Asgar Ali Vs Troilokya Nath Ghose

Court: Calcutta High Court

Date of Decision: Feb. 13, 1890

Acts Referred: Civil Procedure Code, 1882 â€" Section 230, 235, 237, 245

Citation: (1890) ILR (Cal) 632

Hon'ble Judges: W. Comer Petheram, C.J; Prinsep, J; Pigot, J; O''Kinealy, J; Ghose, J

Bench: Full Bench

Judgement

O''Kinealy, J.
In this case the plaintiffs obtained a decree against the defendants on the 6th September 1876, and u/s 230 of the CPC it is

said that an application to execute it would have been barred if made after the 6th September 1888. The judgment-creditor applied for execution

on the 6th July 1888. He made his application in the usual form, and in the last paragraph he prayed that certain Immovable properties (as per list)

belonging to the judgment-debtor might be sold. As a matter of fact no list was filed, nor was its absence reported to the District Judge. On the

13th July the Judge directed that the application should be amended on another point, and on the "25th July the Court directed that a further and

different defect should be set right. On the 11th September the decree-holder filed a list of the Immovable properties, and the Judge in the Court

below who tried this case held that although this list was not ordered by the Court yet the Court, by accepting it, allowed the application of the

18th July to be amended, and had perfect power to do so, although at that time the decree was barred by limitation.

2. On the case coming before a Division Bench of this Court, the learned Judges referred to this Bench the following question:

Is an application in terms of Section 235 of the Code of Civil Procedure, but not containing at foot a description of the property such as is

prescribed by Section 237, an application within the meaning of Section 230?

3. To this question I think there can be only one answer, and that in the affirmative. Section 235 prescribes the form in which the application should

be made. That section gives in detail the particulars that shall be entered in an application for execution, just as the previous sections of the Code

describe in what manner the application shall be written. Section 237 is a special section prescribing what further particulars are necessary in cases

where the application for attachment is made in regard to Immovable property. It requires that the application shall contain at foot a description of

the property sufficient to identify it, and also a specification of the judgment-debtor"s share or interest therein to the best of the belief of the

applicant and so far as he has been able to ascertain the same.

4. Every such description and specification must be verified in the manner provided for the verification of plaints.

5. It is thus clear that every application for the attachment of Immovable property must be made in conformity with the directions contained in

Sections 235 and 237 of the Code.

6. Section 245 enacts that-

The Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of Sections 235, 236, 237,

and 238 as may be applicable be the case have been complied with: and if they have not been complied with, the Court may reject the application

or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected.

7. It seems, therefore, difficult to arrive at any other conclusion than that Section 245 treats an application, imperfect by reason that it has not

complied with the provisions of Section 237, as an application for execution of decree u/s 23O of the Code, and my opinion, therefore, is that the

question referred to the Full Bench must be answered in the affirmative. But at the same time I feel I cannot concur in another conclusion arrived at

by the learned Judges who referred this case. In their reference they state-

If without this list the application of the 6th of July was no application in law, execution is barred; but if, even without it, it was an application within

the meaning of Section 230, it is not barred by that section.

8. I regret I cannot bring myself to acquiesce in this conclusion. On the contrary, I am of opinion that the application was barred. Under the

ordinary procedure of our Courts, an application, if perfect in form, is admitted, and an order is immediately granted to execute the decree; but

where a defective application is made, the Court, on receiving it, is directed to ascertain whether the requirements of the law applicable to the case

have been complied with, and, if not, it may either reject it or allow it to be amended. If amended, the application is admitted, and the Court

proceeds to order execution of the decree according to the nature of the application. These are the provisions of Section 245, which is the only

section in the Code allowing amendment of an application for execution. And if we compare Section 245 with Section 53, which provides for the

amendment of plaints, we can hardly help coming to the conclusion that the Legislature never intended that the Court should allow any amendment

of an application to execute a decree after it had been admitted and an order for execution made in the manner prescribed by Section 245, but

rather that it intended that the application should be dealt with on the merits. So I take it that if the application is so defective, is of such a nature

that no relief can be granted, as it is in the present case, the result is that the application must be dismissed. No doubt in several cases in this Court

the decree-holder has been allowed to give in a supplementary list of property to be attached and sold after the application for execution has been

made and granted: but, properly speaking, the applications made in regard to such supplementary lists were not applications to amend, but new

applications for the execution of the decree made within the time allowed by the law of limitation.

9. In the present case the original application was so defective that no relief could be obtained under it; and if the views already expressed are

correct, it follows that the second and further application of the 11th September was barred and should have been rejected.

Ghose, J

10. I also agree in holding that the application in question was an application within the meaning of Section 230 of the Code. But it was defective

and incapable of enforcement, because it did not contain, as provided by Section 237, a list of the properties to be attached and sold. This defect

might have been rectified, under the provisions of Section 245, within any time that the Court should have thought proper to allow; but it is now too

late to do so.