

## APPELLATE CIVIL.

*Before Mr. Justice Field and Mr. Justice Murpherson.*

IN THE MATTER OF THE PETITION OF BROJENDRA KUMAR RAI CHOWDHURI AND OTHERS.

1886  
February 1.

BROJENDRA KUMAR RAI CHOWDHURI AND OTHERS (DEFENDANTS)  
v. RUP LALL DOSS AND ANOTHER (PLAINTIFF.)\*

*Civil Procedure Code, 1882, s. 492—Civil Procedure Code, 1859, s. 92—  
Injunction to stay sale pending suit to establish title—Superintendence  
of High Court under s. 622, Civil Procedure Code, 1882.*

A claim by *R* to certain property which had been attached by *B* in the course of execution proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, *R* instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civil Procedure Code to stay the sale of the property attached by *B* in the execution proceedings; but that application was rejected, and *R* thereupon applied for and obtained from the Court of the First Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held*, in an application under s. 622 of the Code, to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have, a wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "*in danger of being wrongfully sold*;" if the circumstances justified it, an order could have been obtained under that section from the Court of the Second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided, and no express provision in the Code for stay of execution by a Court executing a decree on the application of a third party, the order of the First Subordinate Judge was made without jurisdiction, and should be set aside.

THIS was the hearing of a rule granted by the High Court on the petition of the defendants, calling on the plaintiffs to show cause why an order of the First Subordinate Judge of Dacca, in certain execution proceedings in his Court should not be set aside. The facts stated in the petition were as follows:—

That in execution case No. 68 of 1885, in the Court of the First Subordinate Judge of Dacca, the petitioners had, in execution of

\* Civil Rule No. 194 of 1886, against the order of Baboo Grish Chundra Chowdhuri, First Subordinate Judge of Dacca, dated the 17th of August 1885.

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a decree against one Madhub Chunder Ghose, attached with a view to sale certain property of the judgment-debtor; that thereupon Rup Lall Doss and Rughoonath Doss, the plaintiffs in the present suit, preferred a claim to the attached property under s. 278 of the Civil Procedure Code, and the claim being disallowed they instituted a suit in the Court of the Second Subordinate Judge of Dacca to establish their right to the property; and applied to the Court in which their suit was brought for an injunction under s. 492 of the Code to restrain the sale of the property attached in the execution proceedings in case No. 68 of 1885. This application was rejected on 17th August 1885, and Rup Lall Doss and Rughoonath Doss thereupon applied to and obtained from the First Subordinate Judge an order that the sale of the attached property should be stayed until the decision of the suit brought by them in the Court of the Second Subordinate Judge.

Mr. *Bonnerjee* on behalf of the petitioners thereupon applied to the High Court (MITTER and MACPHERSON, JJ.) under s. 622 of the Civil Procedure Code to set aside that order, and that Court on the 8th September 1885 granted a rule *nisi*, calling upon Rup Lall Doss and Rughoonath Doss to show cause why the order should not be set aside, as having been made without jurisdiction.

The *Advocate General* (Mr. *Paul*) (with him Baboo *Lol Mohun Das*) now showed cause, and contended that the First Subordinate Judge had jurisdiction to make the order staying the sale in the execution proceedings, referring to *Roy Luchmiput Singh v. The Secretary of State* (1); and *Doorga Ohurn Chatterjee v. Ashootosh Dutt* (2).

Mr. *Woodroffe*, (with him Baboo *Kali Ohurn Banerjee*, for the petitioners referred to *Ishan Ohunder Roy v. Ashamoolah Khan* (3); and *Gossain Money Puree v. Guru Pershad Singh* (4).

The decision of the Court (FIELD and MACPHERSON, JJ.) was delivered by

(1) 20 W. R., 11; S. C. 11 B. L. R., Ap., 27.

(2) 24 W. R., 70.

(3) I. L. R., 10 Cal., 817.

(4) I. L. R., 11 Cal., 146.

FIELD, J.—In this case the petitioner, Brojendra Kumar Rai Chowdhuri, obtained a decree in the Court of the First Subordinate Judge of Dacca. In execution of this decree he sought to sell certain property. Thereupon certain persons, Rup Lall Doss and Rughoonath Doss, preferred a claim to that property. This claim was unsuccessful, and was rejected in the course of the execution proceedings. On this Rup Lall Doss and Rughoonath Doss instituted a regular suit to assert their right to the property attached by Brojendra Kumar Rai Chowdhuri in execution of his decree. In that suit they applied for a temporary injunction to restrain Brojendra Kumar Rai Chowdhuri from selling the property until the decision of the suit so brought by them to assert their title thereto. This suit is pending in the Court of the Second Subordinate Judge. The application for an injunction was refused. Thereupon Rup Lall Doss and Rughoonath Doss went back to the Court of the First Subordinate Judge and applied to him to stay the sale of the property until the decision of the title suit pending in the Court of the Second Subordinate Judge. The First Subordinate Judge, in compliance with their application, made an order so staying the execution of the decree.

We are now asked to say that the First Subordinate Judge had no jurisdiction to make this order. It is contended by the learned Advocate General on the authority of two cases *Roy Luchmiput Singh v. The Secretary of State* (1), and *Doorga Churn Chatterjee v. Ashootosh Dutt* (2), that the First Subordinate Judge had jurisdiction, and that the order staying the execution sale was properly made. It appears to us that the Legislature has deliberately altered the law as laid down in the two cases just referred to. Under s. 92 of the old Code, Act VIII of 1859, the words were "that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated, by any party to the suit;" and in the case of *Roy Luchmiput Singh v. The Secretary of State* (1), it was held that property, which was about to be sold in execution, could not be said to be in danger of being wasted, damaged, or alienated within the purview of these words. In the present Code, s. 492, other words have been introduced, namely, "or wrongfully

(1) 20 W. R., 11; S. C. 11 B. L. R., Ap. 27.      (2) 24 W. R., 70.

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sold in execution of a decree," and these words must be read with the previous part of the section, that is, "that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree." The law does not say that a property is or is about to be wrongfully sold, but that it is *in danger of* being wrongfully sold. We think that these words are wide enough to include a case, such as that which is now before us, and that in a case of this kind there is a sufficient remedy provided under the present Code by an application to the Court in which the title to the property is being litigated, for an *ad interim* injunction to restrain the defendant in that suit from proceeding to a sale of the property until the title has been definitely determined.

The point does not appear to have been as yet decided by this Court under the new Code. But we may refer to the case of *Gossain Money Puree v. Guru Pershad Singh* (1). In that case one Gossain Money Puree obtained a decree against Chacka Singh upon a mortgage bond, and the mortgage property was directed to be sold. This decree was confirmed by the High Court. Chacka Singh was the father of a Mitakshara family. After Gossain Money Puree had obtained his decree, the sons of Chacka Singh brought a suit to have their title to certain shares in the property declared. Gossain Money Puree then proceeded to execute his mortgage decree, whereupon the sons applied for and obtained an *ad interim* injunction restraining him from selling the property until the title suit was decided. The title suit was subsequently decided adversely to the sons. They preferred an appeal to the High Court, and they obtained from the Subordinate Judge a further injunction restraining Gossain Money Puree from executing his decree until the appeal was decided. The High Court were of opinion that the Subordinate Judge had no jurisdiction to grant this further injunction; but in speaking of the first injunction to stay the sale pending the decision of the suit in the Court of the Subordinate Judge, Garth, C.J., said: "He, that is, the Subordinate Judge, had a right whilst the questions in this suit were awaiting trial, to restrain the defendants by an *ad interim* injunction from enforce-

(1) I. L. R., 11 Calc., 148.

ing his decree in the former suit." As we have already said the question now before us was not decided, but the case is important as an instance in which a Subordinate Court issued an *ad interim* injunction since the passing of the new Code under circumstances similar to those in the present case; and such course was approved by the High Court, although the exact question did not come before that Court for decision.

It appears to us then that under the language of s. 492 of the present Code, Rup Lall Doss and Rughoonath Doss could have obtained from the Second Subordinate Judge an *ad interim* injunction to stay the sale of the property. Whether under the circumstances such an injunction ought or ought not to have been granted, is a question not now before us, and upon which we therefore express no opinion.

We are then of opinion that, if the circumstances justified it, an order staying the sale might have been obtained under the provisions of s. 492 from the Second Subordinate Judge; and that this section has been amended so as to afford a remedy which was not available under the section of the old Code. This being so, and the Court executing the decree not being vested with power to stay execution under these circumstances by any of the other provisions of the present Code, we do not think that the First Subordinate Judge had jurisdiction to make, upon the application of a third party, an order staying the execution of the decree. There are, in the present Code, express provisions for stay of execution (see for example ss. 239 and 243, and as to stay of execution of a decree under appeal ss. 545 and 546). There is no provision which enables a Court to stay execution upon the application of a third party; and having regard to the fact that the Legislature has provided for stay of execution in certain cases and has not provided for the particular case now before us, bearing further in mind that in our view the preventive jurisdiction which is sought to be called into operation can be otherwise exercised under a specific section of the Code, we think that the First Subordinate Judge had not jurisdiction to make the order which we are now asked to set aside.

The rule must, therefore, be made absolute with costs.

J. V. W.

*Rule absolute.*

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