Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1892
August 26.

BALKISHEN DAS AND OTHERS (DECREE-HOLDERS) *v.* BEDMATI KOER AND ANOTHER (JUDGMENT-DEBTORS).*

Limitation Act (XV of 1877), *sch. II, art.* 179—*Civil Procedure Code (Act XIV of* 1882), *ss.* 232-248—*Application for execution by transferee of decree—Benamidar.*

The words "in accordance with law" in article 179 of Schedule II of the Limitation Act mean in accordance with the law relating to execution of decrees.

Under section 232 of the Civil Procedure Code the Court executing the decree after giving notice to the decree-holder and judgment-debtor and hearing their objections, if any, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing. When, therefore, a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based are in accordance with law as between such transferee and the judgment-debtor, although he may be merely a benamidar, and such proceedings and application if made in proper time are sufficient to keep the decree alive. *Devnath Chuckerbutty* v. *Lallit Coomar Gangopadhya* (1) and *Gour Sundar Lahiri* v. *Hem Chunder Chowdhry* (2) distinguished; *Abdul Kureem* v. *Chukhun* (3) referred to; *Purna Chandra Roy* v. *Abhaya Chandra Roy* (4) and *Nadir Hossein* v. *Pearoo Thovildarinee* (5), followed.

Under the circumstances application for execution by the transferee of a decree was held to be not barred under article 179 of Schedule II of the Limitation Act.

THE facts of this case were as follows:—

In January 1885 Peary Lall Das and others obtained a decree against Mussamut Dulari Koer on a mortgage bond for a sum of Rs. 16,603. On the 19th December 1887 one Bhokola Das applied, under section 232 of the Code of Civil Procedure, to execute the decree, claiming as a transferee under a written assignment from the decree-holders. On the 27th of January 1888, there

* Appeal from Order No. 11 of 1892 against the order of Babu Jadoo Nath Das, Subordinate Judge of Tirhut, dated the 26th of September 1891.

(1) I. L. R., 9 Calc., 633. (3) 5 C. L. R., 253.
(2) I. L. R., 16 Calc., 355. (4) 4 B. L. R., App. 40.
(5) 14 B. L. R., 425 note; 19 W R., 265.

being no opposition, the name of Bhokola Das was substituted as decree-holder, and notices under section 248 of the Code of Civil Procedure were issued. On the 8th of March 1888 the execution was struck off, but was restored on the application of Bhokola Das on the 12th March 1888, and execution then proceeded. On the 16th May 1888 the mortgaged property was put up to sale, but was not sold, and subsequently the execution case was struck off on the 29th May 1888.

On the 24th November 1888 the Court executing the decree found, at the instance of Balkishen Das and others who had attached the decree, that Bhokola was merely the *benamidar* of Peary Lall Das and others, the original decree-holders. On the 29th of November 1890 Bhokola applied to execute the decree against persons who were alleged to be, but were not in fact, the legal representatives of Dulari Koer. On 31st January this application was admitted as a fresh application for execution, and notices were issued under clauses (*a*) and (*b*) of section 248, Code of Civil Procedure. On the 31st of March 1891 the Court refused the application on the objection of the alleged representatives. On the same day Balkishen Das and others, representing that they had purchased the decree of Peary Lall Das and others, applied for time, so that the objections of the alleged representatives might be disposed of in their presence, but such application was refused on the ground that Balkishen Das and others were not parties to the proceedings.

On 21st July 1891 Balkishen Das and others formally applied, under section 232 of the Code of Civil Procedure, to execute the decree against the proper representatives of Bhokola, and put in a deed of assignment by Peary Lall Das and others and an agreement by Bhokola in which the latter disclaimed all interest in the decree.

The Lower Court held that this application was barred under article 179 of Schedule II of the Limitation Act. Against that decision Balkishen Das and others appealed to the High Court.

Mr. *Jackson* and Baboo *Karuna Sindhu Mukerjee* for the appellants.

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Sir *Griffith Evans*, Baboo *Degambur Chatterjee* and Baboo *Umakali Mookerjee* for the respondents.

The following cases were referred to during the arguments:—*Mahomed* v. *Abedoollah* (1), *Denonath Chuckerbutty* v. *Lallit Coomar Gangopadhya* (2), *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (3), *Fuzloor Ruhman* v. *Altaf Hossen* (4), *Mohabir Singh* v. *Ram Baghowan Chowbey* (5), *Gunga Pershad Bhoomick* v. *Debi Sundari Dabea* (6), *Hem Chunder Chowdhry* v. *Brojo Soonduree Debee* (7), *Abdul Kureem* v. *Chukhun* (8), *Amirunnissa Chowdhrani* v. *Ahsanullah Chowdhri* (9), *Issurree Dassee* v. *Abdool Khalak* (10), *Autoo Misree* v. *Bidhoomookhee Dabee* (11), *Chandra Prodhan* v. *Gopi Mohun Shaha* (12), *Purna Chandra Roy* v. *Abhaya Chandra Roy* (13), *Nadir Hossein* v. *Pearoo Thovildarinee* (14), *Gour Sundar Lahiri* v. *Hem Chunder Chowdhry* (15), *Asgar Ali* v. *Troilokyanath Ghose* (16), *Kunhi Mannan* v. *Seshagiri Bhakthan* (17), *Ramanandan Chetti* v. *Periatambi Shervai* (18), *Hari* v. *Narayan* (19), *Lachman Bibi* v. *Patni Ram* (20), *Lachman* v. *Thondi Ram* (21), *Ram Bakhsh* v. *Panna Lal* (22), *Rai Balkishen* v. *Rai Sita Ram* (23), *Stowell* v. *Ajudhia Nath* (24), *Sheo Prasad* v. *Hira Lal* (25), *Abdul Majid* v. *Muhammad Faizullah* (26).

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The appellants, who are the purchasers of a decree, contend that the Subordinate Judge was wrong in holding that execution was time-barred under article 179 of the second schedule of the Limitation Act.

(1) 12 C. L. R., 279.
(2) I. L. R., 9 Calc., 633.
(3) I. L. R., 8 Calc., 51.
(4) I. L. R., 10 Calc., 541.
(5) I. L. R., 11 Calc., 150.
(6) I. L. R., 11 Calc., 227.
(7) I. L. R., 8 Calc., 89.
(8) 5 C. L. R., 253.
(9) 13 C. L. R., 18.
(10) I. L. R., 4 Calc., 415.
(11) I. L. R., 4 Calc., 605.
(12) I. L. R., 14 Calc., 385.
(13) 4 B. L. R., App. 40.
(14) 14 B. L. R. 425 note; 19 W. R., 255.
(15) I. L. R., 16 Calc., 355.
(16) I. L. R., 17 Calc., 631.
(17) I. L. R., 5 Mad., 141.
(18) I. L. R., 6 Mad., 250.
(19) I. L. R., 12 Bom., 427.
(20) I. L. R., 1 All., 510.
(21) I. L. R., 7 All., 382.
(22) I. L. R., 7 All., 457.
(23) I. L. R., 7 All., 731.
(24) I. L. R., 6 All., 255.
(25) I. L. R., 12 All., 440.
(26) I. L. R., 13 All., 89.

In January 1885 Peary Lall Das and two others obtained the decree in question against Dulari Koer. The decree was obtained on a mortgage-bond for a sum of Rs. 16,603, and the amount now said to be due is something over Rs. 23,000. The execution proceedings have been taken in the Court of the Second Subordinate Judge of Muzaffarpur, which is the Court which passed the decree.

On the 19th December 1887 Bhokola Das applied, under section 232 of the Civil Procedure Code, to execute the decree, claiming as transferee under a written assignment from the decree-holders. The notices prescribed by that section were issued, and, no opposition being offered, the Subordinate Judge directed, on the 27th January 1888, that Bhokola's name should be substituted as decree-holder, and that the notices prescribed by section 248 should issue. After service had been reported, the case was struck off for default on the 8th March, but was restored on Bhokola's application of the 12th March. Execution then proceeded, and on the 16th May 1888 the mortgaged property was put up to sale. There were, however, no bidders, and as no further steps were taken, the execution case was struck off on the 29th May 1888.

Shortly either before or after this—it is not clear which—the decree was attached in the Court of the District Judge by the appellants, who alleged that Bhokola was merely the *benamidar* of the decree-holders, and on the 24th November 1888, the Judge found this allegation to be true.

Nothing further was done till the 29th November 1890, when Bhokola again applied to execute the decree against persons who were alleged to be, but were in fact not, the legal representatives of Dulari Koer, then deceased. On the 31st January the application was admitted as a fresh application for execution, and notices issued under clauses (*a*) and (*b*) of section 248. The alleged representatives came in, and on their objection that they were not the legal representatives of the deceased judgment-debtor, the Subordinate Judge, on the 21st March 1891, refused the application. On the same day the appellants, representing that they had purchased the decree of Peary Das, applied for time, in order that the objections of the representatives might be disposed of in their presence, but the application was refused on the ground that they were not parties to the proceedings.

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On the 21st July 1891 the appellants formally applied under section 232 to execute the decree against the proper representatives of Dulari Koer, and they put in the deed of assignment by Peary and an *ikrarnama* by Bhokola, in which he disclaimed all interest in the decree, and admitted that it had been only nominally transferred to him for the purposes of defeating the claim of the attaching creditors.

The Subordinate Judge has held, on the facts as above stated, that the last application is time-barred, an objection to that effect having been taken by the heirs who came in on notice under section 248. He holds [citing *Denonath Chuckerbutty* v. *Lallit Coomar Gangopadhya* (1) and *Gour Sundar Lahiri* v. *Hem Chunder Chowdhry* (2)] that the applications of Bhokola as *benamidar* of the decree-holders were not applications in accordance with law within the meaning of article 179 of the second schedule of the Limitation Act, and that putting them aside more than three years had elapsed from the date of the decree. He also holds that, even if the earlier applications were good, the application of the 19th November 1890 was bad, because it was made against persons who were not the legal representatives of the deceased judgment-debtor, and that putting it aside more than three years had elapsed from the 29th May 1888, when the execution case was struck off.

The two cases cited are, we think, clearly distinguishable from the present case, on the ground that the applications there relied upon and which the Court had to consider were made by a *benamidar* whose position as transferee was not recognised, and who was not allowed by the Court in the discretion vested in it to execute the decree. In the first case the application was opposed by an attaching creditor, and the application was withdrawn without any order being made upon it; in the second the learned Judges, speaking of the applications with which they were dealing, say that in none of those applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. It was held in each case that the applications were not in accordance with law within the meaning of article 179, and, if we may say so, rightly, as the applicants without the permission of the Court could not represent the decree-holders and

(1) I. L. R., 9 Calc., 633. (2) I. L. R., 16 Calc., 355.

had no status under section 232. The decisions were, no doubt, based on a broader ground and professedly followed the earlier case of *Abdul Kureem* v. *Chukhun*(1) decided by Mitter and Tottenham, JJ. This case was the converse of the one before us. There the decree-holder transferred his decree to A in the name of B who applied for execution, and had his name substituted, but did nothing more. Some time afterwards A as the real transferee applied for execution; the application was refused, but a subsequent application to the same effect was allowed. On B's admission that he was a *benamidar*, it was necessary, in order to avoid limitation, to bring in A's first application which had been refused, and the learned Judges held that it was within the purview of section 232 and, therefore, in accordance with law, and they did so on the broad ground that a *benamidar* was not a transferee within the meaning of section 232 and had no status at all under that section, even if the Court allowed him to execute the decree. But nothing in that case turned on the application of B, it was unnecessary to consider the effect of that application, or of proceedings in execution taken under it with the sanction of the Court. All that was actually decided was that there being an admitted transfer of the decree to A or B, the application of A, the real and admitted transferee, was a good one. We think we need give to the decision no wider effect. The question whether an application for execution by the real transferee of a decree, where the transfer is made *benami* and the application is not allowed, will keep the decree alive, and whether the transferee is entitled to execute the decree when objection is taken to his right to do so and the Court finds that he is a mere *benamidar*, is quite distinct from the question whether an application for execution by an alleged transferee of a decree who is allowed by the Court to carry on the execution, and who is afterwards admitted or proved to be a mere *benamidar* will keep a decree alive, and an answer to the former in favour of the real transferee, does not, in our opinion, necessarily involve a negative answer to the latter. The former question was the only one which the Court had to consider in the case of *Abdul Kureem* v. *Chukhun*, whereas in the present case we have to deal only with the latter.

(1) 5 C. L. R., 253.

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It was held in *Purna Chandra Roy* v. *Abhaya Chandra Roy* (1) that a *benamidar* could execute a decree, and this case goes very much further than we need go. The only case we can find that deals directly with the question now before us is the case of *Nadir Hossein* v. *Pearoo Thovildarince* (2). In that case it was held that the proceedings taken by a *benamidar* who was executing the decree would keep the decree alive. The facts of the case as regards the execution were very similar to the facts of this case. The decree-holder had nominally transferred the decree to another person in order to preserve it from the decree-holders against himself. The *benamidar* took some proceedings in execution, although his application to execute was subsequently disallowed on the ground that he was only a *benamidar*. Kemp and Pontifex, JJ. held that the proceedings taken kept the decree alive, and they overruled the objection that the proceedings must be taken by a person legally and rightfully entitled to the decree.

These cases were, it is true, governed by the Code and the Limitation Act of 1859, but there is, we think, no substantial change in the law. Sections 207 and 208 of the Code of 1859, and sections 230-232 of the present Code alike require that an application for execution should be made by the holders of the decree, or (with the sanction of the Court) by the person to whom it has been transferred by assignment or by operation of law, and a person who is a transferee within the meaning of the one is certainly a transferee within the meaning of the other. Nor has article 179 of the Limitation Act made any real change in this respect. The words "in accordance with law" mean, as we understand them, in accordance with the law relating to the execution of the decrees, and it cannot be said that a person who executes a decree with the permission of the Court—a permission which the Court is expressly empowered to give—is not doing so in accordance with law. What he does, whether he is the beneficial owner or not, is as between himself and the judgment-debtor perfectly good for the purpose of the execution, and all that is required is that it should be done in accordance with law.

(1) 4 B. L. R., App. 40.

(2) 14 B. L. R., 425 note; 19 W. R., 255.

Under section 232 the Court, after giving notice to and hearing the objections (if any) of the decree-holder and judgment-debtor, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing, and as between the decree-holder and the judgment-debtor the effect of the sanction is, it seems to us, to place the person who acts under it and proceeds with the execution in the place of the decree-holder for the purpose of the execution, whether the transfer is real or nominal. The legality of the proceedings taken in pursuance of an application made and allowed under section 232 must depend not on the reality of the transfer, but on the sanction accorded; and if the result was to obtain satisfaction wholly or in part, we know of no authority for the proposition that the proceedings would, as regards the judgment-debtor, be invalid, merely because the person at whose instance they were taken with the sanction of the Court turned out to be a *benamidar* of the decree-holder. It was in this case a mere accident that the property, when put up to sale by Bhokola, was not sold. It may be that the Court would not and should not accord sanction under section 232 if it knew that the applicant was a *benamidar;* but in the absence of objection it can have no knowledge on this matter, and it was not, we think, intended to in any way limit its discretion or invalidate on that account what has been done under the sanction. The object is to obtain satisfaction, and the judgment-debtor gets the full advantage of what is realised from him. Nor is the intention of the decree-holders to commit a fraud on a third person any reason for enabling the judgment-debtor, by ignoring the acts of the *benamidar*, to escape payment of a just debt, especially when, as in this case, to give effect to the judgment-debtor's objection would be to enable him to defeat the claim of the very person whom it was the original decree-holder's intention to defraud.

When, therefore, a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based, are, we think, in accordance with law as between him and the judgment-debtor, although he may be merely a *benamidar*, and this is all that is required to keep

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the decree alive. It would certainly be anomalous if a person who purchased a decree from a *benamidar*, under circumstances which would give him a good title as against the real owner, could not take advantage of the proceedings which the *benamidar* had taken to keep the decree alive against the judgment-debtor, and the real owner, if there was no fraud on the judgment-debtor, would be in no worse position.

We must hold, therefore, that Bhokola's applications of the 9th December 1887 and the 17th March 1888, which led to the properties being put up to sale, were in accordance with law within the meaning of article 179, or had the effect of keeping the decree alive. The same effect must also be given to the application of the 19th November 1890, so far as the *benami* question is concerned, as it was made by a person who had been executing the decree under the sanction of the Court which was still in force.

It remains to consider whether the last-mentioned application was bad on the ground that it was made against persons who were not the legal representatives of the deceased judgment-debtor. There is no reason to doubt that the application was *bonâ fide* and that the persons cited were believed to be the legal representatives. They were, in fact, the reversionary heirs, although the proper representative was the daughter of the deceased judgment-debtor. We think the mistake does not invalidate the application, and that, even if it could not be properly regarded as an application under section 234 by reason of the mistake, it would still be an application to take a step in aid of the execution. There might be a reasonable doubt as to who the legal representatives were, and no safer course could be followed than to cite the persons who were believed to hold that position.

It was contended for the respondents that the appellants had no *locus standi* under section 232 or any other section of the Code, as they merely claimed as transferees, and the Court had not recognized them as such or made any order allowing the decree to be executed at their instance. The respondents did not, however, contend in the Lower Court that the decree had not been transferred to the appellants, or that the latter should not be allowed under section 232 to execute it. Their contention was that the decree was time-barred. This was the question they raised, and which the

Court, at their request, considered and determined, and having determined it in their favour, the Court could not order that execution should proceed. We see no force in this contention.

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We must, for the reasons given, set aside the order of the Subordinate Judge refusing to allow execution on the ground that it is barred under article 179 of the Limitation Act. It is said that other objections were taken which have not been disposed of. If this is so, the Subordinate Judge must, of course, dispose of them before making an order for execution.

The appellants will get their costs in this Court.

C. S. *Appeal allowed.*

Before Mr. Justice Norris and Mr. Justice Macpherson.

SAJEDUR RAJA (DEFENDANT) *v.* BAIDYANATH DEB AND OTHERS (PLAINTIFFS).*

1892 *September* 2.

Right of suit—Civil Procedure Code (Act XIV of 1882), ss. 30, 539—Suit to remove a Mohunt—Trust for "Public Religious purposes"—"Numerous parties."

The "numerous parties" mentioned in section 30 of the Code of Civil Procedure mean parties capable of being ascertained.

Two plaintiffs instituted a suit, on behalf of themselves and 42 other persons named in a schedule to the plaint, against a mohunt of an *akhra* to have certain alienations of property belonging to the idol set aside and the mohunt removed on the ground that he was wasting the idol's property and setting up an adverse title to it, and to have another mohunt and trustee of the property appointed in his place. The plaintiffs alleged that they and the 42 others named in the schedule were in the habit of worshiping the idol or of contributing to the worship and expenses of it, but it was clearly established by the evidence that any Hindu who chose was at liberty to give *puja* or render service and worship, and that others than the plaintiffs and the 42 persons named in fact did so, and that the plaintiffs and the persons named were, therefore, not the only persons interested in the suit. The plaintiffs applied for and obtained leave to institute the suit under the provisions of section 30 of the Code. A decree having been made in their favour, on appeal—

Held, that the suit was not one to which the provisions of section 30 were applicable, as the persons interested therein, not being the whole Hindu

* Appeal from Original Decree, No. 169 of 1891, against the decree of Baboo Atool Chandra Ghose, Subordinate Judge of Sylhet, dated the 26th February 1891.