

(1887) 04 CAL CK 0006
In the Calcutta High Court

Ganee Mahomed Sarkar

APPELLANT

Vs

Tarini Charan Chuckerbati

RESPONDENT

Date of Decision : 05-04-1887

Acts Referred:

Evidence Act, 1872 — Section 86

Citation : (1887) ILR (Cal) 546

Hon'ble Judges : Norris, J;Beverley, J

Bench : Division Bench

Judgement

Norris, J.—The facts of this case appear to be as follows:

The decree-holder, respondent, obtained a decree against the judgment debtor, appellant, in one of the Courts of the Maharajah of Cooch Behar on the 12th of September, 1874. Subsequently the decree-holder applied that the decree might be sent for execution to the District Court of Rung pore. This application was granted, and a copy of the judicial record of the suit was sent to the Rung pore Court, and reached there on the 6th of February, 1886.

2. It is now admitted in argument at the Bar that the copy of the judicial record in the suit was defective, inasmuch as it did not "purport to be certified in the manner certified by the representative of the Government of India resident in Cooch Behar to be the manner commonly in use in that country for the certification of the copies of judicial records." The decree was made in the Court of the Civil Judge of Cooch Behar, and the copy of the record should have been signed by the Judge, his official designation being added below his signature and the seal of the Court affixed ; instead of this it was signed by the Sheristadar.

3. On the 8th February 1886, a notice, u/s 248 of the Code of Civil Procedure, was issued, calling upon the judgment-debtor to show cause on the 20th of February why the decree should not be executed, and on the same day, before he had had any opportunity of appearing to show cause, an order was issued or the attachment of his property. On the 20th of February he appeared and raised

several objections to the execution of the decree. The only one of these objections which it is necessary to notice is the following: " The decree contains order for realization of the money from the mortgaged property only, and it contains no order for realization of the money in any other manner, hence the decree-holder is Dot competent to sell by auction any other property of your petitioner than the mortgaged one covered by the decree."

4. On the 1st of March to which day the case had been adjourned, the judgment-debtor appeared and raised further objections. In the first place he said that the copy record was not properly certified, and therefore the whole of the execution proceedings which had been taken against him were invalid, and in the second place he said that the plaintiff had no right to have his property attached on the 8th of February until he had had an opportunity on the 20th of February of appearing and showing cause why the decree against him should not be executed. The case was then postponed to the 2nd of April, on which day it came on before the Subordinate Judge. In the course of his judgment the Subordinate Judge says: "The judgment! debtor takes several objections against the execution. His first point is that the decree is incapable of execution, because the Governor-General in Council has not by notification made the declaration specified in Section 434 of the Code of Civil Procedure. The plea fails, because such a declaration was made by the Governor-General in Council (High Court Circular Order Book of 1881, page 269). Then it is contended that the certificate of the copy of judicial records of the Cooch Behar Court being a true copy is not in correct form. I am bound to say that the objection, though technical, has weight, and as it is a question of form which may again come up before the Court, it would be better that the attention of the Cooch Behar authorities be drawn to it. The Government of India, in pursuance of the provisions of Section 86 of the Indian Evidence Act and Section 434 of the Code of Civil Procedure, have prescribed that a copy of the judicial record being prepared, and the words true copy" written at the top of the copy, it shall be signed by the presiding officer (or in the case of the Deputy Commissioner's Court, by the Head Clerk and Sheristadar), of the Court in which the original document is recorded, his official designation being added below his signature, and; the seal of the Court affixed. The decree in the present case was made by the Court of the Civil Judge of Cooch Behar and not by the Deputy Commissioner. The certificate is signed not by the presiding officer of the Court but by a gentleman who, from the official designation, appears to be the Sheristadar. Hence this Court cannot consider the copy of the decree to be a true copy, and it must be sent back to the Civil Judge of Cooch Behar through the District Judge, in order that a certificate in proper form may be given. The other points will be decided after the papers come back."

5. I am of opinion that the Subordinate Judge acted quite properly in sending the record back to Cooch Behar to be properly certified, and I am also of opinion that he ought to have set aside the execution proceedings as being altogether void. Against the order of the Subordinate Judge the judgment-debtor appealed to the

District Judge, and at the hearing of the appeal, whatever he may have urged in his grounds of appeal, he only took one point, viz., that the Subordinate Judge had no power to send the record back for correction. He does not appear to have argued before the District Judge that the execution proceedings were void ab initio, and ought to have been set aside, nor did he complain of the Subordinate Judge for not deciding upon the abovementioned ground of objection of the 20th February. The District Judge dismissed the appeal His judgment is as follows: "I do not see how a Court, which receives from another Court a legal proceeding in which there is an inadvertent mistake (which is purely one of form) upon the part of the latter Court, and sends it back with the suggestion that the error should be corrected,, acts without jurisdiction. The appeal is rejected." Now it is plain that the only point urged before the District Judge was that the Subordinate Judge had acted without jurisdiction in sending the record back to Cooch Behar. That judgment, which was delivered on the 5th April 1886, appears to be perfectly right, although I do not agree with the District Judge when he says that the error upon the record was "one purely of form." It is against the order of the 5th of April 1886, and only against that order, that this appeal is brought, and I am, therefore, constrained to say that the appeal fails.

6. But there is still a matter of very considerable importance which remains to be noticed. Section 434 of the CPC says "The Governor-General in Council may, from time to time, by notification in the Gazette of India, declare that the decrees of any Civil or Eevenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty and not established by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India." In pursuance of the powers thus conferred upon the Governor-General in Council the following notification was published in the Gazette of India on 7th March 1879: "Under Section 434 of the CPC the Governor-General in Council is pleased to declare that the decrees of the Civil and Eevenue Courts of Cooch Behar may be executed in British India as if they had been made by the Courts of British India." There was thus a legislative power given to Courts in India to execute the decrees of the Civil and Revenue Courts of Cooch Behar. Then came the question what machinery was to be employed for the purpose of executing these decrees, and what things were necessary to be proved before a Court in British India could execute those decrees. It was clearly necessary to prove the genuineness of the decree which came to the Court in British India from the Court of Cooch Behar. Upon that point it was necessary to refer to the provisions of Section 86 of the Evidence Act, which says : "The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records." Before the notification of 7th March 1879, appeared in the Gazette of India, the

attention of the Legislature had been drawn to the difficulty which might be experienced if u/s 86 of the Evidence Act a certificate was to be required in each case of the manner in which documents are certified in Cooch Behar, and in order to get over this difficulty the then Deputy Commissioner of Cooch Behar, being the then "representative of the Government of India resident in such country," was directed to notify to the Government of Bengal "the mode in which copies of judicial records of the Cooch Behar Courts are certified as correct copies." On 8th April 1879, the following notification was published in the Calcutta Gazette:

With reference to the above notification (i.e., the notification of 7th March, 1879) of the Government of India in the Foreign Department, the following certificate of the mode in which copies of judicial records are certified in the State of Cooch Behar is published for general information. I hereby certify that the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies is as follows: A copy of the judicial record being made, the words "true copy," are written at the top of the copy and it is signed by the presiding officer (or, in the case of the Deputy Commissioner's Court, by the Head Clerk and Sheristadar) of the Court in which the original document is recorded, his official designation being added below his signature and the seal of the Court affixed thus--

(True copy.) A. B. Seal of the Dewany Ahilkar of Cooch Behar. Court G.J. Dalton, Deputy Commissioner.

7. I express no opinion as to whether such a certificate so published was a compliance with the provisions of Section 86 of the Evidence Act, when there was a representative of the Government of India resident in Cooch Behar. It is clearly of no use now the Maharajah of Cooch Behar has come of age, and there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and I do not see how certified copies of judicial records of that State can now be received in evidence in the Courts of British India under the provisions of Section 86 of the Evidence Act, and until some steps are taken by the Legislature there will be great difficulty in executing any decrees of the Courts of Cooch Behar in the Courts of British India.

Beverley, J.

8. I concur with my learned colleague in holding that this appeal must be dismissed. The points pressed upon us are, first, that by the terms of the decree-holder was restricted to execute the decree against the mortgaged property alone; and, secondly, that the attachment was bad, because it was made before the judgment-debtor had had an opportunity of showing cause why the decree should not be executed. The first point was decided by an order of the Subordinate Judge, dated 15th of May 1886, and no appeal was preferred against that order. It is contended now that we can take that order into consideration in the present appeal, which is an appeal against the order of the District Judge of the 5th of April. That is clearly not so, because no appeal lies to

this Court direct from an order passed by the Subordinate Judge. The second point appears never to have been pressed in either of the lower Courts, and in the order of the 15th May the Subordinate Judge distinctly says that no other point has been pressed. For these reasons we consider that at this stage we cannot interfere, however much we may regret the Irregularity that has occurred.