

(1869) 05 CAL CK 0044

In the Calcutta High Court

Case No : Miscellaneous Regular Appeal No. 130 of 1869

Tarak Chandra Bhattacharjee and Others

APPELLANT

Vs

Haro Sanker Sandyal and Others

RESPONDENT

Date of Decision : 13-05-1869

Acts Referred:

Citation : (1869) 05 CAL CK 0044

Judgement

Sir Barnes Peacock. Kt., C.J.—It appears to me that in this case the order of the Subordinate Judge, allowing execution to issue at the suit of the Bhattacharjees for that portion of the decree which they claim to be due to them ought to be reversed. The Sandyls obtained a decree against the Bhattacharjees, and in execution of that decree certain property of the Bhattacharjees was sold and purchased by the Sandyls. The Bhattacharjees subsequently instituted a suit against the Sandyls to set aside the sale of the Bhattacharjees property in execution, and the Bhattacharjees in that suit obtained a decree against the Sandyls for the restoration of the property and the mesne profits which they had obtained while they were in possession. It is unnecessary to refer to that portion of the proceedings which related to the estate called Arungai-jai, which had been sold for arrears of revenue, and in respect of which it has been held that the Bhattacharjees are entitled to recover surplus proceeds.

2. The Sandyls afterwards proceeded to obtain execution of their original decree in the Judge's Court. The Bhattacharjees came in and objected to the Sandyls executing for the whole amount of the decree, and asked that their decree against the Sandyls might be set off against the other decree; the amount of the Bhattacharjees' decree was not then ascertained, as the amount of wasilat had not been assessed. After considerable litigation, an order of the High Court was made on the 14th September 1865, with the consent of both parties, fixing the mode in which the set off was to be made.

3. It appears to me clear, that after that order made with the consent of both parties the Sandyls would never have been allowed to execute their decree for

the full amount, without deducting the amount of the Bhuttacharjees' decree. The Sandyls' decree was a decree of the Provincial Court, and substantially became a decree of this Court. How if the effect of that order made by consent was to prevent the Sandyls executing their decree without giving credit for the Bhuttacharjees' decree, it follows, that it would be most inequitable to allow the Bhuttacharjees to execute their decree against the Sandyls.

4. It appears that Ram Kumar Ghose, who held a money decree against the Bhuttacharjees, claimed to attach in execution of his decree the decree of the Bhuttacharjees, in consequence of which the Sandyls instituted legal proceedings, in which it was held that that decree was bound by the order for the set off as regards Ram Kumar Ghose: *Gobindnath Sandyal v. Ram Coomar Ghose* 6 W.R. 21.

5. A review of that judgment was applied for, and upon review it was held that as the decrees were in different Courts, and as Ram Kumar Ghose was a third party, and no party to either of the decrees, he was not bound by the Sandyls' right of set off. *Ram Coomar Ghose v. Gobindnath Sandyal* 7 W.R. 480.

6. I merely refer to these decisions for the purpose of stating that it is not the intention of this Court in deciding a case between the Bhuttacharjees and the Sandyls, to express any opinion whatever at variance with the decisions between the Sandyls and Ram Kumar Ghose.

7. Upon the Bhuttacharjees applying to execute their decree, as to that part of it which had not been transferred to Ram Kumar Ghose, the case is relieved from all question as to the rights of third parties, and comes back to the question whether the Bhuttacharjees, in the face of the order which was made by the High Court with their consent to the effect that their decree should be deducted from the Sandyls' decree, are to be allowed to treat that order altogether as a nullity, and to execute any part of their decree against the Sandyls. Whatever may be the case as between the Sandyls and Ram Kumar Ghose, it appears to me that the Bhuttacharjees were bound by that order which was made with their consent, and that in the face of the order by which their decree was to be deducted from the Sandyal's decree, they cannot execute their decree against the Sandyls. In substance, that order effected a discharge of the Sandyal's decree to the extent of the amount of the decree of the Bhuttacharjees.

8. There is another point upon which it appears to me that the Bhuttacharjees are not entitled to maintain the order of the Subordinate Judge for the execution of any part of their decree.

9. Section 207 of Act VIII of 1859 enacts, that "when any party, in whose favour a decree has been made, is desirous of enforcing the same, he shall apply to the Court whose duty it is to execute the decree, either in person or through his pleader in the suit, or some other pleader duly appointed to act for him in that behalf. If there be two or more decree-holders, one or more of them may make the application, if the Court shall see sufficient cause for allowing him or them to

make such application, and the Court shall, in such case, pass such order as it may deem necessary for protecting the interests of the other decree-holders."

10. This section applies to the enforcing of the decree in toto, and not for enforcing the decree in different proportions. If there are two or more decree-holders jointly interested in a decree, one or more of them may apply for execution, and the Court may, if it thinks it reasonable, make an order for their proceeding with the execution, and it may make such order for protecting the interests of the other decree-holders as it may think proper. But that section throughout applies to the execution of the entire decree, and not splitting up decrees into several portions, and to the execution of those portions only of the decree.

11. Section 208 of the Act enacts, that "if a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been transferred, or his pleader, and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder."

12. That section also applies to the transfer or assignment of a decree in its entirety. It does not intend that a decree should be assigned to as many persons and in as many portions as the decree-holder may think fit to split it up into. If the decree-bolder were allowed to do so, the judgment-debtor might be ruined. Suppose there was a decree for a lac of rupees, it could not be contended that the decree-bolder could assign it to a lac of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise there might be a lac of executions under the decree, a lac of seizures and a lac of sales, under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined.

13. This is shown to be the correct view of the case by supposing a case of execution by arresting the judgment-debtor. Could each one of the assignees arrest the debtor for his own portion? It appears to me that the section which provides the period, during which a judgment-debtor is to be detained in jail in execution of a decree, shows that the Legislature contemplated one entire execution, and not several executions as to portions of the same decree.

14. There are several decisions on section 207, in which it has been held, that although the Court may allow one of two decree-holders to take out execution of the whole decree, it cannot allow him to take cut execution of part of it to the extent only of his own interest: *Prannath Mitter v. Srinnath Halder* 2 Wym. Rep. 185, *Prannath Mitter v. Mathurnath Chuckerbutty* 6 W.R. Mis. 64, *Thakoor Dass Sing v. Luchmeeput Doogur* 7 W.R. 10, and *Poorao Chandra Mookerjee v. Sharoda Churn Roy* 3 B.L.R. App. 21.

15. I do not mean to say that a person may not apply for execution of part of a

decree if he admits that the remainder has been satisfied, nor do I mean to say that where a decree is perfect for execution in certain respects and imperfect in other respects, that execution may not be taken out for the portion which is perfect. For instance, a decree-holder may obtain a decree to recover possession of lands and for *wasilat* to be assessed in execution. The decree cannot be executed as regards the *wasilat* until it is ascertained. That ought not to prevent the execution-creditor from executing the decree as to that portion which is perfect, and seizing in execution the land which has been decreed to him. But after the decree is perfect for execution in its entirety, as for instance in the case just put, after the *wasilat* had been assessed and fixed, I apprehended that the execution-creditor cannot take out one execution for the *wasilat*, another for the costs, and another for the interests on the costs; nor after a decree is perfect in execution can he by assignment split up that decree and subject the judgment-debtor to as many executions as there are assignees of different portions of the decree. Whether an assignee of part of a decree may be considered in same way as a party u/s 209, or whether an assignor may apply for execution of the whole of the decree notwithstanding the assignment of part, is a question which it is not now necessary to decide. It appears to me that if there are several assignments of different portions of a decree, there can be only one execution of the decree.

16. In addition to the arguments already adduced, I think it is not unimportant to consider the injury which would be caused to the judgment-debtor, if each assignee of a part could have separate costs for his own execution.

17. It appears to me that the Bhuttacharjees, independently of the order to which I have referred, are not entitled to have execution of part of the decree, whilst they admit in their petition that other portions of the decree remain unsatisfied. Either they and their assignees must come in together and apply for execution of the whole decree; or they must apply to execute the whole and raise the question, whether they can do so after an assignment of part of it; or they must be content to wait until they can get rid of the difficulty which they have brought upon themselves by assigning the decree in portions.

18. Further, I hold, that if a decree be seized in execution, the whole decree must be seized and sold together, and that it cannot be seized in portions and sold in portions under an execution. At any rate if this could be done, the judgment-debtor cannot be made to suffer any loss by having the decree executed against him in several portions.

19. I find on looking at the petition of the judgment-debtor before the Subordinate Judge, that the order of this Court of the 14th September 1865, made by consent of both parties, was not brought to his notice. That order might have been set up before him as an answer to the execution, or it might have formed a ground for applying to this Court to restrain the Bhuttacharjees from executing their decree in opposition to the terms of the order which had been made with their consent. I was under the impression that the order of the 14th

September 1865 had been brought to the notice of the Subordinate Judge, but I find it was not brought to his notice in the Sandyls' answer. Under these circumstances, I think the decision of the Subordinate Judge ought to be reversed, solely on the ground that he granted an execution of a part only of a decree, without entering into the question as to the circumstances under which the remainder of the decree had been transferred.

20. The appellant will get his costs in this Court and in the lower Court.

Jackson, J.

21. I concur with the Chief Justice on both points. I think that a decree cannot be executed in portions; and on this point alone, the Principal Sadder Ameen ought to have rejected the application of these Bhuttacharjee decree-holders. I am also of opinion that the question as between the Bhuttacharjees and the Sandyls was finally decided by the order of this Court of the 14th of September, 1865. It may be, that so far as Ram Kumar Ghose is concerned, some portions of this order, as far as they affect him, may have been set aside; the Bhuttacharjees are now attempting to take advantage of the order passed in a case in which they were not real parties, but which affected only Ram Kumar Ghose.

22. The orders of the 14th of September 1865 were orders apparently founded on the application of the Bhuttacharjees themselves, and they were orders passed in compliance with such application.

23. These orders have never been set aside so far as the Bhuttacharjees are concerned, and they are final; and looking to this order the Bhuttacharjees are unable now to take out execution of this portion of the decree, which they state they have reserved in their own hands. I concur therefore with the Chief Justice in reversing the decision of the Principal Sadder Ameen, and in disallowing the application for execution.