

Chutterput Singh Vs. Sadasook Kotary

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Court : Kolkata

Decided On : Apr-26-1917

Reported in : 42Ind.Cas.623

Judge : Lancelot Sanderson, C.J. and ;John Woodroffe, J.

Appellant : Chutterput Singh

Respondent : Sadasook Kotary

Judgement :

Woodroffe, J.

1. This is an appeal from an order on an application made by a judgment-debtor that an earlier order made by this Court, dated 9th May 1916, for his arrest may be vacated, cancelled and set aside' en the ground that on the date on which the writ of arrest was asked for, the decree was barred by limitation.

2. On the 3rd September 1896 a decree was made (ex parte) in the High Court for Rs. 17,626-10-4. On the 3rd May 1901, copy of the decree was sent to the District Judge of Murshidabad for execution on the 30th July 1902, a sum of Rs. 322 8-3 was realized. Then some eleven years later on the 2rith July 1913, an application was made for execution' by attachment of the immoveable property No 147, Cotton Street, Calcutta, belonging to the' judgment-debtor. The Master ordered notice¹ under Order XXI, rule 22, to issue. On the 23rd September 1913, notice

was served upon the judgment-debtor. On the 18th November 1913, the judgment-debtor entered appearance through Babu Haripada Dutt. On the 22nd November 1913, warrant of attorney on behalf of the judgment debtor was filed. On the 29th November 1913 the Master ordered execution to issue after' hearing both sides.

3. It is said that this order by the Master was invalid as he had no jurisdiction to make it and thus to create a revivor which is a judicial act.

4. On the 8th January 1914, the Sheriff actually attached the property. On the 26th November 1914, an order was made for sale of the property No. 147, Cotton Street A proclamation was settled, but the sale stood over. On the 13th March 1916 the judgment-creditor asked for execution by arrest pf the judgment-debtor and on the 13th March 1916, notice was directed to be issued under Order XXI, rule 22.

5. In the affidavit stating that notice was, served on the judgment debtor the deponents say that the latter, observing the parties serving the notice, immediately retired to the inner apartment of his house and refused to come out though called upon. There is no denial of this fact by the judgment-debtor, the affidavit of his servant not being of any value on this point.

6. On the 9th May 1916, order was made by Fletcher, J., for the arrest of the judgment-debtor. On the 22nd August 1916, notice was given of an application to set aside the order for arrest. On the 29th August 1916V the application was heard by Chitty, J., and on the 29th November 1916, an order was made by Chitty, J., dismissing the application On the 23rd January 1917 a memorandum of appeal was filed by the judgment-debtor, the hearing of which is now before us.

7. The appellant's contention is that Fletcher, J.'s order was erroneous as the execution proceedings were then barred, and that Chitty, J.'s judgment is erroneous as it upholds Fletcher, J.'s order. The respondent contends that the order of 9th May 1916 was a good order, having regard to the fact that in 1909 the new Civil Procedure Code of 1908 came into operation and under Section 128, the High Court might make rules delegating to the Registrar any judicial duty. It is thus

contended that if the former rules were inconsistent with the former Code in so far as they permitted the Registrar to do what was in fact a judicial act though the Code only allowed of the delegation of quasi-judicial acts, yet under the present Code the Court may delegate also judicial acts, and Section 157 of the new Code contains rules under repealed enactments which are not inconsistent with the Code. For the former rules, whereby the Registrar was empowered to deal with execution proceedings in matters which are properly judicial acts, are consistent with the present Code which allows of the delegation of judicial acts. There appears to be much force in this argument.

8. It is not, however, necessary to decide the point, as we think it clear that Mr. Sircar's argument must prevail, namely, that even assuming (without admitting) that execution was barred and that the judgment of Fletcher, J., was erroneous, yet as Fletcher, J., had as a Judge admittedly jurisdiction to determine the matter before him, his order could only have been set aside by review or appeal.

9. It would not have been open for Chitty, J., to set aside an order made by a Judge of concurrent jurisdiction on the Original Side of the Court. It was contended by Mr. Jackson that notwithstanding Fletcher, J.'s order it was possible that other orders might be subsequently passed in the matter of the judgment-debtors. It may be that an original application based on facts arising after Fletcher, J.'s order may be made. But this is not such an application, but an application to one Judge to set aside an order of another Judge on the ground that that Judge erroneously held that on the date when he entertained execution, such execution was in fact barred. It is clear that such an application as that before us will not lie. The case of *Khairaj Mai v. Daim* (1), which was cited to us after the close of the argument by Mr. Jackson, is not in point.

10. The elementary principle was there affirmed that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record, and that an order which is passed without jurisdiction is a nullity, may be disregarded and need not be set aside. This case has no application to the facts before us where Fletcher, J., had jurisdiction to determine the question arising in the execution proceedings, where the judgment-debtor was

a party, was served, and did not choose to appear and where the order sought is one to set aside a previous order on the ground that the Judge erroneously made it though the execution was barred. We do not say that there was any error in law, but if there was, it was an erroneous decision on a matter over which the Court had jurisdiction. The appeal is accordingly dismissed with costs.

Sanderson, C. J.

11. I concur.

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