
(1933) 07 CAL CK 0015
In the Calcutta High Court

Kangal Chandra Mondal and Others

APPELLANT

Vs

Nandalal Marwari and Another

RESPONDENT

Date of Decision : 01-07-1933

Acts Referred:

Citation : AIR 1934 Cal 465

Hon'ble Judges : Mitter, J;Henderson, J

Bench : Full Bench

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 4th 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 4th March 1921 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.

2. The decree was by consent and the decretal money was payable by certain instalments. On 7th January 1925 an application for execution of this decree was made and the said execution case was dismissed in part satisfaction on 25th May 1925 and the sum of Rupees 3,282-8-0 was realized. The present application for execution was made by the minor son of Durgadas Marwari through his mother and guardian Narbuddi Marwari for realization 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 11th 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; and (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.

3. 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 14th 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 Order 21, Rule 15, Civil P. C; (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 3,282-8-0 and subject to a further deduction of the sum of Rs. 9,178-10-0 which has been realized by the decree-holders as appears from the order of 14th December 1929 (Ex. A) ?an order which is inter partes.

4. With regard to the first ground taken the Subordinate Judge has held that there has been a substantial compliance with the order passed on 14th December 1929. He is of opinion that the present application for execution has stated in fact that the results of the previous execution cases and the extracts of the register (Ex. D) filed by them shew the result specifically. It is argued that the sum of Rs. 9,178-10-0 which has been realized 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. 9,178-10-0 should also have been shewn as realized 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 Order 21, Rule 11 although it is inaccurate in some particulars.

5. Ordinarily the applicant for execution, is bound to mention in the application any payment made between the parties after decree: see *Paupayya v. Narasannah* (1878) 2 Mad 216. 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* AIR 1919 Mad 256. The question whether an application is in accordance with law depends on the facts of each particular case for, as pointed out by Cumming and Mukherji, 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. 9,178-10-0 they have referred to the judgment of 14th December 1929 as representing the result of the previous Execution Case No. 81 of 1928 and this judgment shews that the sum of Rs. 9,178-10-0 had been realized by the attachment of decree obtained by the judgment-debtor against third persons. In Ex. 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. 9,178-10-0.

6. 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. 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 Order 21, Rule 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.

7. In the present case a sum of Rupees 3,282-8-0 in addition to Rs. 9178-10-8 had been realized. 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 Tarak Nath Saha and Others Vs. Moti Lal Agarwala and Others, . Besides it appears that when in the previous application for Execution 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.

8. 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 principle analogous to *res judicata* for on 19th 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 28th 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 19th March and against the subsequent order of the 28th 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.

9. 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. 9,178-10-0. This order being *inter partes* is undoubtedly very

strong evidence that the sum has been realized. 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. 3,282-2-0 and the further sum of Rs. 9,178-10-0 from the said Rs. 23,000. The sum of Rs. 9,178-10-0 must be taken as having been paid before 14th 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 6 per cent per annum will be allowed. 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.

10. I agree.