(1869) 03 CAL CK 0003

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 536 of 1868

Gaurmohan Bandopadhya and Others		APPELLANT
	Vs	
Tarachand Bandopadhya and Others		RESPONDENT

Date of Decision: March 8, 1869

Judgement

Mitter, J.

This case affords a glaring instance of the gross injustice that is so often done to decree-holders in this country, by the arbitrary manner in which execution cases are generally dealt with by the lower Courts. It appears that, on the 26th August 1861, the decree-holder in this case, now appellant before us, deposited the fees of an Ameen, who was deputed by the Court to ascertain the amount of mesne profits, due under the decree, by local investigation. On the 31st August 1861, the case was struck off the file, merely because the Ameen could not proceed with the local enquiry, on account of the rains. On the 3rd September 1862, the decree-holder applied to the Court for the restoration of his case to the file; and the Court, after granting this application, sent for the original decree and certain other papers connected therewith, which had been previously transmitted to the Judge''s office. On the 22nd September following, some of the papers sent for were received from the Judge''s office, but neither the decree of the Court of first instance, nor that of she Court of Appeal was forthcoming. The decree-holder, accordingly, applied to the Munsiff on the 24th September 1862, requesting that officer to send for those papers; whereupon, the Munsiff Bent a rubokari to the Judge on the 3rd November 1862, requesting him to transmit them as soon as possible. Before, however, these pacers could be received, the case was again struck off by the Munsiff on the 28th February 1863, upon the ostensible ground that the decree-holder bad failed to take the necessary steps for the execution of his decree, whereas it is manifest that no such steps could be taken before the decree sought to be executed had been received from the Judge''s office. The decree-holder again applied for execution; and

the case being again restored to the file, an objection was raised by the judgment-debtor to the effect, that the decree was barred by limitation. The Munsiff overruled this objection, and his order was confirmed, on appeal, by the Judge, on the 27th July 1867. The decree-holder then applied to the Munsiff to grant him four days'' time for the purpose of filing a bond of reference to arbitration. Three days only were granted; and although the decree-holder was present in Court by his pleader, the case was again struck off the file on the 30th July 1867 for default; the default alleged being nothing more than the failure of the decree-holder to file the arbitration bond above referred to. On the 12th August fallowing, the decree-holder again applied to the Munsiff for execution and that officer granted the application, overruling certain preliminary objections, which the judgment-debtor had raised against the restoration of the case to the file. Against this order, an appeal was preferred by the judgment-debtor to the Judge; and one of the grounds taken in the appeal was that the Munsiff had ordered the execution case to proceed, without taking any notice of the plea of limitation raised by the debtor. No allusion appears to have been made to the previous order of the Munsiff overruling the plea of limitation, or to that passed by the Judge on the 27th April 1867, upholding the same. The Judge has now held that the decree is barred by limitation, inasmuch as in his opinion no effectual steps were taken to keep it alive between the 31st August 1861 and the 21st November 1864. Hence the present appeal. We are of opinion that the decision of the Judge is erroneous in law. The order of the Munsiff overruling the plea of limitation, and that of the Judge upholding the same, bearing date the 27th July 1867, have become final by operation of law, and the Judge was not competent to go behind those orders, in order to declare that the proceedings taken between the 31st August 1861 and the 21st November 1864 were not effective. Then, again, we observe that all the proceedings held by the Munsiff for striking off the execution case from the file, from the 31st August 1861 downwards, are clearly without any warrant in law. There is no particular law authorizing the Courts to strike off execution cases from the file; and the only way in which such a thing can be done, is by invoking the provisions of sections 110 and 114 of the Code of Civil Procedure. These sections, however, relate to those cases only in which the plaintiff has failed to appear either in person or by pleader; and we do not see how the provisions of those sections can be applied to an execution case, when the decree-holder is actually present in Court, either in person or by his pleader. But be this as it may, it is perfectly clear that the proceedings in question were altogether arbitrary. If the Ameen could not proceed with the local investigation, because the rainy season had set in, or if there was some negligence in the Judge''s office in transmitting the necessary papers of the case, or again if the arbitration bond could not be filed in time, but the decree-holder was ready and willing to proceed with the case through his constituted vakeel, we are unable to see how the decree-holder can be held guilty of default, and why his application for execution should be struck off the file. It may be all very well for judicial officers, entrusted with the execution of decrees to swell their monthly returns by striking off every execution case at

random on the last day of the month, but there cannot be the least doubt that such proceedings on their part are productive of the greatest hardship and injustice to the decree-holders, whose cases are thus struck off. We do not see any reason why the bearing of execution cases should not be conducted in accordance with the rules laid down in the Code of Civil Procedure; why, in fact proper dates for the hearing of those cases should not be fixed, and notice thereof given in due time to all the parties concerned; or why, when an execution case is for some reason or other put off on a particular day, a fresh day should not be fixed for its hearing exactly in the same way as is done in the case of original suits; or why again, applications relating to execution of decrees should be dealt with, in the first place, by that most meaningless and mischievous order, "let it be kept on the record," and then struck off on the last day of the month. A new law of limitation has come into operation, and however innocent might have been the practice of striking off execution oases, at a time when every decree-holder had a fresh start of twelve years from the date when his application for execution was last struck off, a blind adherence to that practice in the present day, in open defiance of the Code of Procedure, cannot but be productive of the most serious consequences. It is high time that this practice should be at once discontinued, for otherwise all the time and labor we employ in passing our decrees, are absolutely thrown away, inasmuch as we shall have afterwards to declare that they are all barred by limitation. It is notorious that the troubles of a suitor in this country only begin when he has obtained a decree. The utmost efforts are made to conceal every particle of property upon which the decree can be levied, and the decree-holder is certainly not much to be blamed for not taking out a process of arrest against the debtor, when he knows full well that by doing so he would be merely sending good money after bad, by being obliged to defray the expenses incurred in the jail. It is very easy for a debtor to plead, that the proceedings taken by his creditor are not bona fide; but without making any severe remarks upon the conduct of a man, who complains of mala fides, simply because his creditor did not take any compulsory steps against him to realize a just debt, which he himself ought to have satisfied long ago of his own accord and free-will, it must be always borne in mind that want of bona fides should not be presumed against any body, much less against a decree-bolder, who has to receive something, and not to give it. In the present case the Judge has held that the proceedings taken by the decree-holder, from August 1861 to November 1864, are not bona fide merely because nothing was actually realized under those proceedings. This appears to us be a mistake. It has been already held by a Full Bench of this Court that a mere application for execution, if bona fide, is a proceeding within the meaning of section 20, Act XIV of 1859, and the effect of this ruling would be entirely nullified, if we were to hold it, as a matter of course, that every proceeding which is not followed by some substantial result is necessary mala fide irrespective of all the other circumstances by which it may be accompanied. The judgment of the Judge is accordingly reversed, and that of the Munsiff affirmed with costs.

Loch, J.

2. I concur generally in this judgment. A very objectionable practice of striking off execution cases from the file, in order to clear it and show a good return in the quarterly statements, exists in most districts and the effect of an order striking off a case is that all proceedings taken by the decree-holder, to attach and bring to sale the property of his judgment-debtors, are considered null and void, and he has to commence, de novo, to attach the property, which the owner in the meantime may have alienated. If, as was pointed out by my colleague, the lower Courts would fix a day for hearing these cases as is done with suits and miscellaneous applications, execution cases would not be so frequently struck off, but it is owing to the uncertainty when these cases will be taken up, that prevents parties taking proper steps to enforce execution. In Behar it not unfrequently happens that an execution case is struck off the file, with consent of the parties; the debtor being allowed time to pay up; and even in such oases, it is held that all steps previously taken for the execution of the decree must be commenced afresh. This practice is very objectionable, and not warranted by law, I concur in the order passed by my colleague.