

(1943) 07 CAL CK 0018
In the Calcutta High Court

Arjun Lal

APPELLANT

Vs

Banbehari

RESPONDENT

Date of Decision : 05-07-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1944 Cal 328

Hon'ble Judges : Roxburgh, J; Blank, J

Bench : Full Bench

Judgement

Roxburgh, J.—These appeals arise out of one judgment of the Subordinate Judge of Asansol in a proceeding u/s 47, Civil P.C. instituted on an application by the Receiver of a certain trust property known as the Mukunda Madhusudan Trust Estate. Execution of a decree in Money Suit No. 288 of 1932 of the Dhanbad Court was proceeding in the Court of the Subordinate Judge of Asansol, the trust estate be-ing defendant 15 in that suit. Arjun Agarwalla, assignee of the decree in Money Suit No. 288 is the appellant in F. M. A. No. 132 while the Receiver Bonbehari Chatterjee, is the appellant in F. M.A. No. 192. The trial Court has held: (1) that the objector's contention that the decree in Money Suit No. 288 of 1932 is not valid against the trust estate cannot be raised in execution proceedings; (2) that notice under Order 21, Rule 16 was duly served on the trust estate; (3) that the act that the decree-holder had accepted certain sums from some of the judgment-debtors, viz., Rs. 1500 from original defendants 9-11, Rs. 1500 from defendants 31-35, and Rs. 1100 from defendant 13 in full satisfaction of their claims was no bar to his realizing the whole balance from the Receiver; (4) he has however directed as a Court of equity and as the Court appointing the Receiver in T.S. No. 22 of 1937, that the "Receiver is only to be allowed to pay first the actual share of the estate, namely 10 1/2 pies and has directed that the decree-holder will them after realization of this amount, proceed against the other judgment-debtors and on his failure to obtain the decretal amount from them, he will be allowed to proceed with the execution of the decree against the properties in the hands of the Receiver, after taking fresh permission of the

Court. The Receiver appeals in respect of the first three decisions; the decree-holder appeals in respect of the limitations contained in the fourth decision.

2. Money Suit No. 288 of 1932 was brought in respect of certain mining royalties. Defendant 7 in the suit was Sm. Indumati Debi; defendant 8 was Sm. Gopi-bala Debi, both described as daughters of Mukunda Lai Laik, who was in fact the settlor of the trust Mukunda Madhusudan Sampat, which is so named in the deed of trust. Defendant 15 was the "Mukunda Madhusudan Sampat Trust Estate."

3. The final decree is Ex. A (A/part II/4). As appears from the judgment in the suit "after restoration" (Ex. 3B. Part II/I) dated 29th June 1933, the suit was originally decreed on 16th August 1934 on contest against defendant 14 and ex parte against defendants 4-36. There were three applications for restoration under Order 9, Rule 13, Civil P.C. one of which was made on behalf of defendant 15 (Mukunda Madhusudan Trust Estate). It appears further that originally the suit was only against defendants 12 to 14 heirs of one of the four original lessees, and that the remaining defendants, including defendant 15, the trust estate, were subsequently brought on the record. After restoration a joint decree on contest against defendant 15 and against others was passed on 29th June 1935 and this was made joint with the previous decree against the other defendants. The decree recites that the suit was disposed of in the presence of Mr. Sasanka Mukherjee, pleader for defendant 15. The Vakalafnama filed in the suit on behalf of the estate, dated 21st January 1934, bears the seal of the Mukunda Madhusudan Sampat Estate, with Srimati Indumati Debi shown as "Kartri Paricharika", and is signed by her as such. This was filed before the original ex parte decree was passed on 16th August 1934, and the judgment after restoration shows that defendant 15 filed a written statement at the original stage. There was an issue in the suit after restoration. "Has the plaintiff any cause of action for this suit against defendants 15, 21 (a) and 30" and there is a finding that the plaintiff "as assignee has got every right to claim the arrear of rent purchased by her from all the principal defendants who are the heirs and legal representatives of the original lessees," and that nothing had been shown why "the plaintiff should not get a decree against the present defendants."

4. We proceed to consider the matter arising out of the first point decided by the trial Court. On behalf of the Receiver, Mr. Amarendra Nath Bose contends that despite all that was done in Money Suit No. 288, the suit is defective to affect the trust property because the provisions of Order 31, Rule 2, Civil P.C. were not complied with, as all the trustees were not made parties. At a preliminary hearing of this appeal the trust deed was not available; it has been called for and is now before us, it shows that the original settlor, Mukunda Lal Laik, was to be the first trustee, and after his death his wife, and after her death his daughters, Indumati Devi and Gopibala Devi (defendants 7 and 8 in the suit). There is provision that when there was more than one trustee the elder was to be karta and was to manage the estate, taking the opinion of the others. Mukunda Lal Laik and his wife are now dead, and according to the terms of the deed,

Indumati and Gopibala are new the trustees, the former being senior and "karta." Mr. Bose contends that Gopibala is a trustee, and she has not been made a party as such. The appearance of the estate on the record by name, represented by a pleader appointed by Indumati as "kartri paricharika" is not sufficient. The Receiver was appointed in T.S.No.22 of 1937 of the Court of the Subordinate Judge of Asansol. This was an administration suit filed on 9th May. 1938, by Gopibala Devi on behalf of herself and other beneficiaries of the trust estate, and also as trustee against her sister Indumati Devi as head trustee and beneficiary of the estate, and others. According to-the judgment (Ex. 1-B, part 11/18) in this case the affairs of the estate had drifted from bad to worse until Indumati "wisely applied to the Sub-Judge of Purulia early in 1932 and obtained an Order (Ex. 49) consistent with her seniority and the terms of the trust deed in pursuance of which she alone took up the estate management on 28th April 1932, as its "kartri paricharika." The learned Judge stated: "I think defendant 1 should cease to be the sole kartri paricbarika and be considered in terms of the trust deed as joint trustee with her younger sister Gopibala... " He directed that accounts be taken to ascertain the liability of Indumati as kartri paricharika during the period from 28th April 1932 (the date of the appointment by the Subordinate Judge of Purulia)and 19th May 1937, the date of the filing of the plaint in the suit before him, and directed that "plaintiff 1 and defendant 1 are joint trustees, of this trust property and the right of defendant 1 as sole kartri paricharika ceases from thisdate." The sons of the sisters were appointed as Receivers, but subsequently the present Receiver has been appointed in their place. The Order of the Subordinate Judge of Purulia, dated 27th April 1932, referred to in the judgment in T.S. No. 22-of 1937, was also called for in this appeal along with the trust deed. The Order does not show more than that the Receiver in the suit before the Subordinate Judge of Purulia was authorised to pay all amounts to the kartri paricharika. It remains to note that in the course of the execution proceedings in respect of M.S. No. 288, the assignee of the decree (Arjun Agarwalla) applied in T.S. No. 22 of 1937 for permission to execute the decree against defendant 15 in M.S. No. 288; (the Trust Estate). The Receiver objected, but by an Order dated 10th August 1939 (Ex. B, A Part II/62) his objection that the estate had not been properly represented in the money suit was overruled, and permission to execute was given. We do not, however, think that this decision precludes a different decision in the present case; in an application for permission to proceed against the Receiver the point was obviously not a proper one on which permission could have been refused. We have set out the facts at length, though the point was decided briefly by the learned Subordinate Judge on the ground that no objection as to the validity of the decree can be raised in the execution proceedings. The more detailed examination of the facts does not lead us to any different conclusion. At best the point is a highly technical one, though that alone is no reason why it should not succeed. The estate has in substance been represented throughout; the suit was brought during the period after 28th April 1932, when the kartri paricharika had an official reco-gnition from the Purulia Court, the exact nature of which is not

very clear. Until the present Receiver arrived on the scene no one ever thought of suggest-ing that there had not been proper representation of the Trust Estate. In the suit Indumati herself appeared as "kartri paricharika" instructing the pleader for the Mukunda Lal Madhusudan Sampat; both sisters were parties in their own names. No objection to the representation was taken, on the other hand the decree was reopened at the instance of the estate so represented. In view of these circumstances we see no rea-son to differ from the view of the trial Court that no objection can be taken in execution to the validity of the decree to affect the Trust Estate. The appeal fails in respect of the first point raised.

5. The second point decided by the trial Court raises the question whether notice under Order 21, Rule 16 was properly served, and, if not, whether the failure to make service is fatal to the execution. Mr. Bose relies on the decision in Umamoyee Dasya and Another Vs. Jatan Bewa and Others, and in Sarifa Khatun Vs. Asimannessa Bibi and Others, , Older 21, Rule 16 was amended so far as this Court is concerned in 1933, and it is clear that now no contention can be made as to the validity of proceedings pending the hearing of the objections of the judgment-debtors, if any, whatever might be the case under the Rule as it stood before amendment. The earlier case cited was decided under the Rule as it so stood. In the present case it may be stated without discussion that the trial Court is in error in holding that as the notice was duly stuck up the service on the estate was good. Service had been first attempted in M. Ex. Case No. 474 of 1935 on a person not authorised to receive summons. There was thus no service of notice, but on the other hand, the Trust Estate through Indumati Devi, as kartri paricharika filed an objection on 14th May 1937, in the later execution case No. 96 of 1937, ground (d) of which specifically challenged the assignee's right to proceed. (Ex. I. A. part 11/47). The objection was dismissed for default and non-prosecution on 21st July 1937 (Ex. D (5) A Part 11/55). Shortly after this, on 8th August 1937, the Trust Estate appeared in the same manner and applied for an adjournment of the sale waiving fresh issue of sale proclamation. The object of Order 21,Rule 16 is to give the judgment-debtors an opportunity to object to execution by the assignee. In this ease, the objector defendant 15, the Trust Estate, had the opportunity and took it, though it did not press the matter. Unless it can be said that Order 21, Rule 16, enacts a lormalistic but essential ritual, so that even though the judgment-debtor appears and objects to execution by the assignee still, unless he has been served pro-perlly with the piece of paper informing him of his opportunity to object, the proceedings must fail as mullities, there is no substance in the point now raised. We do not think this is the correct view, particularly having regard to the amended form of Rule 16; the objection on the ground of non-service of notice under Order 21, Rule 16 fails.

6. The third and fourth points decided by the trial Court may be disposed of together and cover both the appeals. We think that the learned Subordinate Judge was in error in obtruding his functions as Court appointing the Receiver (in T.S. 22 of 1937) into the matter of the execution of the decree in M.S. 288 of

1932, and further that his Order even regarded as, strictly speaking, one made in T.S. 22 of 1937, is not proper. As Court appointing the Receiver we do not think he should have attempted to control the proceedings in the execution as he has done. In any case it is clear that the fact that the decree-holder may have released some of the joint judgment-debtors from some part of their share of the judgment debt does not affect the liability of the others to contribute: 3. Gour Mohan v. Kanta Mohan 46 C.W.N. 234, and u/s 44, Contract Act, it does not discharge the other joint debtors. The decree-holder is entitled to proceed against the remaining judgment-debtors in such manner as he chooses; the executing Court could not prevent him so doing, and we do not think that the fact that one of the judgment-debtors is a Receiver gives, in the circumstances, the Court which appointed him any right to place obstructions in the way of execution. Even conceding that in special circumstances some control might be properly exercised by the Court! appointing the Receiver, we see no reason for such interference in this case. The result is that we allow the appeal of the decree-holder in this matter, and dismiss that of the Receiver. In the result appeal No, 132 of the decree-holder succeeds and is allowed with costs. The appeal of the Receiver No. 192 fails on all points and is dismissed with costs. The Order of the trial Court is modified and the application of the Receiver is dismissed in toto with costs. Hearing fee two gold mohurs in each case. Let the records be sent down as early as possible.

Blank, J.

7. I agree.