1930

NAZIR KHAN v. RAM MOHAN

Lastly it was argued by Mr. *Iqbal Ahmad*, the learned counsel for the applicant, that the plaintiffs were not precluded from proving an oral agreement to pay. On this point we cannot do better than quote the following remarks made by the present Chief Justice RANKIN of the Calcutta High Court. In *Dula Meah* v. *Moulvi Abdul Rahman* (1) his Lordship observed as follows :—"Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence (Evidence Act, section 91). Moreover, where there is an express promise, an implied promise will not be inferred." We entirely agree with these observations.

In the result our answer to the question referred to us by the Division Bench is in the negative, namely, that in the circumstances set forth in the question referred to us, the plaintiff cannot recover.

We direct that the record with our answer and a copy of this judgment be sent to the Bench making the reference.

REVISIONAL CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Niamat-ullah.

DEORAJO KUER (OBJECTOR) *v.* JADUNANDAN RAI (DECREE-HOLDER)*

1930 *July*, 1.

Civil Procedure Code, sections 64 (Explanation) and 73—Rateable distribution among decree-holders—What constitutes "application for execution" for purpose of section 73—Claimant for rateable distribution need not expressly pray for attachment afresh and sale—Inquiry into validity of claimant's decree whether competent.

Where the property of the judgment-debtor had already been attached and been ordered to be sold at the instance of one decree-holder, and another decree-holder made an application in the form prescribed for applications for execution and

*Civil Revision No. 182 of 1929.
(1) (1923) 28 C.W.N., 70.

1930

DEORAJO KUER v. JADUNANDAN RAI.

prayed for a rateable distribution of the assets to be realised, mentioning that the property was already under attachment and orders for sale, but did not expressly pray for attachment and sale, it was *held* that for the purpose of section 73 of the Civil Procedure Code the application was a sufficient application for execution of decree as required by that section and the applicant was entitled to a rateable distribution. In the circumstances there was no necessity for a fresh attachment or for a prayer for the same; and there was in substance an implied prayer for the sale of the property and rateable distribution.

It followed from the Explanation to section 64 of the Code that a decree-holder might have a claim for rateable distribution without a fresh attachment.

It would not be competent to a court acting under section 73 of the Code to inquire into the validity of the decree of a claimant for rateable distribution, on an allegation that the decree was a collusive one.

Mr. *Baleshwari Prasad*, for the applicant.

Mr. *K. Verma*, for the opposite party.

SULAIMAN and NIAMAT-ULLAH, JJ. :—This is an application by a rival decree-holder from an order granting rateable distribution of the assets realised by the court. The applicant had obtained a money decree against the judgment-debtor and his property had been attached by him and put up for sale at auction. The respondent decree-holder, who also had a money decree against the same judgment-debtor from another court, got the decree transferred to the same court which was executing the applicant's decree. After the execution of the decree had been transferred, he filed an application on the 15th of March, 1929, describing it as an application for execution. It was in fact on a printed tabular form prescribed for applications for execution under order XXI, rule 11. All the particulars required for an application for execution were filled in, from columns 1 to 9. In the last column, No. 10, which has a heading "the mode in which the assistance of the court is required" he stated

that the only property which the judgment-debtor had, had already been attached in execution of the other decree and was to be put up for sale on the 20th of March following. He therefore prayed that the decree-holder should be paid his decretal amount by rateable distribution of the amount realised at the auction sale. He gave particulars of his own decree and the amount due from the judgment-debtor. It is not disputed that the office of the court below treated this application as one for execution and the court actually ordered it to be registered as such. After the assets were realised the court, in spite of the objection by the applicant to the contrary, ordered a rateable distribution.

The applicant has now come up in revision to this Court and it is urged on her behalf that the order of the court below was either without jurisdiction or illegal because there had been no proper application for the execution of the respondent's decree before the assets were realised. This argument is based on the circumstance that in the prayer sought for there was no request either for the attachment of the property and sale or for the arrest of the judgment-debtor. The contention is that the only modes of execution of a money decree are attachment and sale, or sale without attachment, and arrest, and that unless one of these modes is specified there is no proper application for execution in accordance with law. Strong reliance is placed on a Nagpur case, *Balaji* v. *Gopal* (1).

Under order XXI, rule 54, the way in which immovable property can be attached is by making an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the way prescribed in sub-rule (2) of that rule. It can-

(1) A.I.R., 1929, Nag., 148.

1930

DEORAJO KUER v. JADUNANDAN RAI.

not be disputed that in the present case this procedure had already been adopted at the instance of the applicant himself. The property was already in *custodia legis* and there seems to us to have been no absolute necessity for a fresh attachment of the same property, that is to say a fresh order issued to the judgment-debtor prohibiting him from transferring or charging it.

The Explanation to section 64 undoubtedly implies that a priority as against subsequent transferees is established by a claim for rateable distribution which is included in the claim for attachment. It seems to us to follow that one may have a claim for rateable distribution without a fresh attachment. As a matter of fact even in cases of money decrees it is not always necessary to have a fresh attachment. Order XXXVIII, rule 11, refers to one case where there need not be an order for attachment after the decree.

The real point to consider is the proper interpretation of section 73 of the Code of Civil Procedure, under which the court below has acted. That section requires that before the court has received the assets there must have been an application to the court for the execution of the decree for the payment of money against the same judgment-debtor which had not been satisfied. If such an application has been made it is the duty of the court to distribute the assets rateably among all such claimants. The only question which we have to consider is whether the application of the 15th of March, 1929, can be said to have been an application for the execution of the decree within the meaning of section 73. We may in this connection point out that the language of this section is not so strict as for instance that of article 182 of the Limitation Act which expressly uses the expression "in accordance with law." At the time when the respondent

applied, the property was already under attachment. In our judgment it was unnecessary for him to ask for a fresh attachment. When he wanted that the sale proceeds realised by the court at auction should be distributed rateably, he was by implication asking for the sale of the property and for the payment of the money due to him under the decree. His application was professedly one for execution of the decree and he wanted the realisation of the amount due to him in the way which was most practicable at the time. We do not think that the mere fact that he omitted to ask for the attachment of the property afresh would justify us in saying that he had not applied for the execution of his decree.

When an application for rateable distribution is made after an attachment has already taken place the attachment really enures for the benefit of all claimants and is as effective as if it had been brought about separately by each of them, provided of course that they had, before the assets were realised, applied for execution of their decrees. In such cases it is quite sufficient for them to ask that the sale should take place and the sale proceeds distributed amongst them proportionately. As we interpret the application, there was in substance an implied prayer for the sale of the property and rateable distribution. We may point out that section 73 does not require a separate application for rateable distribution and accordingly there can be no objection to including a prayer for the distribution of the assets in the application which is really for execution of the decree itself.

It only remains to refer to the Nagpur case quoted above. It appears that the only application which had been made in that case was one asking for rateable distribution, pure and simple, and there was no application even ostensibly under order XXI, rule 11. The learned Judges accordingly held that the application could not be treated as an application for execu-

1930

DEORAJO KUER v. JADUNANDAN RAI.

tion and therefore the requirements of section 73 had not in that case been complied with. The application before us is of an entirely different nature as discussed above. Even if there were any slight defect or irregularity in the form of the application, that would not necessarily in every case make the application a void one.

We are also convinced that substantial justice has been done in this case and even if we had not taken the view that the court below was right we would have been very loath to interfere in revision.

The next ground urged is that the decree obtained by the respondent was a collusive decree and the court below should have gone into that question. We are of opinion that it would not have been within the power of the executing court to inquire into this allegation. The respondent holds a decree which has not been set aside, and in trying to see whether he is entitled to a rateable distribution the court could not have started an inquiry into the alleged collusion between the parties to it. The respondent is a holder of the decree the execution of which has been transferred to the court below and that court would not be competent to inquire into the validity of the decree on any such ground.

The application is accordingly dismissed with costs.

Before Mr. Justice Banerji.

1930
July, 4.

NABIDAD KHAN (PLAINTIFF) *v.* ABDUL RAHMAN (DEFENDANT)*

Contract Act (IX of 1872), section 23—Public Policy—Stifling a prosecution—Bond executed for the consideration of the withdrawal of a prosecution—Promisor having no personal interest in the matter—Agreement void.

An agreement, the object and consideration of which is the withdrawal of the prosecution of a third party, the pro-

*Civil Revision No. 99 of 1930.