(1910) 08 CAL CK 0030

Calcutta High Court

Case No: Appeal from Order No. 658 of 1908

Sripati Charan Choudry and Others		APPELLANT
	Vs	
R. Belchambers and others		RESPONDENT

Date of Decision: Aug. 4, 1910

Final Decision: Allowed

Judgement

1. The substantial question of law which requires consideration in this appeal is, whether the decree-holders are still entitled to take out execution of a decree for rent made in their favour so far back as the 19th June 1898. The judgment-debtors in answer to the application for execution made on the 2nd May 1907, urged that execution could not proceed as the judgment-debt had already been extinguished by limitation. The Court of first instance accepted this contention as well-founded, and dismissed the application on the ground that a previous application for execution made on the 14th January 1903 was barred by limitation. Upon appeal the District Judge has reversed that decision and allowed execution to proceed on the ground that it is no longer open to the judgment-debtors to urge the objection that the judgment-debt had already been extinguished by limitation, inasmuch as they did not prefer any such objection in previous execution proceedings. It appears that the first application for execution was made on the 13th August 1898. A sum of Rs. 600 was realised by the sale of the properties of the judgment-debtors and the execution case was disposed of on the 27th May 1899. The second application for execution was made on the 14th September 1899. On the 10th November 1899 the decree-holders paid the requisite process fees for service of the sale proclamation, but apparently no other steps were subsequently taken, and on the 18th January 1900, the application was dismissed for non-prosecution. The third application for execution was made on the 14th January 1903, upon which an order was made for the issue of a notice under sec. 248 of the Code of 1882. On the 16th February 1903, the return of service of notice was filed in Court. The decree-holders were thereupon directed to take further steps in aid of execution. Apparently they did nothing, and

on the 23rd February 1903 the application was dismissed for default. Subsequently, the decree-holders appear to have discovered that the judgment-debtors had no other properties within the jurisdiction of the Midnapur Court, where the decree had been passed, which might be seized in execution. Consequently, on the 1st June 1904, they applied to the Midnapur Court to transfer the decree to the Court of the Subordinate Judge of the 24-Pergunnahs. On the same date, the Court directed the issue of notice under sec. 248, C. P. C, upon the judgment-debtors.On the 18th July 1904, the return of service of the notice was received. The Court thereupon ordered the issue of the requisite certificate which was granted on the 20th July following. After the decree had been thus transmitted to the Court of the Subordinate Judge of the 24-Per-gunnahs, on the 16th February 1905, the decree-holders presented their fourth application for execution in the latter Court. On the 18th March 1905, a writ of attachment was directed to issue; this was subsequently returned unserved. There was a fresh order for the issue of attachment on the 3rd April 1905. On the 20th April the return of service was received by the Court. On the day following the sale proclamation was directed to issue and the 13th June 1905 was fixed for the sale of the properties attached. On that day, however, the Court dismissed the application for execution inasmuch as it was discovered that the decree-holders had failed to deposit the necessary process fees. The records were then returned to the Midnapur Court. On the 30th July 1908, the decree-holders again applied to the Midnapur Court for transfer of the decree to the Court of the Subordinate Judge of the 24-Pergunnahs. The Court directed the issue of a notice upon the judgment-debtors under sec. 248 of the Code of 1882. On the 22nd August 1906, the return of service of notice was received, and on the 1 st September 1906 the necessary certificate was issued. After the decree had been thus transferred a second time from Midnapur to the 24-Pergunnahs, the decree-holders presented their fifth application for execution in the Court of the Subordinate Judge of the 24-Pergunnahs. The judgment-debtors then appeared and contended that the application could not be entertained as the previous application made on the 14th January 1903 was obviously barred by limitation. The Subordinate Judge held that this contention was well-founded and it has not been contested before us that if the matter is still open for consideration, the application of the 14th January 1903 was unquestionably barred by limitation. But it has been argued on the authority of the decision of the Judicial Committee in the case of Mangal Prosad Dichit v. Girija Kant Lahiri I. L. R. 8 Cal. 51 (1881)., that the matter is no longer open to discussion, that the judgment-debtors were bound to urge this objection in the course of execution proceedings which followed the application of the 14th January 1903, and that, in any event, they were bound to urge the objection either in the course of the application for transfer of the decree from Midnapur to the 24-Pegunnahs or in the course of the application for execution of the decree made on the 17th February 1905. The District Judge has given effect to this contention and has held that the judgment-debtors are no longer entitled to question the validity of the application made on the 14th January 1903. In our opinion, the view taken by the District Judge

is erroneous and cannot be supported. It is well settled that mere service of notice upon a judgment-debtor under sec. 248, C. P. C, is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice under sec. 248. In support of this proposition reference may be made to the cases of Bissessur v. Mahatab 10 W. R. F. B, 8 (1868). Umed Ali v. Abdul Karim 8 C. L. J, 193 (1908), and Khosal Chandra v. Akhiluddi 14 C.W.N. 114 (1909). It cannot again be disputed that if an order for execution has been made without notice to the judgment-debtor, it is not sufficient to debar him from urging the objection of limitation. In support of this proposition reference may be made to the cases of Maazam Husain v. Sarai Kumari 11 C. L. J. 367 : s c. 14 C. W. N. 43 (1909). Mon Mohan Karmokar v. Dwarka Nath Karmokar 7 Ind. Cas. 56; M. A. 363 of 1909. and Moochai Mondal v. Masuunddin Molla Unreported M. A. 532 of 1909. In these cases, it was pointed out that the principle which underlies the decision of the Judicial Committee in the cases of Mangal Prasad Dichit v. Girija Kant Lahart I. L. R. 8 Cal. 51 (1881). Pant Kripal v. RupKuart I. L. R. 6 All. 269 (1883;.and Bent Ram v. Nanhumal I. L. R. 7 All. 102 (1884);. is that a party to an execution proceeding who allows an order for execution to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of the order, cannot be permitted at a subsequent stage of the proceedings to re-open the whole matter in controversy. In other words, as pointed out by Mr. Justice West in Sheikh Badan v. Ram Chandra I. L. R. 11 Bom. 537 (1887). the doctrine rests on the ground that the judgment-debtor, when called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had either failed in his contention to the contrary or at any rate allowed the judgment to go by default. Consequently as has been pointed out in the case of Narayana v. Gopal Krishna I. L. R. 28 Mad. 355 (1904). Ramasami v. Ramasami I. L. R. 30 Mad. 255 (1907). if by reason of the omission to serve a notice or by reason of the defective notice served upon the judgment-debtor, he had not the opportunity to contest the validity of the proceeding, he is not bound by the doctrine of estoppel. Now in the case before us, it is conceded that a notice under sec. 248, as required by the law, was not issued upon the basis of the application for execution made on the 17th February 1905; consequently, any order for execution in the course of that proceeding cannot bind the judgment-debtor. Such an order cannot debar him from urging that the previous application for execution was barred by limitation. No doubt, notices under sec. 248 were served upon the judgment-debtors on the basis of the application for transfer of the decree from the Midnapur Court to the Court of the Subordinate Judge of the 24-Pergunnahs. It is manifest, however, from an examination of the provisions of the Code that, upon receipt of such notice, the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation. Sec. 223 of the Code of 1882 defines the circumstances under which the decree of one Court may be transmitted by that Court to another Court for execution. Sec. 224 then lays down the procedure to be followed when the Court desires that its own decree shall

be executed by another Court. The Court sending the decree for execution under sec. 223 is required to send along with the copy of the decree a certificate stating that the satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been satisfied in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted. The concluding words of clause (c) of sec. 224 make it obvious that in sending the certificate the Court is not called upon to consider whether the decree is still capable of execution. All that the Court is called upon to certify is that a specified part of the decree still remains unexecuted. Whether the decree in so far as it is still unexecuted, is capable of execution under the law, is a question for determination by the Court to which the decree is transferred, when a proper application for execution is presented to that Court. Consequently, we must hold that even though a notice may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent for him to appear and contend at that stage that the decree ought not to be transferred, because an application for execution thereof is likely to prove infructuous. We may further observe that the language of sec. 248 makes it reasonably plain that a notice under that section is not required to be issued upon an application for transfer of a decree. The explanation to the section provides that the word "" Court" means the Court by which the decree was passed, unless the decree has been sent to another Court for execution, in which case it means such other Court; in other words, the notice under sec. 248 must be issued by the Court which has seizin of the application for execution, whether it be the original Court which made the decree or is the Court to which the decree has been transferred for execution. Consequently, it follows that upon receipt of the notice under sec. 248, thus irregularly issued, it was not only not the duty of the judgment-debtor to appear and urge the objection of limitation, but that under the law it was impossible for him to take that step. The position in substance is that the decree-holders omitted to cause the issue of the notice under sec. 248 upon their application for execution, and got it issued upon their application for transfer of the decree. The two elements which must be established before a judgment-debtor can be held debarred from urging the question of limitation, are thus both absent in the case before us. We may add that upon the application of the 14th January, though a notice under sec. 248 was issued there was no order for execution which could bind the judgment-debtors, while upon the application for execution of the 17th February 1905, though an order for execution was made, it was made without notice to the judgment-debtors. Consequently the principle which underlies the decision of the Judicial Committee in the case of Mangal Prasad Dichit v. Girija Kant Lahiri I. L. R. 8 Cal. 51 (1881).cannot have any possible application to this case. The matter is still open for discussion and it is not disputed that if it is open for consideration, the judgment-debt was barred by limitation long ago.

2. The result is that this appeal is allowed, the order of the District Judge is discharged and that of the Court of first instance is restored. Under the circumstances of the case, we make no order as to costs in any Court.