

(1880) 12 CAL CK 0006

Calcutta High Court

Case No: None

Kadumbini Dabya

APPELLANT

Vs

Koylash Chunder Pal
Chowdhry

RESPONDENT

Date of Decision: Dec. 22, 1880

Citation: (1881) ILR (Cal) 554

Hon'ble Judges: McDonell, J; Broughton, J

Bench: Division Bench

Judgement

Bronghton, J.

The question in this case arises on the construction of Section 58 of Beng. Act VIII of 1869, which enacts as follows:

No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in Sections 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of such, judgment, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.

(After stating the facts, the learned Judge continued):

2. There is some confusion in the case owing to the judgment of the Court of first instance deciding the case with reference to the application of the 19th August 1879, although the case (which is called No. 35 of 1880) apparently refers to the application of January 1880. This is, however, immaterial, because it" the application of August 1879 was out of time, so was that of January 1880.

3. It is contended on behalf of the respondent that these applications were a continuation of the applications of 1877, and that the only question in the case is, whether the respondent acted with reasonable diligence in applying for the renewal of the already existing process in execution ; and this, it is said, is a question of fact

which cannot be dealt with in a second appeal.

4. In support of the first branch of this argument, two cases decided by Mr. Justice AINSLIE and myself were cited.

5. In the first case - Deodhary Singh v. Kunwar Dowlut Ram (3 C. L. R. 189) -the application for execution was within time, but it took a few days for the Court to obtain the records, and they were not received until after the time had expired. That case was therefore analogous to the case of Hera Loll Seal v. Poran Matteah (6 W. R., Act X Rule 84), decided by Sir BABNES PEACOCK, C.J., and Markby, J., and was decided accordingly.

6. In the other case - Golami Sahu v. Chutterbhooj Patuck (3 C. L. R. 261) -the application for execution was made on the 10th of October 1871, and on the 24th of February 1872, the creditor applied that the case should be taken off the file for the present, but that the attachment which had issued should be kept in force. His next application was made on the 8th February 1875, and it was held that it was within three years.

7. In both of these cases, therefore, the attachment was subsisting; in the present case it had been withdrawn on the 13th of March, and the execution-proceedings had also been struck off on the 15th. The second of the cases cited was not a case under this special provision of the Rent Law, but an ordinary case of execution of a decree, and the three years ran, not from the date of the decree, but from the date of the last application to enforce it.

8. In the course of the argument in the case of Deodhary Singh (3 C. L. R. 189), two cases were cited, which have been cited again in the present case - namely, Rhidoy Krishna Ghose v. Kailas Chandra Bose (4 B. L. R. F. B. 82 ; Section C., 13. W. R., F. B., 4) and Lalla Ram Sahoy v. Dodraj Mahto (20 W. R. 395). In the former of these two cases the Full Bench by a majority gave a wide interpretation to the expression "shall be issued," but even in this case the applicant lost no time in applying for a sale of the property as soon as the orders of the Court of the 24 Parganas staying the execution-proceedings of the Revenue Court ceased to be operative. That case, therefore, is not an authority for the validity of the execution in the present case, where there has been considerable delay. "The case of Lalla Bam Sahoy (20 W. R. 395) is more in point, but in this case the execution was made within time, and an order was made for the sale of the property to take place on the 21st of November 1871, the decree being dated the 3rd of September 1868. On consent of the parties, and on a petition of the judgment-debtor dated the 18th of November 1871, the sale was stayed for two months ; this period expired in February 1872, but the judgment-creditor waited until April 1872, when it was held that his application came too late. Here also the attachment was not removed although the sale was stayed. A fortiori the application in the present case was out of time.

9. This precedent also disposes of the objections that the question of due diligence cannot be gone into on a second appeal, for it was a case of a second appeal; and indeed no question of fact is involved in these cases ; the facts are found; the only question is, whether on these facts the creditors can be considered to have used due diligence.

10. A further objection has been raised in this case on behalf of the creditor. He contends that the judgment cannot be held to come within the meaning of Section 58 of the Rent Law, because the costs of the appeals from the first order of the lower Court ought to be added to the amount of the judgment. The case of *Campbell v. Huq* (6 W. R., Act X Rule 8) was cited in support of this argument. In that case it was held that the costs of, and incidental to, the execution ought to be added. This conclusion was arrived at by applying to the case the definition of costs to be found in Section 188 of Act VIII of 1859, now repealed. The interpretation was a wide one, but it did not go so far as is contended in the present case, but only so far as to add the costs of stamps, & c., in the execution-proceedings. The 188th section could not have been read to include the costs of appeal in the costs of the original suit spoken of in Section 187, for such costs are in the discretion of the Appellate Court, and not of the Court which passed the original judgment.

11. On these grounds, I think that the execution in the present case was barred by lapse of time, and that the appellant, judgment-debtor, is entitled to succeed.