

**(1868) 08 CAL CK 0002**

**Calcutta High Court**

**Case No:** Special Appeal No. 911 of 1868

Chandrakant Bhattacharji

APPELLANT

Vs

Jadupati Chatterji

RESPONDENT

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**Date of Decision:** Aug. 5, 1868

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### **Judgement**

Phear, J.

The Lower Appellate Court has treated this as a suit instituted to set aside a decree of the Collector, and holding that this cannot be done by a Civil Court unless fraud be established in the matter of obtaining the decree, he has dismissed the plaintiff's suit, upon the ground that he had failed to make out such fraud. It seems to us that the Lower Appellate Court is wrong in the view which it has taken of the scope of the plaint. The plaintiff does not seek by his prayer to get rid of the decree passed by the Collector. He merely says that the sale of his rights in suit, which has been pretended to be effected in execution of that decree, is illegal and void; that it is calculated by reason of the judicial complexion which it wears to work him serious injury for the future, and he asks to have that sale declared void, and his rights of property, so far as they are threatened by that sale, confirmed. It seems to me that the Civil Court has complete jurisdiction to entertain a suit of this kind. It is in no way an attempt to interfere with the judicial discretion of the Collector within his jurisdiction. If it were, I should certainly hold that we ought to be guided by the principle involved in the dictum of the Chief Justice, in *Nilmani Banik v. Padma Lochan Chuckerbutty*, (Case No. 1678 of 1865, 5th February 1866), and couched in these words: "I agree entirely in the decision that a suit "will not lie in a Civil Court to annul the decision of a Revenue Court, u/s 151<sup>3</sup> of Act X of 1859, or to set aside a sale of a tenure by order of a Collect" or, in execution of a decree for arrears of rent." Obviously the decree there referred to, and the sale following thereon, were matters which fell within the range of the Collector's judicial discretion. The Collector has, undoubtedly, a power to sell a tenure, if it be a tenure of a transferable nature, in execution of a decree passed by him for arrears of rent due in respect of that tenure. The Chief Justice goes on to say, "there is no general power

in one" Civil Court to set aside the decree of another Court of competent jurisdiction, "upon the ground of an error or mistake upon the part of the Court making" the decree. But when a decree of one Court, or an execution of a decree, is "obtained by fraud, the fraud gives a right of action to the party injured by it " against the party guilty of the fraud." In every word of that, I entirely concur But the whole question before us is, whether or not the act of selling the rights of the plaintiff in suit No. 140, was the act of a Court competent to effect such a sale. If it be conceded that the Court was competent to effect the sale, there is nothing left for us to decide. But if the Court had no power, jurisdiction, or competence, in regard to selling the rights of the plaintiff, which it pretended to sell, it seems to me clear, that it is the duty of a Civil Court to vindicate those rights and to declare them intact on behalf of the plaintiff, just as much, notwithstanding that the danger has come from the act of a Court of Justice, as if his rights were put in peril by the conduct of an individual.

2. Now returning more closely to the subject of this suit, the material facts seem to me to be almost admitted. The way that the plaintiff establishes the allegations of his plaint, is by referring to the orders of the Collector attaching and selling certain alleged property of his, under a decree for arrears of rent. The translation of the Deputy Collector's order for attachment, which is now before us, is in these words: "According to the prayer of the petition presented by the "decree-holder, it is prayed that the money of the decree be realized by the "attachment and sale of the rights which Chandrakant and others have in case No. "140 of 1865, of the Court of the Sudder Ameen of this zillah, in which Chandrakant Bhattacharji and others are plaintiffs, and Surendra Nath Boy and others "are defendants. Therefore it is ordered that together with a copy of this proceeding, the schedule (furd) filed, be transmitted to the Sudder Ameen of this "zillah, in order that, in the event of the statement of the decree-holder being true, "and there being no objection, the attachment be effected and information "thereof sent."

3. This is dated the 26th of February 1866: Following this, on the 12th of March 1866, the Deputy Collector makes this further order: "Whereas the "decree-holders have, for the purpose of realizing the said sum, presented a "petition for execution of decree, and prayed for the realization of the sums respectively due to them under their decree, by the sale of the rights and benefits" (labh) of their judgment-debtors, in the suit No. 140 of 1865, of the Court of the "Sudder Ameen of this zillah, instituted by Chandrakant and others; and a proceeding of this Court of 28th February has been sent to the Court of the Sudder "Ameen, directing the attachment of the said right of suit, and the Sudder Ameen "has by a proceeding of the 6th of March, after attaching the said right of suit," sent information thereof;--therefore it is ordered that 12 A.M. of Monday, the "2nd April, corresponding with the 21st Chaitra 1272, be fixed for the sale of what-" ever rights and benefits (labh) the judgment-debtors have in the said suit, and that, "together with a copy of this proceeding, proclamation of sale be transmitted to the "Judge of this zillah, so that the said proclamation of sale being published in the "Court house,

full fifteen days before the day of sale, information thereof be" sent, and that three copies of proclamation be made over to the Nazir, for the "purpose of being published in the Sudder and Mofussil." Then follows the schedule exhibiting the subject which is to be sold, and that is described as "Suit No." 140 of 1865 of the Court of Sudder Ameen of this zillah; plaintiffs, Chandrakant "Bhattacharji and others; defendants, Surendra Nath Boy and others," the names of both parties being given in full It seems to me, without doubt, that what the Deputy Collector attached and sold, so far as he could, was simply the right and benefits of the judgment-debtors, that is the present plaintiffs, in the suit No. 140 of 1865. I have had, I must admit, some little difficulty in assuring myself what the Deputy Collector, or any of the parties concerned, intended to represent by those words, "rights and benefits in the suit." To take the word "rights," does it comprehend the original cause of action, that in which the right to bring the suit originated? Does it embrace the right of continuing or compromising the suit, or does it mean something more, viz., does it, by any possibility, mean all the rights, or all the property which may be asserted or recovered as the results the suit? The difficulty of answering that question is, I think, at once apparent upon reflection. There are suits, and if we except the indirect statement in the plaint, we do not know at all from any thing that appears on the record, whether this is not one of them in which the rights of the parties, from beginning to end, may be perfectly independent of property. Suppose this is, (and there is nothing besides the allusion in the plaint to show to the contrary)--suppose this is a suit for defamation of character, the right of bringing the action, the right of continuing it, the right to obtain vindication of character, are each and all of them perfectly independent of any thing which can be said to bear the attributes of property. There may not be a pecuniary award, the judgment may not contain an award of money, and yet it may afford the plaintiff a complete vindication of his character. Or again for aught I know, although, no doubt, there are several plaintiffs, and a good many defendants, the suit may be of the nature of a suit for the restoration of conjugal rights. If it is so, the rights in the suit have no relation whatever to property. Can it be that the Deputy Collector in his sale-order used the word "rights" in a sense which would include the rights of a plaintiff in such an action as one of those which I have just mentioned?

4. Then we come to the word "benefits." In those cases which I have supposed, although benefits may probably be, with correctness, said to be conveyed in the award of the Court, they too may have nothing to do with property. So that so far as I can see, "rights and benefits in a suit" generally, without specification of what the nature of the suit is, by no means, of necessity, mean any thing which is of the nature of property.

5. Now with this little clearing up of the matter, the question suggests itself, has the Deputy Collector power to sell the "rights and benefits" of a party in a suit, irrespective of whether these are of the nature of property or not? I refer, therefore, to the powers of sale which are given to the Collector by the provisions of Act X of

1859. Section 86 is, I think, the first section that touches on this point, and that section is couched in very general words, for reasons that are easily apparent: "Process of execution may be issued against either the person or the property of the judgment-debtor." Nothing is here said as to the particular nature of the property to which recourse is to be had, because the Act presently goes into detail as to the proper mode of execution to be followed with regard to each sort of property which it allows to be taken. The word here used is simply the general term "property." The following sections, that is the sections which immediately follow, are devoted to prescribing how execution against the moveable property of the debtor shall be carried into effect, and the latter words of Section 86 lay down that the process of execution in such a case shall be in a particular form given in the schedule. The form is in English. I am not going to read the form, although it is a short one, but I wish to point out that the Nazir is directed by it to carry out the orders of the Court, by seizure and sale of the moveable property. Consequently, I understand all the directions of the Act with regard to process of execution against moveable property, to have reference solely to such kind of property as is capable of being manually seized. After the sections which are directed to execution against moveable property, follows Section 105, which enables the Collector, if the decree be for an arrear of rent due in respect of an under-tenure which is transferable by sale, to sell that tenure in execution of the decree. And finally comes Section 109, which says, that "in the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, if satisfaction of the judgment cannot be obtained against the person or moveable property of the debtor, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor;" and then follows Section 110,<sup>4</sup> which regulates the mode in which the sale of such immoveable property on such a contingency shall be effected. On the whole, it appears to me clear that the Deputy Collector has only power under Act X of 1859 to sell, in execution of a money-decree, such moveable property as is capable of being manually seized, and he can issue process against immoveable property of any kind, only when recourse cannot be had to the person or to the moveable property such as I have already mentioned. After this review of the powers of the Collector, if I return to the case before us, it seems to me that the Collector here has not conformed to the provisions of Act X of 1859. He has sold the rights and benefits of the plaintiff in a certain suit. To my mind, that subject of sale cannot, by any stretch of words, be made to fall into the class which is designated by moveable property, capable of being manually seized. It may not, in any given case, be property at all; and even when it can be said to be of the nature of property, it is not of the substance,---it is merely an incident thereto. I am also very clear that these words, "rights and benefits," in the suit, by themselves alone cannot be taken to indicate immoveable property even when the suit concerns immoveable property. I think I have given reasons for these views. I may remark by the way (although probably the Civil Court could not inquire into this point), it is not shown to us by any thing on the record that the contingency had happened upon

which the Deputy Collector was justified in having recourse to immoveable property at all. Still, assuming that he was so justified, as we are bound to do, if necessary, for the defendant's case, I do not think that any thing which appears upon this record supports the allegation or gives rise to the presumption that he has in this instance, sold immoveable property. I do not desire to lay down judicially that property which is actually the subject of a suit might not be passed, conveyed, or sold under phraseology, which would seem to make the suit itself the most important ingredient in the subject of sale or conveyance. For instance, here the Collector might, I imagine, have used words in some such way as this: "the rights and interests of the judgment-debtor in the immoveable property which is the subject-matter of the suit No. 140." He might have used such words, as in reason ought to be considered as words indicating the actual immoveable property, to recover which the plaintiffs were suing and if he had done so, and had further followed the rules prescribed for the sale of immoveable property, no doubt (assuming still that the contingency had occurred which would give him jurisdiction to sell immoveable property), he would have sold the immoveable property, and with it, the rights of suit. But I cannot by any liberality of construction, upon reading the Rubokaris of the Deputy Collector, come to the conclusion, that, in this case, he has done any thing of the kind. He has, to my mind, distinctly separated the rights of suit from the property in respect of which the suit is brought. There is not, moreover, as I have already said, from beginning to end of his proceedings, a single thing which even suggests to us an idea of what the suit is about. It may be to recover immoveable property. It may be for breach of contract. It may be for vindication of personal rights. There is nothing whatever to show that the rights and benefits which the Deputy Collector pretended to sell was property of any sort or kind; and it appears to me that he intended to sell them as something quite distinct from the property which the suit might in its result affect, and quite independently of whether the suit concerned moveable or immoveable property at all. In short, I can only conclude that he sold them simply as rights of suit and nothing more, considering them to be, as such, some sort of moveable property with which he could deal. This is to my mind manifestly wrong. I think that there is no power under Act X of 1859 given to the Collector to sell rights of suit qua rights of suit alone. Repeating that, as it appears to me, the Deputy Collector has done this in this case, and nothing else, and desiring again to guard myself against being supposed to express the opinion that the sale could not have been effected by the Deputy Collector in such a way as to pass both the property sued for and the rights of suit, I think that the plaintiff has made out his claim to have the declaration for which he asks. In my opinion, the sale proceedings of the Collector in no way affected the rights of the plaintiff in the suit No. 140, and I think that the plaintiff is entitled to have a declaration to this effect from the Civil Court. In this view the appeal must be decreed, the decree of the Lower Appellate Court must be reversed, and it must be declared that the rights and interests of the plaintiff in the suit No. 140 of 1865, and the property which is the subject of that suit, are not affected by the sale, which was

held in execution of the decree passed by the Deputy Collector. The appellant must have his costs in this Court and in the Lower Appellate Court.

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<sup>1</sup>[Sec. 86:--Process of execution may be issued against either the person or the property of a judgment-debtor; but process shall not be issued simultaneously against both person and property. Process of execution against the person or moveable property of a debtor shall be in the Form E or F contained in the Schedule to this Act, or to the like effect. (Repealed as respects N.W. Provinces by Act XIV, 1863, s. 5; and see Note at end of Act.)]

Issue of process of execution.

<sup>2</sup>[Sec. 109:--In the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor.]

In all cases of decrees for money if judgment cannot be satisfied by sale of debtor's moveable property, execution may be had against his immoveable property.

<sup>3</sup>[Sec. 151:--In the performance of their duties under this Act the Collectors and Deputy Collectors shall be subject to the general direction and control of the Commissioners and the Boards of Revenue; and the Deputy Collectors shall be subject to the direction and control of the Collectors to whom they are subordinate. All orders passed by a Collector under this Act, not being judgments in suits or orders passed in the course of suits, and relating to the trial thereof or orders passed after decree, and relating to the execution thereof, shall be appealable to the Commissioner; and all such orders passed by a Deputy Collector shall be appealable to the Collector; but no judgment of a Collector or Deputy Collector in any suit and no order of a Collector or Deputy Collector passed in any suit relating to the trial thereof, or after decree and relating to the execution thereof, shall be open to revision or appeal otherwise than as expressly provided in this Act.]

Collectors and Deputy Collectors to be subject to general direction and control of the Commissioners and the Boards of Revenue.

No appeal from orders of Collectors and Deputy Collectors in certain cases.

<sup>4</sup>[Sec. 110:--If the immoveable property against which execution is applied for be a house or other building, process shall be issued in the same manner as for the attachment and sale of moveable property, and the provisions of Sections XCVIII, and XCIX, shall be applicable to the execution of such process. If the property be a saleable under-tenure, it shall be sold under the provisions of the law for the time being in force applicable to the sale of such under-tenures for demands other than

those of arrears of rent due in respect thereof. If the property be an estate or a share of an estate it shall be sold under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land revenue.]

Mode of executing process if immoveable property be a house or other building.

If it be a saleable under-tenure

If it be an estate or a share of an estate.