(1910) 09 CAL CK 0029

Calcutta High Court

Case No: Appeal from Order No. 457 of 1909

Moharaj Kumar Bindeswari Charan Singh		APPELLANT
	Vs	
Thakur Lakpat Nath Singh		RESPONDENT

Date of Decision: Sept. 5, 1910

Citation: (1910) 09 CAL CK 0029

Final Decision: Dismissed

Judgement

1. This is an appeal on behalf of the judgment-debtor against an order by which execution has been allowed to proceed. There is no controversy as to the circumstances under which the Appellant, an infant, resists execution of the decree. The Plaintiff sued for declaration of title, for confirmation of possession and for a permanent injunction to restrain the Defendants from interfering with his possession. The Subordinate Judge made a conditional decree in favour of the Plaintiff for recovery of possession upon payment of a specified sum. The principal Defendants against whom the decree was made were the present Appellant, an infant, represented by his mother, and also his father. Against the decree, the infant alone appealed to this Court. When the appeal came to be heard, it was argued on his behalf that the decree against him ought to be discharged, because he had been re presented in the suit by his mother, a married woman, in contravention of the provisions of sec. 457 of the CPC of 1882, as explained in Kali Shankar v. Maharaja Pratap Udai Nath 6 C. L. J. 36 (1907). To this objection, the reply on behalf of the Plaintiff-Respondent was that if it was well-founded, the logical inference was that the appeal itself was incompetent because it had been presented on behalf of the infant by his mother. The Appellant accepted this position and the appeal was dismissed on the ground that it had been preferred on behalf of the minor by a person not competent to represent him. Upon dismissal of the appeal, the decree-holder applied to execute the decree. It was then objected on behalf of the infant by his mother that the decree could not be executed against him because there was no valid decree

against him. The Deputy Commissioner has overruled this objection on the ground that the question of the validity of the decree could not be examined in execution proceedings under sec. 47 of the Code of 1908. In this view, the Court below has overruled the objection and directed execution to proceed. The infant has now appealed to this Court represented by his mother, and on his behalf, it has been argued that the Court below ought to have held that the decree is not binding upon the infant and cannot be executed against him. In our opinion, the contention is obviously unsustainable in execution proceeding. The learned Vakil for the Appellant has appreciated the difficulty of his position, because if his contention is well-founded, the infant is not a party to the suit, and the question raised does not fall within the scope of sec. 47, which authorizes a Court of execution to deal only with questions which arise between the parties to the suit in which the decree was made or their representatives. Consequently the order of the Court below is, in this view, not a decree and the appeal is incompetent. But he has argued that as the order of the Court below purports to have been made under sec. 47, it must be taken to be a decree and appeal able as such. In support of this proposition reliance has been placed upon the cases of Hurrish Chandra v. Kali Sundari L. R. 10 I. A. 4 : s. c. I. L. R. 9 CaL 482 (1882), Abdul Rahiman v. Ganapati I. L. R. 23 Mad. 517 (1900) Latchmanan v. Ramanathan I. L. R. 28 Mad. 127 (1904) and Bickett v. Morris L. R. 1 Sc. & Div. 47 (53) (1866) to show that when jurisdiction has been usurped by a Court an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction, in other words, that a party who has induced a Court to act without jurisdiction cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction. In our opinion, there is considerable force in this contention and the present appeal must be treated as competent. Indeed, the Respondent has not argued that the appeal is incompetent, because his position here as in the Court below has consistently been that the decree binds the infant and may be executed against him.

2. As regards the merits of this appeal, it has been argued that it is not open to the decree-holder to contend that the infant was properly represented in the suit, because to allow him to do so would be to permit him to take up a position inconsistent with that assumed by him when the appeal against the original decree was heard. In our opinion, this is not an accurate statement of the actual position. When the appeal against the original decree was heard, the Respondent did not take exception to the competency of the appeal; it was the Appellant who made a bold effort to assume a position contradictory to that adopted by him in the original Court, where no suggestion had been made that the infant was not properly represented. To this argument of the Appellant, the Respondent appropriately replied that it necessarily tended to destroy his appeal. The Appellant voluntarily assumed that portion and practically invited the Court to dismiss his appeal as incompetent. It is difficult to appreciate how, under these circumstances, the decree-holder can be charged with inconsistency, or how it can be seriously maintained that as between him and the infant judgment-debtor, it has been conclusively established

that the decree does not bind the latter. Nothing that happened in this Court when the appeal against the original decree was heard can possibly support this conclusion. The doctrine that a party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent is firmly settled and has been repeatedly applied. [Gandy v. Gandy 30 Ch.; D. 57 (82) (1885) Sir Chandra v. Bansidhar 3 B. L. R. 214 (1869)., Brijbhoohun v. Mohadeo 17 W. 11. 421 (1872) Efatoonnissa v. Khondkar Khoda 21 W. R. 374 (1874) Sonaoolla v. Imamooddin 24 W. R. 273 (1875), Dabee v. Mungar 2 C. L. R. 208(1878), Sutyabhama v. Krishna I.L. R. 6 Cal. 55 (1880) Bhaja v. Chuni Lal 5 C. L. J. 95 (105) (1906). Manindra v. cretary of State 5 C. L. J. 148 (169) (1907). Broom on Legal Maxims 132]. But this principle cannot be applied to the prejudice of the present Respondent.

3. The only question which now requires consideration is, whether it was open to the Court below to investigate the validity of the decree and its binding character in so far as the infant is concerned. That it was not competent to the Court below, as an execution Court, to embark upon such an enquiry is, in our opinion, beyond the pale of controversy. It is elementary doctrine that an execution Court when called upon to execute the decree must proceed on the assumption that there is a valid decree capable of execution. The party who seeks to attack the decree must do so in a separate proceeding, for example by a suit or an appeal or an application for review. If any authority is needed for a proposition of this character, it is sufficient to refer to the decision of the Judicial Committee in Rashidunnisa v. Muhammad Is mail L. R. 36 I. A. 168: s. c. I. L. R. 31 All. 672; 13 C. W. N. 1182 (1909) and the case of Khiarajmal v. Diam L. R. 32 I. A. 23 : s. c. 9 C. W. N. 201; I. L. R. 32 Cal. 296 (1904) tends to support the same conclusion. The Court below adopted an obviously right course when it declined to consider the validity of the decree.

4. As a last resort, the learned Vakil for the Appellant has asked for permission to treat the petition of objection in the execution proceedings under sec. 47 of the Code of 1908 as a plaint in a suit for declaration that the decree was not operative against the infant. In the circumstances of this case, we do not think that this application should be granted. The petition of objection requires considerable modification before it can be treated as an appropriate plaint in a declaratory suit. Besides no question of limitation can arise as the Appellant is still an infant. It will therefore be obviously more satisfactory if a separate suit to test the validity of the decree is instituted by the infant upon a plaint properly drawn up for the purpose. But to guard against any possible injury to the infant by reason of an execution against him before the proposed suit is instituted we shall direct a stay of execution for a limited time. The result, therefore, is that the order of the Court below must be affirmed and this appeal dismissed with costs. We assess the hearing fee at 5 gold mohurs. We further direct that the execution be stayed till the 50th November next.