
(1881) 08 CAL CK 0017
In the Calcutta High Court

Peary Chowdhrair

APPELLANT

Vs

Protap Chunder Doss

RESPONDENT

Date of Decision : 25-08-1881

Acts Referred:

Citation : (1882) ILR (Cal) 174

Hon'ble Judges : Prinsep, J;Field, J

Bench : Division Bench

Judgement

Field, J.—The facts of this case are briefly as follows:

2. There are two properties, named Rungmehal and Tripuli. Rungmehal was first in existence as a one-storied building. Tripuli was subsequently erected in the form of a two-storied house. The original eastern wall of Rungmehal was built, as many native walls are built in this country, receding inwards gradually from the basement or foundation. When the Tripuli building was erected, the western side wall of the Tripuli house followed this recession or inclination of the eastern wall of the Rungmehal building, so as to lean upon this and rest partly over the original site thereof, that is upon the top of the one-story, of which the Rungmehal building originally consisted. From that point, the western side wall of the Tripuli building receded gradually inwards towards the east, so that the top of this side wall of the upper story of the Tripuli building lay somewhat to the east of the bottom of the same wall, where it rested upon the top of the wall of the lower story. Subsequently, Rungmehal and Tripuli, which had originally belonged to one and the same owner, passed into the hands of separate proprietors, and the Rungmehal proprietor proceeded to erect a second story on the top of the Rungmehal building, which (as already stated) was originally a one-storied building. In erecting the eastern side-wall of this upper storey, the Rungmehal owner followed the line of inclination of the upper story of the Tripuli house. The effect of this was, that the eastern side-wall of the Rungmehal building dovetailed into, infringed and rested upon the western side-wall of the Tripuli building. The Tripuli proprietor then brought an action denying the right of the

Rungmehal owner to rest the side-wall of his upper story upon the Tripuli side-wall; and the result of that litigation was, that the Tripuli owner obtained a decree in this Court. The essential part of that decree, for the purposes of the matter now before us, is this, that "the defendants do forthwith pull down and remove such portion of the wall as has been erected by them upon the west wall of the plaintiff's house." An application was made for execution of that decree, and in column (j) of the application made u/s 235 of the Code of Civil Procedure, the mode in which the assistance of the Court was required was stated to be by giving them possession of the western wall of the Tripuli house by pulling down the wall erected thereupon.

3. Now, we are clearly of opinion, that the assistance here required was a form of assistance which could not be granted in the terms in which it was asked, regard being had to Section 260 of the Code of Civil Procedure. That section provides, that when the party against whom a decree for the performance of, or abstention from, any particular act has been made has had an opportunity of obeying the decree, 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. However, that application was received and acted upon in the form in which it was made, and out of this error has arisen the whole of the proceedings which form the subject of appeal now before us. The Munsif made the following order: "Order will accordingly be issued to the Nazir to remove the judgment debtor's wall off the top of the decree-holder's wall of the first story, according to the directions in the High Court's judgment." We think that this was an improper order. In the first place, it was an order not warranted by the law, and it is exceedingly undesirable that the Nazir of a Civil Court should be sent out to perform an act of the kind, for the performance of which he cannot be supposed to be fitted, which, if resisted, might lead to an unseemly breach of the peace and serious subsequent consequences. An appeal was preferred against the Munsif's order, and the District Judge confirmed it on appeal. We think that the course which should have been pursued was this. It should have been pointed out to the decree-holder that the provisions of Section 260 of the Code of Civil Procedure, contain the procedure to be followed for executing a decree of this kind; and it should have been explained to him that the application presented u/s 235 should have asked that particular assistance which, under the provisions of Section 260, could have been granted. It is now pressed upon us by the learned Advocate-General, that we ought ourselves to make the order in the terms of Section 260. Section 577 of the CPC provides, that the judgment in an appeal may be for confirming, varying, or reversing the decree. We think however in this case that, as the decree-holder did not ask for that assistance which he might have had under the provisions of the Code, we ought not to vary the order for execution in such a matter as to give him that for which he did not ask. We think that the proper order to make is to set aside the order made by the Munsif and affirmed by the District Judge, and to remand this case to the lower Appellate Court with this direction, that he allow the decree-holder, within a time to be fixed by the

Judge, to amend his application for execution so as to bring it within the terms of Section 260. In order to prevent further difficulty, we deem it right to point out, that the proper course to be pursued, under this section, is to serve a notice upon the judgment-debtor, calling upon him to comply, within a time to be fixed by such notice, with the order contained in the decree; and if the judgment-debtor, within such time, fails to comply with such order, the Court can then, at the instance of the decree-holder, make an order either for the judgment-debtor's imprisonment or for the attachment of the property, due regard being had to the provisions of the section in the latter case. We think, therefore, that the order of the Munsif must be set aside, and this case remanded in order that these directions may be complied with.

Prinsep, J.

4. The decree passed in this case contained an order to the defendant to perform a certain act,--that is, to pull down a wall to the extent to which he had erected it upon the plaintiff's wall. The decree-holder and the lower Courts have misunderstood that order so as to justify the Court of Execution acting itself to carry out the terms of the decree on the failure of the judgment-debtor, defendant, to perform the act which he was ordered to perform. The alternative however, is, as declared by Section 260 of the Code of Civil Procedure, that if, after sufficient notice, the party against whom the decree has been passed fails to perform the particular act ordered, the decree may be enforced by the imprisonment of the judgment-debtor, or by the attachment of his property, or by both. In the present instance it is impossible to execute this decree in the manner in which the decree-holder has sought to execute it, and inasmuch as the lower Courts should have corrected the error of the decree-holder in his original application to execute the decree by requiring him to amend that application, I think that we may fairly now allow such amendment to be made so as to bring the application within the terms of Section 260.