

(1869) 09 CAL CK 0031

In the Calcutta High Court

Case No : Miscellaneous Regular Appeals Nos. 294 and 283 of 1869

N.P. Pogose

APPELLANT

Vs

Khaja Abdul Ganni

RESPONDENT

Date of Decision : 24-09-1869

Acts Referred:

Citation : (1869) 09 CAL CK 0031

Judgement

Hobhouse, J.—The objections which are taken by the judgment-debtor Khaja Abdul Ganni before us, seem to us to be of two kinds. First of all that the proceedings on the part of Najibunnissa were not carried on in good faith, and secondly that if they were carried on in good faith, still they were carried on behind the appellant's back, and therefore could not be looked at as proceedings against him. It is not as I understand it contended that the application of Najibunnissa of the 15th March 1864 was not a proceeding in execution of her decree. That point seems to be conceded, and indeed that point has been, as we understand it, conclusively ruled by the Full Bench decision in Ram Shaye Sing v. Begun Sing. 6 W.R. Mis. 98 That proceeding was obviously in time, and we think from that all the proceedings we have mentioned must be considered to have been made in good faith. The decree-holders asked for execution against the judgment-debtors. They were opposed in that application by a person who said that he was alone the person who had a right to execute. They at once joined issue with that person. They contested the claim with all diligence in the first Court and with equal diligence in the second Court, that is to say, in the High Court on the 2nd December 1864. Her heirs on her decease also contested that claim, and with diligence. They did so first in the Court having jurisdiction to execute the decree, and then again in the High Court. It was there pointed out to them that their remedy was in a Civil suit. With such diligence as we may expect from natives of this country, and with reference to the known expenses of litigations in such a case, they instituted that Civil suit, and prosecuted that suit until they got a decree removing the obstacle that lay in the way of their executing the original decree it seems to us that it cannot be contended that

these were not proceedings in good faith, that is to say, that they were not taken with the purpose and intention to carry the original decree into execution.

2. The next point is whether, if as a matter of fact the judgment-debtor Khaja Abdul Ganni never had any notice of these proceedings, they were yet sufficient to keep the original decree in force. The material words of the law are: "No process of execution shall issue to enforce any judgment or decree unless some proceeding shall have been taken to enforce such judgment or decree, or to keep the same in force within three years next preceding the application for such execution." It is contended that the general principle that persons who are not parties to a suit are not bound thereby, must be applicable to this case, but we think that here we must take the law as it stands, and that we are not bound to suppose that that law is at all governed by the principle for which the learned counsel for the appellant contends, and we think that the facts of this case show that there are very good reasons why the law in question should not be governed by the principle contended for. The law simply requires that the decree-holder shall have taken out some proceeding to keep his decree in force within three years next preceding his application for execution. The rulings of this Court which have been brought under our notice, viz., *Ram Shaye Sing v. Begun Sing* 6 W.R. Mis. Rul. 98, *Shureefunnissa v. Rajkissen* 4 W.R. 24, *Ishan Chunder Bose v. Juggobundhu Ghose* 8 W.R. 98, *Kali Kishor Bose v. Prosunno Chunder Roy* 10 W.R. 248, do not seem to me to go further than this, viz., that the proceeding to be taken out by the decree holder must be taken out in good faith, and that a suit carried on in furtherance of an intention to execute is a proceeding within the meaning of section 20 of the Act. I do not therefore think that any one of these rulings carries us sufficiently far so as to be a ruling on the point we have to decide; although there are no doubt in those rulings expressions which seem to show that all that has to be considered with reference to any proceeding of the decree-holder is whether such proceeding was taken by the decree-holder in good faith in order to carry out the execution of his decree. But, as I have said before, I think that the words of the law are sufficiently clear, and we may stand upon those words; and I will take this particular case as showing that in my judgment it may be impossible in many cases for a decree-holder to proceed against his judgment-debtor, except to the extent that the decree-holder has done in this case, viz., so as always to have the judgment-debtor before the Court. In this case the decree-holder first applied for execution within the prescribed period, and he prayed for that execution against the properties of his judgment-debtors, He never ceased from the year 1864 up to the year 1867 making persistent efforts through the Courts to get at the judgment-debtors and their properties. It was not his fault in any sense that he did not obtain his object. He could not proceed except through the Court, and the Court repeatedly and persistently refused to aid him until he got the final decree in March 1867. I think then that upon the wording of the Act itself the decree-holder is not bound to shew more than that he did proceed within the period laid down, and I would go farther and say that I do not see how he could have made the judgment-

debtors parties to the suit, and to the proceedings which he carried on against his alleged vendees from the year 1864 to 1867. It seems to me that in that suit and in those proceedings he had no cause of action against the judgment-debtor before us, neither do I think that even the Court itself under the provisions of section 73 could have made the judgment-debtors parties to the suit. The test is whether the persons whom it is sought to make parties have any share or interest in the subject-matter of the suit, or are likely to be affected by the result. Now the suit in this instance was between two contending decree-holders. One said he was the decree-holder, and the other the contrary, and I do not see what share or interest it can be said that the judgment-debtors had in the suit. Neither do I see how they could be affected by the result of it. They were bound by the decree to give up possession and to pay wasilat to the judgment-creditor whoever he might be, and it seems to me that it was immaterial to them whether the one person or the other was the judgment-creditor. We think then that on the whole the lower Court was right in holding that this application for execution was not barred by the application of the Statute of Limitation. We accordingly dismiss this appeal with costs.

3. We may mention that there were other lines of argument in support of the respondent's view of the case as taken by the learned counsel for the respondent, but as we decide the case on the grounds that I have mentioned, we do not think it necessary to go into those points. The decision in this case admittedly governs case No. 283 of 1869, which is likewise dismissed with costs.