
(1873) 03 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 967 of 1871

Kalee Coomar
Chatterjee

APPELLANT

Vs

Siddhessur Mundul

RESPONDENT

Date of Decision: March 18, 1873

Final Decision: Allowed

Judgement

Jackson, J.

The case comes before us in special appeal, and the principal point which we have to decide is whether, under the circumstances, there is any personal liability attaching to the Nazir. The view taken by the Zilla Judge in his decision, which is the one immediately before us, is contained in the part of the judgment which I am about to read. He says:--(reads the portion set out in the statement of the case.) The Government advocate appeared in this case, and although we could not see that the Government had any direct interest in the matter, not being a party to the suit, we gladly heard the learned gentleman, and are much indebted to him for the assistance which he has rendered to the Court in the decision of this case. It was contended amongst other things that both the Nazir and the peon who was the officer immediately employed to execute the warrant are paid servants of Government, and one servant is not responsible for the acts of the other; that the Nazir, like all Nazirs of the Civil Courts, has now no interest in the fees leviable as tallubana for serving processes; that there is no analogy between the office of a Nazir and that of a Sheriff of an English county as supposed by the Courts below; that the peon was a public servant; and that if the warrant in this case was addressed to the Nazir, it was so done in contravention of the terms of Beng. Act V of 1863; and accordingly it was contended that the writ ought to have been addressed to the peon, and that the common practice in this matter was to make over warrants of Courts, though addressed to the Nazir, to the subordinate piadas for execution. Mr. Bell, I should mention at the close of his argument, proposed to point out who was the real person who ought to have been sued, and who was liable for the demand, and he contended that the Munsif ought to have made the parties who were really liable defendants in the suit. As to this contention I

may observe that, when a plaintiff brings a suit against a person who is not liable to him for the particular matter for which the suit is brought, it is not for the Court to go on and find out who is the person really liable to the plaintiff; and as it was altogether foreign to the purposes of this appeal to consider who, if not the Nazir, was liable, we did not think it necessary to enter into that part of the case. The Munsif who decided the suit in the first instance laid considerable stress upon the terms of s. 87, Act X of 1859, and the form being, I understand, the Form (E), annexed to that Act, and which is prescribed by s. 86 of that Act. S. 86 was repealed by Beng. Act VI of 1862, and instead of that we have s. 17 of Beng. Act VI, of which the last words are "process of execution against the person or moveable property of a debtor shall be in the Form (E) or the Form (F) contained in the schedule to Act X of 1859, or in a Form as nearly resembling those Forms as the circumstances of the case may admit." Now, subsequent to the passing of Act X of 1859, and before the bringing of this suit, a material change in the law regulating the machinery for executing processes of Courts, including the Courts of the Collector, had taken place by the repeal of s. 14, the only then surviving part, of Regulation XXVI of 1814, and by the enactment of Beng. Act V of 1863. When Act X of 1859 was enacted, not only the Regulation of 1814, but also Regulation V of 1804, ss. 12 and 13, were in force, and by these two provisions taken together, it was provided that all orders and processes of the Civil Courts and Revenue officers were to be executed by the Nazirs of those Courts, who were permitted to appoint their own mirdhas and peons, and who received as their remuneration one-fourth of the tallubana paid in each case to the peon who carried the several processes and orders. Under that state of things, a large portion, nearly the whole, of a Nazir's receipt, was derived from such deductions and other fees received by him, and most probably in consideration of that circumstance, the Nazir might have been held responsible for the acts of his peons resulting in wrongful damage to parties. That was entirely changed by Beng. Act V of 1863, and the peon, as well as the Nazir, became, it seems to me, a regular paid officer of Government. It was left to the discretion of the executive Government to direct that the peons should be either paid by fixed salary, or remunerated by fees, but the peculiar connection which previously existed between them and the Nazir was entirely severed. The Nazir had the nomination of them subject to the approval of the Judge (and in this case of the Collector), but he had not the power to remove them, nor had he power to employ any person other than a peon appointed under that Act in the service or execution of any process of Court, except with the special leave of the Court. I do not propose to consider here the relation between an English Sheriff and a Nazir, because I am clearly of opinion that there is no analogy whatever between the case of a Sheriff and the case of a Nazir. The Munsif observes, referring to the provisions of ss. 87 and 99, Act X of 1859:--"These provisions show that an officer, and not a peon, is to execute such writs, that he is actually and manually to take moveables out of the judgment-debtor's possession, and deposit them in some fit place, or keep them in the custody of some fit person approved by himself." I do not quite know what in the Munsif's mind was the distinction between a peon and an officer, but if he meant to say that the Nazir is an officer, and the peon is not, and that the Nazir is actually and manually to take moveables out of the judgment-debtor's possession, and

deposit them in some fit custody, I fear that, unless Nazirs are provided with some physical apparatus beyond that which is commonly given to men, it would be absolutely impossible for them to undertake such duties; and if to the performance of these manual functions is to be attached the corresponding liability in such matters, I apprehend no pecuniary inducement will be sufficient to induce a person of respectability to accept so burthensome an office. S. 8, Beng. Act V of 1863, provides:--"On every process issued for service or execution by any peon appointed under this Act, there shall be endorsed the name of the peon deputed to serve or execute the same, the period within which the peon is required to certify service or execution, the amount payable for the service or execution of the process, and the date of payment, and such endorsement shall be signed by the Nazir or clerk of the Court." This provision recognizes distinctly that it is the peon who serves and executes, and it is the peon from whom certificate of service or execution is to be taken, and if in addition to such certificate of service, which in my experience is always furnished by the peon, the Nazir appends some further certificate of his own, that, it seems to me, is not sufficient to entail on him any pecuniary responsibility, and does not affect the reality of the service by the peon. The Judge finds in this case that the property in respect of which the damages were claimed had been removed from the possession of the present plaintiff who was the defendant in the rent suit, but he says:--"It is not material in this suit to find whether the zimmadars held it or the decree-holder; for, if the Nazir is primarily responsible, he may settle with those who took the property; and if the Nazir is not primarily responsible, this suit must fail, because he has been made the sole defendant." It appears to me that it was highly material to find whether the zimmadars or the decree-holder held the property, because the law does not, so far as I know it, authorize the making over of the property attached to the decree-holder's custody, but it does in s. 99 expressly authorize the property being left in the custody of some fit person, meaning thereby, I suppose, some independent and respectable person. The Judge states that "an action lies here because the Nazir does not execute the order of the Court for the restoration of the property." In the present case it seems that the order of attachment was executed by one peon, and the order for restoration of the property entrusted to another, I confess I am unable to see how the Nazir, under the circumstances, failed to execute the order of the Court for the restoration of the property. Then it is said that the "inability of the Nazir to restore the property arises from his own negligence." It appears to me that there was no negligence on the part of the Nazir. He entrusted the parwanna to a peon who was appointed with the sanction of the Court expressly for the purpose of such duties; and the return of the peon with the Nazir's certificate upon it was submitted in due course to the officer presiding in the Collector's Court, and was presumably approved by him.

2. I have already said that, in my opinion, the officer executing the writ was not the Nazir, that the piada was not a mere subordinate of the Nazir, and an agent whom he had power to employ, but a person who, although in a subordinate capacity, was as much an officer of the Collector's Court as the Nazir himself. In this view of the case, it appears to me that the Nazir is not directly liable, as held by the Courts below, to indemnify the

plaintiff, and it is not our function to settle here who is the person, if any, liable.

3. I am reminded that there is no specific allegation of misconduct against the Nazir in this case, but only a charge of implied neglect. The question therefore turns upon the general liability of the Nazir. The judgments of the lower Courts are set aside, and the plaintiff's suit is dismissed with all costs.