
(1874) 04 CAL CK 0004

Calcutta High Court

Case No: Special Appeal No. 1601 of 1873

Krishna Kishore Poddar

APPELLANT

Vs

Woomesh Chunder
Roy And Another

RESPONDENT

Date of Decision: April 22, 1874

Judgement

L.S. Jackson, J.

It appears to me that the Legislature has used words wide enough to include a case of this kind, doing what might reasonably be supposed to be their intention, and providing that, when a decree has been transferred from the one Court to the other, any application afterwards, whether for the execution of it, or to set it aside, should be made to the Court to which it had been transferred. It would be very inconvenient if one kind of application were to be made to one Court and another kind to another Court. The 3rd section, after providing for decrees being transferred, says, that "such execution and proceedings may be had in respect of such decrees as if the same were decrees of the Court to which they shall have been so transferred." I do not understand these words as meaning that the proceedings are to be only proceedings in execution, but generally proceedings relating to the decree. If they were to be limited to proceedings in execution, the words should have been "and such execution and proceedings thereon in respect of such decrees." The words "proceedings in respect of such decrees" are wide enough to include an application to set aside a decree as having been made ex parte, and there being ground for setting it aside.

2. Then in the 5th section it is said that nothing in the Act is to affect "applications not being applications in suits, nor applications for execution of, or in relation to, decrees transferred." These words show that the Legislature considered that applications in suits would be affected by the Act. In fact all applications would be affected by it. An application in a suit where the decree has been transferred to set it aside is an application in the suit. It is also an application "in respect of" the decree. We must consider that those words were intended to include something more than proceedings in execution of the decree. They appear to have been inserted in order to give the Court as large an

authority as possible where decrees had been transferred. It is to my mind much the more reasonable construction, that where a decree has been transferred to a Court, any application after that in relation to it should be made to the Court to which it has been transferred. I think our answer to the question should be to that effect. We shall reverse the decrees of both the lower Courts. The application to set aside the ex parte decree will be transferred to the Court of the Subordinate Judge of Backergunge. The plaintiff will have the costs of this appeal, the parties will bear their own costs of the proceedings in the lower Courts, and the costs of the suit will abide the result.

(1) Before Mr. Justice L.S. Jackson and Mr. Justice Macpherson.

The 13th September 1871.

In The Matter of The Petition of Wooma Churn Mozoomdar.*

Beng. Act III of 1870--Transfer of Decree--Jurisdiction.

On the 7th May 1870, a decree for rent was obtained by one Chunder Kant Roy Chowdhry against the petitioner in the Court of the Deputy Collector. Before any execution had been taken out under that decree, Beng. Act III of 1870 came into force, and under s. 2 of that Act the suit was transferred to the Munsif's Court. Subsequently the Munsif made an order for the issue of execution, and thereupon the present petitioner appeared in the Munsif's Court, and stating that he wished to apply under s. 58 of Act X of 1859 to have the case reheard, on the ground that the decree of the 7th May had been obtained against him ex parte without his having had any notice that a suit was instituted against him, he prayed the Munsif to send the record back to the Deputy Collector in order that an application might be made to the Deputy Collector for a rehearing. The Munsif declined to send the record back to the Deputy Collector, but at the same time, apparently, expressed an opinion that it was not in the Munsif's Court, but in the Deputy Collector's Court alone, that the application under s. 58 could be entertained. An application was subsequently made to the Deputy Collector, who sent for the record from the Court of the Munsif, and on the 22nd of December 1870 ordered that there should be a fresh trial. On the 27th of February 1871 he reheard the case, and decided it in favor of the defendant (the present petitioner).

The Collector on appeal, on the 9th May 1871, held that the Deputy Collector had no power to set aside the order.

On an application by the petitioner to the High Court (Macpherson and Ainslie, JJ.) the learned Judges, on the 31st July 1871, granted a rule calling upon Chunder Kant Roy Chowdhry to show cause why this order of the Collector should not be set aside on the ground that it was made without jurisdiction, the following judgment being delivered by

Macpherson, J.--The reason why I think that the petitioner is entitled to the rule is, that it appears to me that the whole of the proceedings, both before the Collector and the Deputy Collector, were without jurisdiction.

(The learned Judge then stated the facts as above, and continued):--It appears to us to be clear that the Deputy Collector had no jurisdiction in the matter, and that under Beng. Act III of 1870 it was by the Munsif, and the Munsif alone, that the application for the rehearing of the case under s. 58, Act X of 1859, could be heard. I think the whole of the proceedings of the Deputy Collector are irregular and without jurisdiction. But the fact that the Deputy Collector was acting without jurisdiction does not give the Collector jurisdiction in the matter. The Deputy Collector's proceedings were wholly irregular; but so far as I know, no provision is made for any appeal to the Collector in such cases, and the proper remedy would have been by an application to this Court.

In strictness, therefore, I think the petitioner is entitled to a rule (if it be worth while to issue it) calling upon the opposite party to show cause why the Collector's order should not be set aside.

Baboos Rash Behari Ghose and Bhowani Churn Dutt showed cause.

Baboo Anundo Chunder Ghosal in support of the rule.

The judgment of the Court was delivered by

Jackson, J.--We do not consider it necessary to quash the order of the Collector by which the original order of the Deputy Collector was set aside, but we add to it the direction that the application made by the defendant to the Deputy Collector for a new trial be transferred to the Court of the Munsif, who will consider the propriety of granting such application. We do not allow any costs.

* Rule No. 2247 to show cause against an order of the Collector of 24-Pergunnahs, dated the 9th May 1871, quashing an order of the Deputy Collector of Diamond Harbour, dated the 7th May 1870.

(2) Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

The 24th June 1872.

Oodwunt Mahtoon (Judgment-debtor) v. Biddhi Chand Chowdhry (Decree-holder).*

Beng. Act III of 1870--Transfer of Decree--Procedure.

The judgment-debtor in this case having been arrested in execution of an ex parte decree passed against (sic) by the Revenue Court, which decree was afterwards transferred to the Civil Court under Beng. Act III of 1870, applied to the Munsif for a review of judgment. This application was made more than fifteen days after process of execution first issued.

The Munsif held that the case must be decided under Act X of 1859, and refused the application, and his order was confirmed on appeal by the Judge, who was of opinion that the cases of *In re Sreemutty Juggodumba Dossee* 10 B.L.R., App., 22 and *In re Wooma Churn Mozoomdar Ante*, p. 215 clearly showed that the case must be reheard under s. 58, Act X of 1859, and not under s. 119, Act VIII of 1859.

The judgment-debtor then preferred the present appeal.

Baboo Nil Madhub Sen for Appellant.

Baboo Kalikishen Sen for Respondent.

The following judgments were delivered

Couch, C.J.--It is possible that the Judge may have been misled by a passage in the judgment in the case of *In re Wooma Churn Mozoomdar* (a), where it is said that the application for the rehearing of the case under s. 58, Act X of 1859, could be heard, and he may have supposed that the Court was laying down that the application was one under s. 58, Act X of 1859, and must be dealt with according to that Act. But Macpherson, J., was there only describing the application in the terms in which it had been made by the party. It had been erroneously made to the Munsif under s. 58, Act X of 1859, when it ought to have been made according to the provisions in s. 119, Act VIII of 1859, because it was by that Act that the procedure in the transferred suits was to be regulated.

The provisions of the law appear to me to be clear in the first instance, the suits which were pending in the Revenue Courts were not transferred to the Civil Courts, but suits which were brought after Act VIII of 1869 came into force were to be brought in the Civil Courts and to be regulated by Act VIII of 1859. The suits which remained in the Revenue Courts were naturally allowed to be regulated by the practice of those Courts. The Act of 1870 provided for the transfer from the Revenue Courts of the suits which had been allowed to remain there, and it having been provided by the Act of 1869 that the new suits should be regulated by the Code of Civil Procedure, it was natural that the Bengal Legislature should say that all future proceedings in the transferred suits should be regulated in the same way, and that the Civil Court should not apply to the transferred suits a procedure which it was not accustomed to.

The provisions appear to me to be quite consistent. In this case the application was governed by s. 119, Act VIII of 1859, and the period allowed by that section ought to have been given to the party.

We must reverse the order of the lower Court, and remand the case for rehearing. The appellant will have the costs in this Court.

Ainslie, J.--I wish to add that in the order granting the rule in *In re Wooma Churn Mozoomdar Ante*, p. 215, the only question before Mr. Justice Macpherson and myself

was, what Court had jurisdiction to try the case. We did not consider what procedure was to be applied by the Court that might eventually have to try the case, and it was not intended to decide that s. 58, Act X of 1859, would apply.

* Miscellaneous Special Appeal, No. 125 of 1872, from an order of the Judge of Zilla Patna, dated the 19th January 1872, affirming an order of the Munsif of Behar, dated the 9th September 1871.

(3) Before Mr. Justice Bayley and Mr. Justice Ainslie.

The 2nd July 1872.

Raja Mohesh Chunder Singh Surman and Others (Plaintiffs) v. Bhoobun Moyee Debia (Defendant).*

Beng. Act III of 1870--Transfer of Decree--Jurisdiction.

Baboo Gopal Lall Mitter for the appellants.

Baboos Romesh Chunder Mitter and Lalit Chunder Sen for the respondent.

The facts of this case appear sufficiently in the judgment of the Court, which was pronounced by

Ainslie, J.--In this case judgment was delivered by the Deputy Collector on the 3rd September 1868 against certain defendants, then present before him, and the husband of the present respondent, who has since died, and who was then not present.

On appeal by the plaintiff against so much of the order as disallowed a portion of his claim, the Judge made an order on the 25th November 1868 confirming the decision of the first Court, and that judgment was also affirmed by the High Court on the 17th June 1869. Execution as against the husband of the present respondent was sued out on the 9th May 1870, and on the 13th August following a list of certain moveable property belonging to him was filed in Court, but when the order for attachment issued none of those properties could be found, and a return was made to that effect on the 24th August 1870. On that same day an application was made for the sale of certain immoveable properties, and on the 31st August 1870, the respondent filed a petition applying for a rehearing, on the ground that her husband had received no notice of the suit. This application was refused by the Munsif, to whom it was presented (Beng. Act VIII of 1869 having in the meantime come into force), on the 25th February 1871, on the ground that the rehearing was barred by the institution of an appeal and special appeal.

This was clearly wrong, for if the husband of the respondent really had no notice of the suit, he could not be concluded by anything done in it. The plaintiff ought to have tried the question of due service of summons.

On appeal to the Judge that officer held that the Munsif had no jurisdiction in the matter, but that the application should be made in the Revenue Court.

An application having been made to the Deputy Collector on the 12th September 1871, was disallowed on the merits on the 4th October following.

On the 17th February 1872, the order now appealed against was made by the Judge. It says:--"Let the papers be returned to the Collector for disposal with reference to the preceding remarks."

The first ground of special appeal is that the Deputy Collector had no jurisdiction in the matter, and that the Judge was wrong in sending the case to be tried by the Revenue Court.

The jurisdiction of the Revenue Court is now at an end, and it has very recently been determined in *Oodwunt Mahtoon v. Biddhi Chand Chowdhry* Ante, p. 216, that all proceedings under Act III of 1870 must be heard and disposed of by the Civil Courts, and that the procedure to be followed is that of Act VIII of 1859. Everything that has been done in this case by the Revenue Court, and the order of the Judge remanding the case to the Revenue Court, must be set aside as altogether without jurisdiction.

The second ground of appeal is that the Judge ought to have determined whether the application for revival could be entertained, the said application having been made after expiry of the period presented by law. If the state of the case put before us, and which has not been contested, is correct, it would appear that the first process for the enforcement of judgment was executed within thirty days of the date on which the application for rehearing was filed.

The case will have to go back to the Munsif, in order that he may enquire and determine whether notice of the suit was actually served upon the husband of the respondent. If not, she will be entitled to a rehearing.

The costs of this appeal will follow the result.

* Miscellaneous Special Appeal, No. 134 of 1872, against an order of the Officiating Judge of Zilla Mymensingh, dated the 17th February 1872, reversing an order of the Deputy Collector of that district, dated the 4th October 1871.