whole. Limited administration can only be granted under special circumstances.

1880

IN THE GOODS OF GRISH CHUNDER MITTER.

The real point in the case decided by Kennedy, J., in the case of *Kadumbinee Dossee* v. *Koylash Kaminee Dossee* (1), is beside the present question; and the opinion there expressed by the learned Judge seems not to have been necessary for the purposes of his decision.

Attorney for the Secretary of State: *The Government Solicitor* (Mr. *Upton*).

Attorney for the petitioner: Baboo *Shamoldhone Dutt.*

Before Mr. Justice White.

KRISTO MOHINEY DOSSEE AND OTHERS *v.* KALLY PROSONNO GHOSE AND ANOTHER.*

1880
Dec 7.

Execution—Relief asked for in accordance with Statements in Plaint not forming a Separate Prayer in the Plaint—General Prayer for Relief—Control of Execution.

A, a joint owner of an estate with *B*, saved the joint estate from sale for arrears of Government revenue in payment of which *B* had made default, for such purpose mortgaging her share in the estate to *E*. *A* then sued *B* for contribution. Pending that suit, *B* again made default, and the estate was sold and purchased by *C*, subject to incumbrances. Subsequently, *A* obtained her decree against *B*, and assigned her decree to *D*, who obtained an order for execution and attached certain property belonging to *B*. *D* and *B* then entered into an agreement with *C*, that they would release *C* and the share charged with payment of *A's* decree, from all liability, and that they would entrust the whole conduct of the execution-proceedings to *C*, in consideration of his granting a perpetual lease of part of the property to *D* and *E*. In pursuance of this agreement, *D* and *E* granted a release to *C*, and *C* granted a lease to *E* for himself, and it was contended, also, as benamidar of *D*. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord or on the petition of *B*, or his legal representative, notwithstanding objection on the part of *D* and *E*, make any order directing the decree to be executed against the estate, then in such case *D* and *E* should not be bound by the release, and that it should be open to *C* to cancel the agreement. *D* applied for execution against the estate of the adopted son of *B* (who had died), but subsequently abandoned all proceedings and transferred his decree to the High Court to obtain execution against a house belonging to *C*, in Calcutta. The adopted son and widow of *B*,

* Application in suit No. 632 of 1880, Original Side.

(1) I. L. R., 2 Calc., 430.

1880

KRISTO MOHINEY DOSSEE v. KALLY PROSONNO GHOSE.

in a suit brought against *C* and *D*, objected to the execution-proceedings, and after paying the sum due to *D* into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit.

Held, that *D* had obtained, out of the lien directed by the decree, some benefit or advantage, which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not form the subject of a separate prayer in the plaint, the Court would grant the injunction.

THE facts of this case, which gave rise to the motion made before the Court, were, that two persons, Khelut Chunder Ghose and Kaminee Soondery Dossee, were the joint owners of a certain estate, registered No. 1 in the Towjee of the Nuddea Collectorate; that the Government revenue, through default on the part of Khelut Chunder, fell into arrears, and Kaminee, in order to prevent a sale of the estate, borrowed a sum of money at high interest, mortgaging her share of the estate to one Hurry Churn Bose, and paid off the sum due as revenue; she, on the 5th June 1872, sued Khelut Chunder, for contribution of his share of the revenue so paid by her as aforesaid, asking that the property for which revenue had been paid might be made a first charge for the debt. Pending this suit, Khelut Chunder again defaulted, and Kaminee being unable to raise sufficient money to save the estate, it was sold by public auction, and purchased, on the 23rd March 1874, by one Kaliprosonno Ghose, subject to the incumbrances thereon; and he, on 9th April 1874, took an assignment of the mortgage from Hurry Churn Bose. On the 11th January 1873, Kaminee's suit against Khelut Chunder was dismissed, but was eventually, on the 18th January 1876, finally decided in her favor in the Court of appeal. On the 16th January 1877, Kaminee assigned her decree to one Rutnessur Biswas, who, on the 13th July 1877, after placing his name on the record in the stead of Kaminee, applied for and obtained an order for execution of Kaminee's decree, and attached certain properties belonging to Khelut Chunder. Some time in the month of July 1877, Rutnessur and Hurry Churn Bose entered into an agreement with Kaliprosonno Ghose, "that they should not proceed to realize the charge against the zemindari which formerly belonged to Khelut and Kaminee, and that they would release Kaliprosonno and the share so charged with the payment of the decree, from all liability, and

1880

KRISTO MOHINEY DOSSEE v. KALLY PROSONNO GHOSE.

that they would not take any proceedings in any Court against Kaliprosonno and the share charged under the decree, and that they would entrust the whole conduct of the execution-proceedings to Kaliprosonno in consideration of the latter granting a perpetual lease of part of the said property to Rutnessur and Hurry Churn Bose at a low rental." There was, however, a proviso in this agreement to the effect, that should the Court, in which the decree should be executed, of its own accord, or upon petition of Khelut Chunder, or his legal representatives, and notwithstanding objections on the part of Rutnessur and Hurry Churn Bose, make any order directing the decree to be executed in the first instance against the estate formerly belonging to Khelut and Kaminee, then Rutnessur and Hurry Churn Bose should not be bound by the covenant for release, nor be bound to indemnify Kaliprosonno as therein agreed; but that in such case it should be open to Kaliprosonno to cancel the agreement. In pursuance of the agreement, on the 4th August 1877, Rutnessur and Hurry Churn Bose executed a release in favor of Kaliprosonno; and on even date with such release, Kaliprosonno executed a patni lease in favor of Hurry Churn Bose.

On the 1st August 1877, Rutnessur took certain steps to execute his decree, which, however, were subsequently abandoned. But, after the death of Khelut Chunder, Rutnessur, on the 13th June 1878, applied for execution against certain property of Romanath Ghose, the adopted son of Khelut Chunder, but an objection was successfully taken that execution should first be taken out against the property which formerly belonged jointly to Khelut and Kaminee, and an order passed in accordance with such objection; this order was, however, reversed by the High Court, and Rutnessur, however, subsequently, abandoned all previous execution-proceedings, and transferred his decree to the High Court for execution against certain properties of Kaliprosonno in Calcutta.

The plaintiffs in this suit, the widow of Khelut Chunder, and the next friend of Khelut Chunder's adopted son, Romanath Ghose, objected to execution being taken out, and after paying the sum due to Rutnessur under the decree into Court, asked for an injunction to stay all further execution-proceedings.

1880

KRISTO MOHINEY DOSSEE *v.* KALLY PROSONNO GHOSE.

On the 15th September 1880, a rule *nisi* was obtained, calling upon Rutnessur to show cause why all further execution-proceedings should not be stayed.

Mr. *Branson* (with him Mr. *Mittra*), for the defendant Rutnessur Biswas, showed cause against the rule.—The rule has been obtained on the facts set out in the plaint alone, no verified petition or affidavit has been filed by the plaintiffs. The Court will not make absolute the rule, seeing that it has been obtained in such an irregular manner. [WHITE, J.—I find that the practice in the offices of the Original Side of the Court is to allow in taxation the costs of affidavits in such motions as the present, but inasmuch as such an affidavit would be but an echo of the plaint, I do not think I can refuse to hear the rule because there happens to be no petition or affidavit.] Plaints are verified on *information and belief*, and no Court would grant an injunction on an affidavit made merely on *information and belief*. [WHITE, J.—The Court having granted the rule on the plaint, I shall allow the rule to be heard.] The only point raised by the other side as against our right to take out execution is, that we entered into an agreement with Kaliprosonno, which has partially satisfied the decree. Now there has been no part satisfaction, the plaintiff makes no such allegation in his plaint, and no patni has been granted to my client. [Mr. *Kennedy*.—The prayer for general relief is large enough to include the allegation.] The question as to whether there has been partial satisfaction, ought to have been raised in the execution-proceedings, and not in a separate suit: s. 244 of Act X of 1877. Where an injunction is applied for on one ground, it will not be granted on another which has not been put forward: Joyce on Injunctions, p. 1030.

Mr. *Kennedy* (with him Mr. *Evans*, Mr. *Bonnerjee*, and Mr. *Henderson*) in support of the rule.—We have paid the money due under the decree into Court, and the defendants should only be allowed to take it out on giving security; we say that Kaliprosonno ought to pay the money, and not Khelut Chunder's estate. Rutnessur and Hurry Churn agreed to release the charge on Kaliprosonno and also the charge on the

estate; the patni potta was executed in pursuance of the agreement, and we say that Hurry Churn executed it as for himself and benami for Rutnessur; we, therefore, seek to have the equities between Khelut and Kaliprosonno determined. Rutnessur has not been compelled to go against Allumpore, the estate formerly belonging to Khelut and Kaminee; therefore the saving clause of the agreement is not put in force.

WHITE, J.—I have come to the conclusion, after some doubt, to make this rule absolute.

The object of the suit is to compel Kaliprosonno Ghose to pay, to the extent of the value of his share in a particular zemindari, the amount of a decree which has been passed against this estate.

It is unnecessary to consider the doubts as to whether the plaintiffs will be entitled at the hearing to that relief or any other relief in some qualified form, because, assuming that they could establish their right to any such relief, I consider that the plaintiffs have failed to show that the defendant Rutnessur Biswas, who is now executing the decree, ought to be stayed in consequence, supposing even that such an equity at all exists. The Appellate Court having decided that Rutnessur may execute his decree against the estate of Khelut, and not against the estate upon which a lien was declared by the decree, he cannot, in my opinion, be restrained from executing his decree, because he is exercising his own right, but when he does exercise that right, the plaintiffs can ask Kaliprosonno to recoup. The prayer of the plaint is not one upon which they can take this point, but I am not prepared to say that the plaintiffs may not at the hearing get the benefit under the prayer for general relief against the defendant Kaliprosonno Ghose.

It is objected that, having regard to the rules which govern this Court in granting injunctions, the rule should be discharged, because the Court is of opinion that the injunction could only be sustained where there is a specific prayer—*Castelli* v. *Cook* (1). I am not prepared to give full effect to the rule asked for, but there are statements in the 18th and the follow-

(1) 7 Hare, 89.

1880

KRISTO MOHINEY DOSSEE v. KALLY PROSONNO GHOSE.

ing paras. of the plaint, which show that certain transactions have taken place between Kaliprosonno and Rutnessur, the result of which appear to me to be, that Rutnessur has, out of the lien directed by the decree, derived some benefit or advantage, which benefit or advantage the plaintiffs ought to have valued, and such value set against the amount which they are bound to pay Rutnessur under the decree. This, however, does not form the subject of a separate prayer in the plaint.

It appears to me that there is a case made out that the defendant Rutnessur's execution should be controlled. I think this Court ought to control it and make the circumstance alluded to by Mr. Branson a consideration in dealing with the costs.

It is also objected, that as it appears that Rutnessur has been only executing the decree, the question raised by the plaintiffs as to partial discharge of the decree should be dealt with under s. 204 of the Civil Procedure Code. This is no doubt an argument to be adduced at the hearing, and I cannot at this stage of the case be called upon to decide that, nor could I dismiss the suit at this stage while this point is not decided. The money has been paid into Court by the plaintiffs, and that was one of the terms upon which this rule was obtained.

Now the question is, whether the execution-creditor is to be put upon some terms if he takes out the money before the final determination of the case.

Upon the fact appearing in the plaint that Rutnessur obtained a benefit which the plaintiffs ought to have in reduction of what is payable under the decree, *viz.*, the value of an eight anna share in patni lease in five villages without salamee, it may be that they are only entitled to whatever the amount of money was in the payment of which Khelut Chunder made default, and for which his estate was sold; but all this should be decided at the hearing. At all events, some benefit has been obtained which ought to go in reduction of the amount decreed.

Mr. Branson's client ought to have his costs.

The plaintiffs having paid into Court the amount of the decree and costs, *plus* Rs. 500 for costs of execution, this rule should be made absolute, and Rutnessur be restrained from prosecuting his execution-proceedings until the hearing of the

suit or further order of this Court. Rutnessur to be at liberty to take the amount out of Court on furnishing security to the satisfaction of the Registrar. He will have his costs of showing cause against the rule.

Rule absolute.

Attorney for the plaintiffs: *J. Remfry.*

Attorney for the defendant Rutnessur: Baboo *Troyluckonauth Roya.*

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880 *Dec. 7.*

IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCER.

THE EMPRESS *v.* NOBO GOPAL BOSE.*

Transfer of Criminal Case to another District—Criminal Procedure Code (X of 1872), s. 64—Grounds necessary to obtain Transfer when application is opposed by Accused.

Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

THIS was an application for the transfer of a criminal case under s. 64 of Act X of 1872.

On the 19th November 1880, the Crown obtained a rule calling upon the accused to show cause why the case should not be transferred from the Court of Burdwan to Hooghly, or to such other district as the Court might direct.

The grounds on which the rule *nisi* was obtained were set out in an affidavit of Mr. Stevens, the District Magistrate of Burdwan, and were to the effect that he had been informed, and believed, that the case was causing considerable excitement in the district; that the prosecutor and one of the accused were persons of influence in the locality; and that most of the inhabitants of the district had their sympathies enlisted on one side or the other.

The rule came on for hearing on the 7th December 1880.

* Criminal Rule, No. 31 of 1880, against the order of C. C. Stevens, Esq., District Magistrate of Burdwan, dated the 30th November 1880.