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MAY 1.
CIVIL
REFERENCE.
30 C. 713=7
C. W. N. 821.

attachment is made in due form by the decree being sent down for execution to the Calcutta Small Cause Court.

The second question in the reference has in effect been already answered, that question being whether in such cases such Court is competent to serve through the Small Cause Court, Calcutta, the attachment order named in paragraphs 4 and 5 of section 268 of the Code of Civil Procedure, on the disbursing officer having his office in the town of Calcutta, and the said disbursing officer on receipt of such order is bound to give effect to the orders of the Court. If the attachment is of salary to fall due and is to be made in the manner indicated in section 268, which we have already referred to, the attachment itself could not be made by the Gobindapur Small Cause Court without the decree being transferred for execution to the Court of Small Causes at Calcutta.

The third question is whether "when the salary of a Railway servant working within the local jurisdiction of a Court has been ordered to be attached in execution of a Small Cause Court decree passed by such Court, and when the disbursing officer has given effect to such attachment by recovering the decree money from a Railway servant and holding in deposit the same amount, such Court is competent to order the disbursing officer to pay the attached amount into the Court (to remit the amount by postal money-order) and if any such order is made and duly served upon such disbursing officer, whether the latter is bound to carry it out."

To the third question stated in the reference our answer is this: that the disbursing officer when he submitted to the order for attachment did so under a mistake of fact, namely, that the order had really emanated from the Calcutta Small Cause Court, which has jurisdiction in the matter. But when he was informed that the order did not really emanate from that Court but proceeded from the Gobindapur Court, which has no jurisdiction over him, he was justified in not remitting the money to the Gobindapur Court. But as we are informed by the learned counsel for [718] the Railway Company, and as we have already observed above, the money is still in deposit with the disbursing officer, and will be available for the decree-holder if only the attachment is made in due form by the decree being transferred to the Small Cause Court at Calcutta for execution.

30 C. 718.

APPELLATE CIVIL.

PASUPATI NATAH BOSE v. NANDO LAL BOSE.* [27th March, 1903.]

Execution of decree—Decree declared void as against one of the parties, effect of—Fraudulent decree.

A brought a suit for partition against B and C, and obtained a decree by consent, based upon the award of certain arbitrators. C subsequently brought a suit for a declaration that the award and the decrees were fraudulent and void as against her. The suit was decreed in her favour. On an application for the execution of the decrees by A against B, objection was taken by the latter on the ground that, inasmuch as the decree was declared to be fraudulent and void as against C, it was not susceptible of execution:—

Held, that as the decree was declared fraudulent and void as against C only, it was a subsisting decree between A and B and was susceptible of execution.

* Appeal from Order No. 509 of 1900, against the order of Ram Gopal Chaki, Subordinate Judge of 24-Perganas, dated December 15, 1900.

Bhimaji Govind Kulkarni v. Rakmabai (1) and *Natesa Ayyar v. Annasami Ayyar* (2) referred to.

[Rel on 10 I. C. 780. Ref. 32 I. C. 881=30 M. L. J. 465.]

APPEAL by Pasupati Nath Bose, the judgment-debtor.

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This appeal arose out of an application for execution of a decree. Nando Lal Bose brought a suit for partition against his brother, Pasupati Nath Bose, his sister-in-law, Sreemutty Nistarini Dassi, and others in the Subordinate Judge's Court at Alipore. The matter was referred to arbitration of certain gentlemen, and by consent of parties, on the 12th September 1899, it was ordered by the Subordinate Judge that the award of the [719] arbitrators be filed in the Court and the same be confirmed as a decree of the Court. Under the award Nando Lal Bose was to obtain a certain sum of money from Pasupati Nath Bose as owelty. Subsequently Sreemutty Nistarini Dassi brought a suit on the Original Side of the High Court, claiming to have the award and decree set aside as fraudulent and of no effect as against her. That suit came on for hearing before Mr. Justice Stanley, who declared that the award and decree were fraudulent and void as against the plaintiff, Nistarini Dassi, and that decision was confirmed on appeal.

Nando Lal Bose, the decree-holder, then applied to the Subordinate Judge of 24-Perganas for realization of a certain sum of money which was decreed in his favour by virtue of that award, as against the judgment-debtor, Pasupati Nath Bose. Pasupati objected to the execution of the decree mainly on the ground that, inasmuch as the decree was set aside by the High Court as fraudulent, it was no longer capable of being executed. The Court of first instance overruled the objection and allowed the execution to proceed.

Dr. *Ashutosh Mookerjee* (*Babu Jnanendra Nath Bose* with him). The Court below was wrong in allowing the execution to proceed, the decree having already been set aside as against one of the defendants, as fraudulent. It was a partition decree. A partition decree inures to the benefit of all the parties to the suit. If it is of no avail against one of the parties, it is ineffectual as against the others.

Babu Dwarka Nath Chuckerbutty for the respondent. There is no difficulty in executing the decree. Where a decree of a Court is set aside as against one of the parties only, the result of it is not that it is set aside as against the others. The cases of *Bhimaji Govind Kulkarni v. Rakmabai* (1) and *Natesa Ayyar v. Annasami Ayyar* (2) support my contention.

Dr. *Ashutosh Mookerjee* in reply.

MACLEAN, C. J. This is an appeal from the order of the Subordinate Judge of the Second Court of Alipore, dated 5th of [720] December 1900, under which he allowed execution to proceed as between Nando Lal Bose, who is the decree-holder, and Pasupati Nath Bose, who is the judgment-debtor, and the present appellant. By a consent decree dated the 12th of September 1899, it was ordered that the award of certain arbitrators, which is referred to in the decree, be filed in the Court, and the same be confirmed as a decree passed by the Court. That decree was passed in a suit instituted in the Alipore Court between Nando Lal Bose as plaintiff and his brother, Pasupati Nath Bose, as the first defendant, and Sreemutty Nistarini Dassi as the second defendant, and there were other defendants to whom I need not particularly refer.

(1) (1885) I. L. R. 10 Bom. 338.

(2) (1901) I. L. R. 25 Mad. 426.

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Subsequently Nistarini Dassi brought a suit on the Original Side of this Court, claiming to have the award and the decree, which I have mentioned, set aside as fraudulent and of no effect as against her. That suit was heard before Mr. Justice Stanley, who declared that the award and the decree were fraudulent and void as against the plaintiff and not binding upon her. Nando Lal Bose appealed against that decision, but it was ultimately confirmed by this Court. Therefore the position is this: the decree as against Nistarini Dassi is not binding upon her, having been declared to be fraudulent and void as against her. Then Nando Lal Bose proceeds to execute the decree as against Pasupati Nath Bose, but the latter says that, inasmuch as the decree has been declared to be fraudulent and void, the decree altogether must be taken to be so, and therefore it is not susceptible of execution, and that the execution proceedings ought not to go on.

I do not think that argument ought to prevail. The decree has only been declared fraudulent and void as against the plaintiff, Nistarini Dassi, but as between the two brothers, Nando Lal Bose and Pasupati Nath Bose, it remains intact, and if it remains intact as between them, it is difficult to see why Nando Lal Bose should not be entitled to execute it. This view seems to be consistent with the view expressed in the case of *Bhimaji Govind Kulkarni v. Rakmabai* (1) and the English case there referred to. It is also, I think, consistent with the principle laid down in the case of *Natesa Ayyar v. Annasami Ayyar* (2).

[721] It is urged that this principle ought not to apply, having regard to the fact that the decree was a partition-decree, or had the effect of a partition-decree. That does not seem to me to affect the principle: it may lead to complications, but those, perhaps, would arise whichever way we decide the point.

The decree is a subsisting decree between the two brothers, and, if subsisting, is susceptible of execution.

On these grounds the appeal fails and must be dismissed with costs.

MITRA, J. I concur.

Appeal dismissed.

30 C. 721 (=7 C. W. N. 706.)

CRIMINAL REVISION.

W. R. FINK v. THE CORPORATION OF CALCUTTA.*

[21st May, 1903.]

Receiver—Party to Criminal Proceedings—Leave of Court—“Owner”—Calcutta Municipal Act (Bengal Act III of 1899) ss. 3, 320, 574.

A Receiver appointed by the High Court is not the “owner” of the property of which he has been appointed Receiver, within the meaning of s. 3, cl. (32) of Bengal Act III of 1899; nor can he be made a party to any suit or proceeding without the leave of the Court appointing him.

Dunne v. Kumar Chandra Kisore (3) referred to.

[Rel. on: 13 Cr. L. J. 489=15 Ind. Cas. 488. Ref. 13 Cr. L. J. 491; 15 I. C. 491; 30 C. L. J. 279=53 I. C. 747; 38 Cal. 714.]

RULES granted to the petitioner, W. R. Fink.

These Rules were issued calling upon the Municipal Magistrate of

*Criminal Revision Nos. 347 and 348 of 1903 against the order of P. N. Mookerjee, Municipal Magistrate, Calcutta, dated March 18, 1903.

(1) (1885) I. L. R. 10 Bom. 333.

(8) (1902) I. L. R. 30 Cal. 593; 7 C.

(2) (1901) I. L. R. 26 Mad. 426.

W. N. 390.