

(1870) 01 CAL CK 0003

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 444 of 1869

Maharaja Dhiraj

Mahtab Chand Bahadur

APPELLANT

Vs

Ram Brahma Mullick

and Another

RESPONDENT

Date of Decision: Jan. 10, 1870

Judgement

Jackson, J.

This is a case relating to execution proceedings, the application to execute having been preferred on the 18th April 1865. Previously to the application, the sale of the judgment-debtor's property had taken place on the 13th March 1862. That sale was confirmed by the Court on the 22nd April, and the money-proceeds of the sale were drawn out on the 29th May. The sale, consequently, had taken place more than three years before the application, but the confirmation and drawing of the money were within three years. The question is whether either of these two acts can be relied on by the decree-holder as proceedings taken by him within three years, so as to enable him to proceed.

2. It appears to me that we ought to follow the ruling in *The Maharajah of Burdwan v. Luckee Monee Debia* 8 W.R. 359, which has been followed on another occasion in *Juggat Mohinee Bibee v. Ramchand Ghose* 9 W.R. 100.

3. In both these cases, as well as in the case before us, the confirmation of the sale appeared to have been purely of a formal character, and it was not shown that any substantive application for that purpose by the decree holder had taken place, or that the decree-holder had to resist any objections to the sale on the part of the judgment-debtor.

4. We have been referred to *Gunga Bishen Chund v. Maharajah Dhiraj Mahtab Chund Bahadoor* 10 W.R. 224, in which a confirmation of the sale, coupled with the taking of the money realised by the sale, were referred to and affirmed as being proceedings taken by the execution-creditor. That case appears to me to be clearly distinguishable from the

present, because, in that case, after the sale, there was an objection on the part of the judgment-debtor, and it was after contest between him and the execution-creditor, and, therefore, not by the Court of its own motion, that the sale was confirmed. Mr. Justice Bayley says in his judgment in that case: The decision quoted of Juggut Mohinee Bibee v. Ramchand Ghose 9 W.R. 100, has no bearing on the circumstances of this case. There it was held that a mere formal confirmation was not a proceeding. But here we have special appellant objecting, his objections set "aside, the sale upheld, and then the money taken, which certainly is, to my mind, a proceeding." I understand that the learned Judge looked upon all that taken together, namely, the objection on part of the judgment-debtor, the setting aside of the objection, the confirmation of the sale, and then the taking out of the money, as being a proceeding on which the decree-holder could rely. Mr. Justice Mitter, indeed, in his judgment in that case, seems to go somewhat further. He says:-- The decree-holder received the proceeds of sale subsequent to such a proceeding, and the receipt of sale-proceeds was, undoubtedly, a proceeding within the meaning of the section." If I understand the learned Judge aright, this would include the case of a decree-holder who for his own benefit, allowed the sale-proceeds to remain for ten or even twenty years in the Collector's treasury, and then applied and drew the money out. It seems to me, with great respect, that the law would not enable a decree-holder, by the mere circumstance of allowing money, which was at his disposal, to remain in the Collector's treasury for such a period as might be convenient to him, to give himself a period of limitation within which to carry out an execution-proceeding. But that I understand is merely an expression of the learned Judge's opinion, perhaps not very much considered, and not necessary for the decision of the case, and at any rate, not the decision of the Court. That, I apprehend, must be contained in the judgment of Mr. Justice Bayley. I, therefore, see no reason to depart from the view which I expressed in the case of The Maharajah of Burdwan v. Luckee Monee Debia 8 W.R. 359.

5. I think in this case, the execution-creditor was barred, and that the judgment of the Court below must be affirmed with costs.

Markby, J.

I also think that this appeal must be dismissed. I quite agree that the payment of money out of Court to the judgment-creditor, on the 29th of May 1862, cannot be considered as a proceeding within the meaning of section 20, Act XIV of 1859. With regard to the confirmation of the sale, I am not at present prepared to say that a Court, u/s 256 of the Code of Civil Procedure, is bound, of its own mere motion, to confirm a sale thirty days after the sale has taken place, to which no objection has been made; nor am I prepared to say, that, if the sale be confirmed upon the application of the judgment creditor, even though no opposition be raised on behalf of any person, that that might not be a proceeding within the meaning of section 20; nor am I certain that the two decisions which have been referred to go to that extent. Moreover, it does not appear to be necessary in this case to express any opinion on those points, because, whether or not

the Court is bound to confirm a sale of its own motion, it seems clear that that was the course taken in this case, and that the sale was confirmed by the Court not upon any application made on behalf of the judgment-creditor, but as a matter of routine; and I am at a loss to see how any steps taken by the Court itself, of its own motion, can be considered as a proceeding by the execution-creditor taken in execution of the decree. A proceeding taken in execution of the decree must mean a proceeding taken by the judgment-creditor himself. This, therefore, gets rid of all question as to whether the confirmation of the sale by the Court on the 22nd April 1862 was a proceeding taken in execution of the decree. That being so, more than three years have elapsed since the last proceeding was taken, and the decree is barred.