(1868) 08 CAL CK 0023

Calcutta High Court

Case No: Regular Appeal No. 256 of 1868

Mussamut Jumayi		APPELLANT
	Vs	
Sheikh Wahid Ali		RESPONDENT

Date of Decision: Aug. 13, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

There are some facts in this case which are beyond dispute. One is that the plaintiff in this suit was, on the 30th of December 1854, when the litigation was commenced by Wahid Ali against her, entitled to property in her individual character, and that if this suit is not maintainable, her private property will be made available to satisfy the liability of her deceased father for mesne profits and costs, though she has not inherited a farthing from him. This litigation, in which she has been unfortunately engaged, has occupied a space of nearly fourteen years. (His Lordship, after stating the various proceedings which are set out in the referring order of Macpherson, J., down to the bringing of the present suit, continued):--The Principal Sudder Ameen having raised an issue whether the plaintiff inherited any property from her father, Waris Ali, found that the father was a Thanna peon on a salary of rupees 4 or 5 a month, out of which he had to support a wife, two daughters, and a son, besides himself, and he came to the conclusion that he never had any immoveable property, which could have descended to the plaintiff; and he stated that, in his opinion, whatever little property the father possessed, had been seized by his son Inayet Hossein, after his death. The plaintiff having succeeded in her suit, Wahid Ali appealed to this Court, on the 5th of September 1867, contending that no suit could be maintained by the plaintiff, and that as she was a party to the original suit, her only remedy was by application to the Court. I am glad to be able to say that in my opinion there is no legal foundation for this contention.

2. Section 11, Act XXIII of 1861, is that upon which the appellant''s contention is founded. It enacts, amongst other things, that any question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not

by separate suit.

3. It appears to me that this enactment does not apply to a case in which a decree, under which property has been sold in execution, is subsequently reversed upon appeal, and in which the decree-holder is the purchaser under his own decree; and if so, it does not apply to this case, in which the decree under which the execution took place, though not actually reversed, was so far modified by the order of the High Court of the 5th July 1864, that it neither justified the execution which was issued under it, nor the sale which was effected under that execution.

4. Further, it appears to me that the plaintiff was not, so far as her own property was concerned, a party to the suit in which the decree was passed, within the meaning of section 11, Act XXIII of 1861. That decree was against her in her representative capacity, and not in her individual capacity. So far as the suit related to her in her individual capacity, she obtained a decree in her favour with costs. u/s 104 of Act VIII of 1859,* an application was made upon the death of her father, that she and her brother should be substituted as his heirs. That section merely says: "That the Court shall enter the name of such representative in the register of the suit in the place of such defendant, and shall issue a summons to him to appear and defend the suit; and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit."

5. No doubt, she became substantially a party to the suit as one of the heirs of her father, but that was only in her representative capacity. We are now dealing with a section which uses the words "between the parties to the suit," and is directed to be read as part of Act VIII of 1859.

6. There are several sections of Act VIII of 1859, in which as well as in section 11, Act XXIII of 1861, the word "parties" is used, and in which I think it clear that the Legislature intended only parties in their own right, and not parties in a representative character.

7. Section 209, for example, enacts: "That if there are cross-decrees between the same parties for the payment of money, execution shall be taken out by that party only who shall have obtained a decree for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction on the decree for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both decrees."

8. It is clear that the plaintiff was not a party to the suit within the meaning of that section; for, if she was, the present defendant might, in the suit in which he was plaintiff, have set off the mesne profits and costs for which he, as plaintiff in the other suit, had obtained a decree against her as one of the representatives of her father against the costs for which she in her own right had obtained a decree

against him. The greatest injustice would be caused by holding that the present plaintiff was a party within the meaning of section 209.

9. In section 201 of Act VIII, the word "party" is again used. It enacts, that if the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of "his property, or by both, if necessary."

10. If the present plaintiff was a party within the meaning of that section, she was liable to be arrested in execution and to have her own property attached for the mesne profits due from her father, though she never received any assets from him. If she was liable under that section, she would have no right to relief at all, and it would be useless to inquire whether she ought to have proceeded by action or application to the Court out of which the execution issued. No one would, I think, hold that the Legislature intended that a person, circumstanced as the plaintiff is, would be liable to be imprisoned for the debt of her father, when, in fact, she never received any assets whatever from him.

11. Moreover, we find that when the Act intends to deal with a representative, it uses words accordingly. Section 203 says: "If the decree be against a party as the representative of a deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property, or if no such property can be found, and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, the decree may be executed against the defendant to the extent of the property not duly applied by him, in the same manner as if the decree had been against the defendant personally."

12. But the person who obtains a decree against a representative, cannot execute it, against the private property of the representative, unless the representative fail to prove that he has duly applied the assets of the deceased which had been proved to have come into his possession. In this case, it was found, that no assets of the father had come into the hands of the plaintiff.

13. If this action is to be defeated, upon the ground that the plaintiff ought to have applied to the Court in which the decree was obtained by motion or petition for relief, one would expect to find some section pointing out the nature of the application which ought to be made in such a case. But although I asked the learned counsel for the appellant, if he could point out any section of Act VIII of 1859 by which any provision was made for such an application, he was unable to point out any such section.

14. If the suit had been against the defendant individually, and a decree had been obtained against her in her private capacity, and her private property, which is the subject of this suit, had been attached, she could have had no remedy, for the property would be liable to attachment. But her private property was seized under a

decree obtained against her, not in her private capacity, but as the representative and heir of her deceased father, from whose estate she had received nothing.

15. Section 246 would not meet such a case. That section enacts: "In the event of any claim being preferred to, or objection offered against, the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree, or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession, not on his own account, or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immovable or moveable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

16. If the plaintiff had made an application under that section, her claim must have been disallowed, for the property was in her possession on her own account, and not on account of any third person.

17. Section 247 says: "That the claim or objection shall be made at the earliest opportunity to the Court which shall have ordered the attachment; and if the property to which the claim or objection applies shall have been advertised for sale, the sale may (if it appears necessary) be postponed for the purpose of making the investigation mentioned in the last preceding section. Provided that no such investigation shall be made, if it appear that the making of the claim or objection was designedly and unnecessarily delayed with a view to obstruct the ends of justice. The order disallowing the investigation shall not be subject to appeal, and the claimant shall be left to prosecute his claim by a regular suit."

18. It appears to me that the plaintiff, as regards this property, which was seized in execution of a decree obtained by the present defendant, against her in her

representative capacity, was not bound to make an application to the Court, and that her proper remedy was an action. If the defendant had retained possession of her property, her suit would have been to recover it back again; but as it is, she has been restored to the possession of her property, all that she seeks and all that she asks for, is a declaration of her right, and that the sale, under the execution, may be declared to be void, so that the defendant may not enforce his purchase against her. But Mr. Paul says: " Do not give her that relief now; hold that this suit is not maintainable, leave the defendant ant to bring an action to turn her out; and then it can be held that the plaintiff gained no title under the purchase in execution, and he will be defeated in his demand," as if this unfortunate lady had not had a sufficient amount of litigation already respecting her small property, such litigation having commenced in 1854, and continued down to the present time. If the plaintiff is not entitled to set aside the sale in this suit, upon the ground that her only remedy was by motion to the Court, she is equally liable to be defeated if the plaintiff should sue her under his alleged purchase. He will have just as good a ground in such suit as he has in this for contending that the plaintiff''s only remedy was by motion to the Court out of which the decree issued, and on appeal u/s 11 of Act XXIII of 1861 in the event of her application being decided against her.

19. For these reasons, it appears to me that the plaintiff''s suit is maintainable. The decree of the lower Court will, therefore, be affirmed with costs.

Loch, J.

20. I quite concur in the opinion expressed by the Chief Justice.

E. Jackson, J.

21. I concur in the judgment of the Chief Justice.

Macpherson, J.

22. I still incline to the opinion which I expressed in referring this case to a Full Bench, that no separate suit will lie. But in other respects I concur with the Chief Justice.

Glover, J.

I also retain my former opinion, and I was prepared to suggest a course by which Mussamut Jumayi would have been able to recover her undoubted rights, without bringing a fresh suit at all. The decision of the majority, however, effects the purpose I had in referring this case, though in a different way, and I am perfectly satisfied with the result.

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Proceeding in case of death of one of several defendants or of a sole surviving defendants.	Sec. 104:--If there be two or more defendants, and one of them die, and the cause of action shall not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant or sole surviving defendant, where the action survives, the plaintiff may make an application to the Court specifying the name, description, and place of abode of any person whom the plaintiff alleges to be the legal representative of such defendant, and whom he desires to be made the defendant in his stead; and the Court shall thereupon enter the name of such representative in the Register of the suit in the place of such defendant, and shall issue a summons to him to appear on a day to be therein mentioned to defend the suit ; and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit.