

(1881) 01 CAL CK 0021

Calcutta High Court

Case No: None

Ramkumar Ghose and
Others

APPELLANT

Vs

Dinendronath Sannial
and Another

Tarakchandra
Bhattacharjia Vs
Baikantnath Sannial
and Others

RESPONDENT

Date of Decision: Jan. 26, 1881

Citation: (1881) ILR (Cal) 107

Hon'ble Judges: J. W. Colvile, J; Collier, J; B. Peacock, J

Bench: Full Bench

Judgement

B. Peacock, J.

This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 16th of March 1877, which reversed an order of the Subordinate Judge of Rajshahye, dated the 10th July 1875, by which he ordered, amongst other things, that an execution case, No. 69 of 1875, instituted by the respondents against the appellants should be postponed until further orders.

2. At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of Rajshahye so far as it related to the execution case, No. 69 of 1875, and that the respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this report until after the argument of another appeal in some respects connected with this case, in which Tarakchandra Bhattacharjia is the appellant and Baikantnath Sannial and others are the respondents.

3. Their Lordships will now proceed to give their reasons for the report in the first appeal, which will be submitted to Her Majesty at the next Council. The history of the case is stated by the learned Judges in the judgment under appeal. It appears that, in the year 1828, certain persons who are now represented in estate by the appellants, and whom, as well as the appellants, it will be convenient to speak of as the Sannials, obtained a decree against certain other persons who, as well as the Bhuttacharjia, respondents, may be called the Bhuttacharjias, for a sum exceeding Rs. 82,000. It was subsequently held that the judgment carried interest at 12 per cent, from the date of the decree until the realization thereof. In execution of the decree the Sannials attached, sold, and became the purchasers of certain Immovable properties of the Bhuttacharjias, and obtained possession thereof, which they retained for many years. After considerable delay the Bhuttacharjias instituted proceedings to set aside the sale in execution, and on the 10th of November 1857 obtained a decree of the Principal Sadr Amin of Rajshahye, setting aside the sale and declaring the right of the [115] Bhuttacharjias to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sadr Court on the 23rd May 1860.

4. In the interval, between the date of the decree of the Principal Sadr Amin and the affirmance thereof by the Sadr Court, viz., on the 17th of May 1858, Anund Mohun Ghose, the father of the respondent Bamkumar Ghose, and who is now represented by him, obtained a decree against the Bhutta-charjias for a sum exceeding 67,000 rupees. In execution of that decree Anund Mohun Ghose attached, in May 1863, the Bhuttacharjias right to mesne profits under their decree against the Sannials of the 10th of November 1857, and on the 26th May 1865, an order was issued by the District Court for sale of the decree for mesne profits.

5. The sale in execution of the Sannials' decree of 1828 having, as before stated, been set aside, they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were, from time to time, given by different Courts as to the amounts due to the Sannials and to the Bhuttacharjias respectively, on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the Sannials under their decree exceeded the amount due by them to the Bhuttacharjias under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the Sannials and the Bhuttacharjias. It is sufficient to say that, on the 14th of September 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justice Kemp, and Campbell, stating that it had been arranged, by cones(sic) of both parties, that the Sannials should have simple interest only on their original decree from the year 1828 to the date of payment, it being under stock that the cross-decree of the Bhuttacharjias for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges having then

proceeded to modify an order which had been previously made, declared that simple interest [116] only should be calculated on the Sannials' decree from 1828, and that then the decree of the Bhuttacharjias should be set off against the gross amount of the Sannials' decree once for all.

6. It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding in which the Sannials were petitioners, and the Bhuttacharjias were judgment-debtors. Bamkumar Ghose was not a party to the proceeding. He did not, however, proceed to a sale under the execution against the Bhuttacharjias of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the Sannials, together with all interest due thereon, in lieu of the sum of Rs. 74,506 due to him upon the decree obtained against them by Anund Chundra Ghose, his father. The arrangement was carried into effect by a deed of sale, dated the 15th Cheyt 1272, corresponding with the 27th March 1866. It was correctly stated by the High Court that the only question they had to deal with was, whether Ramkumar Ghose, by purchasing the Bhuttacharjias' claim to mesne profits on the 27th of March 1866, after their agreement with the Sannials to have their decree adjusted by set-off, recorded in the order of the 14th September 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the Bhuttacharjias' decree.

7. The Subordinate Judge had held that Ramkumar Ghose, by privately purchasing the mesne profits from the Bhuttacharjias, had destroyed the right which he possessed under his attachment as a decree-holder, and stayed his execution against the Sannials. The High Court reversed that decision, and held that the benefit of the attachment was not affected by the private purchase, and that Ramkumar Ghose was entitled, so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent-decree between the Sannials and the Bhuttacharjias which had been recorded behind his back while the property was subject to his attachment. They, however, limited the right of Ram-[117] kumar Ghose to avail himself of the mesne profits freed from the Sannials' right of set-off to the extent of satisfying the amount of his decree against the Bhuttacharjias with simple interest to the 14th September 1865, the date of the consent order.

8. Their Lordships are of opinion that the private sale to Ramkumar Ghose was not tantamount to, and had not the same effect as, a sale in execution of Ramkumar Ghose's decree, under which the mesne profits had been attached; and that Ramkumar Ghose, by virtue of his purchase, acquired no greater interest than the Bhuttacharjias had in the decree for mesne profits, and consequently that he was bound by the order of the 14th September 1865.

9. By Section 201 of Act VIII of 1859, it is enacted that if the decree be for money (which Ramkumar Ghose's decree was), 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. By Section 205 debts due to the judgment-debtor may be attached and sold as property in execution of a decree. By Section 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court; and then by Section 240, in the ease of an attachment by written order, any payment of the debts to the judgment-debtor after the order shall have been made known in the manner in the said Act mentioned, and during the continuance of the attachment, shall be null and void.

10. It is not necessary to decide whether, if Ramkumar Ghose had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th September 1865, the attachment having been issued pendente lite,—that is to say, pending the proceedings between the Sannials and the Bhuttacharjias, in which the question was raised as to the right of set-off. It may be admitted for the sake of argument, but only for the sake of argument, that [118] the order of the 14th September 1865, made by consent of the Sannials and of the Bhuttacharjias, directing the set-off, amounted to a payment of the mesne profits by the Sannials to the Bhuttacharjias, and a receipt thereof by the Bhuttacharjias within the meaning of Section 240. The effect of that Section, however, is not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void, so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the ease of *Anund Loll Doss v. Jullodhur Shaw* (14 Moore I.A. 549). The private sale, pending the attachment, was binding upon Ramkumar Ghose, and also upon the Bhuttacharjias. Ramkumar's decree was satisfied by the sale to him of the mesne profits in lien of the sum due to him under his decree. He never afterwards could have proceeded to execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached, he abandoned his execution, and also the attachment, which was a part of the execution.

11. There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by

him subsequently to the attachment of the property sold in execution.

12. The High Court relied upon the case of Annavunavadan v. Iyasawmy Pillai (6 Mad. H. C. Rep. 65), but there is a distinction between that case and the present, for there the property sold was hypothecated to the plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than [119] the decision under consideration, and their Lordships are not prepared to say that it would have been affirmed on appeal.

13. Their Lordships cannot but regard as lamentable, the long, harassing, and expensive litigation to which the Sannials have been subjected in endeavouring to obtain the fruits of their decree of 1828, an object which, although upwards of half a century has elapsed since the date of t b decree, they have not as yet attained. It is indeed a subject of deep regret that in the course of that litigation so many contradictory and conflicting judgments have been delivered, sometimes on appeal from an inferior to a superior Court, and sometimes even by the same Judges in reviewing their own judgments.