

(1903) 03 CAL CK 0023
In the Calcutta High Court
Case No : Appeal from order No. 509 of 1900

Pasupati Nath Bose

APPELLANT

Vs

Nando Lal Bose

RESPONDENT

Date of Decision : 27-03-1903

Acts Referred:

Citation : (1903) 03 CAL CK 0023

Final Decision : Dismissed

Judgement

Maclean, C.J.—This is an appeal from the order of the Subordinate Judge of the Second Court of Alipore, dated 5th of December 1900, under which he allowed execution to proceed as between Nando Lal Bose, who is the decree-holder and Pasupati Nath Bose, who is the judgment-debtor and the present Appellant. By a consent decree dated the 12th of September 1899, it was ordered that the award of certain arbitrators, which is referred to in the decree, be filed in the Court and the same be confirmed as a decree passed by the Court. That decree was passed in a suit instituted in the Alipore Court between Nando Lal Bose as Plaintiff and his brother, Pasupati Nath Bose, as the first Defendant and Sreemutty Nistarini Dassi as the second Defendant and there were other Defendants to whom I need not particularly refer. Subsequently Nistarini Dassi brought a suit on the Original Side of this Court, claiming to have the award and the decree, which I have mentioned, set aside as fraudulent and of no effect as against her. That suit was heard before Mr. Justice Stanley, who declared that the award and the decree were fraudulent and void as against the Plaintiff and not binding upon her. Nando Lal Bose appealed against that decision, but it was ultimately confirmed by this Court. Therefore the position is this: the decree as against Nistarini Dassi is not binding upon her, having been declared to be fraudulent and void as against her. Then Nando Lal Bose proceeds to execute the decree as against Pasupati Nath Bose, but the latter says that, inasmuch as the decree has been declared to be fraudulent and void, the decree altogether must be taken to be so and therefore it is not susceptible of execution and that the execution proceedings ought not to go on.

2. I do not think that argument ought to prevail. The decree has only been declared fraudulent and void as against the Plaintiff, Nistarini Dassi, but as between the two brothers, Nando Lal Bose and Pasupati Nath Bose, it remains intact and if it remains intact as between them, it is difficult to see why Nando Lal BoSe should not be entitled to execute it. This view seems to be consistent with the view expressed in the case of Bhimaji Govind Kulkarni v. Rakmabai ILR (1885) Bom. 338 and the English case there referred to. It is also, I think, consistent with the principle laid down in the case of Natesa Ayyar v. Annammi Ayyar ILR (1901) Mad. 426.

3. It is urged that this principle ought not to apply, having regard to the fact that the decree was a partition-decree, or had the effect of a partition-decree. That does not seem to me to affect the principle : it may lead to complications, hut those, perhaps, would arise whichever way we decide the point.

4. The decree is a subsisting decree between the two brothers and if subsisting, is susceptible of execution.

5. On these grounds the appeal fails and must be dismissed with costs.

Mitra J.

6. I concur.