(1868) 02 CAL CK 0007

Calcutta High Court

Case No: Special Appeal No. 224 of 1867 and Miscellaneous No. 317 of 1867

Radha Binode Chowdhry		APPELLANT
	Vs	
Digumburee Dossee and Others The Maharaja of Burdwan Vs Nund Kishore Doss Mohunt		RESPONDENT

Date of Decision: Feb. 3, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

We are of opinion that, in cases falling under s. 119 of Act VIII of 1859, the application must be made within a reasonable time, not exceeding thirty days after process for enforcing the judgment has been executed. The question is, what is the meaning of the words "within thirty days after any process for enforcing the judgment has been executed;" whether they mean, in the cases of property attached, within thirty days after the sale, or simply within thirty days after the attachment? Kemp and Markby, JJ., have held that they mean within thirty days after the property has been actually sold in Radha Binode Chowdhry v. Modhoo Soodun Sircar, 7 W.R., 198. If the time runs from actual sale, I apprehend that they must run from the date of confirmation of sale; for, until it is confirmed, there is no actual binding sale of the property in execution.

2. The case which is provided for is the case of decrees passed against a defendant ex parte, and the object of the Legislature seems to have been to take care that, in the case of an ex parte decree, the party against whom it is passed may have an opportunity of showing that he had no notice of the suit. The Legislature have fixed thirty days after process for enforcing the judgment has been executed. The Legislature provided that, before an ex parte decree should be given, the Judge should be satisfied that the defendant had been served with a summons. S. 111 says:-- "If the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit ex parte" The Court cannot pass an ex parte decree against a defendant until it is

satisfied that the summons has been served, and it is only to provide for the contingency of the Judges being satisfied that the summons has been served when it has not been served, that this provision is made for the defendants coming in and asking to have the ex parte decree set aside. If the plaintiff makes a false representation, he would be liable to punishment for perjury, or the fraud would itself vitiate the decree, and the other party might, on the ground of fraud, come in at any time to set aside the decree. But where a defendant is not served with a summons, he may not know of the decree. The first notice he may have of it is when his property is attached in execution. S. 119 was to provide against the contingency of the defendants not being served with a summons, and it allows him to come in to set aside the judgment within thirty days after process for enforcing it has been executed.

3. By s. 232 it is provided:-- "If the decree be for money, and the amount thereof is to be levied from the property of the person Against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following." If the property consists of lands, houses, or other immoveable property, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift or any other way, and all persons from receiving the same by purchase, gift or otherwise; see s. 235. When that, notice has been given, the process of attachment has been executed. That is one process of execution. The plaintiff who executes the process is not to sell. S. 248 declares that "sales in execution of decree shall be conducted by an officer of the Court, or by any other person whom the Court may appoint."

4. It appears to us, therefore, that, as soon as the property has been attached under the warrant of the Court, directing the bailiff to attach it in execution, there has been a process of execution completely executed, and the party wishing to have the ex parte decree set aside must come in within thirty days from that time.

5. If he is entitled to wait until thirty days after the sale has been actually confirmed, then let us see what time he will get. By s. 246 it is enacted:-- "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 s. 220."

6. He might be occupied six months (more or less) doing that. Then he is to proceed under s. 248, and after that there must be a proclamation under s. 249, and the sale cannot take place until after thirty days from the date of proclamation. Under s. 256 before the Court can confirm the sale, thirty days are allowed for application being

made to the Court to set aside the sale on the ground of irregularity; and if no such application be made, the Court shall pass an order confirming the sale. So that the party gets thirty days after proclamation, and thirty days after the sale, before confirmation can take place, in addition to any time occupied in consequence of claims to the property. Then, in addition to that, under s. 256, he may come in and represent that there was an irregularity or any other matter, and thus occupy the Court for a considerable time; and then, if the construction contended for is correct, he is to have thirty days in addition to all this.

7. In the order of reference in case No. 317, L.S. Jackson, J., has stated the point so clearly that we cannot do better than give his own words. He says:-- "If we were to hold otherwise, it would follow that the defendant might raise, successively, a number of objections to the proclamation, or to the sale of his property, and contest these questions in every stage; and finally, when the decision had been given against him, and the sale was confirmed, he might then turn round and, under s. 58, claim a new trial. It appears to me that the Legislature cannot have intended that; but that, as soon as execution of some process or writ against the defendant had apprised him of the fact of the decision, he is bound thereupon to apply to the Court "within fifteen days for a new trial."

8. It appears to us, therefore, that process of execution is executed, within the meaning of s. 119, when an attachment of the property takes place, and that if the party means to contest the validity of the decree, on the ground that he had no notice of the summons, he must come in within thirty days from that time in cases under Act VIII of 1859, and within fifteen days in cases tried under Act X of 1859. Both cases will go back to their respective Division Benches for final determination, together with this expression of our opinion.