
(1955) 07 CAL CK 0037
In the Calcutta High Court
Case No : Civil Revn. No. 1828 of 1954

Sunil Roy

APPELLANT

Vs

Biswanath Dutta and Another

RESPONDENT

Date of Decision : 19-07-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 43, Order 21 Rule 46, 63, 73

Citation : AIR 1956 Cal 373 : 60 CWN 624 : (1957) 2 ILR (Cal) 98

Hon'ble Judges : K.C. Das Gupta, J;Guha, J

Bench : Division Bench

Advocate : S. Das and A.C. Bose, for the Appellant; Ramendra Mohan Chatterjee and Phakir Chandra Halder for Opposite Party No. 1, for the Respondent

Judgement

K.C. Das Gupta, J.—This Rule is directed against an order refusing an application for rateable distribution. The petitioner got a decree for Rs. 6,890/6/3 against Phani Bhusan Singh on 15-9-1953 in Suit No. 3414 of 1951 on the Original Side of this Court. He started execution proceedings in the Court of the Subordinate Judge, Alipore, on 19-9-1953, after having obtained a certificate of non-satisfaction from this Court in Ex. Case No. 19 of 1953. In the application for execution he prayed for attachment and sale of the moveable property described in these words:

"New Morris minor Saloon Car (1953) Model -- temporary registration No. WBX 4028, Engine No. A. P. H. M. 905, chassis No. F. A. H. 55/160483 colour-black, registered in the name of Sinha & Co., Purulia, lying in the premises of G. McKenzie & Co. (1919) Limited, at 208, Lower Circular Road, Calcutta. Dt. 24-Parganas."

2. In the meantime Biswanath Dutt obtained his decree in Suit No. 17 of 1953 on the Original Side of this Court against the same Phanibhusan Singh. This was on the 18-6-1953. He started execution proceedings for the same on 11-8-1953 and asked for attachment of the same motor car under Order 21, Rule 46, Civil P. C.

and sale of the same thereafter.

Attachment in this case was effected on 18-8-1953. The motor car was sold on 28-9-1953. On 25-9-1953, the present petitioner Sunil Roy made his application "under Section 73 read with Section 63, Civil P. C." for rateable distribution of the sale proceeds.

3. In the execution case No. 19 of 1953 an application u/s 47, Civil P. C. was made by the judgment-debtor on the ground that there was no valid attachment as, though the motor car was in the possession of a third person G. McKenzie & Co. Ltd., no action was taken under Order 21, Rule 46, Civil P. C.

In disposing of the application u/s 47 the executing Court stated that the contention that attachment was invalid was accented by the decree-holder's Advocate and passed the following order:

"Hence on the consent of parties the application u/s 47, C. P. O. is allowed on consent and the attachment of the motor car is withdrawn. The decree-holder to take steps in the execution case, if any by 23-1-1954."

As no step was taken, the execution case was dismissed for default by an order dated 25-1-1954.

4. The Court which received the assets on the sale of the motor car has held that there was no attachment in law in execution case No. 19 of 1953 and so no action could be taken u/s 63, Civil P. C. It held also that there was no question of action u/s 73, as the execution petition of the present petitioner was in a different Court. In that view the Court rejected the prayer for rateable distribution.

5. It is contended before us that the Court below failed to exercise the jurisdiction vested in it by law on the erroneous view that there was no attachment in law. The question for consideration is whether there was an attachment in law in Execution Case No. 19 of 1953.

6. It is not disputed that the Court did issue a writ of attachment and that writ was executed. Apparently the writ directed attachment in the manner mentioned in Order 21, Rule 43, Civil P. C., in the view that the motor car was in the possession of the judgment-debtor. Actually, however, the motor car was not in the possession of the judgment-debtor, but of a third party G. McKenzie & Co. Ltd.

The contention on behalf of the other decree-holder Biswanath is that the attachment made under Order 21, Rule 43, C. P. C. was a nullity and so the legal position was as if no attachment had been made at all. This contention which was accepted by the Court below is, in my opinion, unsound.

It may be correct to say that where in fact the moveable is in the possession of a third person, an attachment made in the manner specified in Order 21, Rule 43 -- viz., by seizure should not be allowed to continue and the proper method of

attachment under Order 21, Rule 43 should be followed. That does not mean that the attachment made in the wrong method was a nullity.

In my judgment, the attachment by seizure in such a case continues to be an attachment in law unless and until it is withdrawn. We find that in this case the attachment was in fact withdrawn by an order passed on 5-1-1954. The withdrawal took effect on and from 5-1-1954. Before the withdrawal, the attachment was a valid attachment in law.

7. Immediately after 21-9-1953 on which the attachment in Execution Case No. 19 of 1953 was made the position in law therefore was that the same property, viz., the motor car was under attachment by the orders of attachment of two different Courts, by the order of the 5th Subordinate Judge, Alipore, in Execution Case No. 19 of 1953 and by the order of the 2nd Subordinate Judge, Alipore, in Execution Case No. 17 of 1953.

Under Section 63, Civil P. C. therefore, it became the duty of the Second Subordinate Judge, Alipore, under whose decree the property was first attached to realise the property and to determine claims thereto. The 2nd Subordinate Judge's Court did realise the assets.

What remained to be done was the "determination of the claim" to the sale proceeds. As the claim had already been made on the 26th (25th?) September, 1953, by the present petitioner it was the duty of the Second Subordinate Judge, Alipore, which held the assets to determine the claim and, if the claim was held to be valid, to determine the assets rateably between the two decree-holders.

8. The question has been raised whether the fact that attachment was withdrawn on 5-1-1954 stands in the way of the petitioner's right to rateable distribution. The answer to this question must be in the negative. As soon as the sale was held, that is, on 28-9-1953, the Court's duty was to determine the claim.

The fact that the Court did not do its duty then and did not decide the question of rateable distribution before 5-1-1954 cannot affect the matter. If on 28-9-1953 the petitioner had the right of rateable distribution, what happened on 5-1-1954 was of no consequence. It is worth mentioning here that when after the attachment, the attached property was sold, the attachment had ceased and there was really no scope for withdrawal of any attachment.

9. At one stage I was inclined to think that as the execution case in which the attachment had been made had itself been dismissed on 24-1-1954, no claim remained to be determined thereafter. On further consideration, however, I have come to the conclusion that the dismissal of the execution case on a later date would not affect the right to rateable distribution.

To hold that the later event of dismissal of the execution case would extinguish the right to rateable distribution would have the result of making a party suffer because of the Court's inability to perform its duty in time. Such a position cannot be tolerated.

I would, therefore, hold, even apart from authority that once it had become the duty of a court u/s 63, Civil P. C. to make a rateable distribution, that duty must be performed even though thereafter the execution case had been dismissed. The position would obviously be different where the claim itself was abandoned. I find that a similar view was taken in a case u/s 73, Civil P. C. by Mookerjee and Beachcroft, JJ. in "Byomkesh Chakrabutty v. Hemanta Kumar" AIR 1915 Cal 16 (V 2) (A). "At pp. 16-17" of the report their Lordships say:

"It has been contended, however, on behalf of the opposite party that inasmuch as the application of the petitioner for execution had been dismissed for non prosecution on 13-5-1912, he was not, 011 20-5-1912, when he applied to set aside the sale, a person entitled to share in a rateable distribution of the assets within the meaning of Rule 90,

In our opinion, this contention is unsound. The dismissal of the application on 13-5-1912 for non-prosecution did not affect the right of the petitioner to share in a rateable distribution of the assets. It was the duty of the Court to grant him relief on the basis of his right which had accrued previously, for there is no suggestion that he had waived or abandoned his claim against the judgment-debtors.

In our opinion, on the date on which the application to set aside the sale was made under Rule 90 it was made by a person entitled to share in the rateable distribution of the assets and consequently should have been entertained by the Court."

10. The learned Advocate for the respondents drew our attention to the decision in "Gopal Chandra Bose v. Hari Mohan Dutt" AIR 1916 Cal 264 (V 3) (B) and suggested that in that case Mookerjee had gone back on the view expressed by him in the earlier case. "At p. 266" of the report appears the observation on which the learned Advocate has relied for this suggestion:

"It may be conceded that if on an application for execution, it has been held that the decree has been satisfied or is barred by limitation or if such application has been dismissed and is not pending at the time when the assets are realised, no valid claim for rateable distribution can be laid u/s 73."

In my judgment, these observations do not at all touch the decision of their Lordships in the earlier case. What was being considered in Gopal Chandra Bose's case (B) was whether if the application for execution had been dismissed before the claim for rateable distribution had been made, the application could be entertained. That is quite a different question, from where the application for rateable distribution had been made when an execution case was pending and in a later date the application for rateable distribution was dismissed for non-prosecution.

11. I have, therefore, come to the conclusion that the learned Court below was bound in law to exercise the jurisdiction in the application for rateable

distribution and to make such distribution as he thought proper.

12. I would, therefore, make the Rule absolute, set aside his order refusing the application for rateable distribution and order that the rateable distribution should be made in accordance with law.

13. The petitioner will get his costs from the contesting opposite party.

Guha, J.

14. I agree.