

Kumar Krishna Mitter Vs. Amulya Charan Mitter

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Court : Kolkata

Decided On : Jan-11-1915

Reported in : AIR1915Cal788,31Ind.Cas.616

Judge : Chitty, J.

Appellant : Kumar Krishna Mitter

Respondent : Amulya Charan Mitter

Judgement :

Chitty, J.

1. This is an application by Kumar Krishna Mitter, decree-holder in Suit No. 163 of 1914, asking that a fund of Rs. 4,650-2-7 lying in the hands of the Accountant-General of this Court to the credit of the said suit be, after payment of the petitioner's costs, divided rateably between the petitioner and Ram Chandra Ray Chaudhuri, execution-creditor in Suit No. 453 of 1910. The facts are as follows: Property which had belonged to Hari Das Mitter, deceased, was subject to a mortgage, dated 19th December 1901, in favour of Byomkesh Chuckerbutty. The mortgagee instituted a suit on his mortgage (No. 179 of 1911) making the representaives of Hari Das Mitter party defendants. The final decree in that suit, dated 15th January 1913, ordered a sale of the mortgaged property. The sale took place on 2nd May 1914, and after making the first and second payments prescribed by Section 73(1), proviso (c), (It does not appear that there were any

subsequent incumbrances), there remained a sum of Rs. 4,650-2-7 as surplus sale-proceeds.

2. On 6th April 1914, the present petitioner obtained a decree in this Court for Rs. 1,644-15 9, interest and costs against the estate of Hari Das Mitter. On 18th June 1914, he applied for execution and attached the surplus sale-proceeds above mentioned. In November last, he applied to have the said fund transferred to the credit of his suit, No. 163 of 1914, and it was so transferred under an order of 2nd December 1914. That transfer was made without notice to other creditors. The certificate of the Accountant-General, which was the only certificate required on the application for transfer, showed no attachment or other impediment as regards that fund.

3. On 22nd December 1908, Ganga Das Mahta had obtained a decree in Small Cause Court Suit No. 22785 of 1908, against the estate of Hari Das Mitter for Rs. 1,684-2-0, including, costs and interest up to 26th April 1911. The statement in paragraph 13 of the present petition, that that was a personal decree against Amulya Charan Mitter and Bireshur Mitter, is incorrect. That decree was transferred to this Court for execution on 1st May 1911, and on 28th August 1911, that execution-creditor attached the mortgaged property.

4. On 29th July 1910, Ram Chandra Ray Chaudhuri obtained a decree in Suit No. 453 of 1910 for Rs. 2,701 with further interest and costs against the estate of Hari Das Mitter. In execution of that decree, he also on 10th January 1913, attached the mortgaged property.

5. There was further execution-creditor, Gourhari Mukerjee, who held a money-decree for Rs. 2,000 odd against the estate of Hari Das Mitter, but as he did not apply for execution until 12th December 1914, i.e., after the assets had been received by the Court, it is obvious that he has no locus standi on the present application, and his claim may, therefore, be left out of consideration.

6. On 22nd December 1914, the present petitioner applied that the fund might be rateably distributed between himself and Ram Chandra Ray Chaudhuri. For the purpose of this application, it was necessary for him to produce certificates, not

only of the Accountant-General, but also of the Sheriff and the Registrar. From the two latter, it appeared for the first time that there were attachments against the property at the instance of Ganga Das Mahta and Ram Chandra Ray Chaudhuri. It is clear that by the provisions of Section 73(1), proviso (c), these persons are entitled to be paid rateably out of the proceeds of sale in priority to the present petitioner, whose attachment was issued after the sale, and then only against the surplus sale-proceeds. As their claims are more than sufficient to absorb the whole fund, Rs. 4,650-2-7, it follows that there will be nothing left for the petitioner, and his present application must necessarily fail. It is a matter of regret that it should have been possible for the petitioner to obtain the order for transfer of the fund, without its transpiring that there was in reality no fund to transfer in which he could hope to share. This is due to two defects in our procedure, one of which has already been recently dealt with by the issue of a general order. Till recently, it was uncertain in which suit an application for transfer of a fund should be preferred, the suit to the credit of which the fund lay, or the suit to which it was to be transferred. I have intimated that in future, it should in all cases be made in the suit to the credit of which the fund is lying. The second defect is that in applications for transfer, such as that in the present case, orders have been passed on the certificate of the Accountant-General only. From this certificate all the attachments or incumbrances on a property or its sale-proceeds do not necessarily appear. If on such applications, the petitioner were required to produce a certificate also from the Registrar, he would be compelled to search the registers of that officer as well, and any objections which might exist to the transfer, would necessarily be disclosed. In my opinion this practice should be followed in the future, and on an application for the transfer of a fund to which the provisions of Section 73(1), proviso (c), Code of Civil Procedure, may possibly apply, the applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar.

7. This application fails and must be dismissed. Under the peculiar circumstances, I direct that each party do bear his own costs. As the order for transfer should never have been made, I direct that the funds in question be transferred back to the credit of Suit No. 179 of 1911, to be dealt with under Section 73(1), proviso (c), if and when the parties or either of them entitled thereunder make an application

for that purpose. Application dismissed.

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