Baij Nauth Prosad and Others Vs Ghanshyam Dass and Others

Court: Calcutta High Court

Date of Decision: Jan. 25, 1904

Judgement

1. In this appeal which arises out of certain execution proceedings taken by the Appellants, decree-holders, the only question for determination is,

whether the application for execution is barred by limitation. The facts with reference to which that question arises are shortly these : The decree

sought to be executed was passed on the 26th March 1898. Then after some intermediate applications for execution and rateable distribution, an

application for rateable distribution was made on the 7th February 1899. Upon that application the Court ordered rateable distribution on the 12th

August 1899 ; and on the same day it ordered the execution case to be struck off, the attachment continuing. Thereafter two applications were

made on the 4th January 1901 for an order for withdrawing monies to which the decree-holders were entitled upon rateable distribution. And the

present application for execution was made on the 17th May 1902.

2. There can be no question that the application for rateable distribution made on the 7th February 1899 was in time, for, it was made within three

years from the date of the decree; nor can there be any question that the decree-holders are entitled to reckon time from the date of that

application, as being an application to the Court to take some step in aid of execution. But as the present application is made more than three years

after the date of that application, it can be in time, only if the next preceding application, namely, that of the 4th January 1901, can be regarded as

one made to the Court to take some step in aid of execution within the meaning of cl. (4) of Art. 179 of the 2nd Schedule of the Limitation Act. If

that application can be so treated, then as it was made within three years from the date of the next preceding application, within that clause, and

was within three years from the date of the present application, the present application will be saved from being barred by limitation.

3. The question then is reduced to this, namely, whether the application for an order of the Court for withdrawing the monies to which the decree-

holders were entitled by rateable distribution was an application to the proper Court to take some step in aid of execution of the decree. The Court

below has answered this question in the negative, relying upon the cases of Hem Chunder Chowdhri v. Brojo Soondury Debee I. L. R. 8 Cal. 89

(1881), Fazal Imam v. Metta Singh I. L. R. 10 Cal. 549 (1884) and Gunga Perhsad Bhoowmik v. Debi Sundari Debea I. L. R. 11 Cal. 227

(1885), and the learned vakil for the judgment-debtors, Respondents, in supporting the judgment of the lower Court relies also upon the case of

Ananda Mohan Roy v. Hara Sundari I. L. R. 23 Cal. 196 (1895). On the other hand the learned vakil for the decree-holders, Appellants,

contends that the application of the 4th January 1901 comes within the scope of the words ""an application to the proper Court to take some step

in aid of execution"" in cl. (4) of Art 179 of the 2nd Schedule of the Limitation Act, as those words are comprehensive in their signification, and the

application relied upon was an application to the proper Court to take some step, in aid of execution, that is, the last and the most important step in

the execution of the decree, namely, the making of an order for the actual payment of money to the decree-holders in satisfaction of their decree ;

and in support of this contention the case of Sariatoolla Molla v. Raj Kumar Roy I. L. R. 27 Cal. 709 (1900) is referred to.

4. We are of opinion that the contention urged on behalf of the Appellants is correct, and that the cases cited on the other side are all

distinguishable from the present. Those were cases in which the decree-holder applied for an order for payment to him of monies either deposited

by his judgment-debtor, or realized by the sale of the properly of his judgment-debtor, or as in the last case, namely, that of Ananda Mohan Roy v.

Hara Sundari I. L. R. 23 Cal. 196 (1895) for an order for setting off the amount of his decree against the purchase money which the decree-holder

as purchaser of the judgment-debtor''s property was bound to pay; and no question arose in any of those cases as between the decree-holder

whose application for execution was objected to as being barred by limitation and any other rival decree-holder. In the present case the application

of the 4th January 1901 made by the decree-holder for an order of the Court for payment of money had reference, not to any money deposited by

the judgment-debtor to the credit of the decree-holder, nor to any money realized in execution of the decree of the decree-holders now before us;

but it was for an order for payment of so much of the money realized by the sale of the judgment-debtor''s property in execution of some other

decree held by some other decree-holder, as the present decree-holders were entitled to under the rule of rateable distribution embodied in sec.

295 of the Code of Civil Procedure, The order applied for was, therefore, a judicial order determining the claims of rival decree-holders, and not a

merely ministerial order for payment of money as a matter of course, as in the cases cited.

5. This distinguishes the case now before us from those that have been cited on the other side.

6. That being so, it becomes unnecessary for us to consider whether the view taken in those cases is one that we should be prepared to follow, or

whether the matter should be referred to a Full Bench for further consideration.

7. It was argued by the learned vakil for the Respondents that as the order for rateable distribution was made on the 12th August 1899 and the

execution case was struck off, there could not have been any application to the Court to take some step in aid of execution within the meaning of

the 4th clause of Art. 179, for two reasons, first, because there was no pending execution case in which an application could be made to the Court

to take some step in aid of the execution; and, secondly, because necessary orders having already been passed, nothing more remained to do

except to obtain merely a ministerial order from the Court.

8. We are unable to accept this contention as correct. Although the execution case was struck off by the order of the 12th August 1899 as that

same order directed that the attachment should continue and as another order of that same date directed that there should be rateable distribution

under sec. 295 of the CPC without fixing the amount to which those decree-holders were entitled, we think the Striking off of the execution

proceedings was no bar to the application of the 4th January being entertained and being treated as an application within the 4th clause of Art.

179; nor do we think that the order which the decree-holders asked for on the 4th January 1901 could be treated as a merely ministerial order.

The order applied for was a judicial order to be passed by the Court, after considering the claims of rival decree-holders, fixing the amount which

the present decree-holders were entitled to recover under the rule of rateable distribution.

9. The order of the Court below disallowing the execution as barred by limitation must therefore be set aside, and the case sent back to that Court

in order that the execution proceedings may go on.

10. The Appellants are entitled to their costs of this appeal. We assess the hearing fee at three gold mohurs.