

Calcutta High Court

Mungeshur Kuar And Ors. vs Jamoona Prashad on 14 May, 1889

Equivalent citations: (1889) ILR 16 Cal 603

Author: T A Gordon

Bench: Tottenham, Gordon

JUDGMENT Tottenham and Gordon, JJ.

1. It is contended on behalf of the appellants, firstly, that the case before the Subordinate Judge was in the nature of a claim under Section 278, Civil Procedure Code, and that therefore no appeal lay to the District Judge; and, secondly, that the property is not liable to be sold, because it devolved on the appellants as heiresses of their father and not of their mother.

2. As regards the first point, we are of opinion that the case is governed by the provisions of Sections 2341 and 244, Civil Procedure Code. It is clear from what we have already said that the appellants were brought on the record as representatives of the deceased judgment-debtor, without reference to their liability or non-liability as such representatives. This was in accordance with para 1 of Section 234. Then as to their liability, that question has to be ascertained according to the provisions of para 2 of Section 234 by the Court executing the decree. In the present case the question was whether certain property was liable to be sold in execution, and we think that such a question is a question relating to the execution of the decree between the decree-holder and the appellants, and that consequently it has to be determined under Section 244, Civil Procedure Code. It is strongly urged that as the property came into the hands of the appellants through their father, they are in respect of such property his legal representatives, and not representatives of their mother. Assuming that the property did belong to their father, and this is a disputed question before us, this contention is no doubt true. But after all, it seems to us that this is rather a matter of liability than of representation. The liability of the property to be sold in execution depends upon the determination of the question, whether it was the father's or the mother's, and, upon the determination of the same point depends the question whether the appellants are in respect of this property the legal representatives of their father or their mother. But as we have already intimated we think that question falls within the scope of Section 244. It is also contended that the form of the proceedings before the Subordinate Judge, shows that he treated the case as one coming under Section 278, and not under Section 244. The petition of the appellants has been read to us, and we find no reference in it to Section 278, and the mere use of the word " claim " by the Subordinate Judge in his judgment is not in our opinion inconsistent with the objection of the appellant's coming under Section 244.

3. Further, in the view we take we think we are fully supported by authority. In the case of Chowdhry Wahed Ali v. Jumae 11 B.L.R. 149 : 18 W.R. 185 the Privy Council, dissenting from the opinion of a Full Bench of this Court, held that, " when a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of the 11th clause of the Act of 1861."

4. That was a case under the old Code, and there is this difference between it and the present case, that in that case the decree was against the representative, whereas in this case the representatives have been brought in after decree. But this we think makes no difference. The principle laid down applies to both cases, as the liability of a representative under Sections 234, and 252, Civil Procedure Code, is substantially the same.

5. The Privy Council decision was followed by tin's Court in the cases of Oseemunissa Khatoonv. Ameeroouissa Khatoon 20 W.R. 162 and Amaerunnissa Khatoon v. Mahomed Mozuffer Hossein Chowdhry 12 B.L.R. 65 : 20 W.R. 280 [this case is very similar to the present]; by the Allahabad High Court in Ram Ghulam v. Hazaru Kuar I.L.R. 7 All. 547, and Kashi Prasad v. Miller I.L.R. 7 All. 733; by the Madras High Court in the case of Kuriyali v. Mayen I.L.R. 7 Mad. 255; and by the Bombay High Court in the case of Nimba Harishet v. Sitaram Paraji I.L.R. 9 Bom. 458. The following rulings are relied upon on behalf of the appellants, hut we think they are clearly distinguishable from the present case: Shankar Dial v. Amir Haidar I.L.R. 2 All. 752, Nath Mal Das v. Tajamal Hossein I.L.R. 7 All. 36, Bahari Lal v. Gaun Sahai I.L.R. 8 All. 626, Famndro Deb Raikut v. Jugudishvari Debi I.L.R. 1.4 Cal. 316, Roop Lall Das v. Bekani Meah I.L.R. 15 Cal. 438, Kameshwar Pershad v. Run Bahadur Singh I.L.R. 12 Cal. 458, Kanai Lall Khan v. Soshi Bhuson Biswas I.L.R. 6 Cal. 777.

6. The cases of Shankar Dial v. Amir Haidar I.L.R. 2 All. 752, and Nath Mal Das v. Tajamal Hossein I.L.R. 7 All. 36, were both referred to in the case of Ram Ghulam v. Hazaru Kuar I.L.R. 7 All. 547, which we have already mentioned, and were distinguished from that case. In both these cases the judgment-debtor objected to the attachment of certain property, on the ground that such property was in his possession as trustee for an endowment and not in his own right; and it was held that the objection, although made by the judgment-debtor, was one properly falling under Sections 278-283 Civil Procedure Code, and that the order passed upon it was not appealable.

7. But in the present case the appellants claim the property in their own right. The case of Bahari Lal v. Gauri Sahai I.L.R. 8 All. 626, is also different. There the judgment-debtor filled two distinct characters, one as representative of the original judgment-debtor, and the other as representative of a third party who had died after preferring a claim; and it was the order passed on this objection which was held to have been passed under Section 2812, Civil Procedure Code.

8. The cases of Fanindro Deb Raikul v. Jugudishwari Dabi I.L.R. 14 Cal. 316, and Roop Lall Das v. Bekani Meah I.L.R. 15 Cal. 329, are clearly not on all fours with the present case. And in the case of Kanai Lall Khan v. Soshi Bhuson Biswas I.L.R. 6 Cal. 777, the High Court held that there were special circumstances which took it out of the general rule established in the cases of Chowdhry Waited Ali v. Jumaee 11 B.L.R. 149 : 18 W.R. 185, and of Ameerunnissa Khatoon v. Mahomed Mozuffer Hossein Chowdhry 12 B.L.R. 65 : 20 W.R. 280.

9. Lastly, there is the case of Kameshwar Pershad v. Bun Bahadur Singh I.L.R. 12 Cal. 458, to which our attention has been particularly drawn, But in that case there was no decision that the order passed by the Subordinate Judge did not fall under Section 244. On the contrary, the case appears to have been treated by the Subordinate Judge and the High Court as one coming under Section 244.

The real point decided was that Run Bahadur could not be held liable as regards property which had devolved on him as reversionary heir of the husband of the deceased judgment-debtor, or as regards property which had been made over to him by the debtor prior to decree, and that in respect of such property he was not, properly speaking, the representative of the judgment-debtor.

10. We think therefore on a careful examination of all the reported cases bearing on the matter in dispute, that the weight of authority is in favour of the view we take, viz., that the present case comes under Section 244.

11. Then as regards the second point argued before us, we think there has been no proper judicial enquiry as to whether the property in dispute belonged to the father or the mother of the appellants.

12. From an affidavit filed before us it would appear that it was understood before the Subordinate Judge that there was no question as to the property having originally belonged to the husband of the judgment-debtor, and it was for this reason that certain documentary evidence on this point tendered by the appellants was not received. The District Judge merely observes that there is no proof on the record that the properties attached belonged to the father's estate, while before us the matter is disputed. Under these circumstances we think the appellants are entitled to ask for a judicial enquiry, and that the proper course will be to set aside the District Judge's order, and to remand the case to him with directions to receive and consider any evidence that may be adduced by the parties in reference to the matter in dispute, that is, the ownership of the property, and then to re-try the appeal. We may add that we think the question of legal necessity does not arise in the execution of the decree. The decree-holder cannot go behind the decree. Costs will abide the event.

1 If judgment-debtor die before execution, application may be made against his representative.

[Section 234: If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.] 2 Disallowance of claim to release of property attached.

[Section 281: If the Court is satisfied that the property was. at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.]