(1868) 02 CAL CK 0003

Calcutta High Court

Case No: Application for Review No. 890 of 1866 and Miscellaneous Appeal No. 131 and 854 of 1866

In Re: Digumburee Dabee and Soroop Chunder Hazra — APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 3, 1868

Judgement

Sir Barnes Peacock, Kt., C.J., Bayley and Macpherson, JJ.

In the first case (No. 890) certain plaintiffs sued to enhance the rent of their estate. It does not appear what their respective interests in the estate were. But it appears that they failed in the suit, and were rendered liable for costs. But unless we know the extent of their respective interests in the estate, we cannot say in what proportion as between themselves they were each liable for those costs. One of the persons, however, against whom the decree was passed for costs, unknown to the others, purchased the benefit of that decree against himself and the others in the name of a third person benami, and then he attempted to issue execution against the others for the whole debt which was due from him and them jointly. The Judge held that he had a right to issue that execution. It is unnecessary for me to go through the several decisions of the Division Bench upon the subject. The last decision was this, that the party who purchased the decree had a right to issue execution against the others: but finding that the decision of Musst. Kishen-Kaminee Chowdrain v. Mohima Chunder Roy 2 Hay, 459 under which one of several judgment-debtors purchasing a decree against himself and others was declared entitled to execute it against the others only after deducting his own share of the liability, and only to the extent of the respective liabilities of each of the other debtors, the Division Bench referred the case to a Full Bench. Under s. 208, Act VIII of 1859, the assignee of a decree has a right to issue execution if the Judge think it just and proper that he should be allowed to do so. The question then arises, whether it is proper to allow one of several debtors, who has purchased a decree against himself and the others, to issue execution against his co-debtors, and

recover from them the whole amount?

2. The case not being provided for by any specific rule, it becomes necessary for the Court, under Regulation III of 1793, to decide the case according to the principles of justice, equity, and good conscience. The Court must therefore decide whether it is according to the principles of justice and equity and good conscience to allow one of several debtors under a decree to purchase the decree, and levy the whole amount against his co-debtors. If he could do so, one of nine several debtors, liable amongst themselves to pay eight-ninths of a debt, might purchase the whole debt for one-ninth of the amount of it. If he could buy the whole or even eight-ninths when he had paid only one-ninth as the purchase-money for the decree, instead of having to pay eight-ninths, he would pay one-ninth and put eight-ninths into his pocket, and by that means be a gainer of seven-ninths by the transaction. That would not he according to the principles of justice, equity, and good conscience.

3. Now, having to administer equity, justice, and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.

4. If the decree had not been sold, the judgment-creditor might, in his discretion, have executed it against the debtor who has now purchased it.

5. Baboo Sreenath Doss, who argued this case very ably for the appellants, referred to Story''s Equity Jurisprudence Paras. 499(b), (c) and (d), and cited many cases to show that if a man, being one of several debtors, takes an assignment of a debt, he by so doing discharges the debt. There are also one or two other cases which were not referred to by Baboo Sreenath Doss. One is the case of Reed v. Norris 2 M. & C., 361, see p. 374 in which a son being indebted to his father upon a bond for &#65533; 1,000, and interest, subsequently joined his father as surety in a bond to Lord Vernon for &#65533; 500 and interest. A memorandum was endorsed upon the bond for &#65533; 1,000, by which it was agreed between the father and son that the son should not he called on to pay the principal sum of &#65533; 1,000, until the father should have paid all principal money and interest due on the bond for &#65533; 500. The son compromised the claim of Lord Vernon''s executors on the bond for &#65533; 500, and the question was whether the son''s executors could set off the whole of that debt against the bond. Lord Cottenham said:-- "The question is how far the representatives of the sod, the surety, having come to an arrangement with Lord Vernon''s executors, by which the bond for &#65533; 500 has been got rid of and discharged, are entitled, as against the father''s estate, to demand more than they have actually paid to Lord Vernon''s executors in exoneration of the liability of the son''s estate upon the bond for &#65533; 500. Now, if there had been no authority upon this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances,

the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit, of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation, and becomes subject to a liability upon a contract of indemnity. The contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety then settle with the oblige, and instead of treating that settlement as payment of the debt, treat it as an assignment of the whole debt to himself and claim the benefit of it as such to the full amount, thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?"

6. Applying the principle of that case to the present, let us see how it stands. In that case the surety could only recover the amount which he had actually paid. But in this case one of several co-debtors having paid less than the full amount of the debt seeks to recover the full amount of the debt from the others. At moat, he is entitled only to an equal proportion with other debtors of the amount which he paid to get rid of the debt.

7. The other case is Dowbiggen v. Bourne 2 Y. & C., 462, which I think, is almost a stronger case than the other. A and B, as his surety, having given joint and several promissory note to C, the latter brought separate actions against A and B upon the note, and recovered judgment in both actions. C afterwards issued execution upon the judgment obtained against B, whereby B was compelled to pay the whole debt and costs Upon a bill filed by the administratrix of B for the purpose of obtaining an assignment of the judgment which had been recovered against A, the principal debtor, it was held that such judgment, not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment as sought by the bill. Alderson, B., in giving judgment in the case, said:-- "I expressed my opinion on the hearing of this case that the plaintiff could not derive any benefit from the assignment of the judgment against Cawthorne; and that, supposing that to be the case, there was not any ground for the interference of a Court of equity to decree that assignment. The

question I desired an opportunity to consider was whether, under the circumstances, there would be any remedy at law, supposing an assignment of the judgment were actually executed to the executors of Mr. Dowbiggen. It is quite clear from the authorities, that a surety who pays the debt of the principal debtor is entitled to the benefit of all those securities which the creditor, himself could render available against the principal debtor. That point was, in effect, determined by Chief Baron Alexander on the argument of the demurrer in this case; and I cannot help regretting that he did not then dispose of the question of law which is now raised, and which was as ripe for discussion seven years ago as it is at the present time. In this case the assignee, if he obtain an assignment or the judgment, must necessarily proceed in the name of the assignor to enforce that judgment. Now, what are the facts of the case? A joint and several promissory note was entered into by Cawthorne and Dowbiggen as his surety. The note when due was not paid, and the payee of the promissory note brought an action, and obtained judgment for the full amount of the note and interest against Cawthorne, the principal debtor; for I think it is fully established that Cawthorne was the principal debtor. The holder of the note, having obtained this judgment against Cawthorne, finding that it was not likely to be made available, brought another action, as he was entitled to do, against Dowbiggen, the surety, and recovered judgment against Dowbiggen for the amount of the note and interest. Dowbiggen paid the amount of the principal money and interest due on the note and the costs of the action against him, and the holder of the note having been thus satisfied the whole of the principal money and interest, had no further claim, except perhaps in respect of the costs of the action against Cawthorne, and if he had afterwards ventured to proceed on the judgment against Cawthorne, the Court of King''s Bench, in which the judgment was recovered, would have interfered in a summary manner to stay proceedings on the judgment, except for these coats. The whole effect, therefore, of assigning the judgment to the plaintiff would be to give her that which would be wholly useless, except for the purpose of recovering the costs of the action against Cawthorne, and to which, as administratrix of Dowbiggen, she could not possibly have any right. And that it had been felt that she had no such right was evident from the tender to the defendants, the Bournes, of those costs. The case in substance is not distinguishable from the case Copis v. Middleton, Turn & Russ, 231 before Lord Eldon, in which he says that if a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety paying the bond has a right to stand in the place of the mortgagee; but that if there is nothing but the bond, the surety, after discharging it, cannot set it up against the principal debtor. It appears to me that any assignment of the judgment would be entirely useless; and, therefore, under the whole of the circumstances, I think the bill must be dismissed; but as the Bournes might, I think, readily have given to Mrs. Dowbiggen what she required, though it was perfectly useless, I think the bill must be dismissed against them without costs. There is no ground or pretext for making the surety pay the costs of the principal: the bill must therefore also be dismissed without costs against the

defendant Cawthorne."

8. It appears to me that this case shows clearly that, if one debtor satisfies the judgment-debt, and takes an assignment of it, he cannot enforce it by execution, or in any Way, against his co-debtors. His only remedy is to sue them for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased, having regard to the proportion in which they were bound, inter se, to satisfy the original decree. It is said, if you do not allow the plaintiff to execute this decree, you will put him to all the inconvenience of instituting a regular suit for contribution. But suppose you do allow him to execute it, you will force the defendants to sue for contribution. It appears to me that that certainly would be a very inconvenient course, and would lead to a multiplicity of actions, which the law abhors. It appears to me, upon the general principles of equity, that the debtor in this case having taken an assignment of the judgment, was not entitled to enforce it by execution against his co-debtors.

9. Then the question arises, what is to become of the sale which has taken place under the execution? We are asked whether the sale ought to be reversed. It appears to ma that the creditor who obtained the execution ought not to have the benefit of the moneys realized from the sale under that execution. But whether the sale is to be reversed, so as to deprive the purchaser under the execution of the benefit of that which he has derived from his purchase, is another question. That is a question which the Court, could not decide in the appeal under s. 256. All that the Court could decide under that section was whether the sale could be set aside upon the ground of an irregularity in publishing or conducting the sale, not whether execution was granted after the judgment had been satisfied.

10. Further, it appears to me that an appeal, under s. 11, Act XXIII of 1861, against the order for execution, would not affect a purchaser at a sale under the execution, inasmuch as he was not a party to the proceedings. The only way to raise the question between the co-debtors and the purchaser is by a regular suit. Whether the sale can be reversed, as against the purchaser, cannot be decided in this appeal, and we express no opinion upon it.

11. The case must go back to the Division Bench which referred it for final decision.

12. The same principles apply to case No. 854, which is the case of a surety.

13. The last case will go back to the Division Bench which referred it.

Seton-Karr, J.

14. I am of the same opinion. I was one of the Judges who passed the decision, in Musst. Kishenkuminee Chowdrain v. Mohima Churn Roy 2 Hay, 459, already quoted. On that occasion it appears to have been assumed or admitted without argument that the decree was perfectly capable of execution in some way or other, and the only point that we decided was that, when one of several judgment-debtors

purchased the decree, he could not, in execution thereof, realize from any one of them the whole of the debt minus his own share, but that he was, at the most, entitled to recover from each of them his particular quota of contribution to the common debt. After hearing the arguments, I am now prepared to go still further than the above decision, which appears to me correct as far as it goes, and on the particular point then raised before us; and I am now prepared to say that the decree, under the circumstances, when purchased by one co-debtor, ought not to hare been executed at all, and that the only remedy of the debtor-purchaser was to proceed against his co-debtors in a regular suit for their shares of the contribution to the common debt. I think a decision to this effect, shutting out the execution of the decree altogether, and declaring the debt extinguished as far as the original decree-holder was concerned, is one consonant to equity, to public policy, and to that which should be the aim of our Courts, namely the avoidance of multifarious and harassing litigation.

15. As regards the purchaser who is not properly before us, I also concur in the conclusions arrived at by the learned Chief Justice.

Phear, J.

I agree so entirely with the judgment of the Chief Justice, that I do not propose to add anything to it, except so for as to say this, that it seems to me that a money decree may be treated simply as an order of the Court, as between the parties, directing that the one party shall pay to the other a certain sum of money. Execution is merely a process provided for the purpose of securing obedience to this order. Therefore as soon as payment has been made by the person ordered to pay, there is in one sense an end of the decree, and no further execution can be taken under it. I do not think it necessary to go further than that. If that is so, then the moment one of the joint judgment-debtors in the case before us, who was himself bound to pay the whole debt, did satisfy the judgment-creditor by purchasing the decree,--and as regards this result, it does not matter how many hands the decree had previously gone through,--the whole object of the decree was fulfilled, and process of execution ought not to have issued. It is another question how the judgment-debtor, who has in this way satisfied the judgment-creditor, is to get reimbursed by his co-debtors in the event of their declining to do so without compulsion. The obvious course for him to take is to bring a suit against them collectively for contribution.