

(1933) 07 CAL CK 0011

In the Calcutta High Court

Case No : Appeal from Original Order No. 66 of 1932

Kangal Chandra Mandal and Others

APPELLANT

Vs

Nandalal Marwari and Another

RESPONDENT

Date of Decision : 04-07-1933

Acts Referred:

Citation : (1933) 07 CAL CK 0011

Final Decision : Allowed

Judgement

Mitter, J.—This is an appeal on behalf of the judgment-debtors and is directed against an order of the Subordinate Judge of Asansol, dated the 4th of January, 1932, by which he disallowed the objection of the Appellants to the execution of a decree obtained, against them by the Respondents decree-holders. The relevant facts may be briefly stated. On the 4th of March, 1924, Ramkumar Marwari and Durgadas Marwari, father of Nandalal Marwari, the minor Respondent to the present appeal, obtained a decree against the Appellants for a sum of Rs. 23,000. The decree was by consent and the decretal money was payable by certain instalments. On the 7th of January, 1925, an application for execution of this decree was made and the said execution case was dismissed on part satisfaction on the 25th of May, 1925, and the sum of Rs. 3,282-8 was realised. The present application for execution was made by the minor son of Durgadas Marwari through his mother and guardian Narbuddi Marwari for realisation of the sum of Rs. 13,374-8-10, being the half-share of the balance left including interest and cost. This application was made on the 11th of February, 1931. Several objections were taken to this execution; (1) that the petition for execution is not maintainable according to law, (2) that it is barred by the law of limitation, (3) that the case cannot proceed as the decree-holder has not complied with the order passed in a previous execution case. Although these three objections were taken in the Appellant's written petition, the only objection which seems to have been urged before the Subordinate Judge is the last one. This last objection was disallowed by the Subordinate Judge who directed the execution to proceed.

2. Against this order the present appeal has been brought and the grounds urged before us are (1) that the application is not in accordance with law as the particulars required to be furnished, by the order of the 14th of December, 1929, have not been furnished; (2) that the application being one by a joint decree-holder for his share, is not maintainable having regard to the provisions of Or. 21, r. 15 of the Code of Civil Procedure; (3) that the present application is barred by limitation and (4) that in any event the execution cannot proceed for the entire sum claimed by the petition but can proceed for the sum of Rs. 23,000 less Rs. 3,282-3 and subject to a further deduction of the sum of Rs. 9,178-10 which has been realised by the decree-holders as appears from the order of the 14th December, 1929 (Ext. A)--an order which is inter partes.

3. With regard to the first ground taken, the Subordinate Judge has held that there has been a substantial compliance with the order passed on the 14th of December, 1929. He is of opinion that the present application for execution has stated in fact the results of the previous execution cases and the extracts of the register (Ext. D) filed by them shew the result specifically. It is argued that the sum of Rs. 9,178-10 which has been realised by the attachment of one of the decrees obtained by the judgment-debtors against third persons has not been shewn and that, therefore, the application is not in accordance with law. It is true, as shall be shewn presently in relation to the fourth ground, that the sum of Rs. 9,178-10 should also have been shewn as realised, but that circumstance does not make the application any the less in accordance with law as the application is in the Tabular form as required by Or. 21, r. 13, although it is inaccurate in some particulars. Ordinarily the applicant for execution is bound to mention in the application any payment made between the parties after decree; see *Panpayya v. Narasannah* I. L. R. 2 Mad. 216 (1880). But the same Court has held that the non-mention of an uncertified payment out of Court in an application for execution does not render it an application not in accordance with law; see *Marimuthu Naicken v. Ramaswamy Padayachi* 51 I. C. 114 (1919). The question whether an application is in accordance with law depends on the facts of each particular case; for, as pointed out by Cuming and Mukerji, JJ., in the case of *Srimati Saudamini Ghose Vs. The Jessore Registered Loan Company Limited*, every omission in an application for execution is not necessarily a material irregularity such as would vitiate the execution proceeding and whether an omission is or is not material will depend on the facts of the particular case. Although the decree-holder has not indicated in their application for execution that judgment-debtors are entitled to a deduction of the sum of Rs. 9,178-10, they have referred to the judgment of the 14th of December, 1929, as representing the result of the previous execution cast- No. 81 of 1928 and this judgment shews that the sum of Rs. 9,178-10 had been realised by the attachment of decree obtained by the judgment-debtor against third persons. In Exhibit A the following passage occurs:--"The judgment-debtors have shewn by a certified copy filed before me that at least one of the decrees attached has been satisfied by the recovery of Rs. 9,178-10." As this judgment has been referred to

in column 28, its proper legal effect is a matter for consideration by the Court when determining the present application. In these circumstances we are of opinion that the petition is in accordance with law.

4. With regard to the second ground taken, it appears that this objection was not taken in the Court below in the precise form in which it is presented here. It does not appear from the petition of objection that the ground was taken to the effect that the application for execution of the decree offended against the provisions of Or. 21, r. 15 of the Code. Besides it appears that the rule that one of several decree-holders of a joint decree is not entitled to execution in respect of his share of the decree, but that he must apply for execution of the whole decree, applies only in those cases where the whole decree has remained unsatisfied. That rule does not apply where a joint decree has been satisfied in part before the date of the application for execution. In such a case execution cannot issue for the whole decree, but only for so much thereof as has remained unsatisfied. In the present case a sum of Rs. 3,282-8 in addition to Rs. 9,178-10 had been realised. Notice of this application for execution with regard to certain portion of a decree, namely, his share was given to his co-decree-holder Ramkumar Marwari who has raised no objection to the present execution. The effect of this application for execution for the Respondent's share of the balance of the decretal amount is as if he has given up his claim to the rest of the decree. There is, nothing illegal in such an application as has been held in the case of *Gopendra v. Matilal I. L. R. 56 Cal. 12 (1928)*. Besides it appears that when in the previous application for execution in Miscellaneous case No. 81 of 1928, the present decree-holder applied for execution of his share of the decree, no objection was taken by the present Appellants. On all these grounds the second ground urged must fail.

5. The third ground urged relates to the question of limitation. It appears that although the point was taken in the petition of objection, it was not pressed before the Court below. Besides, it seems to us that this question cannot be raised now on a principle analogous to *res judicata*, for on the 19th of March, 1931, the attachment was directed to be made. The judgment-debtor appeared and prayed for time for filing objection and no objection was filed even on the 28th of April, 1931, with the result that the order of attachment became final as their petition for further time was rejected. As no appeal was filed against the order of attachment, dated the 19th of March and against the subsequent order of the 28th of April, the order of attachment has become final which implies that the decree is a subsisting decree and is not barred by limitation. This ground must also fail.

6. We now proceed to deal with the fourth and the last ground. There can be no question that at least one of the decrees attached has been satisfied by the recovery of Rs. 9,178-10. This order being *inter partes* is undoubtedly very strong evidence that the sum has been realised. The decree-holder is bound to give credit for this sum. The result is that the order of the Subordinate Judge

must be varied and the execution will proceed in respect of the half-share of the decree in question after deducting from the sum of Rs. 23,000 the sum of Rs. 3,282-2 and the further sum of Rs. 9,178-10 from the said Rs. 23,000. The sum of Rs. 9,178-10 must be taken as having been paid before the 14th of December, 1929. The result is that this appeal is allowed and the order of the Subordinate Judge is varied as indicated above. Half-share of the balance with interest at the rate of six per cent, per annum will be allowed.

7. The appeal is accordingly allowed and the order of the Subordinate Judge is varied as indicated above. As the success of the parties is divided each party will bear their own costs throughout.

Henderson, J.

I agree.