

CALCUTTA HIGH COURT

Gobindnath Choudhuri

Vs.

Basiruddin Mondal

(Asutosh Mookerjee and Panton, JJ.)

29.07.1921

JUDGMENT

Asutosh Mookerjee , J.

1. This is an appeal by the decree-holder from an order for partial cancellation of a sale of four properties held in execution of a mortgage-decree on the 16th April 1917, The validity of the sale was challenged on the ground that at the time when the application for execution was made, the decree had become extinguished by limitation and could not consequently form the basis of a valid sale. The Court of first instance dismissed the application. On appeal the District Judge has cancelled the sale in respect of three of the properties. We are of opinion that the order made by the District Judge cannot be supported.

2. The facts material for the determination of the question argued before us may be briefly stated. On the 1st August 1910, the appellant obtained a mortgage-decree against the respondent, which directed the sale of the four properties included in the security. The first application for execution was made on the 30th July 1913. Shortly after this application had been made, a claimant instituted a suit for declaration of title to a half share of the fourth property covered by the mortgage-decree. On the 14th November 1913, the claimant obtained an order in his suit for an injunction to stay the sale of the particular property claimed by him, which had been notified for the 15th November 1913. The decree-holder and the judgment-debtor were both parties to that suit and were consequently bound by the order for injunction. On the 15th November 1913, the decree holder made two applications to the Execution Court. In the first application, he asked for leave to bid at the sale and to set off the purchase-money against the judgment-debt, if he should become the purchaser. In the second application, he prayed that the three properties which were not covered by the injunction might be brought to sale forthwith. The Execution Court, on the first application, granted the decree holder leave to bid at the sale and on the second application, directed the proper officer to sell the three properties not covered by the injunction and to report the result. The sale was held accordingly, but the report submitted to the Judge showed that the highest bid was inadequate. The sale was thereupon directed to continue till the 18th November 1913; but this did not lead to any better result. The consequence was that on the 18th November 1913, the Execution Court ordered that the entire execution proceedings be stayed till the disposal of the suit instituted by the claimant. Thereafter, on the 21st November 1913, the execution case was dismissed on the ground that no further proceedings could be taken till the

disposal of the suit. On the 13th May 1914, the suit of the claimant was decreed and his title to one-half share in the fourth property was declared. On the 8th November 1916 the second application for execution of the mortgage decree was made by the decree-holder. On the 12th December 1916 notice was served on the judgment-debtor under Order 21, Rule 22, inasmuch as more than one year had elapsed from the date as well of the decree as of the previous application for execution. On the 29th January 1917 notice was served on the judgment-debtor under Order 21, Rule 66, in order that sale proclamation might be settled. On the 10th February 1917 it was recorded in the order sheet that as notice had been served and no objection had been taken, the sale proclamation should issue for sale to be held on the 16th April 1917. The sale proclamation was served on the 9th March 1917 and the sale was actually held on the date fixed, when the decree holder became the purchaser. The present proceeding was then initiated for the purpose of cancellation of the sale on the ground that at the time when the second application for execution was made, the decree had already been extinguished by limitation. In our opinion there is no foundation for this contention.

3. On behalf of the decree-holder reliance has been placed upon the provision of Sub-section (1) of Section 15 of the Indian Limitation Act of 1908, to the effect that in computing the period of limitation prescribed for any application for the execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded. The decree-holder has urged that if the period between the 18th November 1913 and the 31st May 1914 is excluded under Section 15 (I), the application for execution presented on the 8th November 1916 cannot be deemed barred by limitation. The judgment-debtor has argued, on the other hand, that as the injunction related to only one half of the fourth property covered by the mortgage-decree, execution proceedings should not have been stayed in respect of the remaining share of that property and the other three properties included in the decree; and that the order made by the Execution Court for stay of the entire execution proceedings should accordingly be regarded as made without jurisdiction. We are unable to accept this contention as well-founded. It may be observed that Sub-section (1) of Section 15 contemplates the stay of execution of a decree either by injunction or by order; plainly, an injunction to stay execution may be issued in a proceeding other than the execution proceedings, while an order for stay of execution may be made by the Execution Court itself in the course of those proceedings. In the case before us, the injunction, no doubt, related to only one-half share of the fourth property and was issued by the Court which had cognizance of the suit instituted by the claimant. If that injunction had stood by itself, there would have been no stay of the execution proceedings in respect of the remaining properties. This was precisely the view adopted by the Execution Court on the 15th November 1913, and the proper officer was directed to sell the properties other than a half share of the fourth property and to report the result to the Court, On the 18th November 1913, however the Court proceeded to stay the entire execution case. There can be no question that this order was made with jurisdiction, as it is competent to the Execution Court to stay execution from time to time. Whether the Court should in the circumstances of the present case have passed an order of that description, is not relevant for the decision of the question raised before us. The order was made with jurisdiction, even though it be assumed that the order was not made in the proper exercise of judicial discretion. Besides, we cannot overlook that the decree-holder and the judgment-debtor were equally bound by this order and it is not open to either of them to challenge its propriety in the present proceedings. We are consequently of opinion that this case is covered by Section 15 of the Indian Limitation Act. There was in this case a decree the

execution whereof had been stayed, as regards one-half share, of one of the properties, by injunction, and as regards the remaining properties, by an order of the Execution Court itself. Consequently, the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made and the date on which the injunction and the order ceased to be operative. We may finally add that in this case the judgment-debtor is not competent, after the sale has taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made. The judgment-debtor had notice of this application and by reason of his omission to take objection at the proper stage, the order for the issue of the sale proclamation was made on the 10th February 1917. That order could have been made only on a determination, express or implied, that there was a valid application for execution of a subsisting decree. This is precisely a case where it may be asserted that the judgment debtor, being called on to dispute, if he wished or if he could, a certain proposition of right and nonsequential demand of relief or action by the judgment-creditor, had allowed the judgment to go by default, resulting in the same consequences as if he had raised and failed in his contention to the contrary. In such circumstances, it is not open to either party, at a subsequent stage of the proceedings, to impugn the validity of the sale; *Krishna Behari Roy v. Bunwari Lall Roy*¹ *Mungul Pershad v. Grija Kant Lahiri*² *Ram Kirpal v. Rup Kuari*³ *Raja of Ramnad v. Velusami Tevar*⁴ *George Henry Hook v. The Administrator-General of Bengal*⁵

4. The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower Appellate Court. We assess the hearing fee in this Court at two gold mohurs.

¹2 I.A. 283 : 1 C. 144 : 25 W.R. 1 : 3 Sar. P.C.J. 559 : 3 Suth. P.C.J. 213 : 1 Ind. Dec. (N.S.) 93

²8 I.A. 123 : 8 C. 51 : 11 C.L.R. 123 : 4 Sar. P.C.J. 249 : 4 Ind. Dec. (N.S.) 32

³6 A. 269 : 11 I.A. 37 : 4 Sar. P.C.J. 489 : 3 Ind. Dec. (N.S.) 718

⁴59 Ind. Cas. 880 : 48 I.A. 45 : 19 A.L.J. 168 : 40 M.L.J. 197 : 13 L.W. 290 : (1921) M.W.N. 51 : 33 C.L.J. 218 : 25 C.W.N. 581 : 23 Bom. L.B. 701 : 29 M.L.T. 345 (P.C.)

⁵60 Ind. Cas. 631 : 48 I.A. 187 : 19 A.L.J. 366 : 40 M.L.J. 423 : 29 M.L.T. 336 : (1921) M.W.N. 313 : 33 C.L.J. 405 : 3 U.P.L.R. (P.C.) 17 : 23 Bom. L.R. 648 : 25 C.W.N. 915 : 14 L.W. 221 : 48 C. 499 (P.C.).