

(1938) 05 CAL CK 0010
In the Calcutta High Court

Sital Chandra Bose

APPELLANT

Vs

Ramesh Chandra Mitter and Others

RESPONDENT

Date of Decision : 31-05-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 116

Citation : AIR 1938 Cal 615

Hon'ble Judges : Costello, J; Biswas, J

Bench : Full Bench

Judgement

Costello, J.—The petition on which this rule was granted stated that the petitioner was aggrieved by the order of the Subordinate Judge of the 24-Parganas, being an order dated 4th May 1938, in the proceedings which are described as Money Execution Case No. 1 of 1938. The order complained of is in these terms:

Decree-holders put in a petition praying that the execution case may be struck off on non-satisfaction for reasons stated therein, The petition is rejected, as the property advertised for sale has been knocked down and the bid is pending for Court's acceptance.

2. The present proceedings before us are remarkable in that the petitioner was the judgment-debtor and he is complaining against an order made by the learned Sub-ordinate Judge, an order which the decree-holder himself does not complain of, though it was made on a petition put in by the decree-holder. It has been argued before us that the learned Subordinate Judge was wrong in rejecting the application of the decree holder for withdrawal of the execution case and in so doing, he exercised a jurisdiction not vested in him by law. There is the further usual allegation in cases of this kind that the Subordinate Judge acted illegally in the exercise of his jurisdiction in rejecting the said application. It is further contended that his reasons therefor were entirely unsound. In my opinion there is here no question of jurisdiction. The learned Subordinate Judge was dealing with the matter, which is described as Money Execution Case No. 1 of 1938, and

he therefore was empowered and authorized and had jurisdiction to make such orders as he thought necessary for the purpose of dealing with those proceedings. Apart altogether from the question of jurisdiction however, in my opinion, the learned Judge was perfectly justified in making the order which he made on 4th May last. The petition was this: Going back to 9th February 1938, we find that there was an order directing the issue of a sale proclamation fixing 19th April 1938, for sale of the properties which are the subject-matter of the execution proceedings. There was a further order made on that date that the decree-holder was to file the finally published Record of Rights and the valuation roll of the properties. On the date for which the sale was fixed, viz. 19th April, the decree-holder put in a petition asking; for permission himself to bid at the sale. And that was allowed. On the same date the judgment-debtor appeared and filed a petition asking for time.

3. To that petition the decree-holder assented and two weeks' time was allowed to the judgment-debtor to discharge the judgment debt, and the sale was put off until 3rd May 1938. On that date, an order was recorded: "Nazir to conduct the sale and report." Then followed two other orders. The first is in these terms: "Received Nazir's report. One Sm. Raj Lakshmi Mitter purchased the property at Rupees 32,000. Put up to-morrow for acceptance of the bid."

Then we find this recorded : "At this-stage, judgment-debtor puts in a petition praying for time till to-morrow for payment of the decretal dues. Put up to-morrow for order." So, once again, the judgment-debtor obtained time in which to pay. On the> next day in accordance with that order, the judgment-debtor's petition came before the learned Judge and he made this order: "He (that is to say the judgment-debtor) is permitted to deposit the decretal amount. before the acceptance of the bid."

4. Now, it seems quite apparent from the* behaviour of the judgment-debtor that he was, to say the least of it, obstructive and was doing his very best to prevent the sale-being completed, and I think one can, not unreasonably, come to the conclusion that the decree holder was rather nervous as to what might happen if the sale was in fact confirmed, having regard to the attitude which the judgment-debtor was then taking up. Accordingly he put in a petition which is the one on which the order complained of is based. It appears that the decree-holder was asking to be allowed to withdraw the execution proceedings, because he was afraid that there might have been some irregularity which the judgment-debtor would be able to take advantage of. It seems quite clear from the endorsement on the order-sheet that the decree-holder was only concerned to withdraw from the proceedings, because he was afraid that there was some irregularity and not because he desired to stop the sale or to do anything which would prevent himself from obtaining satisfaction of the decretal amount from the judgment-debtor. It is abundantly clear from the statement in the order recorded on 4th May 1938, that the learned Judge was of opinion that he ought not to allow the decree-holder to withdraw, because in some way or rather, to

some extent at any rate, a third party had entered on the scene and had acquired a position, if not an interest which had to be taken into consideration. The real situation seems to have been this that from the very outset, the learned Judge had in his own mind decided that the bid of Raj Lakshmi was one which he might properly accept. The only reason why he did not accept it on 3rd May was because the judgment-debtor intervened and applied for further time. We find it recorded at the end of the order of 4th May "... and the bid is pending for Court's acceptance." That seems to be a statement that so far as the property is concerned, the bid would be accepted. On the same date the learned judge recorded this:

No money paid by the judgment-debtor. Sm. Raj Lakshmi's bid for Rs. 32,000 put up for orders. As the bid is a contested one and does not appear to be low, it is accepted. Poundage fee of Rs. 330 filed.

5. The learned Judge had given to the judgment-debtor ample opportunity of escaping the situation in which he might find himself obliged to pay some compensation to the purchaser at the auction sale and we are told that the real reason for this application is because the judgment-debtor wishes to avoid having to pay a sum of money by way of compensation to the lady who was the purchaser at the execution sale. We find it recorded under date 4th May:

At this stage decree-holders put in a petition certifying full satisfaction of the decretal dues. Put up to-morrow for orders in presence of pleaders for the decree-holder, judgment-debtor and the auction-purchaser.

6. So that the judgment-debtor with his eyes open waited to make payment until after the Judge had definitely decided to accept the bid. Further on the same date-we find this order:

Judgment-debtor 1 files an application stating certain facts. Let it be kept with the record. Chalan showing deposit of Rs. 8000 filed by the auction-purchaser.

7. And then the matter was put over until 10th May for hearing arguments. The matter was further postponed until 19th May. In the meantime, the judgment-debtor rushed up to this Court and succeeded in obtaining a rule. It is clear beyond all question that the learned Judge was holding the view that a third party was concerned in the matter and so he was quite right in refusing to the decree-holder at that stage leave to withdraw from the proceedings. No question of jurisdiction and, indeed, no question of the propriety of the Judge's order can possibly arise, unless it can be argued successfully that a decree-holder has an absolute and indefeasible right to withdraw from execution proceedings at any stage no matter what the situation may be. Mr. Bagchi appearing on behalf of the judgment-debtor took up that attitude at the outset, and on the strength of an observation in *Chowdhury Ram Prasad Rai and Others Vs. Mahesh Kant Chowdhury*, where Jwala Prasad J. said: "He had the right to withdraw the execution petition at any moment he liked". The learned Judge was referring, of course, to the decree-holder; but it is quite obvious on a perusal of the judgment

that although taken out of its context that seems a categorical statement that a decree holder has the right to withdraw an execution petition at any moment he likes, it is clear enough that the learned Judge was dealing with the particular facts of the case then before him and not making a generalization. It is clearly laid down in *Kenaram Bakshi v. Kailash Chandra Dutt* 1913 18 C LJ 53 that a decree holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option. That, indeed, seems to be a matter of common sense. Faced with that authority, Mr. Bagchi found himself obliged to qualify his original broad proposition, and he then argued that at any rate the decree-holder has a right to withdraw at any stage of an execution proceeding unless and until a third party has acquired some right or interest in the property which is the subject-matter of the execution proceeding. It is clear beyond all question that what happened in the present case is that when the learned Judge made the order complained of, he was dealing with the matter upon the footing that a third party had acquired some sort of interest in the property. He may have been right or he may have been wrong either on the law or on the facts or on both. But if the law is that a decree-holder has not an unqualified and absolute right to withdraw at any moment of time, then it is obviously the bounden duty of the Judge dealing with an execution matter to exercise his judicial discretion and to determine as a Judge whether in his opinion in the circumstances and upon the facts of the particular case, the decree-holder ought to be allowed to withdraw. Now, it does not seem to have been disputed by Mr. Bagchi at any rate in the later stages of his argument that it is the law that a decree-holder cannot of his own volition withdraw from execution proceedings where the circumstances are such that some third party has become involved or has acquired some interest.

8. I have said that in the present instance the learned Judge rightly or wrongly took the view that a third party had acquired an interest. We are not now concerned to enquire whether that was a right or whether it was a wrong view of the matter. Obviously, if the learned Judge took the view that there was somebody who had made a bid which he himself intended to accept, it was open to him to come to the conclusion that the decree-holder ought not to be allowed to withdraw at that particular stage. If the learned Judge was wrong in coming to the conclusion, as he may have been, that this lady had acquired some legal interest as regards the property, that is not a matter which is a fit subject for review in proceedings taken u/s 115 of the Code. In my opinion, the judgment-debtor had no right to come here at all : he is complaining of an order which the decree-holder himself does not complain of. This is plainly an attempt on the part of an obstructive judgment-debtor to delay payment of his just debt. It is clear that this applicant has no locus standi. If he has, he has nothing to complain of on the order made in the execution proceedings. The rule accordingly must be discharged with costs, five gold mohurs. Let the records be sent down without delay.

Biswas, J.

9. I agree.