

Chutterput Singh Vs. Sait Sumari Mal and ors.

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Court : Kolkata

Decided On : May-08-1916

Reported in : 36Ind.Cas.602

Judge : Lancelot Sanderson, C.J.,; John Woodroffe,; Asutosh Mookerjee,; Chitty and; N.R. Chatterjea, JJ.

Appellant : Chutterput Singh

Respondent : Sait Sumari Mal and ors.

Judgement :

Lancelot Sanderson, C.J.

1. This is an appeal by the defendant against the decision of the learned Judge by which he refused to set aside an attachment effected at the instance of
2. The material facts and dates were as follows On the 21st May 1896--The plaintiffs obtained a decree in the High Court for the payment of money against the defendant.
3. 2nd September 1896--An application was made for the transmission of a certified copy of the decree to the Purnea Court.
4. 15th May 1899--Application for execution by arrest and imprisonment of the defendant was made the former application having been returned unexecuted.

5. 12th February 1900--An order on the last-mentioned application was made--returnable on the 12th March 1900.
6. 12th March 1900--The time was extended for three months.
7. 1st June 1908--An application was made in the High Court for the transmission of a copy of the decree to Murshidabad for the attachment of property.
8. 30th June 1905--Order for transmission was made.
9. 17th July 1908--Copy of the decree was transmitted.
10. 18th January 1915--Application was made for execution by attachment of 147 Cotton Street.
11. 10th June 1915--Order was made for execution.
12. 19th July 1915--Notice of application by the defendant to set aside the attachment was issued.
13. 2nd August 1915--The application was heard and refused and it is from the order of 2nd August 1915 that the defendant appealed.
14. The point relied upon in the Court below by the defendant was that the decree of 21st May 1896 in execution whereof the attachment was made was barred by the above-mentioned Statute of Limitation On behalf of the plaintiffs it was urged that by reason of the application of 15th May 1899 and the orders of 12th February 1900 and 30th June 1908 the decree was kept alive and was, therefore, enforceable by execution.
15. The clause which is applicable to this matter is Article 13 of the First Schedule of Act IX of 1908. The first coloumn describes the application as follows: 'To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council.' The second column prescribes the period of limitation viz., 12 years. The third column specifies the time from which the period of limitation, begins to run as follows: when a right to enforce the judgment, decree or order accrues to some

person capable of releasing the right.' It is clear that if the matter stopped there the decree would not be enforceable, for it was made on the 21st May 1896 and the application for execution, which is now material, was not made until the 18th January 1915. But there is a proviso contained in Article 183 which runs as follows: 'Provided that when the judgment, decree or order has been revived, or some part of the principal-money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivors, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be, and it is in respect of this proviso that the question which has been referred to the Full Bench arises.

16. It is not denied that the order which was made on the 12th February 1900 for the execution of the decree by the arrest of the defendant constituted a 'revivor' within the meaning of the clause; but it is said on behalf of the defendant that more than 12 years has elapsed since such revivor and that the decree is no longer enforceable. On the other hand, the plaintiffs allege that the application of the first June 1908 and the order of 30th June 1908 constituted a revivor within the meaning of the clause and consequently that the decree is still capable of being enforced, inasmuch as the application was made on the 18th January 1915, a date within the period of 12 years, counting such period from June 1908. It is necessary, therefore, to consider in the first instance what was the nature of the application of the 1st June 1908 and the proceedings in connection therewith. The particulars of the application are shown by the entry in the last column of the form on which the application was made as follows:

By transmission of certified copy of the said decree together with a certificate of non-satisfaction to the Court of the District Judge of Murshidabad within whose jurisdiction the defendant has property and by attachment and sale of which the plaintiffs' claim may be satisfied. The defendant has no property within the jurisdiction of this Hon'ble Court whereby the decree can be satisfied.

17. This was obviously an application for transmission of a copy of the decree under Sections 223 and 224 of the Civil Procedure Code of 1882, the Code which was in force at the date of the application. The particulars of the application show that it was intended to bring it within Clause (6) of Section 223, and the procedure which the Court was asked to make use of was that provided by Section 224 of the Act.

18. The application, however, was made upon a form which was applicable to an application under Section 235 of the Act, 1882, which deals with an application for execution and which sets out the particulars which must be included in a tabular form, which the applicant or some other person acquainted with the facts must verify.

19. Upon the application being made, an order was made by the Registrar that notice under Section 248 should issue. Notice was thereupon served upon the defendant calling upon him to show cause why the decree should not be executed against him.

20. On the 30th June 1908 the following order was made by the Registrar: 'Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed', and in consequence of this order a copy of the decree with a certificate of non-satisfaction was transmitted to the Murshidabad Court.

21. It was argued first that the order was in itself a 'revivor' within the meaning of Article 183 of the Schedule of the Limitation Act.

21. The test of what constitutes such a 'revivor' is in my judgment correctly laid down by Mookerjee, J., in *Srimati Kamini Debi v. Aghore Nath Mookerjee* 4 Ind. Cas. 402 : 11 C.L.J. 91 at p. 93 : 14 C.W.N. 357 as follows: The essence of the matter is that to constitute a revivor of the decree there must be, expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it, and I think it must necessarily be implied that such determination must be by a Court or person duly qualified to make it.

22. The question, therefore, arises whether by the above-mentioned order there was such an express or implied determination in this case. In my judgment the substance and not the form of the matter must be looked at and considered from that point of view; the application was for the transmission of a certified copy of the decree together with a certificate of non-satisfaction and no more, and the order made in substance was that the application should be granted. The actual words of the order were, let execution issue as prayed.' These words necessitate a reference to the application which, as already stated, was not an application for execution, but for the transmission of a certified copy of the decree. It was said during the argument that the application had to be made on the form above mentioned, as there was no other form provided. To my mind the use of a particular form cannot affect the matter when once it is established that the application was not for execution, but merely for transmission of a copy of the decree. All that happened in reality was an application to the Registrar for transmission of the copy of the decree, a direction by him that notice of such application should be given to the judgment-debtor, and on his non-appearance an order that the copy of the decree should be transmitted in accordance with the application. Under these circumstances, in my judgment, there was no determination that the decree was still capable of execution, and the order of the 30th June 1908 did not constitute a revivor within the meaning of Article 183.

23. It was further argued, however, that the notice issued under the directions of the Registrar and the order of 30th June 1908 taken together constituted a 'revivor.' It was urged that the notice to show cause was contemplated by Article 183 as a revivor in the same way as under Article 182 and that such notice and the order had the same effect as the procedure of scire facias.

24. It is true that the direction given by the Registrar was that notice under Section 248 should issue, and it has also been held that the procedure embodied in Sections 248 and 249 is analogous to the procedure of scire facias and that such procedure, when properly and rightly used, would constitute a revivor, see *Jogendra Chundra Roy v. Syam Das* 1 Ind. Cas. 168 : 36 C. 543 : 9 C.L.J. 271; but in my judgment Sections 248 and 249 were not applicable to the matter in question. These sections deal with an application for the execution of a decree

and provide for notice being given to the party against whom execution is applied for, and if he does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

25. They have no relation, in my opinion, to an application for the transmission of a copy of the decree under Section 223, which may be ordered according to the words of the section 'on the application of the decree-holder.' The notice, therefore, which was issued under Section 248 was inapplicable to the proceedings in question. But it was urged by the learned Advocate-General that if the Court has in fact sent notice to the debtor and has in fact adjudicated upon the matter, something has been done to show that the decree is capable of execution.

26. I think it would be unreasonable so to hold when, having regard to the facts of the case, it is plain that the Registrar did not adjudicate upon the question whether the decree was capable of execution, but merely ordered a copy of the decree to be transmitted to the Murshidabad Court, with a certificate of non-satisfaction. Further, even assuming that the notice was rightly sent and in accordance with the provisions of the Act by the Registrar, it should be pointed out that the Registrar would have no jurisdiction to adjudicate upon any matter, such as limitation, with reference to the question whether the decree was capable of execution. Such a question would, in my judgment, have to be determined by the Court itself under Section 249 of the Civil Procedure Code.

27. It is true that by Section 637 of the Civil Procedure Code any non-judicial or quasi-judicial act which the Code requires to be done by a Judge, may be done by the Registrar, and the Court may by rule declare what shall be deemed to be non-judicial or quasi-judicial acts within the meaning of the section. Rule 515-A, which came into force on 1st September 1905, provided that certain applications therein specified should be made to the Registrar or Master, and that all acts done by the Registrar or Master under this rule should be deemed to be quasi-judicial. Number 30 under the said rule refers to applications for order for execution of a decree or order for arrest, attachment, sale or otherwise, with power to order issue of notice under Section 248, Civil Procedure Code, where such notice is necessary. But it is

clear that the Registrar was not thereby clothed with authority to decide such a question as arises in this case, viz., whether the decree was barred by the Statute of Limitation.

28. It was argued, however, that Rule 370 of the rules then in force, which are set out in Mr. Belchamber's book, showed that it was incumbent upon the Registrar to issue the notice. This rule came into force on the 1st April 1878, judging from the note attached to Rule 345 in Mr. Belchamber's book and, therefore, before the 1882 Code. It may or may not have been consistent with the Code which was in force at the date when it was passed, but in my judgment it was not consistent with the scheme of the Code of 1882. Under that Act the application for a transmission of the copy of the decree to another Court under Section 223 was a procedure under which the question, whether the decree was capable of execution, was intended to be left to the Court to which the copy of the decree was transmitted a procedure different in its essentials from the procedure provided for an application for execution dealt with in subsequent sections of the Act. In any event I think it is safe to say that these rules must be read as modified by the Civil Procedure Code of 1882 under which the application in this case was made, and in my judgment the notice issued and order made under the above-mentioned circumstances did not operate as a revivor within the meaning of Article 183 of the Limitation Act, Schedule I.

29. It is necessary to notice a further argument by the learned Advocate-General, viz., that with regard to a decree on the Original Side the word 'revivor' in Article 183 meant the same thing as one or more of the matters which are mentioned in Article 182, Sub-clauses 5 and 6.

30. With this I cannot agree. I think the fact that the word 'revivor' is used in Article 183, instead of the different matters specified in Article 182 being set out again or referred to in Article 183 as might have been done, shows that something different to such matters was intended. Further, the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially.

31. For the above-mentioned reasons, in my judgment, the answer to the question referred to us should be that the application of the 1st June and the order of the

30th June do not constitute a revivor within Article 183, The result will be that the appeal will be allowed, that the order of the learned Judge will be set aside, and that the attachment effected on the property of the defendant, viz., 147, Cotton Street, will also be set aside. The defendant will have the costs of the application in the Court below and of this appeal.

Woodroffe, J.

32. The Advocate-General accepts the definition of the revivor as a decision holding that the decree is still capable of execution. He admits that an application for transmission of decree is not a revivor. It is further conceded that even an order for transmission might be regarded as a ministerial act and not as a revivor. In my opinion, an order for transmission as such is not an order on an application for execution, though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere, on which action, unless previously determined, the question of the right to execute the decree is decided. It is, however, argued that in the present case there was something more, viz., the issue of a notice under Section 248 and an order for issue of execution. According to the Code a notice under Section 248 does not issue on an application for transmission under Section 223. But assuming that this was done under Rule 370 of the old rules, the question arises whether that rule which would seem to have been passed under the Act of 1859 was of force under the Code of 1882. But even if it was, this does not assist the creditor. For if the Registrar had power to issue as a 'quasi-judicial act' notice under Section 248, he had no power to determine judicially that the decree was alive had the debtor contested the point. The Judge must have done that and the fact that the debtor did not appear on the notice, cannot give the order passed that judicial character which is necessary for an order operating as revivor. It is to be observed that the order passed was, 'let execution issue as prayed.' The last two words make the order operative as one for transmission of the decree for this was what was asked. In any case it cannot be said that the Registrar either could or did decide that the decree was capable of execution. The proceedings taken did not, in my opinion, operate as a revivor within the meaning of Article 183 of the Limitation' Act. The

decree was transmitted to Murshidabad and so far as appears from the proceedings before us, nothing was done on the order and nothing was attempted to be done in execution until nearly seven years later. I would, therefore, answer the question referred to us in the negative, and I agree in the order passed.

Mookerjee, J.

33. The facts material for the determination of the question of law referred to the Full Bench for decision are not set out in the order of reference and may be briefly recited here.

34. On the 21st May 1898, the respondents obtained an ex parte decree for money against the appellant on the Original Side of this Court. After intermediate proceedings, which need not be described in detail at this stage, the decree-holders, on the 18th January 1915, made the present application of the decree by attachment of premises 147, Cotton Street, in this City. The judgment-debtor objected that the application was barred by limitation under Article 183 of the Schedule to the Indian Limitation Act, 1908, which was in force at the date of the application and governed it on the principle that the law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the proceeding *Lala Soni Ram v. Kanhaiya Lal* 19 Ind. Cas. 291 : 40 I.A. 74 : (P.C.) 35 A. 227 : 17 C.L.J. 488 : 13 M.L.T 437 : 17 C.W.N. 605 : 11 A.L.J. 389 : (1913) M.W.N. 470 : 15 Bom. L. R. 489. 25 M. L. J. 131.. The objection was overruled by Mr. Justice Chaudhuri on the 2nd August 1915 and the propriety of this decision is in question before us.

35. It is plain that the application for execution is prima facie barred under Article 183, which requires an application to enforce a decree of a Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, to be made within twelve years from the date when a present right to enforce the decree accrues to some person capable of releasing the right. As the application for execution with which we are here concerned, was made on the 18th January 1915 in respect of a decree dated the 21st May 1896, the decree-holders seek to escape the bar of limitation by reliance upon that portion of the proviso to Article

183 which lays down that when the decree has been revived the prescribed period of twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January 1915. To substantiate this position they rely on an application made by them on the 1st June 1908 and the order passed thereupon on the 30th June 1908 the combined effect of the application and the order was it is argued, to revive the decree within the meaning of the proviso to Article 183. This view is supported by the decision in *Suja Hossein v. Monohur Das* 24 C. 244 though a contrary view had been accepted when that case was heard in the first instance *Suja Hossein v. Monohur Das* 22 C 921, The contention of the decree-holders also receives some support from the decisions in *Umrao Singh v. Lachmi Narain* 26 A. 361 : A.W.N. (1914) 51 : 1 A.L.J. 80, and *Beni adho v. Shiva Narain* 4 A.L.J. 405 : A.W.N. (1907) 164 the correctness of these decisions has however been impugned before us on behalf of the judgment-debtor.

36. There is no definition of the term revivor in the Indian Limitation Acts of 1859, 1871, 1877 and 1908. But the historical review contained in the judgments in the cases of *Ashootosh v. Doorga Churn Ghattejee* 22 C. 921; *Futteh Narain Ohowdhry v. Chundrabati Choudhrai* 20 C. 551 and *Jogendra Ghundra v. Suam Das* 1 Ind. Cas. 168 : 36 C.543 : C.L.J. 271 shows beyond doubt that the procedure for revivor of judgment on the Original Side of this Court was substantially analogous to the writ of *scire facias* under the Common Law (rule 195 of the rules of 1851 on the Plea Side of the Supreme Court). That procedure was subsequently embodied in Sections 248 and 249 of the Civil Procedure Code of 1882 and later on reproduced as Order XXI Rules 22 and 23 of the Code of 1908. Under these provisions where an application for execution is made a notice is required to issue to the person against whom execution is applied for if more than one year has elapsed from the date of the decree. The notice calls upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court the Court orders the decree to be executed. The order for execution thus made operates as a revivor but the mere issue of the notice does not by itself produce that

consequence *Srimati Monohar Das v. Futteh chand* 30 C. 979 : 7 C.W.N. 793 This fully justifies the rule enunciated in *Kamini Debi v. Aghore Nath Mookerjee* Ind. Cas. 402 : 11 C.L.J. 91 at P. 93 : 14 C.W.N. 357 namely that to constitute a revivor of a decree, there must be, expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. It is of vital importance to add that such determination must be made with jurisdiction and by a competent Tribunal. Tested in the light of this principle, what is the true position of the decree-holders in the case before us? On the 1st June 1908, they applied for transmission of the decree from the Original Side of this Court to the district of Murshidabad, on the allegation that the judgment-debtor had no property within the local limits of the Ordinary Original Jurisdiction of this Court, while he had property within the jurisdiction of the other Court. The application, though made obviously under Section 223, Clause (6) of the Code of 1882, was described as one under Section 235 for execution of the decree; this was indisputably misleading, and if we look to the substance of the matter, as we must do, we cannot attribute to the application a character it did not really possess; what is essential in matters of this description is the substance and not the mere form. The Master recorded the following order on the application on the 1st June 1908: 'Last notice issue under Section 248(a). This clearly was not in conformity with the Code, which contemplates the issue of a notice under Section 248 on the basis of, not an application for transfer of a decree under Section 223, but an actual application for execution under Section 235. The scheme of the Code in this respect will be found fully analysed in the case of *Sripati Cham Chowdhury v. B. Behhambers* 8 Ind. Cas. 22 : 15 C.L.J. 123 : 15 C.W.N 661, and need not be reproduced here. The substance of the position is that the group of Sections (A) from 223 to 229-B in Chapter XIX deal with the Courts by which decrees may be executed while the group of Sections (B) from 230 to 238 deal with applications for execution. These sections indicate that an application for transfer of a decree is in no sense an application for execution *Nilmony Singh Deo v. Biressur Banerjee* 16 C 744; *Chatterput Singh v. daya chand Marwari* 11 Ind. Cas. 216 : 23 C.L.J. 641; *Bohra Khetpal v. Kuar Tikam Singh* 14 Ind. Cas. 72 : 34 A.396 : 9 A.L.J. 365, which dissents from *Ram Sahai v. Nanni* A.W.N. (1886) 137, It is not necessary for us to consider whether as indicated in *Bhabani Gharan Butt v. Pratap Chandra*

Ghosh 8 C.W.N. 575, an application for transmission of a decree may not be deemed an application to take a step in aid of execution nor is it necessary to discuss whether as indicated in Husein Ahmad Kaka v. Saju Mohamad Sahid 15 B. 28, a Court may not decide the question of limitation even before transmission of the decree or whether as ruled in Srihary Mundul v. Murari Chowdhry 13 C. 257 even after transmission the Original Court may not under Section 239 of the Code of 1882 decide the question of limitation when execution has been stayed in the Court to which the decree has been transferred. For the purpose of the present case it is sufficient to hold that Section 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution while the explanation to Section 248 shows that the notice required by that section must, where the decree has been transmitted be issued by the Court to which the decree has been sent for execution. Consequently the issue of the notice in this case under Section 248 on the basis of the application for transmission of the decree was not in conformity with the Code of 1882 which was in force at the time It is said however that the action taken by the Master was in accord with the Rules framed by the Court when the Code of 1859 was in force Raja Sreenath Boy v. Romesh Chandra Acharyya Chaudhuri 12 C.W.N. 897 It is needless to investigate whether the rules when first framed were consistent with the Code of 1859 for even if they were it is plain that after 1882 they could be deemed operative only in so far as they were consistent with the Code of 1882; Baijnath v. Ahmed Musaji Saleji 18 Ind. Cas. 978 : 40 C. 219 : 17 C.W.N. 395. It is significant that the rules framed after the Code of 1908 have been made consistent with that Code, and a notice under Order XXI, Rule 22, is no longer required to be issued upon an application for transmission under Section 39. We next pass on to the order made by the Master on the 30th June 1908 on return of affidavit of service of the notice under Section 248: 'Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed.' The language of the concluding portion of this order is significant; what was prayed was transmission of the decree, and what was actually done pursuant to this order of the Master was, not the issue of any process of execution, but only a transmission of the decree on the 17th July 1908. Here again if we look to the substance of the matter, as we must do, we find that there was in reality no

determination by the Master that the decree was still capable of execution. It is farther plain that the, Master had no authority to make such a determination: for Section 249 requires that the Court should consider the objection, if any, and determine whether the decree should of should not be executed. This is clearly a judicial act which cannot be delegates to a Master under Section 637 of the Code of 1882 and it is worthy of note that although Rule 515(A) invests the Master with power to order issue of a notice under Section 248 it does not authorise him to give a decision under Section 249. It was think incontestable that there was not in this case an order under Section 249 by the Master and that, if there was the order must be treated as made without jurisdiction. My conclusion consequently is that upon the application for transmission of the decree under Section 223 a notice under Section 48 could not properly be issued that such notice though issued did not by itself operate as revivor of the decree and that there was not in fact and could not in law be such a determination by the Master under Section 249 as would operate to revive the decree.

36. It is not necessary to examine in detail the contention that Article 183 should be construed in the light of Article 182 and that whatever is sufficient to keep alive a decree for the purposes of Article 182 should be deemed sufficient for the purposes of Article 183. There is in my opinion no basis whatever for this contention the scheme and scope of the two Articles are radically distinct and no useful purpose would be served by an endeavour to amalgamate them or to interpret the one by reference to the other.

37. On these grounds I agree that this appeal must be allowed with costs throughout the order of Chaudhuri, J. set aside and the attachment cancelled.

Chitty, J

38. I agree for the reasons given by the learned Chief Justice that the question referred to us should be answered in the negative. I have nothing further to add.

N.R. Chatterjea, J.