

(1911) 01 CAL CK 0038
In the Calcutta High Court

Bhabhikan Singh and Others

APPELLANT

Vs

Babu Chakradhar Pershad Singh and Another

RESPONDENT

Date of Decision : 06-01-1911

Acts Referred:

Citation : 9 Ind. Cas. 227

Hon'ble Judges : Woodroffe, J;Carnduff, J

Bench : Division Bench

Judgement

Woodroffe, J.—In this case the respondents applied to the lower Court for an order of injunction restraining the appellants, who were decree holders, from executing the mortgage decree which they had obtained. The respondents also asked that the sale of the mortgaged property might be stayed pending the decision of the suit which has been instituted by them, on the ground that the decree which is sought to be executed was a fraudulent decree. The application was one for an injunction against the alleged wrongful sale in execution of a decree; and it has been held (and in this decision I entirely agree) that in interpreting this portion of the Code, a Judge cannot be too careful as to the mode in which he permits the machinery of the Court to be used for the purpose of enabling the plaintiff" in one suit to delay the decree-holder in another from obtaining the fruits of his judgment by executing his decree in the ordinary course against the property of the judgment-debtor.

2. The learned Subordinate Judge who dealt with I his case has dealt with it without reference to any of the principles which should govern the disposal of an application of this character. The granting of an injunction is not a matter of course.

3. I shall deal, first, with Appeal No. 454 of 1910. The decree was passed on the 31st August 1904, that is, some six years ago. We have been informed that there was no appeal from that decree. The respondent is alleged to have attained majority about March 1903. It is also on the affidavit, and is not denied, that there were several previous executions of the decree. The present suit was

instituted in July 1910; and on the institution of that suit the plaintiffs applied by petition for an order to which I have referred. In support of that application an affidavit by one Raghu Pershad was filed, in which, after stating who he is, he says.--That the decree-holders, defendants, by adopting illegal proceedings for sale in execution case We. 156 of 1910 pending in this Court want illegally to bring to sale the properties, the subject-matter of this suit. The plaintiffs apprehend a serious loss to them if the ancestral properties, the subject-matter of this suit, are sold away. That it is quite necessary for the ends of justice that a temporary injunction should be issued restraining the defendants from adopting any proceeding for sale." It is obvious that this affidavit is not a sufficient affidavit upon which any order could have been made such as that which the Subordinate Judge has made. There was before him no prima facie proof of any of the facts upon which the plaintiffs base their claim nothing, in fact, beyond the allegation that the sale was an illegal sale in execution of the decree.

4. In answer to this affidavit the appellants put in an affidavit in which, in the first place, it is stated that the suit of the plaintiffs is not a bona fide suit, it being contended that the application was made merely for the purpose of delaying execution of the decree passed on the 31st August 1904.

5. Now, in dealing with this part of the case, the learned Subordinate Judge says: "It would be difficult for me to decide whether the suits are bona fide ones or not without going fully into the merits of the case." It was the duty of the Subordinate Judge to have enquired into this question for the purpose of the application before him. Such a finding by him would not, in any way, prejudice the case which was yet to be tried. It was necessary, however, for the purpose of adjudicating whether the application for an injunction should be granted or not For, if the application was made for purposes of delay only no injunction should have been granted. He should, therefore, have entered into and enquired into the question as to whether this was a bona fide application or one made for the purpose of delaying execution. The learned Subordinate Judge then proceeds to say: "The plaintiffs do not admit that Sunt Pershad was the karta of the family." The question is not what the plaintiffs admit or do not admit but what the plaintiff has proved so as to entitle him to the injunction sought. Then upon the sole ground that the applicant had instituted a: suit whether bona fide or not, the Subordinate Judge proceeded to grant a temporary injunction; and then went on to direct as follows: "The execution of the entire decrees to be stayed as the shares of the members cannot be definitely ascertained." He had no power to make an order for stay of that kind. In this case it appears to me that the Subordinate Judge has not exercised any proper discretion in making the order appealed against; nor has he given any valid reasons in support of that order. In my opinion, therefore, this appeal should be allowed with costs and the order of the Subordinate Judge set aside.

6. This decision will also govern the analogous Appeals Nos. 452 and 453 of 1910.

7. I would assess the hearing fee at seven gold mohurs in each appeal.

Carnduff, J.

8. I agree.