

(1956) 01 PAT CK 0005

In the Patna High Court

Case No : A.F.O.O. No"s. 405 and 406 and 1954

Nihar Ganguli and Others

APPELLANT

Vs

Rai Anath Nath Basu and Others

RESPONDENT

Date of Decision : 04-01-1956

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 14
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, 38, 51
Succession Act, 1925 — Section 180
Transfer of Property Act, 1882 — Section 35

Citation : AIR 1956 Patna 223

Hon'ble Judges : Misra, J;Ahmad, J

Bench : Division Bench

Advocate : G.C. Mukherji and S.S. Rakshit, for the Appellant; Lalnarain Sinha and R.P. Katariar, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—These two appeals arise out of two execution cases based on two decrees obtained by the appellants who are Trustees of the estate of Maharaja Sir Jotindra Mohan Tagore against the respondents in the following circumstances:

2. The two decrees were passed in Bent Suit No. 10 of 1947 and Rent Suit No. 1 of 1950, respectively, in respect of the same tenure which was held by the respondents under the proprietor represented by the appellants. The tenure in question was created on 5-1-1897, by exchange of Patta & Kabuliati between Maharaja Sir Jotindra Mohan Tagore as landlord and Pashupati Bose as in the name of one Bhava Nath Sen.

A sum of Rs. 15,676/1/- including revenue was the rental fixed under the document creating the tenure, of which a sum of Rs. 3000/- approximately was for revenue and cess leaving a sum of Rs. 12,000/- and odd as the net rental payable by Pashupati Nath Bose to the landlord. It appears that the rent was

regularly paid up to the year 1939. From that year on, however, the tenure fell into arrears and the proprietor had to institute suits from time to time for realisation of the arrears of rent in respect of the tenure.

Accordingly, when Rent Suit No. 10 of 1947 was instituted for Falgoon kist of 1353 Fs. to Falgoon kist of 1354 Fs., there were already rent decrees outstanding. Rent Suit No. 10 of 1947 was decreed for a sum of Rs. 184077- and odd on 8-5-1948, and Rent Suit No. 1 of 1950 was decreed for a sum of Rs. 55,506/4/- on 31-3-1952. The decree of Rent Suit No. 10 of 1947 was executed in Rent Execution Case No. 37 of 1950 and the tenure was attached on 11-4-1950. On 6-11-1951, the State of Bihar issued a notice u/s 3, Bihar Land Reforms Act and the tenure in question vested in the State of Bihar.

Execution Case No. 37 of 1950 was accordingly struck off on 23-8-1952. The decree-holders applied on 12-12-1952, for transfer of the first decree to the original side of the Calcutta High Court from the Court of the Subordinate Judge, Gaya, which passed the decree. In the meantime, on 8-12-1952, as a result of the notification under the Land Reforms Act, the proprietary interest also vested in the State of Bihar.

The judgment-debtor objected to the application for transfer of the decree to the Calcutta High Court. On 20-12-1952, objection of the judgment-debtor to the transfer was dismissed. The judgment-debtor filed Misc. Appeal No. 12 of 1953 in this Court on 21-1-1953, and on 23-1-1953, the appeal was dismissed by a Division Bench of this Court under Order 41 Rule 11, Civil P. C. On 29-1-1953, the Court of the Subordinate Judge, Gaya, transmitted the decree in Rent Suit No. 10 of 1947.

On 2-2-1953, the decree-holders filed a claim case before the Claims Officer under the Land Reforms Act which was numbered as Claim Case No. 8 of 1953 and was re-numbered subsequently as Claim Case No. 18 of 1954. On 20-2-1953, the decree in Suit No. 1 of 1950 was sought to be transferred by the decree-holders for execution to the Calcutta High Court. On 23-4-1953, the learned Subordinate Judge passed final order on the application for transfer of this decree as well. On transfer the two decrees were sought to be executed on the original side of the Calcutta High Court and execution was taken out on 23-7-1953.

Execution Case No. 20 of 1953 arose out of the decree in Rent Suit No. 1 of 1950 and execution Case No. 21 of 1953 arose out of the decree in Rent Suit No. 10 of 1947. On 10-7-1953, notice was issued under Order 21, Rule 22, Civil P. C., in the Calcutta High Court by the Master in Chambers fixing 4-8-1953, as the date to show cause why the decree should not be executed.

On the date fixed the judgment-debtors did not appear and, accordingly, attachment was effected of a house of the judgment-debtor-appellant in Calcutta on 7-8-1953. On 28-8-1953, objection was filed by judgment-debtor No. 1, out of six judgment-debtors. The remaining judgment-debtors, however, did not

object. The records were called for by the Calcutta High. Court from the Gaya Court on 7-5-1954, on objection having been filed by the judgment-debtor No. 1, and on 23-8-1954, the objection of the judgment-debtor No. 1 was dismissed by P.B. Mukherji J.

3. It appears that learned Counsel for the judgment-debtor prayed in that case that he would agitate the matter in dispute, between the parties in the execution case by way of a regular suit, and, accordingly, Title Suit No. 2822 of 1954 was instituted in respect of Execution Case No. 20 of 1953 which was based on the decree in Rent Suit No. 1 of 1950; and Title Suit No. 2823 of 1954 was instituted in respect of Execution Case No. 21 of 1953 relating to the decree in Rent Suit No. 10 of 1947.

The plaintiff prayed for an injunction in these two suits restraining the decree-holders from proceeding with the execution of the decrees. The prayer for injunction, however, was refused by the Court. Further, the judgment-debtor filed an application on 13-11-1954 and 17-11-1954 in claim case No. 18 of 1954 to the effect that the Claims Officer should direct withdrawal of the decrees from the Calcutta High Court. The Claims Officer, how ever, ordered the applicant to file his application in Rent Suit Nos. 1 of 1950 and 10 of 1947.

On 18-11-1954, the judgment-debtor accordingly filed two applications in the two suits aforesaid praying for withdrawal of the two decrees from the Calcutta High Court. On 19-11-1954, the decree-holders withdrew the claim in respect of these two decrees from the claim case. On 20-11-1954, however, the decree-holders made a further prayer to the Claims Officer for time to re-consider the matter and on 23-11-1954, Mr. S.P. Singh, the learned Subordinate Judge, passed an order that unless the claim was withdrawn, the decrees sent to the Calcutta High Court would have to be recalled.

Mr. Ganga Charan Mukherji, for the appellants contends that this order was passed without giving notice to the decree-holders. On 26-11-1954 the decree-holders intimated to the Court in the claim case. The learned Subordinate Judge accordingly passed an order on that date for withdrawal of the decrees. On 27-11-1954, the decree-holders filed an application explaining the circumstances in which they found it difficult to withdraw the claim case in respect of these two decrees.

On 29-11-1954, the learned Subordinate Judge directed the decree-holders to move the High Court for stay order in respect of the order of recall & on 2-12-1954, the present appeals were filed in this Court together with a petition for stay of operation of the order of the learned Subordinate Judge recalling the decrees from the Calcutta High Court. The application for stay was, however, rejected on 3-12-1954, by this Court.

On 8-12-1954, the decree-holders prayed to the Court that the recall order might not be transmitted as the decree-holders were prepared to withdraw the claim case in respect of the two decrees. The petition was, however, rejected on

9-12-1954. On 6-1-1955, the Registrar of the Calcutta High Court sent a reply to the learned Subordinate Judge refusing to transmit the decrees back to the Gaya Court on the ground that the Calcutta High Court was a Court of record and could not transmit the decrees which were sent to it for execution.

On 24-1-1955, the decree-holders filed a petition before the Claims Officer withdrawing the claims in respect of the two decrees from the claim cases, and on that very day another letter was sent by the learned Subordinate Judge to the Calcutta High Court in proper form, being of the opinion that the only objection of the Calcutta High Court to the transmission was on account of a defect of form.

On 25-1-1955, an order was passed by the Gaya Court that the Judgment-debtor would have to make an application himself in the Calcutta High Court as that Court would not transmit a decree in compliance with a requisition by the learned Subordinate Judge, who was the transferor Court. On 30-3-1955, however, an order was passed by Mr. P.B. Mukherji J., again, to the effect that final order would be passed in regard to the matter of transmitting back the decrees on the decision of Miscellaneous Appeal No. 406 of 1954 under consideration before us, and further execution in the Calcutta High Court was stayed on the application of the judgment-debtor.

It appears that the judgment-debtor being aggrieved by the order of P.B. Mukherji, J., preferred Letters Patent Appeals Nos. 112 and 113 of 1955 in the Calcutta High Court. It is unnecessary to refer to other matters in connection with the execution case in Calcutta, but it may only be stated that on 11-6-1955, the claim case preferred by the decree-holder before the Claims Officer, Gaya, stood dismissed for non-prosecution.

4. It is clear from what I have stated above that the learned Subordinate Judge of Gaya refused the prayer of the decree-holder appellants to cancel his order recalling the two decrees from the Calcutta High Court, mainly, on the ground that his predecessor-in-office, Mr. S.P. Singh, had passed an order on 23-11-1954, to the effect that unless the decree-holders withdrew the claim in respect of the two decrees in question by 26-11-1954, the order passed by the Court regarding the transfer of the decrees to Calcutta High Court would be recalled.

The decree-holders, however, not having done so, and in fact intimating to the Court that their application dated 19-11-1954, praying for withdrawal of their claims from the claim case should be itself deemed to be withdrawn, the Court construed the order as a refusal on the part of the decree-holders to elect to proceed on with the execution in the Calcutta High Court alone. Accordingly, the following order was passed on 26-11-1954, in both the rent suits:

"In view of the order dated 23-11-1954 the order transferring the decrees to Calcutta for execution stands recalled."

5. The view of the learned Subordinate Judge was that the decree-holders were

put to election to decide which course they thought it proper to adopt, viz., either to press the claim u/s 14, Bihar Land Reforms Act, in respect of the two decrees before the Claims Officer or in the alternative to abandon that procedure and to proceed with the execution of the two decrees in Calcutta High Court against the other properties of the judgment-debtor.

According to the learned Subordinate Judge, the decree-holders could not simultaneously pursue both the remedies. That was why he thought it proper to put the decree-holders to election with regard to the particular legal remedy which they thought proper to adopt.

Since, however, the decree-holders refused to make an election and insisted on following both the remedies, the learned Subordinate Judge by way of penalty passed the order that the decrees transmitted to Calcutta High Court should be recalled and, in substance, the decree-holders must be confined to the claim case, although in fact the order that he passed on 26-11-1954, in the claim case was that the petition of the decree-holders in that case should be kept on the record. It may be noted that the Court of the learned Subordinate Judge passing the decrees also happens to be the Claims Officer under the Bihar Land Reforms Act and, thus, functions in a dual capacity.

6. Mr. B.C. Mukerji, appearing for the decree-holders, contended that the order of the learned Subordinate Judge recalling the decrees from the Calcutta High Court was plainly unsustainable, inasmuch as it was based upon the view of the Subordinate Judge that an option was given under the conditional order dated 23-11-1954, to the decree-holders to proceed with only one of the two remedies and not with both.

No such option having been exercised, the order of Mr. S.P. Singh must be given effect to and the decrees must be recalled. The order was passed by Mr. S.G. Waris, Subordinate Judge, but Mr. Waris failed to consider the order of Mr. S. P. Singh, his predecessor-in-office, who passed the order dated 23-11-1954, inasmuch as before putting the decree-holders to election he had himself come to the conclusion that the decree-holders could not pursue their remedy u/s 14, Bihar Land Reforms Act.

If that was his conclusion, it was plainly illegal for him, in any view, to compel the decree-holders to make an election with regard to the course to be adopted by them for realisation off the decretal dues and, that being the position the order must be set aside. There being no basis for the imposition of a conditional order, even according to the conclusion of the learned Subordinate Judge himself (Mr. S.P. Singh), the decree-holders could not be penalised for not making an election.

The contention of Mr. Mukherji seems to be well founded in so far as he has contended that it was not open to the decree-holders to pursue the remedy u/s 14, Land Reforms. Act, which in terms, is confined only to the claim of a creditor, who holds a mortgage or a charge under the Transfer of Property Act, to put up

his claim before the Claims Officer in regard to the amount of compensation payable in respect of the property so mortgaged or charged.

Mr. Lal Narain Sinha, however, appearing for the judgment-debtor No. 1, urged that the learned Subordinate Judge was wrong in his conclusion that Section 14, Land Reforms Act, was not available to the decree-holders; Learned Counsel for the parties accordingly laid stress on the applicability or otherwise of Section 14, Land Reforms Act,

7. Section 14, Bihar Land Reforms Act (Act 30 of 1950) provides:

"(1) Every creditor, whose debt is secured by the mortgage of, or is a charge on, any estate on tenure "or part thereof vested in the State under Sections 3 or 3A may, within six months of date of such vesting or the date on which such creditor is dispossessed under the provisions of Clause (g) of Section 4, or within three months from the date of appointment of the Claims Officer whichever date is later, notify in the prescribed manner his claim in writing to a Claims Officer to be appointed by the State Government for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim."

8. Mr. Lalnarain Sinha invited us to read this section in conjunction with Section 4, which while providing for the manner in which arrears of rent etc., in respect of any estate or tenure would be recoverable, also provides in Clause (d) that no suit shall lie in any civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on such estate or tenure, and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped.

The contention was that rent being a first charge u/s 65, Bihar Tenancy Act, and clause (d) of Section 4 making provision that no suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenureholder, the legislature, evidently, intended to include such statutory charge as well within the meaning of Section 14 of the Act which also refers to the claim of a creditor, who holds a charge on any estate or tenure or part thereof vested in the State.

The word "charge" in Section 14, accordingly must include charge as used in Clause (d) of Section 4. If it were otherwise, it would be a curious position of anomaly that the holder of a rent charge in respect of a tenure would be defeated completely if he would not be competent to file an application before the Claims Officer regarding arrears accruing due prior to the date of vesting. He referred to certain decisions in support of his contention that arrears of rent should be construed to be a debt and the person entitled to the benefit of such arrears must be held to be a creditor so that in terms Section 14 would apply.

Mr. G. C. Mukherji, however, contended that the tenure having vested in the State of Bihar, there could be nothing left on which the charge would operate, and the proprietor would have to pursue his remedy only as a money claim. He

referred in this connection to the case of AIR 1914 111 (Privy Council) a decision of the Privy Council, and urged that the learned Subordinate Judge was right in his conclusion that the decree-holders had no remedy before the Claims Officer. He contended further that the analogy of a mortgage or a charge under the Transfer of Property Act, created by the act of parties, would be inappropriate in the case of a statutory charge u/s 65, Bihar Tenancy Act, which would disappear as soon as the subject, on which the charge could operate, ceased to exist, having vested in the State of Bihar, and the relationship of landlord and tenant thus came to an end; because mortgage or charge of the Transfer of Property Act continues to subsist on account of the principle of substituted security provided under Sections 73 and 100, T. P. Act, which would not be the case where the charge relied upon is a statutory charge.

In my opinion, although parties argued this point at great length it is unnecessary to decide the question in the present case, as these two appeals can be disposed of on a broader consideration which is free from the difficulty besetting the decision of this point.

9. Learned counsel for the appellants next urged that apart from the illegality of the conditional order passed by Mr. S.P. Singh adverted to above, the learned Subordinate Judge was wrong in putting the party to election. Election in the technical sense is confined to the case of a gift or will where the donee or legatee is given a choice of accepting a property under the Gift or Will belonging to the donor or testator and, in the alternative, to fulfil some other condition which it is within his power to fulfil.

In the event of his electing to take under the Will or Gift, he is bound in law to fulfil the other condition which would be binding upon him, and a Court of law would not allow him to resile from the position once he makes an election proceeding in one way or the other as required under the document concerned. The principle does not apply, however, in the case of a legal remedy and it is not open to the Court to compel a party to choose one remedy in law or another.

All that the Court of law is concerned with is to decide the matter before it on its merits. If the Court comes to the conclusion that the case as presented before it is one in which no relief can be granted to the suitor, or not in the manner desired by him, it is to proceed only on the merits of the case. Election, in the circumstances in which a party may be put at the option of the Court is a matter of indulgence.

10. Mr. Lalnarain Sinha, however, appearing for the respondent, contended that the Court, in fact, has such power of compelling a party to elect and, in the event of the failure to elect, the Court can also impose a penalty. Neither party could bring to our notice any direct authority on the point in controversy. Learned counsel for the respondent, however, relied upon the principle of multifariousness in a suit and more than one suit being brought in respect of the same cause of action in a vexatious manner. He referred thus to the various provisions of

Orders 1 and 2 of the Code of Civil Procedure.

It was urged that it is obligatory for a Court, when there is a misjoinder of parties and causes of action bringing multifariousness in a suit, not to dismiss it but to ask the plaintiff to amend the plaint, and in the event of his failure to do so "the Court can impose the penalty of dismissal. Mr. Mukherji however, contended that in the case of a suit suffering from multifariousness when the Court asks the plaintiff to elect, it is not in the technical sense but in the dictionary sense of the term, and it is not a matter of obligation for the Court to ask the party to elect but it is a matter of indulgence so that the suit may not suffer merely for a procedural defect.

It is consistent with the provisions in Order 1, Rule 8, to the effect that no suit shall be defeated for misjoinder or non-joinder of parties. If the party fails to rectify the defect of multifariousness, and if the suit is dismissed in consequence, it is not a matter of penalty but because the Court is not in a position to grant a substantive relief to the plaintiff in the circumstances of the case.

As a matter of fact, it is well established that if a suit is decreed in spite of multifariousness, the judgment cannot be set aside, unless the result has been affected on merits, even on appeal u/s 99, Civil P. C. There is, therefore, no question of obligation laid on the Court in the circumstances. As to the contention of Mr. Lalnarain Sinha that in the event of more than one suit in respect of the same cause of action being instituted the Court can as a matter of penalty dismiss the suit, it was urged by Mr. Mukherji that it could not be so, because Section 10, Civil P. C. provides for a situation like this and the Court is bound to stay the suit, and not to dismiss it.

It is no doubt true that after the decision of the previously instituted suit question of "res judi-cata" or Order 2 Rule 2, Civil P. C. may arise, but the mere fact of institution of more than one suit cannot invoke the penalty of dismissal of the suit by the Court. In my opinion, the contention of Mr. Mukherji is well founded and rests on the language of Section 10, Civil P. C. providing for stay of the subsequent suit. It is also supported by authorities.

The contention of Mr. Lalnarain Sinha on the analogy of more than one suit being instituted on the same cause of action is of no avail to the respondent. In my opinion, Mr. Mukherji is also right in his contention that in the case of multifariousness in a suit when the Court puts the plaintiff to election, and in the event of his failure to rectify the defect when the suit is dismissed, it is not as a matter of penalty but because the plaintiff having failed to amend the plaint, and the plaint as it stands making it difficult for the Court to grant any relief to the plaintiff, the suit is dismissed on merits and not for mere failure of the plaintiff to amend and thus to exercise an option given to him by the Court.

In my opinion therefore, it must be held that the "learned Subordinate Judge, Mr. S.P. Singh, was wrong in putting the decree-holders to election. Mr. Waris, his successor-in-office, was bound to consider the prayer of the decree-holders that

the two decrees from the Calcutta High Court should not be recalled on its own merits, and not because the decree-holders failed to exercise an option given to them by Mr. S.P. Singh under order dated 23-11-1954.

11. Mr. G. C. Mukherji urged further that the only consideration on merits should be whether it was open to the decree-holder to proceed in two Courts, one for execution in the Calcutta High Court and the other by way of presenting a claim before the Claims Officer at Gaya.

It is well-settled that the decree holder may levy simultaneous execution in respect of his decree in more than one Court, and in the present case the only effect of the presentation of the claim before the Claims Officer would be, at the highest to seek also a simultaneous remedy, and what the Court of law has to see is that no double, payment is made to the decree holder inasmuch as if the decretal dues are realised at one place the matter is bound to be brought to the notice of the other Court, by the judgment-debtor, which will take note of the satisfaction of the decree and will dismiss the execution.

Mr. Lalnarain Sinha concedes that simultaneous executions of the same decree are well recognised in law but the present case is not one of simultaneous execution but of seeking a remedy of special character provided u/s 14 of the Act or, in the alternative, of proceeding by way of execution of the decree as a money claim. Mr. Mukherji urged further that this Court can also take notice of the fact that his client has given up his claim before the Claims Officer and it has accordingly been dismissed.

Mr. Lalnarain Sinha urged that the question of dismissal of a claim once having been preferred does not arise and it will still remain pending. In my opinion, however, since it is open to the decree-holder of a rent decree to proceed in execution of it as a money decree against various properties of the judgment-debtor, apart from the one in respect of which rent decree is passed, I see no difference between the case of such a decree holder and the present one where the decree-holders are proceeding against the Calcutta properties and also in respect of the tenure in the claim case, assuming that the claim case is still subsisting, although in fact it is denied, with reference to the order sheet of Claim Case No. 18 of 1954, which I have mentioned above.

The true position on 26-11-1954, in fact, seems to be not that the decree-holders made an election in the case, as Mr. Lalnarain Sinha! contended, but one where they refused to elect and insisted on following both the remedies simultaneously.

12. Mr. Lalnarain Sinha contended that it is either a case of failure to elect which must bring down the penalty of recall of the order of transmission of decrees to the Calcutta High Court as the two remedies could not be pursued simultaneously, or a case of election by the decree-holders choosing to press the claim case after a good deal of deliberation, which may be clear with reference to the various petitions filed by them.

A perusal of the order sheet to which I have made reference above shows that the attitude taken up by the decree-holders, in fact, was that they would not make an election and would leave matters as they were inviting the Court to pass the proper orders.

Mr. Mukherji contended that it was so in the peculiar circumstances of the case, because, in any case, the remedy open to the decree-holder of a rent decree or rent charge u/s 14, Land Reforms Act is not free from difficulty, and a decree-holder could not take the risk of choosing a particular remedy when the two sets of judgment-debtors, viz., judgment-debtor No. 1 and his cousins, namely, the sons of the sister of their father, took up inconsistent attitude and opposed the execution of the decrees in Calcutta High Court and before the Claims Officer on mutually contradictory grounds.

In the result, the decree-holders could not undergo the risk of stating that they would fall back, necessarily, upon the remedy by way of execution in the Calcutta High Court and they were not in a position to formally withdraw the claim case. Mr. Lalnarain Sinha relied upon the following observation of Ramaswami J., in the case of "Raghubir Saran v. Basudevanand", 1953 BLJ 563 (C) :

"It is open to the creditor to make an election, as to the choice of his remedies in a case of this description. It is open to him either to give up his right of filing a claim u/s 14, with respect to the vested estates and to prosecute the suit or execution proceeding exclusively in civil Court. On the other hand, the creditor may give up his remedy in the civil Court and prosecute his claim solely u/s 14, before the Claims Officer who will proceed u/s 16 to re-open the decree and to grant necessary relief.

If Section 14 and 16 are construed in this manner there would be no occasion for conflict of jurisdiction between the Claims Officer acting u/s 16 and a Civil Court hearing a mortgage suit or executing a mortgage-decree. If this interpretation of Section 14 and 16 is adopted there would be no insuperable difficulty in holding that Section 4 (d) of the Act refers only to a case where the mortgage or charge exclusively relates to the estates which are notified u/s 3 and which have become vested in the State of Bihar".

In my opinion, the observation is of no avail to the learned counsel for the respondent. That was a case in which the holder of a mortgage decree sought to proceed against that part of the mortgaged property which was still the property of the mortgagor, the remainder having vested in the State of Bihar under the Land Reforms Act. That judgment-debtor resisted the execution on the ground of inconsistent remedies on account of the peculiar provisions of Section 14, Land Reforms Act, and the rights of the mortgagee-decree-holder under the "Code of Civil Procedure and Transfer of Property Act.

Their Lordships overruled the objection holding that there was nothing to prevent the decree-holder from electing to proceed with the execution against the remaining property subject-matter of the mortgage. This decision does not go

beyond this proposition and cannot be construed as laying down that in case of failure to elect, a certain penalty imposed by the Court must follow.

In any event, this matter is now purely academic, as the claim case, in fact, has not been pursued by the decree-holders and now stands dismissed. In view, however, of the conclusion at which I have arrived in regard to the holder of a rent decree to proceed against in rent claimed property as well as other properties as a money execution it must be held that the learned Subordinate Judge was not right in imposing upon the decree-holder-appellants the penal by of recalling the order transmitting the decrees to the Calcutta High Court whatever the decision in the claim case might be.

13. Since I have come to the conclusion that the order of the learned Subordinate Judge putting the decree-holders to election was Illegal and no penalty by way of recall of the order transferring the decree could have been imposed, the argument of Mr. Mukherji that the order of transfer cannot be re-opened as it is barred by the principle of "res judicata" actual or constructive, does not fall to be determined.

14. The appeals accordingly succeed and the order of the learned Subordinate Judge is set aside. In view, however, of the uncertain attitude of the decree-holders themselves during the proceedings in the Court of the learned Subordinate Judge, it seems to me that parties should bear their own costs of these appeals.

Ahmad, J.

15. I agree.