(1870) 02 CAL CK 0034

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 363 of 1869

Radha Prasad Singh		APPELLANT
	Vs	
Megh Narayan Sing and Others		RESPONDENT

Date of Decision: Feb. 24, 1870

Judgement

C.P. Hobhouse, J.

We think that this appeal must; be dismissed with costs. The decree-holder in this case was one Maheswar Bax Sing. The decree was for possession of certain immoveable properties. On the 22nd January 1869, one Radha Prasad Sing, who is admitted to be the son of the said Maheswar Bax Sing, applied for execution of the decree, offering security by reason that an appeal was pending in the Privy Council. The judgment-debtors objected to this application, on the ground that the said Radha Prasad could not be substituted as decree-holder in the place of his father, because the father had made no legal assignment to the said Radha Prasad of the decree. The Court below called for what is called a kyfeut (or "statement") from the Maharaja, Maheswar Sing; and on receiving such kyfeut, purporting to declare that the decree had been assigned over to the said Radha Prasad, the Court directed, u/s 208 of the Code, that the said Radha Prasad might be substituted as decree-holder in the place of his father.

2. The judgment-debtors appeal against this order, averring that there is no legal evidence on the record of any transfer of the decree within the meaning of section 208 from the original decree-holder to Radha Prasad.

3. The question, however, has first to be determined whether any appeal lies against an order passed under the provisions of section 208. That section runs in these terms:--"If a decree shall be transferred by assignment or by operation of law from the original decree holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred or his pleader; and if "the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." Then section 364

declares:--"" No appeal shall "lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided." Then section 11, Act XXIII of 1861, provides, after stating certain questions that may arise between the decree-holder and the judgment-debtor, that these and any other questions 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, and the order passed by the Court shall be open to appeal." It seems to us clear upon reading these three sections together, that by section 208 it is within the discretion of the Court to grant or to refuse an application of the nature before us. The words are "if the Court shall think proper." Then, clearly, by the provisions of section 364, no appeal lies from such order, unless such appeal will lie under the specific provisions of section 11, Act XXIII of 1861. Those provisions are very clearly in the words of the law confined to questions arising between the parties to the suit in which the decree was passed." Before therefore any appeal will lie in execution proceedings, it seems to us necessary that there must be some question which has arisen between the parties to the suit in which the decree was passed, Now, obviously and upon the contention which the appellant would raise before us, Radha Prasad was not a party to the suit in which the decree was passed; and therefore if we were to read the law, as I think we are bound to read it, in its literal sense, we could not think that any appeal lies against the order of the Court at present before us. But the pleader for the appellant refers us to the judgment in Bishtu Narayan Bandopadhya Vs. Ganga Narayan Biswas . I am not sure that I quite understand, from the expressions used by the learned Judges in that case, what exactly the facts were before them, but they seem to have held that, if a person is brought in as the representative of a judgment-debtor in a suit, then such a person would have a right of appeal under the provisions of section 11, Act XXIII of 1861, though he was not originally a party to the suit. On this point the learned Judge, Mr. Justice Jackson, remarks:--"I find it impossible to come to the conclusion that the Legislature meant to enable orders to be male in execution of a decree affecting persons who were not originally parties to the suit, and who became parties subsequently to the "decree in their representative character, and then to shut out such "parties from the benefit of an appeal to the superior Court. I do not think, therefore, that we ought to say that this is an appeal which the "Judge was not competent to entertain." This is Mr. Justice Jackson"s judgment in which the other Judge concurs. But even if we were to hold that the facts before that Judge were analogous to the facts now before us, and that therefore the precedent applied, still one at least of the learned Judges admits that it is contrary to an opinion expressed by a majority in Mussamut Jumayi Vs. Sheikh Wahid Ali . But in truth I do not think that the circumstances of the present case are similar to the circumstances of that case, for here the very contention of the appellant is that, properly speaking, the respondent was not a party to the suit in its present stage, and it seems, therefore, hardly possible to maintain the position that for the purpose of the appeal he is to be considered a party, whilst yet the object of the appeal is to have it declared that be is not a party; and at any rate the law is clear that the question is not one in which an appeal lies, because it is a question arising between persons who were not parties to the

suit in which the decree was passed. I think therefore that an appeal does not lie, and I would therefore dismiss this appeal with costs.