

(1894) 02 PRI CK 0001

In the Privy Council

Kishore Bun Mohunt

APPELLANT

Vs

Dwarkanath Adhikari and others; Prosunno Coomar Adhikari

RESPONDENT

Date of Decision : 28-02-1894

Acts Referred:

Citation : (1894) 21 IndApp 89

Hon'ble Judges : Macnaghten, Morris, Richard Couch, JJ.

Judgement

Morris, J. 1. Both these appeals have been argued before their Lordships ex parte. 2. In the appeal of Kishore Bun Mohunt v. Dwarka Nath Adhikari and Others, a judgment of the High Court at Calcutta is impeached, which reversed a judgment of the District Judge of Chittagong, who had upheld, with a variation, a judgment of the Moonsif of Sitakund. 3. The facts of the case are shortly as follows: In the year 1880 the Respondents, who are officiating priests in the temple of a deity called Sumbhu Nath Deb, instituted a suit in the Moonsif's Court against the Appellant for the purpose of establishing their right to perform certain offices at the shrine and to receive certain offerings from the votaries. On the 31st of March, 1881, a decree was made by the Moonsif, by which the claim of the Respondents was allowed, and the Appellant was ordered to deliver to the Respondents certain articles necessary for the performance of the offices in question, and the right of the Respondents to the offerings claimed was decreed. This decree was not complied with, and in the year 1885 the Respondents applied to the Moonsif for leave to execute it under Section 260 of the Civil Procedure Code. The Appellant contended that the decree was merely declaratory, and was not capable of execution as prayed. 4. Section 260 provides as follows: "When the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for the performance of or abstention from, any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both." 5. The Moonsif gave judgment on the 25th of May, 1886, ordering the decree to be executed. There was an appeal from the Moonsif

to the District Judge of Chittagong, who, on the 24th of March, 1887, modified the Moonsifs judgment, and directed the decree to be executed in part only. Both parties appealed to the High Court, and the High Court, on the 19th of December, 1887, delivered judgment in these terms: "The order of the. Lower Court appealed against in the appeal from Appellate Order, No. 112, of 1887 will be set aside, and that appealed against in the appeal from Appellate Order, No. 194, of 188J, will stand confirmed. We express no opinion as to whether or not the decree is capable of execution." 6. On the 1st of February, 1888, the Respondents again petitioned the Moonsif for execution of the decree, stating in their petition that they had, since their first action, served the Appellant with notice, and had presented themselves at the temple at certain times specified in the notice, in order that they might be allowed the opportunity of performing a certain ceremony, and receiving certain articles necessary for its performance, and so afford the Appellant an opportunity of complying with the decree. 7. The Appellant did not supply the articles in question, and objected to the petition on the ground that it was barred as being *res judicata*. The Moonsif held that the matter was *res judicata*, and dismissed the petition. The Respondents appealed to the District Judge of Chittagong, who affirmed the decision of the Moonsif on the question of *res judicata*, while reversing it in another respect. Both sides appealed to the High Court, who reversed the decision of the District Judge, and declared that the Respondents were entitled to enforce their decree under Section 260 of the Civil Procedure Code, and ordered execution to issue accordingly. 8. The High Court pointed out in their judgment that their decree in the first suit was only intended to determine that the particular application for execution then the subject of appeal could not be allowed. The Respondents had not at that time placed themselves in the position of having the right to have their decree executed, inasmuch as they had not given notice to the Appellant, and so afforded him an opportunity of complying with it. They had not gone to the temple so as to be ready to receive the articles necessary for the performance of the ceremony if they were offered to them. That matter of fact distinguished the second suit entirely from the first. 9. It is therefore quite plain, in their Lordships' opinion, that the question was not *res judicata*. Their Lordships think that the Respondents were properly non-suited in the first action, because they had not then shown that there was a demand made by them on the Appellant, and an opportunity thus given him of complying with the decree. In the second action they remedied this defect, and stated in their petition that they had given the Appellant notice of their demand, and had duly presented themselves at the temple. The Appellant, in his petition of objection, does not deny this, merely taking the formal objection that the notice was illegal and improper; but the fact of the notice having been given, and of the Respondents having presented themselves at the temple in pursuance of it, was never denied, and was in fact, taken for granted throughout the trial. Indeed, those fresh facts constituted the difference between the two actions. 10. An objection was taken on the part of the Appellant before their Lordships that the notice was not properly before the High Court, and that the High Court was not warranted in

assuming its existence. But it is necessary, in considering such an objection, taken at so late a stage, to look carefully at the proceedings in the Courts below; and it is clear to their Lordships that throughout the whole course of the trial the fact of the notice having been given was admitted. 11. On these grounds their Lordships are clearly of opinion that the judgment of the High Court should be affirmed, and they will humbly advise Her Majesty accordingly. 12. In the appeal of Kishore Bun Mohunt v. Prosunno Coomar Adhikari, the question of res judicata does not arise at all j but it is said that the decree was merely a declaratory one, which could not be executed under Section 260 of the Civil Procedure Code. Their Lordships have no doubt that it is a decree which can be so executed, and that the High Court were right in dismissing the appeal from the District Judge who had directed the execution to issue. Indeed, it has not been substantially argued that if the first appeal fails this appeal can succeed. 13. Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal.