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MUHAMMAD MEHDI HASAN KHAN v. MANDIR DAS.

On the whole their Lordships are of opinion that the judgement and decree appealed against should be set aside and the plaintiff's suit dismissed with costs in all the courts. And they will humbly advise His Majesty accordingly. The plaintiff will pay the costs of these appeals.

Appeal allowed.

Solicitors for the appellant :—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

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May, 2.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

BALMAKUND (DECREE-HOLDER) v. ASHFAQ HUSAIN (JUDGEMENT-DEBTOR).*

Execution of decree—Assignment—Ex parte *order passed subsequent to assignment—Power of court on application of assignee to reconsider such order.*

Pending an application for execution of a decree the decree-holder sold the decree. The purchaser applied for execution ; but whilst his application was pending the former application of the original decree-holder came on for hearing, and it was decided, *ex parte*, that the decree was barred by limitation. *Held* that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the court hearing this application bound by the former *ex parte* finding.

The facts of this case were as follows :—

Jagannath Prasad obtained a decree against Ashfaq Husain. He applied for its execution on the 17th of April, 1911. The judgement-debtor objected that the executing court had no jurisdiction as the decree had been transferred to another court on a previous application, and that the decree was barred by limitation. The date fixed for hearing these objections was the 8th of June, 1911. In the meantime Jagannath had sold his decree to Balmakund on the 27th of April, 1911, who applied on the 2nd of June, 1911, for execution. Upon this application the court ordered notices to issue under order XXI, rule 16, and fixed the 24th of June, 1911, for hearing any objections. On the 8th of June, 1911, the date fixed for hearing the objections to the application of the 17th of April, the decree-holder, Jagannath, did not appear ; the objections of the judgement-debtor were heard and allowed, and the application for execution was dismissed.

* Second Appeal No. 47 of 1912, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 8th of January, 1912, reversing a decree of Murari Lal, Officiating Subordinate Judge of Cawnpore, dated the 10th of November, 1911.

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When the application of Balmakund came up for hearing on the 24th of June the judgement-debtor objected that the matter had already been disposed of by the order of 8th June, and the decree could no longer be executed. The court overruled the objection and ordered execution to proceed. This order was reversed by the District Judge on appeal. The decree-holder appealed.

Dr. *Tej Bahadur Sapru*, for the appellant :—

The order of the 8th of June is not binding upon Balmakund, as he was no party to the proceedings. The original decree-holder having assigned his decree had ceased, at the date of that order, to have any interest in it. At that date the real decree-holder was Balmakund, and he had applied for execution before that date. In making the order of the 8th of June the court overlooked this fact altogether. That order should not have been passed while the application of the 2nd of June was pending decision.

Mr. *Abdul Ruoof* (with him Mr. *B. E. O'Conor* and Mr. *Muhammad Ishaq Khan*), for the respondent :—

The order of the 8th of June stands intact. It has not been set aside by appeal, review or revision. The executing court, which passed that order, could not set aside, alter or ignore it except by a formal review. The order of that court granting Balmakund's application for execution is, therefore, illegal. At the date of the order of the 8th of June the only person whom the Court could recognize as decree-holder was Jagannath. The assignee, Balmakund, had no *locus standi* then, for up to that time the assignment had not been proved to and recognized by the Court. The assignment could not, *ipso facto*, wipe out the name of the original decree-holder at once; it could take effect only when recognized by the Court in proper proceedings therefor. The order of the 8th of June was, therefore, passed against the right decree-holder, and is binding upon his assignee. The assignee should have given notice of the assignment to the parties and obtained postponement. I rely on the ruling in *Sinnu Pandaram* v. *Santhoji Row* (1).

Dr. *Tej Bahadur Sapru*, in reply :—

Notice of the assignment could be given only through the Court and on the assignee's application dated the 2nd of June. Notices

(1) (1902) I. L. R., 26 Mad., 428.

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were ordered by the Court to issue. The court by granting Balmakund's application for execution, must be deemed to have, in effect, set aside or corrected its *ex parte* order of the 8th of June.

KARAMAT HUSAIN and TUDBALL, JJ.—In this case one Jagannath obtained a decree against Ashfaq Husain from the court of the Subordinate Judge of Cawnpore. He made several applications for the transfer of that decree either to the court at Lucknow or that at Bareilly. The decree-holder, on the 18th of April, 1911, made an application for execution in the court of the Subordinate Judge of Cawnpore. The 8th of June was fixed for the hearing of objections raised by the judgement-debtor. Before that date the decree-holder assigned that decree to Balmakund on the 27th of April, 1911. Balmakund, on the 2nd of June, 1911, made an application under order XXI, rule 16, for the execution of that decree. The munsarim on that very date made the following report:—"This is an application under order XXI, rules 11 and 16 of Act V of 1908, and an application in execution has been made on behalf of Jagannath Prasad, decree-holder, and the 8th of June, 1911, has been fixed for the disposal of the objections taken by the judgement-debtor. This application has been presented by the purchaser of the decree." The order on this report is that this be entered in the register of miscellaneous cases and notices fixing the 24th of June, 1911, be issued to the opposite party. The case be put up on the same date for disposal. On the 8th of June, 1911, the application setting out the objections raised by the judgement-debtor to the application of the original decree-holder, Jagannath, dated the 18th of April, 1911, was taken up. The decree-holder, Jagannath, was absent, for the simple reason that he had parted with his interest in the decree in favour of the assignee, Balmakund, who had no notice of that date. The Court, after hearing the objections raised by the judgement-debtor, allowed those objections and held the decree to be barred by limitation. On the 10th of November, 1911, when the Court took up the application of the assignee, dated the 2nd of June, 1911, for disposal, objections were taken by the judgement-debtor. One of those objections was that the application for execution of the decree by the decree-holder was rejected finally on the objection of the judgement-debtor on the

8th of June, 1911, and that, therefore, the decree could not now be executed. Regarding this objection the learned Subordinate Judge remarked as follows:—"I am of opinion that when the decree-holder had not appeared and his pleader did not proceed with the application, it simply should have been rejected. No trial and disposal of the objection was called for. Anyhow, the objections were decided against a person who had no longer any interest in the decree, having sold it before, and the decision was not binding upon the person who was the rightful owner and was not before the court. This disposes of the objection." An appeal was preferred to the learned District Judge, who allowed the appeal on the ground that the order of the Subordinate Judge, dated the 8th of June, 1911, was a subsisting order, and that all the steps taken subsequently thereto were *ultra vires*. The learned District Judge, in connection with that order, remarks:—"The proceedings of the lower court may be called careless or may be called inconsistent. But in my opinion they were perfectly legal, and the order of 8th June could not be ignored or set aside by the court itself in subsequent proceedings. * * * On the facts it is clear that all subsequent proceedings were *ultra vires* and must be set aside." Taking this view of the order of 8th June, 1911, the learned District Judge allowed the appeal. A second appeal is preferred from the decree of the learned District Judge, and it is contended that the order of 8th June, 1911, regard being had to the circumstances of the case, is to be treated as in substance set aside by the learned Subordinate Judge. The learned counsel for the other side argues that that order has in no way been set aside, and that, therefore, it ought to stand. There can be no doubt that the learned Subordinate Judge, when he took up the case on the 8th of June, 1911, was in possession of the facts that the decree-holder had assigned the decree to Balmakund, that he had no subsisting interest in the decree, and that the assignee had no notice of the date fixed for the disposal of the objections taken by the judgement-debtor. The order which he passed was, therefore, quite illegal. That being so, we are of opinion that the learned Subordinate Judge, by his order, dated the 10th of November, 1911, rectified the mistake committed by his predecessor on the 8th of June, 1911, and his remark in respect of that order must be treated as virtually

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setting aside that order, which was an *ex parte* order, and we think that he had power to do so, inasmuch as it is open to every court to correct such mistakes. Such being the case, the view taken by the learned District Judge is not correct. The result is that we allow the appeal, set aside the order of the learned District Judge, and send back the case to him for the decision of the appeal on its merits. The appellant will be entitled to his costs of this appeal.

Appeal allowed.

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May, 11.

REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR v. HARDWAR PAL.*

Act No. XLV of 1860 (Indian Penal Code), sections 182, 211—Sanction to prosecute—Criminal Procedure Code, section 195.

H. made a report against several persons, including one *S.*, at a police station, charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial, but not *S.* Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon *S.* made a complaint to the Magistrate, charging *H.* with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint.

Held that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction.

The facts of this case were as follows :—

On the 23rd of March, 1911, a report was made to the police by Hardwar Pal to the effect that several persons named therein, including one Sher Bahadur Singh, had committed the offence of rioting. The police instituted a case against some of the persons named, but not against Sher Bahadur. The accused were tried and some of them convicted by a Magistrate. These latter appealed to the Sessions Judge, who acquitted them. Sher Bahadur then filed a complaint under the first portion of section 211 of the Indian Penal Code against Hardwar Pal, who objected that the case could not proceed without the sanction of either the Superintendent of Police or the Court. The Magistrate held that no sanction was necessary and issued process against the accused. Hardwar Pal then applied in revision to the High Court.

The application came on for hearing before KARAMAT HUSAIN, J., who referred it to a bench of two Judges.

* Criminal Revision No. 164 of 1912 from an order of Kamta Prasad, Magistrate, first class, of Basti, dated the 2nd of February, 1912.