

(1913) 08 CAL CK 0022
In the Calcutta High Court
Case No : Rule No. 932 of 1913

Peary Lal Das

APPELLANT

Vs

Peary Lal Dawn and Others

RESPONDENT

Date of Decision : 28-08-1913

Acts Referred:

Citation : (1913) 08 CAL CK 0022

Judgement

1. We are invited in this Rule to set aside an order made by the Court below under sec. 73 of the CPC of 1908. The Petitioner Peary Lal Das obtained a decree for money on the 3rd September 1912, against Hari Das Nandi and his four brothers. He applied for execution on the 16th September 1912. The Opposite Party, Peary Lal Dawn, had obtained a decree for money, against the same judgment-debtors on the 4th July 1911. He had applied for execution of his decree on the 23rd July 1911. In that execution, two properties of the judgment-debtors had been sold and a further application had been made for sale of the other properties of the judgment-debtors. Peary Lal Das, on the 11th September 1912, applied for rateable distribution in the execution proceedings instituted by Peary Lal Dawn. The sale which had been advertised to take place on the 13th September was, however, not held. On a subsequent date, duly notified, the sale was again adjourned. Shortly after this, Peary Lal Dawn applied for rateable distribution in the execution proceedings commenced by Peary Lal Das. This application was presented on the 13th January 1913. The position, therefore, was that in the execution proceedings commenced by Peary Lal Das, there was an application for rateable distribution by Peary Lal Dawn, and in the proceedings for execution commenced by Peary Lal Dawn, there was an application for rateable distribution, by Peary Lal Das, on the 13th February 1913. Peary Lal Dawn, however, objected to the application for rateable distribution by Peary Lal Das on the allegation that the decree obtained by the latter was fraudulent. The Subordinate Judge held an enquiry into this matter, and, on the 24th May 1913, decided that the decree of Peary Lal Das was fraudulent as alleged by Peary Lal Dawn. We are now invited to set aside this order on two grounds, namely, first,

that the Subordinate Judge had no jurisdiction to hold a summary enquiry into this matter; and, secondly, that if he had jurisdiction to hold an enquiry, he had acted with material irregularity in the exercise of such jurisdiction, inasmuch as his decision is based upon evidence not taken in accordance with law. In so far as the first ground is concerned, it cannot be maintained in view of the decision of this Court in the case of *Puran Chand Baid v. Surendra Naran Singh* 16 C. L. J. 532 (1912).

2. In so far as the second objection is concerned, it must in our opinion succeed. As appears from the order recorded by the Subordinate Judge, the evidence on behalf of the parties had been adduced, arguments addressed to the Court and judgment reserved--on the 24th May 1913. The Subordinate Judge states that after hearing arguments for nearly two hours, he, was thinking what to do and going through the evidence, but could not decide in his mind what to do; he then took up another case in which he heard the arguments and wrote out judgment; at this stage, a person appeared in the witness-box and said that he was the judgment-debtor, Hari Das Nandi. The Subordinate Judge thereupon examined him. This examination took place without notice to the pleaders for the parties. What effect his deposition produced in the mind of the Subordinate Judge, it is impossible to state with certainty. But the Subordinate Judge records in one part of his order that from what Hari Das Nandi stated to him it appeared to him that he had set up Peary Lal Das to carve out a portion of the sale-proceeds of his property published for sale. It is plain, therefore, that the statements made by Hari Das Nandi must have prejudiced the Subordinate Judge against Peary Lal Das. Now, it cannot be disputed for a moment that this examination of Hari Das Nandi should not have taken place without notice to the parties or their pleaders, and without any opportunity afforded to them to cross-examine him or to rebut his statements. Sec. 165 of the Indian Evidence Act, upon which reliance is placed by the Opposite Party, clearly does not justify the procedure adopted by the Judge. It is further worthy of note that the Subordinate Judge has omitted to consider a very material aspect of the case. As already stated, the application for rateable distribution by Peary Lal Das was made in the execution proceeding of Peary Lal Dawn on the 11th September 1912. At that time Peary Lal Dawn did not object that the application for rateable distribution should be disallowed inasmuch as the decree on which it was based was fraudulent. More than this, on the 13th January 1913, Peary Lal Dawn himself made an application for rateable distribution in the execution proceedings instituted by Peary Lal Das.

3. This application could have been made only on the assumption that the decree obtained by Peary Lal Das was a genuine and valid decree capable of execution. No doubt, it is conceivable that Peary Lal Dawn had reason to suspect the genuineness of the decree of Peary Lal Das, only after his own application of the 13th January 1913 and that it was for this reason that he did not, before the 13th February 1913, take exception to the application for rateable distribution by Peary Lal Das. The circumstance that objection was not taken till the 13th February 1913, does, however, stand in need of explanation, which can be

furnished only by him. This is plainly a matter which cannot be decided on affidavits. If Peary Lal Dawn fails to establish that it was not till after the 13th January 1913 that he had reason to suspect the fraud which on the 13th February he imputed to Peary Lal Das, his objection to the rateable distribution should not be entertained. This aspect of the case has been completely ignored by the Subordinate Judge.

4. The result is that this Rule is made absolute and the order of the Court below set aside. The case will be remitted to the Subordinate Judge in order that he may take up the objection to rateable distribution made by Peary Lal Dawn on the 13th February 1913 and deal with the matter in accordance with law. We find that the execution proceedings commenced by Peary Lal Dawn have been dropped. The effect of our order will be to revive those proceedings. We also find that the Subordinate Judge, after he had disposed of the objection of Peary Lal Dawn to the application by Peary Lal Das for rateable distribution, proceeded to record an order in the execution proceedings commenced by Peary Lal Das to the effect that that case also was dismissed. It was clearly not competent to him to make this order. That order will stand discharged, as it was founded on the order in the rateable distribution proceedings which we have now set aside. The effect will be to revive the execution proceedings commenced by Peary Lal Das. The position will be that both the execution cases will stand revived and the Subordinate Judge will proceed to deal with the question of rateable distribution. There will be no order for costs in this Court.