

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkill.

SADIQ HUSAIN (OBJECTOR) v. LALTA PRASAD AND ANOTHER (DECREE-HOLDERS).*

1897
November 22.

Execution of decree—Restitution of benefit obtained under a decree which is reversed on appeal—Restitution sought by means of execution of appellate decree against a person not a party to the appeal—Civil Procedure Code, section 583.

Held that appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, could not, on succeeding in their appeal, obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council. *Bhagwati Prasad v. Jamma Prasad* (1) referred to.

ON the 21st July 1888 Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz-ud-din Ahmad and Hafiz-ud-din Ahmad. The defendants appealed, and on the 16th of March 1891 the High Court set aside the decree and dismissed the plaintiffs' suit with costs. The defendants assigned their decree for costs to one Sadiq Husain. On the 16th July 1891 Sadiq Husain applied for execution of the decree assigned to him against the plaintiffs, and on the 23rd July 1891 obtained payment of the amount of costs decreed. On the 24th July 1891 the plaintiffs applied to the High Court for leave to appeal to Her Majesty in Council. Leave was granted, and ultimately, on the 5th of August 1895, the Privy Council decreed the appeal and restored the decree of the Court of first instance in favour of the plaintiffs. The plaintiffs did not make Sadiq Husain a party to their appeal to the Privy Council. The decree of the Privy Council was in due course transmitted for execution to the Court of the Subordinate Judge of Bareilly, and thereupon, the plaintiffs filed in that Court an application for execution against the defendants and Sadiq Husain. In that application they prayed, as against the defendants,

* First Appeal No. 15 of 1897 from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 12th December 1896.

(1) L. L. B., 19 All., 136.

1897

SADIQ
HUSAIN
v.
LALTA
PRASAD.

for sale of the property charged in the decree, and, as against Sadiq Husain, for realization by attachment and sale of his property of the amount of costs realized by him in execution of the decree of the High Court of the 16th March 1891, together with certain interest. To this application Sadiq Husain filed objections, which were disallowed by the Subordinate Judge on the 12th of December 1896. From the order disallowing his objections Sadiq Husain appealed to the High Court.

Mr. *A. E. Ryves* and *Manly Ghulam Mujtaba*, for the appellant.

Mr. *D. N. Banerji*, for the respondent.

EDGE, C. J. and BURKITT, J.:—This appeal arises out of an application to the Subordinate Judge of Bareilly made in execution of a decree of Her Majesty in Council. In the suit in which that decree was passed the plaintiffs obtained from the Subordinate Judge of Bareilly a decree for sale on a mortgage with costs. On appeal this Court set aside the decree of the Subordinate Judge and dismissed the suit with costs. That decree of this Court, which was in favour of the defendants, was assigned by the defendants to Sadiq Husain, we presume for consideration. On the 16th of July 1891, Sadiq Husain applied under section 232 of the Code of Civil Procedure for execution of the decree which had been assigned to him for Rs. 4,820, the amount of the costs decreed by this Court in favour of the defendants. Of that application the plaintiffs had notice; they were parties to it. Sadiq Husain obtained an order, and, in execution of the decree assigned to him, he obtained, on the 23rd of July 1891, payment of Rs. 4,820. On the 24th of July 1891, the plaintiffs in the suit applied to this Court for leave to appeal to Her Majesty in Council. The appeal lay as a matter of right. Leave was granted; and finally the appeal came before Her Majesty in Council, with the result that the decree of this Court was set aside and the decree of the Subordinate Judge of Bareilly was restored with costs. That order of Her Majesty in Council was communicated to this Court, and on the application of the

1897

 SADIQ
 HUSAIN
 v.
 LALTA
 PRASAD.

plaintiffs this Court transmitted that order to the Subordinate Judge of Bareilly for the execution of the same. After the arrival of the order of Her Majesty in Council in the Court of the Subordinate Judge of Bareilly, the plaintiffs in the suit presented an application to the Subordinate Judge asking for an order of restitution against Sadiq Husain in respect of the Rs. 4,820-13-0 already mentioned and for Rs. 1,390-13-0, interest on that amount, making a total of Rs. 6,211-10-0. Sadiq Husain was no party to the appeal to Her Majesty in Council.

From what we have said it appears, as was the fact, that the plaintiffs had actually satisfied, by payment to Sadiq Husain, the decree for costs before they moved at all in the matter of appealing to Her Majesty in Council. They consequently had full knowledge that Sadiq Husain was the assignee of that decree and that he was a person interested to maintain that decree in its integrity so far as costs were concerned. Notwithstanding that the plaintiffs knew of Sadiq Husain's interest, they filed their appeal to Her Majesty in Council and proceeded with that appeal without making Sadiq Husain a party to it. When the appeal to Her Majesty in Council came on for hearing, the defendants, apparently through an oversight, were not represented. Sadiq Husain of course was not represented, being no party to the appeal, and the appeal to Her Majesty in Council was decreed in the absence, not only of the defendants but of the assignee of the decree. Sadiq Husain was not even made a party to the application to this Court to put the order of Her Majesty in Council into execution under section 610 of the Code of Civil Procedure. The decree of Her Majesty in Council was against the respondents to the appeal. Sadiq Husain was not a respondent. It was not until the order of Her Majesty in Council arrived in the Court of the Subordinate Judge of Bareilly, that the plaintiffs in the suit sought for any remedy whatsoever against Sadiq Husain. What they seek is an order under which Sadiq Husain's goods and his lands may be seized and sold, and the proceeds up to Rs. 6,211-10-0 be paid over to the plaintiffs. It is contended that

1897

SADIQ
HUSAIN
v.
LALTA
PRASAD.

because the order of Her Majesty in Council ordered this Court to govern itself according to that order, this Court and the Court of the Subordinate Judge of Bareilly are bound to make Sadiq Husain by the process of the Court, *i. e.*, by execution had against his goods or lands, pay to the plaintiffs the amount they claim. It is admitted that section 583 of the Code of Civil Procedure does not apply to this case. It is obvious that that section does not apply. The decree under which the plaintiffs are seeking a benefit is an order of Her Majesty in Council, and not a decree passed under Chapter XLI of the Code of Civil Procedure. Further, section 583 only applies to parties to the proceedings in the suit and in the appeal, and does not apply to assignees of interests of the parties to the suit when those assignees have not been made parties to the suit or the appeal. Mr. *Dwarkanath Banerji* is unable to point out to us any section in the Code of Civil Procedure under which we could make an order which would justify the officer of the Court in seizing and selling in execution of the order of Her Majesty in Council, the goods or lands of a person who was no party to the appeal to Her Majesty in Council and who is not even either named or referred to in the order of Her Majesty in Council. Mr. *Dwarkanath Banerji's* argument went as far as this, that this Court had not even discretion in the matter, that we were merely exercising ministerial functions, and that under the order of Her Majesty in Council we were bound to restore to the successful appellants the moneys they had paid to the assignee of the decree of this Court. According to that contention it would be immaterial whether Sadiq Husain could prove any matter of estoppel between him and these plaintiffs, as, for instance, that he had purchased the decree of this Court on the representation of the plaintiffs that they would not appeal. A somewhat similar case was before this Court last year, *viz.*, *Bhagwati Prasad v. Jamna Prasad* (1). We have been referred to *Rodger v. The Comptoir d'Escompte de Paris* (2) and to *Syud Bazayet Hossein v. Dooli Chand* (3).

(1) I. L. R., 19 All., 136.

(2) L. R., 3 P. C. A., 465.

(3) L. R., 5 I. A., 411.

In our opinion neither of these cases has any bearing on the one before us. If the plaintiffs had desired to obtain a remedy against Sadiq Husain through the medium of an order of Her Majesty in Council, they had ample notice of the assignment to him—they had actually paid him—and they could have made him a party to their appeal; but for reasons best known to themselves they did not do so. The plaintiffs are not asking to follow immovable property decreed to them in the appeal by order of Her Majesty in Council. They are asking to turn this decree against the defendants into a decree against Sadiq Husain, who was no party to the proceedings, and to put it into execution against his goods and his lands as if it had been a decree for money passed against him. In our opinion we have no jurisdiction to make any order for the execution of this order of Her Majesty in Council against Sadiq Husain. Equally in our opinion the Subordinate Judge had no jurisdiction to make the order which he made and which is now under appeal.

We allow this appeal and dismiss the application to the Subordinate Judge against Sadiq Husain with costs in both Courts.

Appeal decreed.

APPELLATE CRIMINAL.

1897

November 23.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* TULSHA.*

Act No. XLV of 1860 (Indian Penal Code), section 307—Attempt to murder—Intention—Knowledge of probable consequence of act—Presumption.

Where a woman of twenty years of age was found to have administered datura to three members of her family, it was *held* that she must be presumed to have known that the administration of datura was likely to cause death, although she might not have administered it with that intention.

THE facts of this case sufficiently appear from the judgment of the Court.

* Criminal Appeal No. 1153 of 1897.

1897

SADIQ
HUSAIN
v.
LALTA
PRASAD.