

Mujib-ullah Vs. Umed Bibi

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Court : Allahabad

Decided On : Jul-31-1908

Reported in : (1908)ILR30All499

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Mujib-ullah

Respondent : Umed Bibi

Judgement :

John Stanley, C.J.

1. The question in this appeal is whether an application for execution made on the 13th of January 1906, is barred by the provisions of Section 230 of the Code of Civil Procedure. Both the lower Courts, as also a learned Judge of this Court, have held that it is not so barred. The circumstances of the case are somewhat peculiar. It is an order of the 10th of February 1904, upon which the real question in my opinion turns. It appears that an application for execution was made by the decree-holder, and the property was attached and directed to be sold. A proclamation for sale was issued, but the sale proved abortive owing to the absence of bidders. Thereupon the decree-holder was required to pay amin's fees and also the fees for a further sale notification. It seems to me that this was not a proper order in view of Rule 388 of the Rules of Court of the 4th April 1894. That rule provides, amongst other things, that no fee shall be chargeable for serving or

executing any process issued a second time in consequence of an adjournment made otherwise than at the instance of a party. Now the adjournment in this case was not at the instance of the decree-holder. It was rendered necessary by the fact that no bidders attended at the sale, and therefore, in the absence of authority to the contrary, I should be prepared to hold that the Court was not justified in requiring the decree-holder to pay further fees. The decree-holder did not pay further fees within the time fixed, notwithstanding that several opportunities were given him for the purpose of making such payment. In consequence of his default the order of the 10th of February 1904 was passed. By that order, after stating that the decree-holder had not deposited auction fees in spite of demands, it was directed that the execution case should be for the present struck off the list of pending cases, the decree-holder to pay the costs of execution. It seems to me upon the language of this order that it amounted to nothing more than a direction that the proceedings should remain in abeyance for the time being. It was not a final order disposing of the execution application. If this was not so, the words for the present' would be meaningless. In this view it appears to me that the case is not similar to that of Dhukiram Srimani v. Jogindra Chandra Sen (1900) 5 C.W.N. 347, which has been relied upon by Dr. Satish Chandra Banerji, in which it was held that a subsequent application was not a continuation of a previous application for execution " inasmuch as there was a clear break in the continuity by reason of the decree-holder's omission to deposit the costs for service of a fresh sale proclamation and thereby the previous proceeding came to an end.' Here the previous proceeding did not come to an end, but was kept in abeyance. It appears to me that the case more nearly resembles that of Rahim Ali Khan v. Phul Chand (1890) I.L.R. 18 All. 482. For these reasons I think that the application of the 13th of January 1906, was a proper application and was rightly granted. For these reasons I would dismiss the appeal.

Banerji, J.

2. I also would dismiss the appeal. The decree in this case was passed on the 20th of May 1880. The application made on the 13th of January 1906 would therefore be barred under the provisions of Section 230 of the Code of Civil Procedure, if it could be treated as an application for execution within the meaning

of that section. A previous application for execution had been made within 12 years from the date of the decree, and if the proceedings which took place in pursuance of that application were not determined by reason of the Court dismissing the application, the present application might properly be regarded as an application in continuation of the previous application. The question whether the present application is a fresh application for execution turns on the meaning and effect of the order of the 10th of February 1904, by which the proceedings in execution under the previous applications were terminated. That order directs the execution case to be removed from the list of pending cases 'for the present.' The Court must have used the words 'for the present' with some purpose. It did not order the property which had been attached to be released from attachment. The use, therefore, of the words 'for the present,' seems to indicate that what the Court intended was only to keep the execution proceedings in abeyance to be renewed again. Under these circumstances the application of the 13th of January 1906, may be reasonably assumed to be an application for the revival of the proceedings which had been kept in abeyance by the order of the 10th of February 1904. In the Full Bench case of *Rahim Khan v. Phul Chand* (1896) I.L.R. 18 All. 482 it was held that a subsequent application will not necessarily be deemed to be a fresh application for execution, if by reason of objections on the part of the judgment-debtors or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution could not be obtained. In the present instance, it seems, the decree-holder was not bound, having regard to Rule 388 of the Rules of the 4th of April 1894, to pay fresh fees for the issue of a proclamation of sale a second time. There was therefore no default on his part and the proceedings were not terminated in consequence of his omission to do something which he was bound to do. That, in my opinion, is another reason why the subsequent application of the 13th of January 1906, should not be treated as a fresh application for execution. It should be held to be, as it purported to be, an application in continuation of the previous application for execution. For these reasons I agree with the learned Judge of this Court from whose judgment this appeal has been preferred in holding that the application for execution not barred.

3. The order is that the appeal be dismissed with costs.

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