(1869) 03 CAL CK 0001

Calcutta High Court

Case No: None

Purna Chandra Mookerjee and Others		APPELLANT
	Vs	
Sarada Charan Roy		RESPONDENT

Date of Decision: March 15, 1869

Judgement

L.S. Jackson, J.

The facts of this case are extremely complicated, but it becomes unnecessary to state them fully here in consequence of the turn which the argument has taken, and the very simple ground on which our judgment will proceed. The present appellant, Puma Chandra Mookerjee, is one of several persons representing the parties who obtained a decree against the respondents, so long ago as the 23rd of June. 1838. The parties who obtained that decree were three brothers, named Durga Charan Mookerjee, Gauri Charan Mookerjee, and Abbaya Charan Mookerjee. Puma Chandra, the appellant before us, is one of the sons, now as I understand the surviving son of Durga Charan. It seems that execution was taken out jointly by these three decree-holders in the first instance, the earliest application bearing date the 17th of November 1838; and this joint execution continued down to the 14th of July 1843. Since that time, it is admitted that no proceeding whatever has bean taken on the part of the decree-holders jointly, but applications have been made from time to time, sometimes effectual applications either in the Court of the Judge or in that of the Principal Sudder Amen, by the representatives of one or other of those brothers. We had a great deal of argument on the last hearing of this case as to whether the proceedings so taken would be effectual proceedings taken for the purpose of keeping the decree in force such as to save the decree-holders from the operation of sections 20 and 21 of Act XIV of 1859. The point, however, which alone we have determined to deal with and our decision upon which is sufficient to dispose of the case, is whether the application before us, which was made by the appellant in the Judge''s Court, is one on which execution can proceed. It seems to me as clear as anything can be that, it is not such an application. In the first place it

is not an application to execute a decree, but only an application to give notice to the judgment-debtors. Notice is to be given to the parties against whom execution of a decree is sought u/s 216 of the Code of Civil Procedure. That notice is to be issued by direction of the Court when the Court has before it an application to execute, drawn up in conformity with section 212. I think that for that reason alone, the Judge would have been bound to refuse to proceed upon this application. He ought to have said, "when I have before me an application to execute a decree which is in force, I will take the application into consideration, and if the circumstances require it, I will direct notice to be served."

2. But in addition to this, the application was defective in various other particulars. In the first place it is I think on the face of it, and specially taken in connection with other applications either made simultaneously or previously pending in the same cause, an application made, not with a view to the execution of the decree, but with a view to the execution of an aliquot part of the decree. It is defective also in the statement required by law of the names of the parties, the amount of the debtor damages due upon it or other relief granted by the decree, the amount of costs if any were awarded, and the mode in which the assistance of the Court is required, whether by the delivery of the property specifically decreed or otherwise.

3. It is contended that the form in which the application was made as to its relating to an aliquot part of the decree, was founded upon and justified by an order made in this cause by the Judge of Hoogly in 1852, and also by a further order of another Judge made in 1865. As to the order made originally in 1852, without considering how far that order was wrong (for wrong it certainly was), it is enough to say that it was made in a different state of the law, long previous to Act VIII of 1859, and can have no bearing on this application which is governed by the present law. As to the order of the Judge made in 1865, that no doubt was an order made under Act VIII of 1859; but it seems quite idle to contend that any order made in the cause in 1865 would justify the parties in proceeding upon a wrong course when the objection was taken in 1868.

4. We are then asked, supposing the application to be erroneous in its present form, to allow this application to be amended so as to make it an application to execute the whole decree. That application is founded upon a decision of this Court for which I was responsible, Juddonath Roy v. Ram Buksh Chuttangee 7 W.R. 535. I need only say that was a decision which must be justified by the circumstances of that particular case, and is by no means to be taken as a precedent for other cases. Moreover, the circumstances of that case were very different from the circumstances of the present case. As I understand that case, the objection as to the informality was only taken in this Court. At that time the law was not perhaps very well understood. But in the case before us, the application which we are now asked to allow to be amended was made in 1868 by two brothers, who were both practitioners of this Court, two years after a Division Bench of this Court had

distinctly pointed out that such an application was illegal. The objection as to its informality was taken immediately on the application being filed. The parties chose, I have no doubt, for reasons of their own, to persist in the course which they took. They have maintained the legality and propriety of that course up to now. I think it would be altogether wrong in us, at this stage of the proceedings, to allow them to amend an application which they now find it impossible to maintain. But as I have already indicated, it seems to me that no amount of amendment can make this into an application such as the Court can proceed upon. It can only be amended by tearing the paper on which it is written and making a fresh application in every respect different from the one originally made. I think, therefore, that the appeal must fail, and must be dismissed with costs.

5. I would only add that the reasons which induce us to refrain from entering into the other questions raised in this appeal are chiefly, that whatever conclusion we might come to upon those questions, we feel would not be binding upon the parties, that is to say, would not finally conclude them so as to pub an end to the contest; because the parties might hereafter combine and make a fresh application to execute the decree which they jointly hold; and upon that it would be open to them, I suppose, to raise once more the whole of the questions arising, namely, whether they are entitled in the existing state of things to execute the decree.

Markby, J.

6. I am entirely of the same opinion, I need only add a few words to what has been said by Mr. Justice Jackson. I think that upon the only point which is now before us, we ought to hold that there was not before the Judge any application for execution on which he could proceed in conformity with the law. The application before him upon which it is contended that he ought to have proceeded was that of Purna Chandra Mookerjee and Atul Chandra Mookerjee of the 2nd March 1868. I think it is perfectly clear, upon the face of that application, that it was not an application for execution of the whole decree, but for execution of their share in the decree only; and if there could possibly be any doubt upon the face of that application itself as to its character and purpose, which I do not think there is, it would be entirely removed by the fact which is now before us that there was made on the same day a similar application by the representatives of another of the three original judgment-creditors for the execution of their share in the decree, and that there was already pending a similar application by a man of the name of Gauri, who represented the third original judgment-creditor, for the execution of his share. And it is also perfectly clear to me, not only that this was originally an application for execution of share in the decree, but that it was expressly so intended and maintained by the parties themselves. If it were otherwise, they would at once, when the objection was taken that execution could not proceed in this form, have said that their desire was to execute the whole decree, upon which it would have been quite easy to have consolidated all the applications, and so proceeded upon

them all together. Instead of doing this, however, the parties to this application have all along maintained their right to proceed in execution for their share. It is unnecessary to refer to the cases in which this Court has held that this cannot be done. I think that we are bound to say that there was no application before the Judge below upon which execution could legally proceed.

7. Then at the last moment, the parties who made this application apply that it may be amended so as to make it an application by two out of several decree-holders to execute the whole decree u/s 207 of the Code of Civil Procedure. If that application had been made in an early stage of the proceedings in the Court below, it seems to me that, looking to the fact that on two previous occasions the Judges of the lower Courts had erroneously held that the decree-holder might proceed to execute his share of the decree, there would have been strong reasons for granting it. But that is a very different thing from an application made to this Court for amendment of the application for execution, after the objection by the judgment-debtor, that execution could not proceed in the form in which it was applied for, has been made for nearly a year, and the matter has gone to a decision in the Court below. I think there is a very good ground for the supposition which has been thrown out by Mr. Justice Jackson that the refusal of these decree-holders to make any such application, and their persistence in the course which they took of executing the decree for their own share, was in order that they might obtain some advantages over their co-decree-holders, I should therefore certainly hesitate very much before now granting such an application. But even supposing that any such application could be granted, we have not even now before as the materials to make the amendment prayed for, for the petitioners for execution are wholly unable to state the particulars required by section 212. Those particulars were not stated in the original petition for execution, and on that ground alone the application ought to have been rejected. Now that we are asked to order execution to proceed on an amended petition those particulars must be supplied. But, as already pointed out, so far from doing this, the decree-holders are unable -to state the most important particular of all, namely, the mode in which the assistance of the Court is required. I therefore concur in thinking that no amendment of the application for execution can now be made, and upon the application as made, the lover Court would not have been justified in proceeding with the execution. It is unnecessary, therefore, to consider whether the execution was barred by limitation at the date of the application. However this may have been, the refusal of the Zilla Judge to proceed with the execution was correct and this appeal ought, therefore, to be dismissed.