

BepIn Behari Sen Vs. Krishna Behari Sen

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Court : Kolkata

Decided On : Feb-19-1918

Reported in : 45Ind.Cas.246

Judge : Teunon and ;Newbould, JJ.

Appellant : BepIn Behari Sen

Respondent : Krishna Behari Sen

Judgement :

1. This appeal arises out of execution proceedings.
2. It appears that in a suit for partition brought by the present respondent under a decree made on an arbitration awarded on the 12th March 1906, the present appellant Bepin Behari Sen and his mother Thakurani Dasi Debi each became entitled to recover a sum of Rs. 2,130 from the present respondent Krishna Behari Sen. Against this decree Bepin Behari and Thakurani Dasi appealed and under the decree of this Court dismissing their appeal on the 8th July 1908 they became liable jointly and severally in a sum of Rs. 506 by way of costs to Krishna Behari. Thereafter they applied for leave to appeal to His Majesty in Council, and by the order dismissing that application on the 6th April 1909 they were directed to pay further costs to the extent of Rs. 80.
3. In 1913 they next brought a suit to have the decree on the award on which it was based set aside; that suit was finally dismissed in April 1915.

4. Meanwhile the respondent Krishna Behari had twice applied in execution in order to realise the sums awarded to him by way of costs. The first application was dismissed for non-prosecution on the 13th September 1911. The second was instituted on the 25th July 1914. To this application Bepin Behari took two objections, namely, (1) that it was barred by limitation, (2) that it should be held in abeyance pending the disposal of the suit of 1913. Both these objections were overruled on the 22nd February 1915.

5. The suit of 1913 having been dismissed in April on the 8th of May 1915, the judgment-debtor-appellant next objected that the sum of Rs. 586 due to the respondent by way of costs should be set off against the sum of Rs. 2,130 due to the appellant under the original decree and that the application for execution should be dismissed. This objection was overruled on the 17th May 1915.

6. It is against this order of the Subordinate Judge and subsequent orders bringing the property of the appellant to sale and confirming the sale thereof to the decree-holder respondent that the present appeal is directed.

7. It is not disputed that the sum to which the appellant became entitled under the decree of 12th March 1906 remains due and unpaid, but on behalf of the respondent it is contended that his application is for execution of the appellate decree, that the appellate decree does not specify the sum due to the present appellant Bepin Behari and that in any case the costs (Rs. 80) awarded to the present respondent by the order dismissing the application for leave to appeal to His Majesty in Council cannot be set off in the way proposed.

8. Now it is no doubt the case that notwithstanding the pendency of an appeal the decree of the Court of first instance may be executed. But when the appeal has been decided then the original decree, is merged in the appellate decree and for purposes of execution as for purposes of amendment, the appellate decree, even when it merely affirms the original decree, is to be taken as embodying and superseding that decree. The respondent, therefore, cannot be allowed to take advantage of the fact that the decree as drawn up does not recite in so many words that under that decree a sum of Rs. 2,000 is payable by the plaintiff-decree-holder to the defendant-appellant. In this view Order XXI, Rule 19, is applicable in

terms and the respondent before ns should not have been permitted to take out execution for the smaller sum due to him under the appellate decree.

9. By Section 36 of the Code the provisions relating to the execution of decrees are made applicable to the execution of orders. The order by which the appellant before ns is made liable in the sum of Rs. 80 by way of costs to the respondent was made in the course of the same litigation as the decree of which the respondent sought execution. That decree placed before the Court by the applicant for execution showed that the sum of Rs. 2,000 was payable by the applicant to the person against whom he sought execution. It is admittedly due and unpaid. Thus whether Order XXI, Rule 19, be or be not applicable in terms, yet on the principles embodied in Order XXI, Rules 18 and 19, and in Section 151 of the Code execution in respect of this smaller sum also should have been refused.

10. For these reasons we set aside the orders complained of and the sale of the appellant's property.

11. The appeal is accordingly decreed with costs. We assess the hearing fee at five gold mohurs.