
(1873) 04 CAL CK 0011

Calcutta High Court

Case No: Regular Appeal No. 12 of 1872

Kally Prosonno Bose

APPELLANT

Vs

Dinonath Mullick

RESPONDENT

Date of Decision: April 23, 1873

Final Decision: Dismissed

Judgement

Sir Richard Couch, Kt., C.J.

It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In *Fuzeelun Beebee v. Omdah Beebee Ante*, p. 60, it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedarnath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedarnath Bose will not be bound by the decree in this suit. We think this would be a sufficient reason for our dismissing this appeal. A false case as to the purchase has been put forward in the plaint; and we have little doubt that this was done designedly and in order to conceal the part which Kedarnath Bose had taken in the transaction. It is, however, desirable that the case should be decided on its merits. We think the Nuddea Court had power to sell the whole estate, and that, for the purposes of attachment and sale in execution of a decree, it must be considered as wholly situated in Zillah Nuddea. If the Court of the 24-Pergunnahs sold the 18 mouzahs, it would have no power to apportion the Government revenue. The purchaser would be liable to pay the whole, and would be involved in constant disputes with the owner of the other mouzahs. Selling the estate thus in parts would greatly lessen the price that could be got for it, to the injury either of the decree-holder or the judgment-debtor, but possibly to the benefit of speculative persons such as the pleader Kedarnath Bose seems to be in this instance. Unless the law is imperative, this ought to be avoided. The CPC has no special provision for such a case as this. "Part of an estate" in s. 249 means, we think, an aliquot part of an estate, which must frequently be attached and sold. In the proceeding in the Nuddea Court, it was possible to follow the directions of

the Code as to making known the prohibitory order (s. 239) and as to Sales (ss. 248, 249), and they have been followed. There is no direction in the Code to the contrary of this proceeding; and it appears to us that the estate may, as we have said, be considered as wholly in Zillah Nuddea. Then, so considering it, was the Nuddea Court authorized to sell? S. 284 says that a decree which cannot be executed within the jurisdiction of the Court whose duty it is to execute it, may be executed within the jurisdiction of any other Court in the manner following. The plaintiff (s. 285) may apply to the Court whose duty it is to execute the decree, to transmit a copy of it with a certificate that satisfaction of it has not been obtained by execution within the jurisdiction of that Court. It will be observed, it is not that the decree cannot be executed. The Court (s. 286), unless there be any sufficient reason to the contrary, is to cause the certificate to be prepared and transmitted to the Court which is to execute the decree; and (s. 287) the copy of any decree or order for execution, when filed in the Court to which it has been transmitted for execution, is to have the same effect as a decree or order for execution made by that Court. There was a certificate of the Judge of the 24-Pergunnahs that the amount of the decree had not been realized by means of that Court. It was made upon the application of the plaintiff (The Land Mortgage Bank) in accordance with s. 285, and there was a decree to be executed. Those two facts were sufficient to give the Court of 24-Pergunnahs jurisdiction to grant the certificate. Strictly it ought not to have been granted until the house and land in 24-Pergunnahs had been sold; but this error does not make the certificate void and avoid the proceeding in the Nuddea Court. There is a wide distinction between a proceeding without jurisdiction, or in excess of jurisdiction, and an erroneous proceeding in a matter within jurisdiction. The latter is ground for an appeal, and one was presented, but not till the 15th of June 1870, after the time allowed by law. In the case of *The Maharajah of Burdwan v. Sree Narain Mitter* 9 W.R., 346, there was an appeal, and we understand the language of the Court in the judgment as used with reference to the case before it. We do not think the learned Judges intended to lay down that, when a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. The judgment, indeed, goes so far as to say that it is only when the decree cannot be executed against the property or person of the judgment-debtor that it may be sent to another Court for execution. This would render it necessary in all cases before a decree is sent to another Court for execution for the sending Court to enquire whether the defendant can be arrested, and if he can, to refuse the application. We believe it has not been the practice to do this. We are of opinion, upon the facts of the case, that the decree of the lower Court is right; and the appeal ought to be dismissed with costs.