

(1947) 07 CAL CK 0009
In the Calcutta High Court
Case No : A.F.A.O. No. 21 of 1947

Atul Krishna Roy

APPELLANT

Vs

Manmatha Nath Roy

RESPONDENT

Date of Decision : 11-07-1947

Acts Referred:

Citation : (1947) 07 CAL CK 0009

Judgement

Lodge, J.—This is an appeal against an order of the Additional District Judge of 24-Parganas dismissing an appeal against an objection under S. 47, Civil P.C. The material facts briefly are as follows: The respondent in this appeal Manmatha Nath Roy instituted a suit in the Court of the Third Subordinate Judge, Alipore, praying for a declaration that certain properties were debutter properties and for a declaration that he was the shebait of those properties jointly with the present appellant, Atul Krishna Roy. There was a further prayer that if the properties were held to be secular and not debutter properties the properties should be partitioned between the parties. It was held that the properties were debutter properties. It was ultimately held by this Court in appeal that the present appellant and the present respondent were both shebait of the debutter properties and the suit was remanded to the Court of first instance for the preparation of a scheme of management. When the matter came again before the Court of first instance, the present appellant and the present respondent submitted an agreed scheme to the learned Judge and that scheme was accepted as a compromise by the Court. According to that scheme, the present appellant and the present respondent should alternately perform the sheba, puja, etc., of the deity for one year. It was also provided that the property of the deity should be divided into two shares and that one of the brothers should have possession of one share as shebait and the other should have possession of the other share as shebait, that each of these brothers should separately enjoy possession of the property, should separately realise rent, separately pay municipal tax, separately let out the property if he thought fit and in fact should be in absolute separate possession of his own share of the debutter property. The present respondent

Manmatha Nath Roy, subsequently applied to the Court of first instance for execution of this decree by the appointment of a commissioner to demarcate the line along which the wall partitioning the two shares of the property would be erected. The present appellant Atul Krishna Roy filed an objection under S. 47, Civil P.C. In his objection he contended that the decree being merely a decree in a declaratory suit for framing a scheme should not be executed at all and secondly he contended that inasmuch as the deity was not represented in drawing up the scheme the scheme was not binding and could not be put into effect by the executing Court. This objection was disallowed by the learned Subordinate Judge. The present appellant appealed and the appeal was heard by the District Judge of 24-Parganas. The appeal was again disallowed and the appellant has now preferred a second appeal before us.

2. The material question for our consideration is whether a scheme drawn up in the circumstances in which the present scheme was drawn up can be enforced by executing the decree. No Calcutta case has been placed before us. The appellant has relied upon the case of *Vaithilinga v. Theyagarajaswami*, AIR 1936 Mad. 581 : (59 Mad. 751) On the other hand the respondent has relied upon the cases of *Damodarbhat v. Bhogilal*, 24 Bom. 45 : (1 Bom. L.R. 509) and *Vythilinga Pandarasannadhi, Trustee Kattalai, Kamalalayam South Bank Vs. The Board of Control, Sri Thiagarajaswami Devasthanam, and Theyagarajaswami v. Balayee Ammul*, AIR 1928 Mad. 61 : (107 I.C. 136). In the two Madras cases relied upon by the learned advocate for the respondent Cornish J. was a party to the decisions. Cornish J. was also a party to the decision relied upon by the learned advocate for the appellant. It seems, therefore, that the considered opinion in the Madras High Court has now come round to the view that such a decree as that before us cannot be enforced by execution proceedings. We respectfully agree with the decision in the case of *Bava C. Vaithilinga Mudaliar Vs. The Board of Control, Sri Thyagarajaswami Devasthanam Tiruvarur*, and we are of opinion that the objection to execution should have been sustained.

3. In this view the appeal must be allowed. The appeal is therefore allowed with costs. The decisions of the Courts below are set aside and the objection under S. 47, Civil P.C., is allowed.

Amin Ahmed, J.

4. I agree.