

1939
 THE
 DISTRICT
 MAGISTRATE
 KHERI,
 v.
 M. HAMID
 ALI
 GARDISH

The question for consideration is whether we should act under the first proviso to section 3 of the Contempt of Courts Act which provides that "the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court" or whether we should compel Hamid Ali Gardish to purge his contempt by payment of a fine or the undergoing of a sentence of imprisonment.

Thomas C.J.
 and
 Radha
 Krishna J.

We put a large number of questions to the accused, and he struck us to be a simple man. We are of opinion that he was foolish in writing the said article. He stated before us that he did not realise the seriousness of the offence. The circulation of the newspaper is very small and we are told the income is about Rs.30 a month.

We accordingly, while convicting Hamid Ali Gardish of contempt of court with respect to the Court of the Tahsildar Magistrate at Nighasan, discharge him on his apology.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge, and
 Mr. Justice Radha Krishna Srivastava

1939
 November,
 21

GOMTI AND OTHERS (JUDGMENT-DEBTORS-APPELLANTS) v.
 JUGUL KISHORE (DECREE-HOLDER-RESPONDENT)*

United Provinces Encumbered Estates Act (XXV of 1934), section 7(1)(a)—Decree of United Provinces court transferred for execution to court outside the United Provinces—Subsequent application by judgment-debtor under section 4, Encumbered Estates Act granted—Execution proceedings in court outside the United Provinces, whether can be stayed under section 7(1)(a).

Where a decree-holder got his decree, passed by a United Provinces court, transferred to a court in a different province, for execution, as some of the property was situate in that province and thereafter the judgment-debtor applied under

*Execution of Decree Appeal No. 48 of 1937, against the order of Mr. Bhagwati Prasad, Civil Judge of Unao, dated the 3rd of September, 1937.

1939

 GOMTI
AND
OTHERS
v.
JUGUL
KISHORE

section 4 of the United Provinces Encumbered Estates Act which was granted, *held*, that the execution proceedings pending in the court outside the United Provinces cannot be stayed by the United Provinces Court which passed the decree as part I of section 7(1)(a) of the Encumbered Estates Act was inapplicable to the case. *Jang Bahadur v. Bank of India, Limited* (1), *Seth Shapurji Nana Bhai v. Shankar Dat Dube* (2), *Srihary Mundul v. Murari Chowdhry* (3), *Swaminatha Ayyar v. Vaidyanatha Sastri* (4), *Balkrishna v. Debi Prasad and others* (5), and *Lang B. N. v. Jaswant Lal Hathi Chand* (6), referred to.

After a decree had been transferred to another court for execution no proceedings can be held to be pending in the court which passed the decree, as a mere order transferring a decree is not issuing a process for the execution thereof, and the words "other execution process" used in the latter part of section 7(1) (a) of the Encumbered Estates Act cannot cover such an order.

Messrs. *Haidar Husain* and *H. H. Zaidi*, for the appellants.

Mr. *M. Wasim*, for the respondent.

THOMAS, C.J., and RADHA KRISHNA, J.:—This is an execution of decree appeal on behalf of the judgment-debtors against whom the respondent at present holds a decree, which he obtained under Order XXXIV, rule 6 of the Code of Civil Procedure. This decree was passed some time in November, 1925. The judgment-debtors have some property situated in the district of Trippera, Bengal. In 1933 the decree-holder applied in the Court of the Civil Judge, then Subordinate Judge, of Unao for transfer of his decree to the Court of the Subordinate Judge of Comilla in Bengal for execution. The decree, was, therefore, sent for execution to that court and the execution thereof is pending there.

In October, 1936, the judgment-debtors made an application under section 4 of the United Provinces Encumbered Estates Act before the Collector of Unao, requesting that the provisions of that Act be applied

(1) (1928) L.R., 55 I.A., 227.

(3) (1886) I.L.R., 13 Cal., 257.

(5) (1930) 7 O.W.N., 363.

(2) (1895) I.L.R., 17 All., 431.

(4) (1905) I.L.R. 28 Mad., F.B., 466.

(6) (1926) I.L.R., 50 Bom., 439.

1939

GOMTI
AND
OTHERSv.
JUGUL
KISHOREThomas C. J.
and
Radha
Krishna J.

to them. The Collector of Unao forwarded the application to the Special Judge of Unao and proceedings before the learned Special Judge are still pending.

On the 24th July, 1937, the judgment-debtors applied in the Court of the Civil Judge at Unao, i.e. the court which passed the decree in favour of the respondent decree-holder praying that by virtue of section 7 of the United Provinces Encumbered Estates Act the execution proceedings going on in the Court of the First Subordinate Judge at Comilla, District Trippera, be ordered to be stayed. The court on the 27th July, 1937, passed an *ex parte* order staying execution proceedings. On the 3rd August, 1937, the decree-holder applied for setting aside the *ex parte* order of stay on the ground that the Court of the First Subordinate Judge of Comilla was situated outside the United Provinces and the execution proceedings pending in that court could not be stayed under the provisions of section 7 of the United Provinces Encumbered Estates Act. This application of the decree-holder was allowed and the order of stay passed on the 27th July, 1937, was vacated. The judgment-debtors have come up in appeal to this Court against the order of the learned Civil Judge of Unao, dated the 3rd September, 1937, cancelling the order of stay of execution proceedings.

The learned counsel for the appellants has argued that the provisions of section 7 of the United Provinces Encumbered Estates Act are fully applicable and they are entitled to obtain an order staying further execution proceedings in respect of the decree in favour of the decree-holder on two grounds namely:

- (1) That the execution proceedings originating in the decree-holder's application for transfer of the decree for execution to the Court in Bengal are still pending in the Unao Court which passed the decree and will terminate when the Bengal Court certifies

to that court the result of the execution under section 41 of the Code of Civil Procedure. These proceedings must be stayed under the first part of section 7(1)(a) resulting in the withdrawal of the decree from the Court in Bengal by the execution Court at Unao in the United Provinces.

(2) That the order passed by the Unao Court transferring the decree for execution to the Bengal Court was an execution process within the meaning of that expression in the latter part of section 7(1)(a) of the United Provinces Encumbered Estates Act and as such it became null and void, and the decree must be recalled from the court to which it was sent for execution. In support of his argument the learned counsel for the appellant has contended that the court does not become *functus officio* between the time when it transfers the decree for execution to another court and the date of certificate under section 41 of the Code of Civil Procedure and that court still retains jurisdiction over execution proceedings. He has placed reliance for this contention upon *Jang Bahadur v. Bank of Upper India, Limited* (1), *Seth Shapurji Nana Bhai v. Shankar Dat Dube* (2), *Srihary Mundul v. Murari Chowdhry* (3), *Swaminatha Ayyar v. Vaidyanatha Sastri* (4) and *Balkrishna v. Debi Prasad and others* (5). He has further referred to *Lang, B. N. v. Jaswant Lal Hathichand* (6) in support of his contention that the court which passed the decree has power to withdraw the decree at any time from the court to which the decree has been transferred for execution.

We find ourselves unable to agree with the contentions of the learned counsel for the appellants. In our opinion the case does not fall either under the first or

1939

GOMTI
AND
OTHERS
v.
JUGUL
KRISHORE

Thomas C.J.
and
Radha
Krishna J.

(1) (1928) L.R., 55 I.A., 227.

(2) (1895) I.L.R., 17 All., 431.

(3) (1886) I.L.R., 13 Cal., 257.

(4) (1905) I.L.R., 28 Mad., 466,
F.B.

(5) (1930) 7 O.W.N., 363.

(6) (1926) I.L.R., 50 Bom., 430.

1939

GOMTI
AND
OTHERS
v.
JUGUL
KISHORE

Thomas C.J.
and
Radha
Krishna J.

the second part of section 7(1)(a) of the United Provinces Encumbered Estates Act.

Section 39 of the Code of Civil Procedure lays down cases in which the court which passed the decree may send it for execution to another court. Order XXI, rules 5 and 6 of the Code of Civil Procedure provide for the mode and procedure of transfer of the decree. It is clear from these provisions that the proceedings in connection with an application for transfer of the decree start with an application for transfer to the court which passed the decree and end when that court has complied with the requirements of rule 6 of Order XXI. Thereafter no proceeding remains pending in that court. It may be that the execution court does not, on an order of transfer, lose its jurisdiction over the execution proceedings for certain purposes but it is very different from saying that the execution proceedings remain pending in that court. The cases cited by the learned counsel for the appellant mentioned above do not lend any support to the particular argument addressed before us.

In *Jang Bahadur v. Bank of Upper India Limited* (1) the facts were that the Court of the Subordinate Judge of Lucknow passed a decree absolute for sale on a mortgage in favour of the Bank of the Upper India, Lucknow, against Raja Durga Prasad, the father of Jang Bahadur appellant. Some property sought to be sold was situated in the district of Hardoi. The Subordinate Judge of Lucknow sent the decree for execution to the Court of the Subordinate Judge of Hardoi under section 39 of the Code of Civil Procedure and execution proceedings started in that court. Raja Durga Prasad then died during the pendency of the execution proceedings in the Hardoi Court. The decree-holder then filed an application in the Hardoi Court praying that Jang Bahadur's name be brought on the record as the representative of Raja Durga Prasad, the judgment-debtor.

(1) (1928) L.R., 55 I.A., 227-5 O.W.N., 502.

This substitution was allowed by the Hardoi Court. After the execution proceedings had gone on in the Hardoi Court for several years Jang Bahadur made an application before the Sale Officer at Hardoi that the sale proceedings were illegal and without jurisdiction inasmuch as the decree-holder did not get his name entered in the decree in accordance with the provisions of section 50 of the Code of Civil Procedure. The Sale Officer referred the matter to the Subordinate Judge of Hardoi, who rejected Jang Bahadur's application. The order of the Subordinate Judge of Hardoi was upheld by the Court of the Judicial Commissioner of Oudh. Jang Bahadur went up in appeal to their Lordships of the Judicial Committee. Their Lordships dismissed the appeal. The argument before their Lordships in the Privy Council was that in view of section 50 of the Code of Civil Procedure the Lucknow Court alone was competent to make the order of substitution. Their Lordships in their judgment observed that the words "which passed it" did not find place in the corresponding section, viz. section 208 of the Code of Civil Procedure, 1859, but were inserted in section 232 of the Code of 1877 and were continued in section 232 of the Code of 1882 and section 50 of the Code of 1908. In their Lordships' view the effect of the introduction of these words was merely to lay down a rule of procedure as to which of the two courts, i.e. the court which passed the decree or the court to which the decree had been transferred for execution, an application for substitution should be made and the non-compliance with such procedure was a defect which might be waived. In the circumstances of the case their Lordships held that it was not open to Jang Bahadur after a lapse of long time to turn round and challenge the legality of the substitution proceedings. In the course of their judgment their Lordships examined section 39 of the Civil Procedure Code and observed that on such transfer of the

1939

GOMTI
AND
OTHERS
v.
JUGUL
KISHORE

Thomas C.J.
and
Raaha
Krishna J.

1939

GOMTI
AND
OTHERS
v.
JUGUL
KISHORE

Thomas C.J.
and
Radha
Krishna J.

decree the court transferring the decree does not altogether lose seisin of the decree and that the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure. This decision does not support in any manner the contention of the learned counsel for the appellants that the execution proceeding remained pending in the court which passed the decree in spite of the fact that the decree had been transferred to another court for execution.

In *Balkrishna v. Debi Prasad and others* (1) a Bench of this Court held that there is nothing to debar a court which passed a decree from deciding any matters which may arise in execution quite apart from attachment or sale of property. This decision again is a decision which defines the respective limits of the jurisdiction of the court which passed a decree and the court to which the decree had been transferred for execution, but is of no help in determining the question involved in the present case.

The other cases need not be considered. The same criticisms apply to them.

We are of opinion that there were no proceedings pending at the date of the order under section 6 of the United Provinces Encumbered Estates Act in the Court at Unao and the first part of clause (a) of section 7(1) does not apply.

As regards the second contention that the order transferring the decree by the Unao Court is an execution process and was in force at the date of the order under section 6 of the Encumbered Estates Act, we are of opinion that it has no force. In our opinion the words "other execution process" refer to processes analogous to attachment of property such as warrant of arrest,

(1) (1930) 7 O.W.N., 363.

order for sale of property, etc. A perusal of the rules of Order XXI of the Code of Civil Procedure will show that that order deals with several stages during the course of execution of a decree. Rules 1 and 2 deal with the question of payment under decree. Rules 3 to 9 deal with transfer of decree to another court. Rules 10 to 23 deal with the form of an application for execution, the persons entitled to execute and the procedure in cases of cross decrees and of cross claims under the same decree, etc. Rule 24 and rules onwards deal with the mode of execution and in this stage it becomes necessary for the court executing the decree to issue certain processes, such as processes for arrest, detention in the civil prison of the judgment-debtor, attachment of property, order for sale, etc. We consider that it is this stage in the execution of a decree when processes for execution are issued. The heading just before rule 24 is "process for execution". Rule 24(1) reads as follows:

"When the preliminary measures (if any) required by the foregoing rules have been taken, the court shall, unless it sees cause to the contrary, issue its process for the execution of the decree".

The language of this clause clearly indicates that the stage in the course of execution contemplated by rules 1 to 23 is only a preliminary stage, and after the preliminary measures required by rules 1 to 23 have been taken the court is required to issue its process for the execution of the decree. The procedure for an application for transfer of a decree is a preliminary measure required to be taken before the processes for execution are issued. A mere order of transferring a decree is not issuing a process for the execution thereof, and in our opinion the words "other execution process" used in the latter part of the clause of the Encumbered Estates Act under consideration do not refer to and cannot cover an order transferring the decree for execution to another court.

We are, therefore, of opinion that section 7(1)(a) of the United Provinces Encumbered Estates Act has no

1938

GOMTI
AND
OTHERS
v.
JUGAL
KISHORE

Thomas C.J.
and
Radha
Krishna J.

1939

GOMTI
AND
OTHERS
v.
JUGUL
KISHORE

Thomas C.J.
and
Radha
Krishna J.

application to the present case and the execution proceedings pending in the Court of the First Subordinate Judge of Comilla cannot be stayed.

It has to be noted that the decree-holder has presented his written-statement claiming the decretal amount against the appellants under section 9 of the United Provinces Encumbered Estates Act, and the learned counsel for the appellants has pointed out that if the execution proceedings carried on in the Court of the First Subordinate Judge, Comilla, are not stayed, a very anomalous position will arise because while the decree-holder will be reaping the fruit of his execution in the Bengal Court he will also be getting a decree on his claim under the United Provinces Encumbered Estates Act. In our opinion the consideration of this question is premature. It will be for the learned Special Judge, when examining the claim of the decree-holder and determining the amount of debt due to him under section 14, to see that the decree-holder does not get any amount twice over. When a decree under section 14 of the United Provinces Encumbered Estates Act is passed then by virtue of section 18 of the Act the effect of the decree passed by the Special Judge would be to extinguish the previously existing rights of the respondent. These rights of the respondent will be substituted by the decree of the Special Judge and the decretal amount shall have to be recovered in the manner and to the extent prescribed by the provisions of the United Provinces Encumbered Estates Act.

The judgment-debtor appellants may after a decree is passed by the Special Judge be entitled to raise the question that after the passing of that decree no further execution in the Court of the First Subordinate Judge of Comilla can go on but this question does not arise in the present case and we express no opinion on that point.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.