

(1871) 06 CAL CK 0015

Calcutta High Court

Case No: None

In Re: Decree Suits
Numbered 228, 229,
230, 231, 232, 234,
236, 238, 239, 240,
241, 242, 243 and 281
or the year 1870, in the
Court of the Moonsiff or
Debhoghue and in the
Matter of the Order of
the High Court of
Chancery in England,
dated 12th November
1870, entitled "In the
Matter of the Bangpara
Tea States Company of
Assam Limited; and in
the Matter or the
Companies Acts, 1862
and 1867; and in the
Matter of Her Majesty's
Letters Patent for The
High Court, Calcutta,
dated 28th December,
1865

APPELLANT

Vs

RESPONDENT

Date of Decision: June 19, 1871

Final Decision: Dismissed

Judgement

Phear, J.

The petitioner in the application is the constituted attorney of the official liquidators

appointed by the High Court of Chancery in the matter of winding-up of the Bangpara Tea Company Limited. He prays that certain decree-suits numbered 228, 229, 230, 231, 232, 234, 236, 238, 239, 240, 241, 242, 243, and 281 of the year 1870, in the Court of the Moonsiff of Debroghur, in all of which suits the Company is defendant, may be removed from the said Court and may be heard and determined in this Court as a Court of extraordinary original jurisdiction. The merits of the suits, in which these so called decree-suits are respectively the execution proceedings, were heard and determined sometime ago, and in each case a decree was passed against the Company. Two portions of the immoveable property of the Company situated in Assam, and known as the Bangpara and Bakul Gardens, were, at different times, attached to answer these decrees, and both were sold by the Court on the 9th December last. Also, on the 16th February last, an order was passed by the Moonsiff confirming these sales.

2. It is objected that, on this state of facts, the 13th clause of the Letters Patent does not empower this Court to make the order which is sought. The clause runs as follows:

And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort "William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

4. The words to remove and try and determine any suit being or falling within the jurisdiction of any Court" seem to me intended to bear a wide signification, I do not think that the Legislature meant them to be limited to any particular period or stage of the suit, conceived as a regular series of steps in procedure. I think rather, that after the commencement of a suit between parties as long as the proceedings in the Court of first instance are in such a condition that the one party is entitled to ask that Court to raise and judicially determine any question material to the final result of the suit, as between himself and the other party, so long is the suit in existence in the first Court and capable of being removed under clause 13, in order that such question may be determined here.

5. Now, in the case before me, the petitioner contends that, in the events which have happened, the order for sale of these properties, although not actually void in law, is yet such as ought, on the principles which regulate the actions of our Courts, to be treated by the Court which made it as if it were so void, and therefore he is entitled as a matter of right to have it set aside, and the sales made thereunder cancelled or vacated. He has accordingly applied to the Moonsiff for this purpose, and his application has been refused; but he has asked the Moonsiff to review his decision, and this application for a review has not yet come on to be heard. Under these circumstances the petitioner maintains that there is, at this moment, pending before the Moonsiff matter of controversy between the Company and the plaintiffs, which is an essential part of the litigation in these suits; and

he prays that this Court will remove the suits to itself in order to do that in regard to them by the exercise of its extraordinary original jurisdiction, which the Moonsiff's Court ought to do, but which that Court, as he says, perversely refuses to do.

6. I will here, by the way, remark, that if the Moonsiff has committed the error of principle which is complained of, the petitioners, instead of coming here immediately, might have obtained a remedy by means of an appeal to the Deputy Commissioner, and in the event of the Deputy Commissioner on that appeal betraying an ignorance or disregard of his duty, the High Court would have set him right under the provisions of section 15 of the Charter Act. And certainly this course would have been, to say the least of it, the more regular course for the petitioner to have pursued. That he has not thought fit to do so, is not I think any bar to his seeking the benefit of this Court's extraordinary jurisdiction, but it is a fact which ought to lead this Court to be especially careful in ascertaining whether or not sufficient ground for taking the extraordinary step of removing the suit is made out. The petitioner has, however, satisfied me that he had good cause for not following the regular course in this case; for he has referred me to a judgment delivered by the Deputy Commissioner on the occasion of an application made to him for a stay of proceedings in one of the suits¹ and from this judgment it is apparent that the Deputy Commissioner was altogether unacquainted with the principles and the English Statute upon which the merits of the petitioner's application depend. It would perhaps have been matter of surprise, had the fact been otherwise. I will proceed at once then to enquire, whether or not the Moonsiff has erred in his duty, and if so, whether it is necessary that the suit should be brought here, in order that the right determination may be come to. The principal facts in the case may be shortly stated. The Bangpara Gardens were attached in execution of the decrees, on the 20th September 1870, and the Bakul Gardens on the 27th October. Both these properties were, as I have said, sold on the 9th December. The Company is an English Company,--that is, its domicile is in England; and on the 25th October, after the attachment of the Bangpara Gardens, and before that of Bakul, a petition for winding-up the Company was presented to the English Court of Chancery. The immediate consequence was that the Winding-up Act of 1862 became applicable to the affairs of the Company. The 25th section of the Act, together with other sections, thereupon enabled the Court of Chancery at once, so far as the Act had operation, to restrain further proceedings in any suits or proceedings against the Company and upon the making of the order for the winding up of the Company, on the 12th November, sections 87 and 163 together, as they have been judicially interpreted, made void all attachments on the property of the Company, and all the proceedings against their property, except so far as the Court of Chancery permitted them to have validity and to be carried on. So that, had the Bangpara Gardens and Bakul Gardens been situated in England, instead of in Assam, after the 12th November, the attachment on those properties would have been so far void in effect that the judgment-creditors could not have proceeded to execution without the express permission of the Court of Chancery, and therefore the sale by the local Court, on the 9th December, made, as it certainly was, without permission or sanction of the Court of Chancery, would, on the same assumption, have been altogether

void. Mr. Marindin's client, the Attorney of the Company, says, he is entitled to ask the Courts of this country to treat that sale as a void transaction, just as it would have been under the supposition I have just made. It has been, no doubt, settled in this Court by the decision in the matter of the Agra and Masterman's Bank 1 I.J., N.S., 335 and in *Peitsch v. The Commercial Banking Corporation* 1 I.J., N.S., 363, that in all cases where a Company is being wound-up by the Court of Chancery in England, the Courts of this country are bound, so far as they can, on a principle of comity, to give effect to all the proceedings and orders of the Court of Chancery relative to the administration of the assets of the Company, and in this respect the decisions to which I refer only follow out the analogy set by the Act itself in section 122, where it directs that the Courts in Scotland and Ireland shall enforce all orders under the Act, &c. But the present application asks the Court I think to go yet one step further,--viz. not only to give effect in this country to an order of the Court of Chancery made in winding up the Company, but also to extend the operation of the English Act itself to this country. But it appears to me that if the English Legislature refrained from extending the provision of sections 85, 87, and 163 of that Act to this country, the Courts of this country are in truth powerless to do so--all that the Courts can do is by the exercise of such, discretionary control as they possess over their own procedure to give assistance to the Court of Chancery and so to further the operations in the winding-up suit. If then this be so, upon going back again to the facts which have occurred, I find that when the property was sold on the 9th December, the Court in this country,--i.e., the Moonsiff's Court,--had undoubtedly the power to sell the property in execution of the decrees passed by itself. The proceedings in the suits appear to have been regular, the property had been attached in due course, and -the order for sale had been made, Had the official liquidator or his representative come in before the sale was actually effected, I think it would have been right that the Moonsiff should have given the fullest consideration to his application, and probably the Moonsiff in such an event should have stayed the sale until the liquidator could have obtained directions from the Court of Chancery at home relative to selling the property. I say probably, because it is possible that even at that time the condition of the gardens was such as made it almost imperative they should be sold without any very considerable delay. But no such application was made to the Moonsiff, and I suppose could not have been made. Indeed I may assume that up to the 9th December the Moonsiff and every one in Assam was quite ignorant that the winding-up order had been made in the Court of Chancery on 12th November. Thus the sale was unquestionably valid at law to pass title to purchasers, and it could not be undone except for good cause within sections 156 and 157 of Act VIII of 1859,--i.e., cause arising out of the procedure. So that, with the best consideration I can give to this matter, on the facts of the case it appears to me that when the attorney of the liquidator applied to the Moonsiff it was too late to undo what had already been done. If the case were brought down to this Court, I think I should have no power to set aside the sale of the 9th December. And I may add that, even if I had that power, I should feel very doubtful whether it ought to be exercised or not. The tendency of the later decisions in the Court of Chancery is to give the judgment-creditor the full benefit of his execution. All that the Court does, even in England in cases like this, as far as I can judge, appeals to be

simply this,--namely, that the conduct of the sale is transferred from the sheriff to the official liquidators, in order that it may be made in such a manner as to realize the best possible price, and the mode in which the Court under this change protects the interest of the execution-creditor is by making an order in the winding-up suit that the execution-creditor should have the same rights over the sale-proceeds as if the sale had been by the sheriff. The form of order, which I suppose is now usual, is given in *in re the Plays-yn-Mhowys Coal Company* 4 L.R., Eq., 691, but I could not make such an order in this Court which is not charged with the winding-up of the Company. By making such an order I should in truth be taking administration of a portion of the assets of the company, and I could not administer them separately from the rest of the assets, and I don't know that this Court has even the power to take on itself administration of the property subordinate to the Court of Chancery. All I repeat that this Court or any other Court foreign to the Court of Chancery can do in a matter like the present is, within the limits of its own procedure in a case before it, to make such an order as will leave the assets so far as may be proper under the administration of the Court of Chancery. There is no opportunity I think for doing that in the present case, so that even if I had the power to set aside the sale of the 9th December, it does not seem to me, I should be rightly exercising the discretion of the Court in doing so. This application must therefore be dismissed with costs.

¹ The judgment of the Deputy Commissioner was as follows:--Mr. Wagantriebe, on behalf of the plaintiff, the official liquidator appointed by the High Court of Chancery, filed an application to stay all proceedings in the matter of the sale of the Bakul gardens of the Bangpara Tea Estate Company, on the ground that the property was in Chancery, and beyond the order of the Court. He filed his power of attorney, and the solicitor's letter forwarding a document, purporting to be a copy of the order made in the Court of Chancery, together with a telegram; and a letter from Mackillican and Co., who appear to have been also appointed agents to the official liquidator, have been received by the Court. It appears from the document, purporting to be a copy of the order of the Court of Chancery (and this document is admitted by the agreement of all parties), that the vesting order empowering the official liquidator was made on 12th November 1870. The parties opposing the application are, firstly, Mr. Alexander Scott Campbell, manager for John Teil and Co., purchasers at the sale; and, secondly, Mr. J.A. Rayson, agent for Mr. H. Bone, a decree-holder, at whose instance attachment issued. The plaintiff's application is opposed on the ground that the attachment was made prior to the date of the vesting order to the official liquidator, and that, therefore, such order could not extend to the property so attached by order of the ordinary Civil Courts. The only question arising then is what was the date of the order of attachment, and this, from the copies of the orders filed by the opposing parties, appears to have been 27th October 1870, whereas the vesting order by the Court of Chancery is dated only 12th November 1870. I hold, therefore, that the attachment and all ulterior proceedings are good and valid, and I

dismiss the plaintiff's application with costs.