

Gopal Chandra Bose and anr. Vs. Hari Mohan Dutt and ors.

Gopal Chandra Bose and anr. Vs. Hari Mohan Dutt and ors.

SooperKanoon Citation : sooperkanoon.com/854915

Court : Kolkata

Decided On : Mar-26-1915

Reported in : 30Ind.Cas.49

Judge : Asutosh Mookerjee and; Newbould, JJ.

Appellant : Gopal Chandra Bose and anr.

Respondent : Hari Mohan Dutt and ors.

Judgement :

1. We are invited in this Rule to set aside an order made under Section 73 of the Code of Civil Procedure, 1908. The property brought to sale is an occupancy holding owned by the Pals. Two sets of decree-holders, the Boses who are the petitioners in this Court and the Butts who are the opposite parties to this Rule, sought to satisfy their dues from the Pals by the sale of this property. The Dutts applied for execution of their decree for money against the Pals. The Pals objected that the holding was not transferable and could not be sold in execution of a decree for money. This objection was overruled by this Court on the 24th June 1912, when it was held that the holding was transferable by custom and was liable to be brought to sale in execution of a money decree. On the 15th March 1918, the Hoses applied for execution of the decree for money which they held against the Pals. They stated that an application for execution had already been made at the instance of the Dutts and the 9th April 1913 had been -fixed for the sale of the property. They prayed in the alternative that if the property was; sold at the

instance of the Dutts, they might be allowed rateable distribution under Section 73 of the Code; if, on the other hand, the property was not brought to sale by the Dutts, they themselves might be permitted to attach and sell it. For some reason not explained, the property was not actually sold on the 9th April 1913. The Pals then objected to the attachment of the property by the Boses, and this time they were more fortunate than they had been with their objection against the attachment and sale of the property at the instance of the Dutts. The Court held that the holding had not been established to be transferable by custom and ruled on the 9th March 1914, that it could not be attached by the Hoses. Their application of the 15th March 1918, in so far as it related to the prayer for rateable distribution, however, remained on the file, and the Court directed it to be heard along with the execution case initiated by the Dutts. The property was sold at the instance of the Dutts on the 16th March, 1914. The Boses then prayed that they might be allowed to share rateably in the sale-proceeds. The Dutts objected that as the loses had failed to attach the property, they could not be allowed rateable distribution under Section 73. The Court adopted this view and on the 3rd September 1914, disallowed the prayer of the Boses for rateable distribution. On the very next day, the sale-proceeds were paid out to the Dutts. The Boses now invite this Court to set aside the order of the 3rd September 1914, on the ground that the Court should have held that they have a locus standi to make the application for rateable distribution. The Dutts contend that the Rule should be discharged on two grounds: Ural, that inasmuch as they have already withdrawn the money from the Court, there can be no order for rateable distribution; and secondly, that as the Roses failed in their application for attachment of the holding, they cannot be permitted to claim rateable distribution under Section 73. In our opinion, both these objections are unsustainable.

2. As regards the first objection, it is obviously open to this Court, should the order of the 3rd September 1914 prove erroneous, to direct the Dutts to bring back into Court the money they had withdrawn on the basis of that order. It is well settled that if pursuant to an erroneous order of a subordinate Court money has been paid out to a litigant, it is competent to' this Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice

between the parties. This fundamental principle is amply supported by the decisions of *Mrinalini Dasi v. Abinash Chunder Duth* 6. Ind. Cas. 508 : 11 C.L.J. 533 : 14 C.W.N. 1024; *Nobin Kali Debi v. Banalata Debi* 33 C. 921 : 2 C.L.J. 595; *Jogesh Chandra Roy v. Yakub Ali* 21 Ind. Cas. 111 : 17 C.W.N. 1057. If the contrary view were taken, the result would be that this Court would find itself helpless when its interference was imperatively needed in the interests of justice. In the present case, it may be observed that the withdrawal of the money was so expeditious that the petitioners had no opportunity whatsoever to apply to this Court to obtain an ad interim order for stay of proceedings and for retention of the money in Court. The first objection to the Rule consequently fails.

3. As regards the second objection, it is plain that to bring a case within the scope of Section 73, it is necessary to establish that, before the receipt of the assets in respect whereof rateable distribution is claimed, more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof. In the present case, an application was made by the Boses for execution and rateable distribution on the 15th March 1913; that application was still pending on the 16th March 1914, when the assets were realised. It may be conceded that if on an application for execution, it has been held that the decree has been satisfied or is barred by limitation, or if such application has been dismissed and is not pending at the time when the assets are realised, no valid claim for rateable distribution can be laid under Section 73. But the case before us is of an entirely different description, for on the 9th April 1913, the Court had expressly directed that the prayer of the Boses for rateable distribution be considered along with the execution case initiated by the Butts, and such claim for relief still awaited investigation when the assets were realised at the instance of the Dutts. Reliance has, however, been placed on behalf of the Dutts upon the decision of *Bithal Das v. Nand Kishore* 23 A. 106 : Q.W.N. (1901) 4 which was distinguished by this Court in *Ramjash Agarwala v. Guru Charan Sen* 3 Ind. Cas. 105 : 11 C.L.J. 69 : 14 C.W.N. 396. There it was found that one of two decree-holders had attached the interest of the judgment-debtor in a joint Mitakshara property. Before the other decree-holder could attach that property, the judgment-debtor died, and it consequently became impossible for him to proceed against an interest in joint

property, which had become vested by survivorship in the other members of the joint family. In these circumstances, it was ruled by Strachey, C.J., that as the decree-holder had lost, his right to attach the share of the judgment-debtor who had died before attachment could be effected, he could not claim rateable distribution. 'We have here to deal with an entirely different set of circumstances; but it is worthy of note that Banerjee, J., did not rest his decision on the same ground as Strachey, C.J., whose view is not quite in harmony with the decision of the Bombay High Court in *Sorabji Edulji Warden v. Govinda Ramji* 16 B. 91. It is needless for us to pronounce an opinion upon the precise question raised in *Bithal Das v. Nand Kishore* 21 Ind. Cas. 111 : 17 C.W.N. 1057; it is sufficient to hold that it is clearly distinguishable and does not apply to the facts of this case. Here the property has been held by the Court to be a saleable occupancy holding; it has actually been brought to sale as such and converted into money at the instance of the opposite party. They, however, argue that the petitioners are not entitled to rateable distribution, because they were unsuccessful in their allegation that the property was saleable. This contention is clearly untenable. Nor can we accede to the suggestion that it was the imperative duty of the petitioners to come to this Court and have the erroneous order against them set aside before they could claim rateable distribution.

4. The result is that this Rule is made absolute and the order of the 3rd September 1914 set aside. The Court below will make an order for rateable distribution, and the Dutts will bring back into Court, within such time as may be prescribed by that Court, so much of the money withdrawn by them as is necessary for payment to the Boses. The petitioners are entitled to their costs both here and in the Court below. 'We assess the hearing fee in this Court at two gold mohurs.