advantage of reading the judgment of my learned brother, Reuben, J. and would respectfully agree with it.

27. The question referred to the Full Bench involves, in my opinion, two questions: (i) whether the Court, which transferred its decree for execution to another Court, has jurisdiction to entertain an application for execution in the absence of a certificate under Section 41 of the Code of Civil Procedure from the Court to which the decree was transferred, and (2) whether the application for execution made to the Court which passed the decree would be an application to the "proper Court."

28. The Code of Civil Procedure has expressly given jurisdiction to the Court which passed the decree to execute it. Unless that jurisdiction is taken away expressly by some provision of the Code, it continues. It may be possible by reading the various provisions of the Code to come to the conclusion that by necessary implication the jurisdiction of the Court, which passed the decree, to execute it is taken away in certain circumstances. I cannot for myself read the provisions of Section 41 of the Code to express anything of the kind suggested in the course of the argument that the Court which passed the decree would not execute it in any circumstance in the absence of a certificate from the Court to which the decree had been transferred for execution. Section 41 of the Code is not in the nature of a prohibition to the Court which passed the decree to execute it in any circumstance in the absence of a certificate. As I read Section 41, it conveys to me the meaning that it is the bounden duty of the Court, to which the decree was sent for execution, to certify to the Court

which passed the decree that such execution had taken place, or where there had been failure to execute it, the circumstances attending such failure. From the earliest times it has been recognised by the Courts in India as well as by their Lordships of the Judicial Committee that simultaneous execution of a decree in different Courts can take place. It is too late now to contend otherwise. That being so, simultaneous execution of a decree by different Courts necessarily implies that such Courts have jurisdiction to execute it. I can quite see that where a decree has been sent for execution to another Court, an application to the Court which passed the decree to execute it as against property not within its jurisdiction or to cause the arrest of the judgment-debtor not residing within its jurisdiction would be beyond the jurisdiction of such Court. There is, however, nothing in the provisions of the Code of Civil Procedure which would prevent the Court which passed the decree to execute it as against property within its jurisdiction or to cause the arrest of the judgment-debtor residing within its jurisdiction, although the decree had been transferred to another Court for execution. The Court to which the decree had been transferred could only execute it as against property within its jurisdiction, or cause the arrest of the judgment-debtor residing within its jurisdiction. The Court which passed the decree could never execute it as against property outside its jurisdiction or cause the arrest of the judgment-debtor residing outside its jurisdiction. My learned brother, Reuben, J., had dealt with the question referred to the Full Bench elaborately and I need not repeat what he has said. In my opinion, the answer to the question referred to the Full Bench should be, so far as jurisdiction is concerned, that the Court which passed the decree has jurisdiction to execute it in certain circumstances inspite of the absence of any certificate under Section 41 of the Code from the Court to which the decree had been transferred for execution.

29. As to whether the Court which passed the decree would be the "proper Court" if an application for execution was filed before it would depend I think, entirely upon the facts of a particular case. If the application for execution was with reference to property within the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing within its jurisdiction, then, in my opinion, it would be the "proper Court." If, on the other hand, the application for execution sought the execution of the decree against property outside the jurisdiction of the Court which passed the decree, or for the arrest of the judgment-debtor residing beyond its jurisdiction, then such an application would not be to the "proper Court".

Das, J.

30. I have had the advantage of reading the judgments prepared by my learned brotheren Reuben and Imam, JJ. and I agree that the answer to the question referred to the Full Bench should be as indicated by Reuben, J.

31. This reference to the Full Bench is under Rule 3 of Chapter V, page 25 of the Rules of this Court, and we have to return the case for final adjudication by the Division Bench which referred it, after expressing our opinion on the point of law referred to us.

32. As explained by my learned bretheren, the question referred to us really involves two questions, one of pure law & the other depending on facts. The question of law is whether the transferor Court has any jurisdiction to execute a decree which it has already transferred to another, Court, in the absence of a certificate under Section 41 of the Code of Civil Procedure from the transferee Court. In my opinion, the answer to this question of law is furnished by the decision of their Lordships of the Judicial

Committee in 'JANG BAHADUR'S CASE'⁵⁵ Ind App 227 (P C) where the limits of the jurisdiction of two Courts were indicated in the following words:

"Under Clause (c) of Section 39, sub-s. 1 of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding, and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (Section 41)."

The point emphasised by their Lordships is that the transferee Court obtained jurisdiction to deal with 'that particular execution proceeding', while the 'transferor' Court 'does not altogether lose seisin of the decree'. The words underlined (here single quoted) bring out, I think, the limits of the jurisdiction of the two Courts.

33. This decision is not, in any way, inconsistent with the earlier decision in 'MAHARAJAH OF BOBBILI'S CASE'⁴³ Ind App 238 (P C), if we only remember the facts of the case. In 'MAHARAJAH OF BOBBILI'S CASE', the decree-holder applied to the District Judge of Vizagapatam for the execution of the decree against property within the jurisdiction of the Munsif of Parvatipur. In that circumstance, it was held that the District Judge of Vizagapatam was not the proper Court within the meaning of Article 182 of the Limitation Act. The decision was not a decision on the question of law referred to above, but rather on the second question whether a particular Court was the proper Court within the meaning of Article 182, which question depended on the facts of the case.

34. The second question whether a particular application for execution to the transferor Court is an application to the proper Court within the meaning of Article 182 (5) of the Schedule to the Limitation Act, depends on facts, such as the nature of the relief, claimed, mode of execution, etc. I do not think that that question can be answered as a pure question of law. If the application is in respect of a relief which the transferor Court can grant, the application is made to the proper Court; otherwise, it is not. The answer to the second question cannot be put in any more definite or categorical form.

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