

Before Mr. Justice Blair and Mr. Justice Banerji.

TAMESHAR PRASAD AND ANOTHER (JUDGMENT-DEBTORS) v. THAKUR PRASAD AND OTHERS (PURCHASERS OF DECREE).*

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March 31.

Execution of decree—Civil Procedure Code, sections 232 and 295—Sale of decree and transfer for execution to another Court—Application by transferees for rateable distribution of assets—Court to which such application should be made.

A decree was transferred for execution from Mirzapur to Gorakhpur; the decree-holder also sold his interest in the decree. The transferees thereupon made an application for execution in the Gorakhpur Court, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri against the same judgment-debtor. Upon this application the following order was passed:—"The judgment-debtors and the transferors both received notice, but none of them put in an appearance, and no objections were filed. As the prayer in this case is to be allowed a rateable share of the assets in Bindesri Prasad's case, let this case be put with that case."

Hold (1) that the Court to which the decree was transferred for execution had no power to entertain the transferees' application for a rateable share in the assets; such application could only be entertained by the Court which passed the decree; (2) that the order passed by the Gorakhpur Court could not operate as *res judicata* so as to prevent the judgment-debtors from questioning the right of the transferees to make an application for execution to that Court; and (3) that the order passed by the executing Court was appealable as an order under section 244 of the Code of Civil Procedure. *Badri Narain v. Jai Kishen Das* (1) and *Amar Chundra Banerjee v. Gurn Prosuano Mukerjee* (2) referred to.

In this case one Maharaj Raja Ram Misir obtained from the Court of the Subordinate Judge of Mirzapur a decree against Tameshar Prasad and others, residents of Gorakhpur. The decree having been transferred for execution to Gorakhpur, the decree-holder sold it to Thakur Prasad and others, who were residents of that place. The transferees thereupon applied for execution to the Court of the Subordinate Judge of Gorakhpur, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri Prasad against the same judgment-debtors. Upon that application the following order was made:—"The judgment-debtors and the transferors both received notice, but none of them put in an appearance,

* Second Appeal No. 717 of 1901, from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 27th of June 1901, confirming an order of Munshi Anant Prasad, Subordinate Judge of Gorakhpur, dated the 9th of March 1901.

(1) (1894) I. L. R., 16 All., 483.

(2) (1900) I. L. R., 27 Calc., 488.

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and no objections were filed. As the prayer in this case is to be allowed a rateable share in the assets in Bindesri Prasad's case, let this case be put up with that case." The transferees had made no application to the Court which passed the decree. The names of the transferees having been substituted by the Gorakhpur Court for that of the original decree-holder, they made a further application for execution. To this the judgment-debtors took various objections, which were, however, overruled by the Subordinate Judge. On appeal by the judgment-debtors to the District Judge that Court held that the whole of the proceedings in the first Court were void for want of jurisdiction, and that no appeal lay, and accordingly dismissed the appeal. Against this order the judgment-debtors appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of an application for execution made by the transferees of a decree. The decree was made by the Subordinate Judge of Mirzapur. As the property against which execution was sought was in the district of Gorakhpur, the decree was sent to the Gorakhpur Court for execution. The decree-holder transferred his decree to the present respondents. Thereupon the respondents made an application for execution of the decree, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri Prasad against the same judgment-debtors. Upon that application an order was made upon the 2nd of April, 1900, couched in the following terms:—"The judgment-debtors and the transferors both received notice, but none of them put in an appearance, and no objections were filed. As the prayer in this case is to be allowed a rateable share of the assets in Bindesri Prasad's case, let this case be put up with that case." No application had been made by the transferees respondents to the Court which made the decree. It is to that Court, and not to the Court executing the decree, that an application could rightly be made and the transferees placed on the record. This is manifest from the terms of section 232, which provides that "a transferee may apply for its

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execution to the Court which passed it." The Court, therefore, executing the decree had no jurisdiction to pass any orders in execution upon the application of the transferees. It has been objected by the respondents that the order of the 2nd of April 1900, which indeed is an order of adjournment, should be taken to operate as *res judicata*, so as to prevent the judgment-debtors from questioning the right of the transferees to make an application for execution to the Court to which the decree had been transferred for execution. Apart altogether from the question whether the first order, if order it be, was made without jurisdiction, it is manifest to us, upon the terms of that order, that it did not, in express terms or by necessary implication, adjudicate upon the right of the transferees applicants. In our opinion it reserved that question as well as the question of rateable distribution for the hearing of the case. Therefore the case on which the respondents rely does not apply.

The learned Judge of the lower appellate Court further held that the Court of first instance having no jurisdiction to entertain the application, no appeal lay to it from the order made by that Court. The authorities on that question point the other way. The order made by the Court executing the decree was an order made under section 244 of the Code of Civil Procedure, and as such an appeal did lie, such an order being a decree within the meaning of section 2 of the same Code. On this point the cases reported in I. L. R., 16 All., 483, and in I. L. R., 27 Calc., 488 are authorities.

The result is that we allow this appeal and dismiss the application made by the respondents with costs in all Courts.

Appeal decreed.