APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1879 *April* 4.

WAHIDOONNISSA AND OTHERS (OBJECTORS) *v.* ROY MOHABEER PERSHAD SAHOO (DECREE-HOLDER).*

Execution of Decree—Partial satisfaction—Further Application for Execution—Surety.

A having obtained a decree against *B* and *C* (the former being made primarily liable) took out execution, and on obtaining partial payment of the amount due to him by the sale of certain property belonging to *B*, entered up satisfaction as to that amount. Subsequently, *D*, another judgment-creditor of *B*'s (who had a lien on the properties sold in execution of *A*'s decree) brought a suit against *B* and *A*, seeking for a refund of the monies received by the latter; this suit (to which *C* was not made a party) was compromised by *A*, who agreed to make a partial refund.

Held, on *A*'s applying for execution a second time against the representatives of *C*, that the partial satisfaction of the decree entered up was binding upon *A* so as to prevent a second application for execution for the same amount being made; and that even were it not so, the refund made on a private understanding between them by *A* to *D* in the suit brought by *D* against *B* and *A*, could not be binding upon *B*, unless he were a party to the compromise, and much less would it be so as against the representatives of *C*, who was not a party to that suit, and therefore the application could not be entertained.

THE facts of this case sufficiently appear from the judgment.

Moonshee *Mahomed Yusuf* and Baboo *Saligram Singh* for the appellants.

Baboo *Mohiny Mohun Roy* and Baboo *Bepin Behari Chatterjee* for the respondent.

BROUGHTON, J. (AINSLIE, J., concurring).—Roy Baboo Mohabeer Pershad Sahoo, the decree-holder in this case, obtained a decree against Mahomed Akran and against Far-

* Appeal from Original Order, No. 8 of 1879, against the order of Baboo Girish Chunder Chowdhry, Subordinate Judge of Sarun, dated the 16th November 1878.

zund Ally, who was Mahomed Akran's surety. Mahomed Akran was made primarily liable under the decree, and Farzund Ally was made liable in the second instance. The decree was executed by the attachment and subsequent conversion into money of certain indigo and an indigo factory belonging to Mahomed Akran.

Mahomed Nawab had a mortgage on this factory and on the indigo.

The attachment in execution was made on the 15th of August 1875.

The date of Mahomed Nawab's mortgage was the 21st of May 1875; it was in the form of a bond payable in two instalments, the first of which was due on the 8th of May 1876, and the second on the 28th of April 1877. The factory and all the indigo which might grow and be manufactured were pledged by the bond.

Mahomed Nawab put in an objection to the sale of the factory and the indigo under the decree, and it was ordered to be sold subject to his objection.

It is admitted that the indigo, which was ready for sale, was by an arrangement sent down to Calcutta to be sold in the indigo mart by Messrs. Moran & Co., and that the proceeds, less charges, were sent back to the Court out of which the process issued, to be distributed to whoever might be entitled to them. The mortgage of Mahomed Nawab thus attached to the proceeds in the same way as it covered the indigo before it was converted into money.

Messrs. Moran & Co. had also a lien upon the indigo which they established by decree, and there is no question now raised as to their right to be paid their debt in the first instance. It was paid, and this payment reduced the balance available for other creditors to 5,427 rupees, less than sufficient to pay the claim of the present decree-holder. He was, however, the first attaching creditor, and was entitled to be paid his debt in full, to the exclusion of other attaching creditors, who, under s. 270 of Act VIII of 1859 then in force, were only entitled to any surplus that might remain after payment of the claim of the first attaching creditor.

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But the claim of the first attaching creditor was subject to the claim of Mahomed Nawab, if he could establish it under his mortgage. Mahomed Nawab did not, however, put forward his claim to the proceeds of the sale of the indigo, and the execution-creditor, without notice to Mahomed Nawab, took out of Court the balance, 5,427 rupees.

The Court, in distributing the proceeds of the sale, took into consideration the fact, that there were several attaching creditors, and rightly gave priority to the present decree-holder as against the others. But it did not take into consideration, as it ought to have done, the claim of Mahomed Nawab.

The decree-holder, having taken the 5,427 rupees entered up satisfaction of his decree for that amount.

Mahomed Nawab then, having first got an *ex parte* decree against Mahomed Akran for rupees 50,000 on his bond, sued the execution-creditor and Mahomed Akran to enforce his lien upon the monies; he did not make the surety, Farzuud Ally or his representatives (for Farzund Ally is now dead) parties to this suit; and Mohabeer Pershad made no attempt to have them brought in as parties under s. 73 of Act VIII of 1859.

This suit was not tried out, but it was compromised by a payment of Rs. 4,600 made by the execution-creditor to Mahomed Nawab. The execution-creditor then sought to execute his decree afresh against the heirs of Farzund Ally, the surety, who are the present appellants.

They made two objections: 1*st*, that the decree had been already executed by the receipt of the Rs. 5,427, and that in respect of that payment, satisfaction had been entered up, and no further execution could be had; that the judgment-creditor had voluntarily relinquished the fruits of his decree, and could not recover them against the appellants in a second execution. Secondly, they objected that the decree could not in any event be executed against them personally, but only against the property of Farzund Ally inherited by them.

The Subordinate Judge has decided the first objection against the appellants. He thinks, that as the judgment-creditor has repaid Rs. 4,600 to Mahomed Nawab, he is in justice and equity entitled to execute his decree over again in respect of that

amount, even although the payment was made under an arrangement by way of compromise, and although it is against the surety, and not against the principal debtor, that he seeks execution.

The judgment-creditor did not enter up satisfaction for the payment of the Rs. 5,427 under any mistaken idea that it belonged to the debtor absolutely free from the claim of any one else, for he had notice of the claim of Mahomed Nawab; nor is there any suggestion of fraud. Mahomed Nawab did not pursue his objection, and assert his claim to the money into which the indigo had been converted, when it was paid into Court to await the result of enquiries into his claim, and those of Messrs. Moran & Co. and of the other execution-creditors, but this conduct of Mahomed Nawab did not affect the judgment-creditor who had already notice of the claim.

The subsequent suit in which Mahomed Nawab recovered Rs. 4,600 under the compromise, was one to which the sureties for the judgment-debtor were no parties; they had therefore no opportunity of contesting the validity of the encumbrance which was impeached by the judgment-creditor in the first instance on the ground of fraud; a contention which he afterwards abandoned by compromising the case.

Even if the satisfaction of the decree entered up by the creditor were not absolutely binding upon him, as I think it is, the payment under such circumstances would not bind the judgment-debtor, unless he were a party to the compromise, much less would it bind his surety.

It appears to me, therefore, that the contention of the present appellants must succeed, and that the decree has been satisfied to the extent of Rs. 5,427 taken out of Court by the judgment-creditor.

The second objection, namely, that the decree could not be executed against the present appellants on the ground that they have no assets of their ancestor Farzund Ally, whom they represent, has not been discussed or decided in the Court below or in this appeal.

The appeal is, therefore, allowed, and the order reversed with costs.

Appeal allowed.