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Court : Kolkata

Decided On : Jun-05-1940

Reported in : AIR1941Cal205

Appellant : Abdur Rouf and ors.

Respondent : Abdur Rahim and ors.

Judgement :

Edgley, J.

1. In the case out of which this appeal arises the decree-holders had obtained a final mortgage decree against certain persons on 28th March 1935, and this decree was subsequently affirmed on appeal. Thereafter, on 25th May 1937, the decree-holders put this decree into execution in execution case No. 50 of 1937 and in that particular execution proceeding they brought to sale the interest of defendant 1 Pran Gobinda Bhandari in the mortgage property. The sale took place on 11th August 1937, and the interest of this particular judgment-debtor was sold for the sum of Rs. 175. Thereafter the decree-holders instituted a further execution case No. 81 of 1938, for the realization of the balance of their dues which amounted to Rs. 113-10-6. On this occasion they proceeded against the interest of defendant 2, Abdur Rahim alias Manglu Mian, in certain items of the mortgaged property which he had purchased from Pran Gobinda Bhandari subject to the mortgage. In these proceedings an objection was filed by Abdur Rahim under

Section 47, Civil P. C., in which he maintained that the decree could not be executed against him as the first execution proceedings had been taken only in respect of the property of Pran Gobinda Bhandari, defendant 1, and, this being the case, it was contended by Abdur Rahim that no further execution proceeding against him was maintainable and the decree-holder must be deemed to have waived any right which he may have had to proceed in execution against Abdur Rahim. This contention was accepted by the first Court and the decision of the learned Munsif was affirmed on appeal by the learned District Judge of Birbhum. It is against the latter decision that a further appeal has been filed in this Court.

2. In arriving at his decision the learned District Judge places some reliance upon two decisions of this Court, viz., the case in *Shyama Charan v. Protap Chandra* : AIR1930 Cal349 , and that in *Jagadish Nath v. Nafar Chandra* : AIR1931 Cal427 . As pointed out by the learned Judge himself, the second of these cases is distinguishable on its facts and it is of very little assistance with reference to the question which has to be decided in this case. In the former case however Mukherji and Guha JJ. observed that

it is well settled that a portion of an entire decree for which execution was not once claimed cannot form part of a subsequent claim in execution.

3. The cases upon which the learned Judges relied in support of this proposition have not been cited in their judgment. It is possible that they may have relied upon certain observations of Sir Barnes Peacock C. J., in *Huro Sunkur v. Taruck Chunder* ('69) 11 WR 488, which were to the effect that, after a decree is perfect for execution in its entirety, the execution-creditor cannot take out one execution for one part (e. g., wassilat) and another for another (e. g. costs or interest on costs) nor can he by assignment split it up and subject the judgment-debtor to a plurality of executions. It was however held subsequently by this Court in *Radha Kishen v. Radha Parshad* ('91) 18 Cal 515, that where a decree gave various reliefs of a different character the Code of Civil Procedure did not prevent a person from making separate and successive applications for execution of the decree, in respect of each such relief. Further, in *Upendra Nath v. K.B. Dutt* ('26) 13 AIR 1926 Cal 1019, the learned Judges did not give effect to the observations of Sir

Barnes Peacock C. J. in *Huro Sunkur v. Taruck Chunder* ('69) 11 WR 488 and followed the view taken in *Radha Kishen v. Radha Parshad* ('91) 18 Cal 515 cited above. They pointed out that there was no authority for the proposition that the principles of O.2, Rule 2, Civil P. C., applied to an application for the execution of a decree and that there was nothing to prevent successive applications for the execution of a portion of a decree from being made. It is therefore somewhat difficult to understand, at any rate as far as this Court is concerned, how the learned Judges came to the conclusion in 1930, in *Shyama Charan v. Protap Chandra* : AIR1930 Cal349 , that it was well settled that a portion of an entire decree for which execution was not once claimed cannot form part of a subsequent claim in execution. It is true that in a later case, *Kusuni Kamini Debi v. Sailes Chandra* ('35) 22 AIR 1935 Cal 118, *Nasim Ali and Khundkar JJ.* pointed out that

there is no provision in the Civil Procedure Code under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piecemeal in different Courts or in the same Court,

and this appears to have been the view taken by the Bombay High Court in *Panaji Girdhar v. Ratan Chand* ('33) 20 AIR 1933 Bom 364. But even now, it can hardly be said that this point has been finally settled in this Court and it is a matter which will doubtless come up for further consideration.

4. Although the learned advocate for the respondent in this case has strenuously argued that the decree-holders in the case with which we are now dealing, were seeking to execute the decree piecemeal, this does not appear to have been the case. In both the execution proceedings, which were filed in connexion with this matter, the decree-holders sought to put into execution the whole of the decree which had been obtained by them. But they proceeded in execution against different items of the mortgaged property in the two proceedings. Their object appears to have been, if possible to realize the whole of their dues from the sale of *Pran Gobinda Bhandari's* property in the first execution proceeding, but as they failed to do so, they then proceeded against certain items of the mortgaged property which were in the possession of the other judgment-debtors. In my view,

the procedure which they adopted in this respect was both legal and proper, as it is undesirable that any judgment-debtor should be unnecessarily harassed by having execution proceedings taken against more of his property than is absolutely necessary for the purpose of satisfying a decree to which he may be a party. The cases to which reference has been made all appear to relate to piecemeal execution of a decree and are not cases in which the whole of the decree was put into execution at different times against separate items of the judgment-debtor's property. In this connexion, it was pointed out in *Murari Ram Das v. Rasik Lal* : AIR1940 Cal159 , that the intention of the Legislature in enacting Order 34, Rule 5 (3), Civil P. C, was to confer a right upon the mortgagee ordinarily to realize his security by bringing only a part of the mortgaged property to sale provided that he was satisfied that the sale of a portion of such property would be sufficient for the purpose of enabling him to realize his dues.

5. In my view if in execution proceedings against a portion of the mortgaged property only the mortgagee fails to realize his full dues, there is no reason why he should not proceed against some other items of the mortgaged property, and it certainly cannot be said that by failure to proceed against the entire property he waives his right to do so in a subsequent execution case. In this view the judgment of the lower appellate Court cannot be supported. It will therefore be set aside and this appeal is accordingly allowed with costs throughout. The hearing fee is assessed at three gold mohurs. The execution will be allowed to proceed.