

Kalyan Singh Vs. Damber Singh

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Court : Allahabad

Decided On : May-21-1909

Reported in : 2Ind.Cas.626

Judge : Banerji and ;Tudball, JJ.

Appellant : Kalyan Singh

Respondent : Damber Singh

Judgement :

1. This appeal arises out of an application for the execution of a decree under the following circumstances. One Sri Kishen Das obtained in the year 1902 a decree for possession and costs against several defendants. Possession has been delivered to him but the decree subsists as a decree for costs. Among the numerous defendants against whom the decree for costs was passed was the respondent Dambar Singh. In 1907 he obtained a decree for profits against Sri Kishan Das and in execution of that decree he attached the decree for costs held by Sri Kishan Das to which we have referred above. In his capacity as attaching creditor he has applied for execution of the decree held by Sri Kishen Das and is now seeking to recover the amount of it from the appellant Kalyan Singh who has purchased some property from Ram Chandar, one of the judgment-debtors under Sri Kishen's decree. It is contended on behalf of Kalyan Singh that as Damber Singh is himself a judgment-debtor to the decree which he is now seeking to execute, he is not entitled to take out execution but can only claim contribution

from his co-judgment-debtors. This contention does not appear to us to be well founded. By virtue of his having attached the decree held by Sri Kishen he was entitled to take out execution of it under the provisions of Section 273 of Act XIV of 1882. He is not an assignee of the decree and the ownership of it has not passed to him. In the case of an assignment of a decree the law provides (see Section 232 of Act XIV of 1882) that a judgment-debtor who is the assignee of the decree is not entitled to apply for execution of it. This rule is manifestly based on the ground that by purchasing the decree the assignee of it has discharged it and the decree no longer subsists and his only right is to claim contribution from the other judgment-debtors. In the case of a decree which has been attached the person who has caused it to be attached has not acquired the ownership of the decree. The decree has not vested in him and he is only doing that which the original decree-holder, who still remains the owner of the decree, could have done. The equity which exists in the case of an assignment of the decree to one of the judgment-debtors, does not subsist in the case of a person who has only caused the decree to be attached. The original decree-holder Sri Kishen Das was fully competent to take the execution of his decree for costs against any one of his judgment-debtors. This right also exists in Damber Singh who is entitled by reason of his having caused the decree to be attached, to apply for its execution. For these reasons, we are of opinion that Damber Singh is competent to take out execution of the decree.

2. The next plea urged on behalf of the appellant is that he holds a prior mortgage of the property which is sought to be attached and that that property should be sold subject to his mortgage. This objection seems to us to be premature. The prior incumbrance alleged to be held by him should be brought to the notice of the Court when proceedings are taken under Order 21, Rule 66, of the Code of Civil Procedure for settling the proclamation of sale. We, therefore, dismiss the appeal with costs.