ALLAHABAD HIGH COURT

Dhan Kunwar

Vs

Mahtab Singh

(Arthur Strachey, CJ. Banerji, J.)

06.07.1899

JUDGMENT

Arthur Strachey, C.J. and Banerji, J.

1. We are of opinion that this appeal must be dismissed. At the same time we are unable to concur in the view of the law on which the learned Judge has dismissed the appeal to this Court. The learned Judge's view was this. He considered that where there had been a sale in execution of a decree, and by that sale the decree as passed was fully discharged, but the judgment-debtor afterwards obtained an amendment of the decree, and the decree as amended showed that the decree-holder had realized at the sale more than he was entitled to, the judgment-debtor had no right under Section 244 of the Code of Civil Procedure to apply to recover the excess realized. We cannot agree with that view at all. It appears to us that the question whether the decree-holder had realized more than he was entitled to under the decree as it finally stood, was undoubtedly a question relating to the execution, discharge or satisfaction of the decree, and that therefore under Section 244 the judgment-debtor was entitled to apply for the recovery of what the decree-holder had taken in excess. The learned Judge says:--"As soon as the decree ceased to subsist Section 244 had no application." It would, we think, be impossible to maintain that after the sale in execution, the decree ceased to subsist in the sense that no amendment of it could be made, and if so the answer is that as soon as the decree was amended, and the amendment showed that the decree-holder had realized too much, the application of Section 244 was revived. So long as there is no question which can be raised under Section 244, that section, of course, could have no application; but as soon as any such question arises the section again becomes applicable. Take the converse case. Suppose that after the execution sale it appeared that the decree awarded less to the decree-holder than he was entitled to according to the judgment. Surely he could apply, notwithstanding the sale, for an amendment of the decree so as to entitle him to recover in execution the full amount decided in the judgment to be due to him, and, if the amendment were made, surely he could then execute his decree for the balance due, and any application for such execution would be made under Section 244. If so, the judgment-debtor, in the converse case of too much having been realized, can equally apply for amendment and afterwards recover the

excess under Section 244. According to the principle laid down by the learned Judge, neither the judgment-debtor nor the decree-holder would have any remedy under Sections 206 and 244, and a separate suit would be necessary, if it were discovered that too much or too little had been realized at the sale in consequence of a clerical or arithmetical error in the decree. Section 244 was intended to make a separate suit unnecessary in such cases.

2. On other grounds, however, we think that the appeal must fail. The whole question is whether the decree-holders in fact realized Rs. 500 odd in excess of what they were entitled to. That is a question of the construction of the decree for sale under Section 88 of the Transfer of Property Act. That decree provides for future interest. It does not expressly state that the future interest is payable until realization, but it does not state that it is to stop at any earlier date. Therefore, unless there is anything to preclude us from so doing, we must construe the decree according to the recent Full Bench ruling in Bakar Sajjad v. Udit Narain Singh (1899) I.L.R. 21 All. 361, as a decree in accordance with Section 88, that is, as a decree awarding interest until the date of realization. On that view of the decree the decree-holders have not realized too much, and this application of the judgment-debtors must fail. Then is there anything which does preclude us from applying the principle laid down by the Full Bench? The only thing which, it is suggested, precludes us is an order passed on the 4th of December 1897, on the judgment-debtor's application by which the Court amended, not the decree under Section 88, but the order absolute for sale under Section 89. Of course, the decree to be executed was the decree under Section 88, and no alteration of the order absolute could affect the rights of the decree-holders under that unamended decree. But it is said that the amending order placed a construction on the decree under Section 88 to the effect that interest beyond six months from the date of the decree should not be allowed. It is suggested that we are bound to construe the decree under Section 88 according to that construction and not on the construction which would be right according to the Full Bench decision. We do not think that the order of December 1897 has any such effect. It was not an order passed in execution proceedings, nor an interlocutory order which could have an effect analogous to that of res judicata in accordance with the well-known rulings of the Privy Council. At the time when it was made, execution proceedings had been completed by the sale. It was not until some time later that proceedings in execution were resumed by the present application under Section 244. We do not think that the principle of the Privy Council rulings can be held to cover an order of this kind. It is difficult, indeed, to say under what provision of the law the order was made. It cannot be regarded as an order under Section 206 of the Code, because the Court did not profess to act on any ground stated in that section. Nor can it be regarded as an order of review. We think that the principle laid down in the Full Bench case must be applied; that the decree-holders did not realize anything in excess of what was due to them under the decree, and that this appeal of the judgment-debtors must be dismissed with costs.