(1921) 10 BOM CK 0006

In the Bombay High Court

Case No : Civil Extraordinary Application No. 111 of 1921

Dattatraya Govindseth Lubri — APPELLANT

Vs

Purshottam Narayanseth Dali — RESPONDENT

Date of Decision : 10-10-1921

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 73

Citation : (1922) 24 BOMLR 1

Hon'ble Judges : Shah, J;Norman Macleod, J;Fawcett, J

Bench : Full Bench

Judgement

Norman Macleod, Kt., C.J.—This is an application to this Court u/s 115 of the Code of Civil Procedure. The applicant obtained a decree against his debtor, presented a Darkhast for execution, and applied therein for rateable distribution of the proceeds of a sale in execution of another decree obtained by the opponent against the same judgment-debtor.

2. The opponent raised a plea that the applicant''s decree had been obtained by fraud. The lower Court considered this question and being bound by the decision in Chhaganlal v. Fazarali I.L.R (1888) Bom. 154 decided that the Court could decide the question of fraud in execution proceedings, where the rival decree-holder raised the point, notwithstanding that a concurrent remedy by a regular suit was left open to him. It is necessary, therefore, to consider the ruling in Chhaganlal v. Fuzarali. Sir Charles Sargent C.J. said:-

The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court (In re, Sunnier Dass) that the Court distributing the proceeds of execution u/s 295 of the CPC (Act XIV of 1882) should inquire into the bona fides of the decree-holders if called in question and decide it in the same manner as all other questions that arise in execution.

3. This question arose in Saravana Pillai v. Arunachalam Chettiar I.L.R (1916) Mad. 841 The learned Judges after considering the Calcutta case and also the

decision of Chhaganlal v. Fazurali, came to the conclusion that it was not open to a Court exercising its duties u/s 73 of the Code of 1908 to inquire into the legality or validity of a decree brought to its notice in distributing the assets.

4. Our attention has been drawn by Mr. Koyajee to Section 272 in the Code of 1859 which says :-

If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached has been obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court, or if it be a decree of another Court, may stay the proceeding to enable the applicant to obtain a similar order from the Court by which the decree was made.

5. Therefore, under that Code the Court which was distributing the assets amongst the decree-holders had the power to deal with the question whether any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by Section 295 of Act XIV of 1882 nor by Section 73 of the present Code. Section 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor. On general principles, the Court, which would be merely a distributing agency, would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree. So it would appear that where the Court is only concerned with distributing assets u/s 73, it cannot have any greater power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution. Sub-section 2 of Section 73 expressly provides that where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets on the ground that such share of the distribution was obtained by fraud or collusion. No doubt, if any such suggestion is made to the distributing Court, the applicant making it would be given an opportunity of filing a regular suit to set aside the decree, which, he alleges, had been obtained improperly, and the distribution might be stayed till that suit was decided. But that would be a matter purely for the distributing Court to decide, because Sub-section (2) implies that in spite of an objection the assets have been distributed, in which case the suit would be one for the refund of the amount distributed, on the ground that the person who obtained such amount had got a decree passed in his favour either by fraud or other improper means. I think, therefore, the decision in Chhaganlal v. Fazarali must be overruled. The rule must be made absolute and the distribution must proceed in the lower Court in the light of this judgment.

6. Costs to be costs in the execution in the lower Court.

Shah, J.

7. I agree.

Fawcett, J.

8. I agree.

