

(1926) 02 CAL CK 0029
In the Calcutta High Court

Akhoy Kumar Talukdar and Others

APPELLANT

Vs

Surendra Lal Pal

RESPONDENT

Date of Decision : 24-02-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 12, 73

Citation : AIR 1926 Cal 957 : 96 Ind. Cas. 378

Hon'ble Judges : Panton, J;B.B. Ghose, J

Bench : Division Bench

Judgement

1. This is an appeal by the defendant No. 1 against a judgment and decree of the Additional District Judge of Dacca, reversing a decree of the Subordinate Judge of that place. The facts are as follows: The defendants obtained a money decree against certain persons on the 30th May, 1917. The plaintiffs' father also obtained a money decree against the same judgment-debtors on the 3rd October, 1917. Both the defendants and the plaintiffs' father applied for execution of their decrees. The plaintiffs' father made an application for rateable distribution of the assets under Section 73 of the C.P.C. on the 9th October, 1917. Then the plaintiffs' father died on the 18th February, 1918. The property which was attached in execution of the defendants' decree was sold on the 9th March 1918 and it appears that the decree-holder was allowed to set off the purchase-money against the decretal amount. The present plaintiffs made an application for substitution in the place of their deceased father in the execution proceedings in the Court of the Subordinate Judge on the 6th April, 1918. The Subordinate Judge rejected the application on the 12th April, 1918. Against that order there was an appeal by the plaintiffs and the Appellate Court made an order for substitution on the 31st May, 1918 and the plaintiffs were substituted in the execution proceedings on the 6th July, 1918. Thereafter the plaintiffs made an application for rateable distribution of the assets on the 20th June, 1918 ; that was rejected in September 1918. Against that order the plaintiffs moved this Court in its revisional jurisdiction and the Rule obtained by him was discharged on the 24th March, 1919. The present suit was instituted purporting to have

been made u/s 73, Sub-section (2) of the C.P.C. on the 22nd September, 1919. The trial Court dismissed the suit mainly on two grounds. First, that the plaintiffs did not obtain a certificate under the Succession Certificate Act in order to recover the amount which was due to their deceased father. Secondly, that the provisions of Section 73 of the C.P.C. did not apply to the suit and, therefore, it ought to fail. On appeal by the plaintiffs the learned Judge has reversed the decision of the Subordinate Judge on the question of Succession Certificate as he held that as, the plaintiffs had substituted themselves in the execution case in place of their deceased father, the money really accrued to them after the death of their father and no Succession Certificate was necessary. It is unnecessary for us to come to any decision on this question, because it is really a matter of form and no suit could have been dismissed on the ground of absence of a certificate. If we held that a Succession Certificate was necessary, we should hold that the proper course for the trial Court ought to have been to allow the plaintiffs time to produce a Succession Certificate retaining the suit on the file of the Court. The real question is whether the plaintiffs are entitled to the relief they claim. The learned Additional District Judge has held that Section 73, Sub-section (1) of the C.P.C. did not apply in terms to this case, and that being so, he ought to have held that Sub-section (2) of Section 73 does not entitle the plaintiffs to bring such a suit as this. But the Additional District Judge has decreed the suit on the ground that the plaintiffs are entitled to relief on principles of equity. Section 73, Sub-section (1), enacts that "Where assets are held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all "such persons." In this case there was an application by the plaintiffs' father for the execution of the decree which he had obtained against the same judgment-debtor as the defendant No. 1 had. The order, therefore, for rateable distribution ought to have been made on that application. But the unfortunate circumstance which happened on the death of the plaintiffs' father on the 18th February, 1918, led to the result that there was no one in existence at the time when the assets were realized between whom and the defendant, the assets could be rateably distributed. It is contended on behalf of the plaintiffs that the fact that an order for substitution was made by the Appellate Court on the 30th May, 1918, kept alive the application made by the plaintiffs' father and it ought to be held that the application for execution made by the plaintiffs' father continued throughout which would entitle the plaintiffs to a rateable distribution of the assets. The difficulty in accepting this contention arises from the fact that there is no provision for any substitution in the case of the death of a decree-holder who has applied for the execution of his decree Order XXII, Rule 12 of the C.P.C. provides that Rule 3 which refers to substitution of legal representatives of a deceased plaintiff does not apply to proceedings in execution of a decree. On the death of the applicant for execution it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the

proceedings in execution of the decree or to apply for fresh execution under Order XXI, Rule 16 of the C.P.C. It was not necessary for them nor was it competent to make an application for substitution. The order for substitution of the plaintiffs in the place of their deceased father in the execution proceedings cannot be held to have continued the application made by the father of the plaintiffs, during the period between the 18th of February and the 6th of April, 1918.

2. The position is that the applications for execution and for rateable distribution of the assets by the plaintiffs' father were not continued on his death on the 18th of February, 1918 and when the property was sold on the 9th March, 1918 there was no person before the Court who could participate in the rateable distribution of the assets. That being so, the order of the Court allowing the defendants to set off the decretal money against the purchase money of the property cannot be questioned as having been wrongly made. It cannot, therefore, be held under Sub-section (2) of Section 73 of the Code that the assets were liable to be rateably distributed u/s 73(1) and that they were paid to a person not entitled to receive the same. On that ground the plaintiffs' suit is not maintainable and it must be dismissed.

3. The last argument addressed to us by the learned Advocate for the plaintiffs was that it was a very hard case and that we should on equitable principles give relief to the plaintiffs. The difficulty in accepting this contention is that one cannot grant relief about a cause of action which is created by and especially provided for in a Statute if the matter does not fall within its provisions, on equitable principles. Ordinarily a decree-holder is entitled to realise his dues from the property of the judgment-debtor. It is only by virtue of Section 73 of the C.P.C. that rateable distribution between different decree-holders is allowable. It is unfortunate that on account of the death of the plaintiffs' father they have been deprived of the advantages allowed under that section, but it appears that they were wrongly advised in not presenting their application on the death of their father for rateable distribution of the assets before the assets were realised. They delayed for about two months before they made any application and about a month after the sale of the property. The appeal must be allowed on the ground we have stated above and the appellant will be entitled to his costs in this Court and in the Courts below.

4. Sometime after our judgment was pronounced but before the transcript was submitted for our signature, the learned Advocate for the respondent drew our attention, to the case of Manmatha Nath Mitter v. Rakhal Chandra Tewary 3 Ind. Cas. 324 : 14 C.W.N. 752 : 10 C.L.J. 896. In that it was held that on the death of a decree-holder, during the pendency of an appeal in execution proceeding, it was open to the legal representatives of the decree holder to apply for leave to prosecute the appeal. But that case is no authority for the proposition that an order for rateable distribution of the assets may be made when the person in whose favour it might be made is dead and there is no other person on the

record at the time when such distribution might have been directed.