

Sm. Sarada Sundari Das W/O Madan Mohan Das and anr. Vs. Jabbar Ali and ors.

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Court : Kolkata

Decided On : Jan-10-1939

Reported in : AIR1939Cal331

Appellant : Sm. Sarada Sundari Das W/O Madan Mohan Das and anr.

Respondent : Jabbar Ali and ors.

Judgement :

1. This is an appeal by the decree-holders whose application for execution has been dismissed by both the Courts below on the ground that at the date of the application the decree under execution was dead and gone. The application for execution with which we are concerned in this appeal was filed on 18th September 1936, and was numbered as Execution Case No. 333 of 1936. For the purposes of following the controversies between the parties, the following facts are material. The decree under execution is a mortgage-decree passed against the respondents so far back as 28th February 1925. The first application for execution, numbered 198 of 1925, was filed on 27th May 1925. The decree-holders did not proceed on with this application and allowed it to be dismissed for default on 8th September 1925. Between 1925 and 1927 there were certain proceedings taken by the mortgagors to set aside the final decree which was passed on 28th February 1925. These proceedings terminated in favour of the decree-holders in the year 1927. On 21st June 1929, the second execution case numbered 189 of 1929 was started.

2. The judgment-debtors filed objections on 18th September 1929. They contended that this execution case, namely the second one, was barred by limitation inasmuch as it was not filed either within three years of the decree or within three years of a step-in-aid of execution taken in the course of the first execution case. This objection under Section 47 of the Code was numbered 82 of 1929. The first Court overruled the objection and held that the second application for execution was within time. The judgment-debtors carried the matter to the District Judge. The learned District Judge concurred with the judgment of the trial Court in his order dated 29th March 1930. A further appeal was taken to this Court by the judgment-debtors and that appeal was dismissed on 24th November 1932. In the meantime, after the dismissal of the Miscellaneous Case No. 82 of 1929 by the first Court, the decree-holders proceeded on with their execution. They were at liberty to do so because there was no stay order either by the learned District Judge or by this Court. It appears from the order sheet of Execution Case No. 189 of 1929, what we have called the second execution case, that the decree-holders had the properties advertised for sale, the sale proclamation having been actually issued on 14th May 1930. In the proclamation the date of sale fixed was 3rd July 1930. This appears from the order sheet Ex. 3 which has been exhibited in the case.

3. On 7th July 1930, there was an order of the Court stating that the sale was to be held the next day by the Nazir, that is to say on 8th July 1930. On 8th July 1930 an order was recorded by the Court dismissing the execution case. This order has been marked Ex. B.2. On 19th August 1933, the decree-holders made another application for execution. This application was numbered as Execution Case No. 292 of 1933. No notice under Order 21, Rule 22 was issued on the judgment-debtors, but we find that a notice under Order 21, Rule 66 asking the judgment-debtors to appear for the purpose of settling the terms of the sale proclamation was issued by the Court. This notice was served on the judgment-debtors on 12th November 1933. The notice required the presence of the judgment-debtors in Court on 27th November 1933. On 19th December 1933 however the execution case was dismissed for default. After that the present execution case was started, as we have already stated, by an application filed by the decree-holders on 18th September 1936.

4. The judgment-debtors in their objection under Section 47 of the Code said that Execution Case No. 292 of 1933 was barred by limitation inasmuch as it was filed beyond three years of 8th July 1930 when the final order, namely the order of dismissal for default, was passed in the previous execution case, namely Case No. 189 of 1929. This objection of the judgment-debtors has been given effect to by both the Courts. The decree-holders contended before the Courts below, as also before us, that this view is wrong on three grounds : first, that for the purposes of limitation under Article 182, Clause 5, Limitation Act, the date of the final order on the application for execution numbered 189 of 1929 must be taken to be the 24th November 1932 - the date of the judgment of this Court passed in Miscellaneous Case No. 82 of 1929; second, that the principles in *Mangal Prosad v. Grijakant* (1882) 8 Cal. 51 case apply, inasmuch as the judgment-debtors had opportunity to appear in the course of Execution Case No. 292 of 1933 and contest that that application was barred by limitation; and third that the execution case, which has been numbered as Execution Case No. 292 of 1933, ought to be treated as continuation of Execution Case No. 189 of 1929; the order recorded on 8th July 1930, which was in form an order of dismissal of the execution case for default being in substance an order by which the Execution Case No. 189 of 1929 was removed from the court-file for the convenience of the Court. In the view that we have taken of the facts it is unnecessary to consider the first two contentions raised before us by the decree-holders' advocate because we have come to the conclusion that this third contention is a sound one.

5. We have already, in reviewing the facts, traced to a certain extent the history of the Execution Case No. 189 of 1929. From the order sheet Ex. 3, it appears that the sale proclamation had been published or at least the Court was satisfied of the due publication of the sale proclamation and the papers had been actually handed over to the Nazir on 8th July 1930 to hold the sale. At the foot of the order sheet Ex. 3 there is an endorsement over the signature of the Nazir that the decree-holder's name was called on but he was found absent. This endorsement was brought to the notice of the Court and on the basis of the said endorsement the Court passed an order to the following effect on the same day (8th July 1930) : 'The decree-holder takes no steps. Dismissed for default.' We do not see what steps the decree-holders could have taken or were required to take at the date of the sale or at the time of the sale when the Nazir had already been commissioned by the Court to hold the sale. It was optional for the decree-holders to be present and they were under no necessity to be present at the time of the sale, unless they had permission to bid from the Court and were desirous of offering bids. The Nazir's report therefore misled the Court. There was in fact no default on the part of the decree-holders in conducting Execution Case No.

189 of 1929 and the order, though in form is an order for dismissal for default, must be taken in substance to be an order for removing the case from the pending file of cases. This view of ours is supported by the judgment of a Division Bench of this Court in Ajodhya Nath v. Srinath Chandra (1921) 8 A.I.R. Cal. 472 where the Court pointed out that not the form but the substance of the order must be looked to. In that case also, the order in form was an order for dismissal for default, but the Court held that on the facts there was no default on the part of the decree-holders and the order recorded in that form must be treated as equivalent to an order for striking of the case or removing it from the file for the convenience of the Court.

6. On the principles laid down in that case the application for execution which was filed on 19th August 1933, and had been numbered as Execution Case No. 292 of 1933 must be treated as a continuation of the application filed on 21st June 1929, and which had been numbered as Execution Case No. 189 of that year. This application was dismissed for default on 19th December 1933. In this view of the case no question of limitation arises because the application for execution which is the subject-matter of the appeal before us was filed within three years of that date. We accordingly set aside the judgments of the Courts below and hold that the decree under execution is still alive and the application for execution which has been numbered as Execution Case No. 333 of 1936 is within time. The execution case is sent to the Court of first instance in order to enable the decree-holders to take further steps for realizing the decretal amount. The result is that this appeal is allowed with costs to the decree-holders appellants throughout, hearing fee being assessed at two gold mohurs.

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