

CALCUTTA HIGH COURT

Dwar Buksh Sirkar

Vs

Fatik Jali

(Macpherson and Stanley, JJ.)

09.12.1898

JUDGMENT

Macpherson and Stanley, JJ.

1. In this case the property of the judgment-debtor was attached and proclaimed for sale. Two days before the date fixed for the sale the decree-holder represented to the Court that the judgment-debtor had satisfied the decree by payment, and asked that the execution case might be disposed of accordingly. No order was passed on this application. On the 1st November, the day fixed for sale, Dewar Bux Sirkar, the appellant in this Court, intervened, and objected to satisfaction being recorded on the ground that he had purchased the decree from the decree-holder by means of a kobala some time before the payment in satisfaction was alleged to have been made by the judgment-debtor, and that the decree-holder could not under such circumstances certify satisfaction. He also said that no payment had, in fact, been made, and that the decree-holder and judgment-debtor were colluding to defeat his right. The Subordinate Judge after taking evidence found that there had been a valid transfer of the decree previous to the alleged payment, and he allowed the objection and rejected the decree-holder's application to have the execution case disposed of as settled. He did not, however, find whether the judgment-debtor had or had not notice of the transfer, or whether he had or had not made the payment alleged by the decree-holder.

2. The judgment-debtor appealed, and the District Judge, without coming to any decision on the disputed question of transfer, reversed the order of the first Court on the ground that he had no jurisdiction to make any such order under Section 244 of the Procedure Code at the instance of the objector. He entertained the appeal merely because he considered that the Judge had acted, although erroneously, under Section 244. It is clear, however, that the appeal did lie, as the Subordinate Judge had in substance held against the judgment-debtor that the decree had not been satisfied.

3. The contention before us is that the Subordinate Judge had full power under Section 244 to make the order which he did make. It appears that the appellant's pleader in the lower Court

conceded that the case did not come under Section 244, apparently with a view to defeat the judgment-debtor's right of appeal; but an erroneous admission of the pleader on a point of law cannot bind the appellant. The respondent's pleader, moreover, appears to have made the same admission, and the Judge said that it was obviously a correct admission.

4. A Full Bench of this Court held in *Ishan Chuhder Sirkar v. Beni Madhub Sirkar*¹ that a purchaser of the mortgaged property after a decree for sale was the "representative" of the judgment-debtor within the meaning of Section 244, and that the word "representative" used with reference to a judgment-debtor was not confined to his legal representative, but included also his representative in interest, when the representative was, as regards that interest, bound by the decree. I think the word, when used with reference to a decree-holder, must in the same way include the purchaser of the decree from the decree-holder by an assignment in writing; and it has been expressly held by the Allahabad High Court in *Badri Narain v. Jai Kishen Das*² that the purchaser of the decree is the "representative" of the decree-holder within the meaning of Section 244. A decree-holder as defined in the Procedure Code includes any person to whom the decree is transferred. As pointed out in the Allahabad case the expression "decree-holder" is not used in Section 244. That section speaks of "the parties to the suit in which the decree was passed or their representatives." The decree-holder who sold the decree was a party to the suit, and the person who purchased the decree from him must, it seems, if he is anything at all, be his representative qua the decree within the meaning of the section.

5. The District Judge was also, I think, wrong in holding that the Subordinate Judge could not under the provisions of Section 244 go into the disputed question of the transfer of the decree. That section, as amended by Act VII of 1888, provides that, if a question arises as to who is the representative of a party for the purpose of the section, the Court may either stay execution of the decree until the question has been determined by a separate suit, or itself determine the question by an order under the section. The only provision in the Code referring expressly to the assignment of a decree is contained in Section 232, and that no doubt contemplates a case in which the assignee applies for execution. In such a case the Court may, if it thinks fit, after notice to the decreed older and the judgment-debtor, allow the decree to be executed by the assignee. If, however, there is an assignment pending proceedings in execution taken by the decree-holder, I see nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution. The recognition of the Court is no doubt necessary before he can execute the decree, but it is the written assignment and not the recognition which makes him the transferee in law. The omission of the transferee, if it was an omission, to make a formal application for execution, was merely an error of procedure and does not affect the merits of the case. The Subordinate Judge had, I consider, power to determine, if he chose to do so, whether there had been a valid transfer of the decree. He did determine that the decree had been transferred by the kobala, and he decided also a question relating to the satisfaction of the decree as between the judgment-debtor and the person whom he found to be the representative of the decree-holder. The appeal of the judgment-debtor was properly before the District Judge, and he was bound to determine all the questions raised in it including the question of representation, if

raised. A second appeal lies to this Court as the appellant is the person who was found by the first Court to be the representative of the decree-holder, and the District Judge has not found that he is not the representative.

6. It is argued for the respondent that the transferee's title was not complete as express notice of the transfer had not been given to the judgment-debtor. As already observed, the transfer, as between transferor and the transferee, is effected by the written assignment. If the judgment-debtor had no notice of the transfer and being otherwise unaware of it paid the money to the decree-holder, the payment was, of course, a good payment, and he cannot again be held liable to the transferor [sic] Those are matters, however, which must be determined, and the order of the Subordinate Judge was defective inasmuch as it did not determine them.

7. The order of the District Judge is set aside, and the case remanded to him in order that he may determine all questions arising on the appeal. The costs of this appeal will abide the result.

Cases Referred.

1(1897) I.L.R., 24 Cal., 62

2(1894) I.L.R., 16 All, 483