

(1926) 01 CAL CK 0031
In the Calcutta High Court

Upendra Nath Bose Roy Chowdhury and Others	APPELLANT
Vs	
K.B. Dutt and Others	RESPONDENT

Date of Decision : 11-01-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : 96 Ind. Cas. 562

Hon'ble Judges : Cuming, J;B.B. Ghose, J

Bench : Division Bench

Judgement

B.B. Ghose, J.—This appeal arises out of an application for execution of a decree for costs. The appellants were the plaintiffs in a certain suit. The final decree in the High Court was made against them and they were made liable for payment of costs of the trial Court as well as of the High Court. The decree of the High Court was dated the 5th of July, 1917. Execution for costs was applied for on the 23rd of March, 1918, and it was for the realization of costs both of the Appellate Court and the trial Court. That application was dismissed in August, 1918, and it is unnecessary to state the reason for the order. The second application for execution was made on the 5th of July 1920 and in that application the decree-holders sought for executing the decree for costs allowed by the High Court only; and the argument of the appellants is based upon this fact. On that application partial satisfaction was obtained by the decree-holders. The third application for execution was made on the 31st July, 1922, in which the decree-holders originally applied for execution of the balance of the costs allowed in the High Court only and afterwards by an amendment of the application, the costs of the lower Courts were also included in the application for execution. That application was also dismissed and the present application was made on the 13th of June 1923 including the costs allowed by both the Courts to the decree-holders. The objections on behalf of the judgment-debtors in the lower Court were that the application was barred by limitation and, secondly, that the decree-holders having asked for the execution of the costs of the High Court only in their application of the 5th July, 1920, they were precluded in the present application

from seeking to execute. the decree for costs of the lower Court. The learned Subordinate Judge has rejected the objection of the judgment-debtors and directed the execution to proceed.

2. The judgment-debtors appeal to this Court and on their behalf the only ground that has been raised is that the decree-holders are precluded from executing the costs of the, first Court on account of the course they had taken in their application of the 5th of July 1920 in which they applied for execution of the costs of the High Court alone. It is not disputed that if the application is maintainable it is not barred by limitation. It is argued that the decree-holders are entitled only to maintain the application for execution with regard to the balance of the costs of the High Court. In the lower Court it appears that the question urged was only on the basis of limitation and it is not disputed that the Subordinate Judge was right in holding that the application would not be barred by limitation. It is, however, contended that the case of *Nepal Chandra Sadookhan v. Amrita Lal Sadoo khan* (1) does not support the proposition that a decree-holder after applying for a partial execution, of a decree for money can maintain a subsequent application for execution of the entire decree. The contention on behalf of the appellants raised by Mr. Gupta is that the principle, laid down in Order II Rule 2, C.P.C. with regard to suits applies to applications for execution, at any rate where the decree is not for different reliefs given to the decree-holders. It is, however, admitted that that rule does not apply in terms to an application for execution of a decree. With regard to the case of *Nepal Chandra Sadhookhan v. Amrita Lal Sadhookhan* 26 C. 888 : 13 Ind. Dec. (N.S.) 1169 Mr. Gupta argues that that case is distinguishable on the ground that the decree was for costs as well as for recovery of Immovable properties. When a previous execution was taken for costs only, the judgment-debtor raised no objection and, therefore, it was held that the judgment-debtor could not raise any objection in the subsequent proceedings, that the previous application for execution was not in accordance with law. The learned Judges there were really dealing with the question of limitation and they held that the subsequent application was not barred by limitation. The case of *Dulichand Bhudar v. Bai Shivkor* 15 B. 242 : 8 Ind. Dec. 164 is almost similar in its facts except that instead of the decree being one for recovery of Immovable properties and costs the decree was for recovery of certain ornaments and costs, There also the question was decided whether the subsequent application was barred by limitation or not. These cases, therefore, do not exactly touch the point that has been raised on behalf of the appellants by the learned Advocate. Reliance is placed mainly in support of the argument on behalf of the appellants on the case of *Huro Sunkur Sandyal v. Taruok Chunder Bhattacharjee* 11 W.R. 488 : 3 B.L.R.A.C.J. 114 in which at page 490, Sir Barnes Peacock observed: "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."

On this statement Mr. Gupta argues that where a decree-holder applies for execution of part of a decree he must be taken to have given up the remainder and it must be held that there was a satisfaction with regard to the portion for which he does not make any application for execution. This argument, it seems, to me, is not supported by the observations made by Sir Barnes Peacock in that case. The learned Judge there disapproved of piecemeal execution of a decree. But it is no authority for the proposition that if a portion of a decree has been previously executed, an application for execution of the remainder would not be sustainable, because the mischief of partial execution can be applied properly to the former application. The subsequent application is for the balance that would be found due after the previous execution had been levied. As there is no authority for the proposition that the principle of Order II, Rule 2, C.P.C. should apply to an application for execution of a decree, I am unable to hold that the present application is not maintainable.

3. Reference may be made on this question to the case of Radha Kishen Lal v. Radha Pershad Singh 18 C. 515 : 9 Ind. Dec. 344 where the learned Judges held that Section 43, which is now Order II, Rule 2, C.P.C. did not apply to proceedings in execution and when a decree gives reliefs of different character such as a decree for possession and a decree for costs, they held that there was nothing in the C.P.C. which prevented separate and successive applications for execution as regards each of them. If that rule does not apply then there is nothing to prevent successive applications for execution of a portion of the decree from being made, although the Court might refuse to execute a portion of the decree when such an application was made on a former occasion.

4. The learned Vakil for the respondents, Mr. Roy, argues that as all the cases lay down that where there has been a previous application for partial execution that saves limitation as a step-in-aid of execution, by implication the cases must be supposed to have held that subsequent applications were maintainable.

5. It is worthy of note that in none of these cases which have been cited was this objection taken that a subsequent application is not maintainable on the principle of Order II, Rule 2, C.P.C. I, therefore, hold that the present application is maintainable.

6. There is one other point which maybe noticed and it is this as I have already stated, that the application of the 31st July, 1922, was originally for the execution of the balance of the costs of the High Court alone. The application was then amended under the orders of the Court by including the costs of the lower Court also. Objection was taken to this amendment. With regard to that, the learned Judge states as follows: "The judgment-debtor contends that such amendments cannot be allowed. My predecessor in-office allowed this amendment. Application for execution are proceedings in suit, Section 153, C.P.C. says that the Court may at any time and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit. This Court finds that the amendment was permissible in law." It is

contended on behalf of the respondents that, on the authority of the case of Mungul Pershad Dichit v. Grija Kant Lahiri 8 I.A. 123 : 8 C. 51 : 11 C.L.R. 113 : 4 S. P.C.J. 249 : 4 Ind. Dec.32 the question cannot be raised in the present proceedings it having been decided previously in favour of the decree-holders. The appellants answer that when the execution case was dismissed they could not, appeal and, therefore, that decision is no I, binding upon them. But I do not think that that argument is sustainable; because it was open to the judgment-debtor to appeal from that part of the order under which the Court allowed the amendment of the application for execution and ordered that the execution would be proceeded with for costs of the lower Court also.

7. On these grounds this appeal must be dismissed with costs. Hearing-fee three gold mohurs.

Cuming, J.

8. I agree.