APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Cunliffe.

1927

Mar. 28.

K. K. DEB

v.

N. L. CHOWDHURY.*

Civil Procedure Code (Act V of 1908), Order 21, Rule 26—Concurrent transfers to two executing Courts whether permitted by law—Court passing decree retains control of proceedings.

It is clear from the provisions of Order 21, Rule 26 of the Civil Procedure Code that the Court which passed the decree retains control of the execution proceedings even after transfer of the decree to another Court.

Held, that there is nothing in the Civil Procedure Code to prohibit the sending of a decree for execution to two Courts at the same time; and that the Court which passed the decree can after sending the decree to one Court for execution has jurisdiction to send it to another Court for execution.

Maharajah of Bobili v. *Narasaraju*, 39 Mad. 640—*referred to.*

Saroda v. *Lachmeepat*, 14 M.I.A. 529—*followed.*

Anklesaria—for the Appellant.

K. C. Bose—for the Respondent.

HEALD, J.—In Suit No. 20 of 1916 in the District Court of Akyab respondent obtained *ex-parte* a money decree for over Rs. 5,000 against appellant, the decree being dated the 31st of March 1916.

On the 10th of April 1916 in Execution Case No. 82 of 1916 of the District Court of Akyab he applied for the transfer of the decree to the Court of the Second Subordinate Judge of Chittagong for execution, and it was duly transferred. Execution Case No. 315 of 1916 was opened in that Court, and ultimately that Court returned the decree with a certificate that a writ of attachment had been issued and a sum of Rs. 450 had been realised, but that because the original decree obtained by the decree-holder at Akyab

* Civil First Appeal No. 123 of 1926.

1927

K. K. DEB v. N. L. CHOWDHURY.

HEALD, J.

had been set aside on the ground of fraud by a decree of that Court passed on the 11th of February 1918 in Suit No. 611 of 1916, the execution could not proceed. It may be noted that it does not now seem to be alleged that the decree was actually set aside, and that the part of the certificate stating that it had been set aside seems to have been mistaken.

On the 2nd of September 1918 respondent in Execution Case No. 138 of 1918 of the District Court of Akyab again applied for the transfer of the same decree and this time he asked for it to be transferred to the First Subordinate Judge's Court at Chittagong. The decree was transferred and the case in the Akyab Court was closed. The record of the proceedings of the Akyab Court does not show that any certificate under section 41 of the Code was received from the Chittagong Court, but it does contain a petition filed by respondent asking whether or not such a certificate had been received, and a note by the Judge saying that no certificate had been received and directing that a letter be written to the Chittagong Court to enquire. The petition was filed on the 30th of November 1925 and the Judge's note was made on the same day, but the record does not contain any reply from the Chittagong Court. It appears however from the register of execution cases in the Court of the First Subordinate Judge of Chittagong, that the decree was duly received in that Court, that execution case No. 610 of 1918 of that Court was opened, the decree to be executed being that passed on the 3rd of March 1916 by the District Court of Akyab in Suit No. 20 of 1916, that application for execution of that decree had previously been made in Execution Cases 82 of 1916, 315 of 1916 and 138 of 1918, that the application was dismissed for default on the 27th of February 1919 and that the result had been reported,

presumably to the Akyab Court, on the 14th of March 1919.

On the 1st of November 1921 in Execution Case No. 56 of 1921 of the Akyab Court, respondent applied for execution of the same decree by the attachment of certain furniture at Akyab which he alleged to belong to appellant. A warrant of attachment was issued but was returned unexecuted because respondent had failed to point out the furniture, and as respondent did not appear his application for execution was dismissed on the 7th of December 1921.

On the 16th of February 1924, in Execution Case No. 6 of 1924 of the District Court of Akyab a fresh application was made for transfer of the decree to the Court of the Second Subordinate Judge of Chittagong, and it was transferred. An Execution Case said to be No. 326 of 1925 of the Second Subordinate Judge of Chittagong was opened but the application for execution was dismissed for default on respondent's part. A fresh application for execution in Case No. 521 of 1925, was made in the same Court, and in that case appellant raised an objection that the application was time-barred, and also that the Court had no jurisdiction because the First Subordinate Judge of Chittagong had sent no certificate under section 41 of the Code to the Akyab Court so that the decree was still in the First Subordinate Judge's Court for execution and could not be executed by any other Court. The Second Subordinate Judge said that it was not for him to hold that the District Court of Akyab had acted illegally and without jurisdiction in transferring the decree to his Court and he stayed execution in order to give appellant time to apply to the District Court at Akyab.

1927

K. K. DEB v. N. L. CHOWDHURY.

HEALD, J.

Appellant then applied to the District Court of Akyab to recall the decree which it had sent to the Second Subordinate Judge of Chittagong in Execution Case No. 6 of 1924 on the ground that after the decree had been sent to the First Subordinate Judge in Execution Case No. 138 of 1918 of the Akyab Court the Akyab Court had no jurisdiction to transfer it to the Court of the Second Sub-Judge at Chittagong.

The learned Judge held that even if no certificate was sent by the Chittagong Court to the Akyab Court in the Chittagong Execution Case No. 610 of 1918, nevertheless the Akyab Court, which was the Court which passed the decree had power to send it for execution to another Court at Chittagong, and accordingly dismissed the application.

Appellant appeals on the ground that the learned Judge was mistaken in law in finding that the Court which passed a decree has power to send the same decree for execution to two Courts at the same time.

We have heard the learned advocates on both sides and on the facts I am of opinion that no question of concurrent execution arose. The register of the Chittagong Court shows that a report, which was presumably the certificate required by section 41 of the Code, was sent by the First Subordinate Judge of the Chittagong Court to the District Court of Akyab in Execution Case No. 610 of 1918 of the Chittagong Court. There is a strong presumption that the entry in the official register of the Chittagong Court was correctly made, and there is also a presumption that that Court followed the procedure laid down in the Code. There is nothing to rebut those presumptions, except the fact that the certificate was not found on the record of the Akyab Court's proceedings. I would therefore hold that the certificate required by section

41 of the Code was sent by the Chittagong Court to the Akyab Court and that therefore there was no question of concurrent execution in two Courts or of the jurisdiction of the Akyab Court, which passed the decree, to transfer the decree to the Second Subordinate Judge of Chittagong.

As however the lower Court disposed of the matter solely on a question of law and the appeal has been argued in this Court only on that question I think that it is desirable that we should express our opinion on the point.

It is common knowledge that there has been a conflict of judicial decision on the question whether the Code allows or contemplates the execution of a decree in more than one Court at the same time, and there is at present before the Indian Legislature a Bill intended to make the law on this subject clear. The view that two Courts cannot have concurrent jurisdiction to execute the same decree is based on the decision of their Lordships of the Privy Council in the case of the *Maharajah of Bobili* v. *Narasaraju* (1). In that case a decree was obtained in the District Court of Vizagapatam and was sent to the Court of the Munsif of Parvatipur for execution on the ground that the properties against which execution was desired were within the limits of the territorial jurisdiction of the Munsif. The Munsif attached certain properties within the local limits of his jurisdiction, but subsequently dismissed the application for execution. The Munsif did not send to the District Court the certificate required by section 41 of the Code. The decree-holder applied to the District Court for the sale of the property which had been attached by the Munsif. Their Lordships held that when the application for the sale of the property which had been attached

(1) (1916) 39 Mad. 640.

1927

K. K. DEB v. N. L. CHOWDHURY.

HEALD, J.

by the Munsif was made to the District Court "that Court was not the proper Court to which the application to execute the decree by sale of the immoveable property which had been attached by the Court of the Munsif should have been made, and that the proper Court to which that application should have been made was the Court of the Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court."

That dictum has since has been regarded as deciding that when a decree has been transferred to another Court for execution, that Court alone has power to execute it, but with all respect to the learned Judges who have so held, I would suggest that it does not go so far. The application with which their Lordships were dealing was an application to the District Court for the sale of property which had been attached in execution by the Munsif's Court. It does not appear from the report whether the property which had been attached was or was not within the territorial limits of the jurisdiction of the District Court, but it may be presumed that it was. It does not however seem to me to follow from the fact that their Lordships held that the District Court was not the proper Court to order the sale of property which had been attached by the Munsif that their Lordships intended to lay down a general rule that a decree cannot be executed in two Courts at the same time. Such a rule would be directly contrary to their Lordships' own decision in the case of *Saroda* v. *Luchmeeput* (2), where they said "A more important point involved in the case is whether the transmission could be made to the three Zillah Courts concurrently, for the purpose of execution. On consideration of the Code their

(2) 14 Moore's Indian Appeals 529.

1927

K. K. DEB v. N. L. CHOWDHURY.

HEALD, J.

Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the creditor, and without injustice to the debtor. If it were not so, the debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the debtor, for the issuing of the execution in more zillahs than one is made subject to the control of the Judge, who may refuse to do so, where 'he saw there was any sufficient reason to the contrary' (section 286). Again, after the attachments have been granted, if there should be any ground of complaint, the debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

"It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a decree for concurrent execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once."

It is clear from the provisions of Order 21, Rule 26, that the Court which passed the decree retains control of the execution proceedings since it can stay execution or make any other order relating to the execution which might have been made by it if execution had been issued by it or if application for execution had been made to it. There is nothing in the present Code, any more than there was in the Code of 1859 which prohibits the sending of a decree for execution to two Courts at the same time and as I do not think that the decision of the Privy Council in the case first cited decides that a decree can never in any circumstances be executed by two

1927

K. K. DEB
v.
N. L. CHOWDHURY.

HEALD, J.

Courts simultaneously, I would hold that the lower Court was right in finding that even if the certificate required by section 41 was not sent to the District Court of Akyab by the Court of the First Subordinate Judge of Chittagong the District Court of Akyab, which was the Court which passed the decree, had jurisdiction to send the decree for execution to the Court of the Second Subordinate Judge of Chittagong.

I would therefore dismiss the appeal with costs. Advocate's fee to be ten gold mohurs.

CUNLIFFE, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Das.

1927

Mar. 29.

EWIN SHAUK WA
v.
U PO NYUN.*

Specific Relief Act (I of 1877), sections 54 and 55—Mandatory injunction whether obtainable against trespasser to remove trees planted and buildings put up—Breach of an obligation necessary for relief.

The defendant, alleged to be a trespasser on the plaintiff's land, had planted rubber trees and erected a hut on a portion of the land. On the plaintiff filing a suit for a mandatory injunction directing the removal of the trees and the hut.

Held, that the case was merely one of trespass and as there was no obligation on the part of the defendant to perform the acts prayed for, a suit for a mandatory injunction would not lie.

Kyaw Din—for the Appellant.

Young—for the Respondent.

DAS, J.—The respondent filed a suit for a mandatory injunction directing the appellant to remove his rubber trees, a hut and brickpost standing on the

* Civil Second Appeal No. 697 of 1926.