
(1984) 06 CAL CK 0002
In the Calcutta High Court
Case No : Second Appeal No. 164 of 1965

Baishnab Das Sen	Vs	APPELLANT
Bholanath Sen and Others		RESPONDENT

Date of Decision : 14-06-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 146, 47
Trusts Act, 1882 — Section 3, 55, 56

Citation : 88 CWN 860

Hon'ble Judges : Amitabha Dutta, J

Bench : Single Bench

Advocate : Barun Roychowdhury, for the Appellant; B.K. Bhattecharjee and S Pal, for the Respondent

Final Decision : Allowed

Judgement

Amitabha Dutta, J.—This is an appeal by the defendant/Judgment Debtor from an appellate order dismissing his application under S. 47 of the Code of Civil Procedure.

2. Admittedly the Respondent No 1 Bholanath Sen as trustee of the premises No. 171, Balaram Dey Street, appointed under a Deed of Trust dated 8.7.1941 executed by Ram Das Sen., instituted Abetment Suit No. 278 of 1954 against the appellant for eviction from a part of the said premises and obtained a decree which was passed on 15.2.1956 by the learned judge, 3rd Bench of the Court of Small Causes, Calcutta. The said decree was affirmed in Special Appeal No. 99 of 1956 by an appellate Bench of the said Court and also in Second Appeal No 1366 of 1960 by this Court. When the suit was pending in Second Appeal the beneficiary Tarak Nath Sen on this application was added a party Respondent by an order made in Civil Rule No. 161/S of 1961 as it was considered desirable that the second appeal should be heard in his presence. After the ejectment decree was affirmed in Second Appeal the Respondent no 2 Trarka nath Sen sought to put the decree into execution by filing an application for execution, which was

registered as Execution Case No. 4 of 1964, along with an application describing its one under Order 1 Rule 10 and Order 21 Rule 16 of the Code. It was alleged in paragraph 4 of the said application that it was, inter alias, provide in the Trust deed dated 8.7. 1941 that in respect of premises No. 17 Balaram Dey Street, Calcutta the trustee was to let out the said premise and realized rent and profits thereof and pays there out in the first place of a rate, taxes etc and then pay Rs. 5/- per month to Sm. Bidyasundari Das for her maintenance, for and during the term of her natural life and then pay all her necessary and reasonable expenses for the maintenance and education of the petitioner to hold the balance of trust hand marked over the same petitioner on his attaining majority and also to convey and transfer to petitioner the premises No. 171, Balaram Dey Street, Calcutta on his attaining majority. It was further stated in paragraph 7 of the said application that the trustee bholanath Sen having failed to render any accounts or to make over sums due to the petitioner or to convey the petitioner the said premises, the petitioner filed suit No 1587 and 1959 in the Original Side of this Hon"ble Court against the trustee for a decree directing the trustee to convey the said premises and render accounts. The Respondent No 2 prayed for being added as a party plaintiff in the ejectment Suit with leave to execute the decree against the appellant for recovery of possession of the suit premises. The appellant filed an application under S. 47 of the Code challenging the right of the Respondent NO. 2 Tarak Nath Sen to execute the decree.

3. Both the courts below have proceeded on the footing that according to the terms of the Trust Deed the Respondent No. 2 on attaining majority became the sole owner of the property in respect of which the trustee bholanath Sen had obtained the decree for abetment against the appellant and dismissed the application under S. 47 of the Code. The court of appeal below has relied on the provisions of S. 146 and Order 22 Rule 10 of the Code in holding that the Respondent No. 2 has right to execute the decree.

4. Before this Court it has been submitted on behalf of the appellant that the Respondent No. 2 has no locus standi or right to execute the decree as he is neither an assignee of the decree as mentioned in Order 21 Rule 16 of the Code nor a person in whom the suit premises have vested in terms of the Deed of Trust dated 8.7.1941 in which admittedly the settler expressed his intention that on attainment of majority by Tarak nath Sen the trustee would convey the premises No 171, Balaram Dey street to him. It is also the admitted position that for failure on the part of the trustee to convey the said property, Tarak nath Sen brought suit No. 1587 of 1959 in the Original Side of this Court against the trustee and obtained a decree against him for conveyance of the said property but the conveyance has not yet been executed in terms of the said decree. It is, therefore, contended on behalf of the appellant that the learned judge of the court of appeal below has erred in affirming the order of dismissal of the appellant's application under S. 47 of the Code passed by the trial Judge.

5. On the other hand it is contended on behalf of the Respondent No. 2 that he

being a person claiming under the trustee decree holder is entitled to execute the decree in view of the provisions of S. 146 and Order 22 Rule 10 of the code, although the suit premises have not yet been conveyed to him by the trustee in terms of the deed of trust and the subsequent decree passed in suit No. 1587 of 1959 of this Court. In this connection reliance has been placed on the Bench decision in *Indrajit Choubey and Another Vs. Sitaram Agarwalla and Others*, . But in that case the claimants who got the decree-holder's interest under a partition were allowed to continue the execution proceedings started by the decree-holder on substitution in place of the decree-holder under Order 22 Rule 10 of the Code as there was devolution of interest during the tendency of the execution proceedings to which the provisions of S. 146 of the code were held to be applicable. The learned advocate for the Respondent No. 2 have also relied on the decision in the case of *Zila Singh and Others Vs. Hazari and Others*, . In that case one N filed a preemption suit against the original vendor of certain Land and his vetoes. The trial court decreed the suit non-condition to deposit certain amounts, with which N complied. Soon thereafter N sold the lands to the appellants. The Supreme Court held that if N could have made an application for execution for the decree as decree holder, the appellants as purchasers of land from N would be claiming under N and therefore their application for execution would be maintainable under S. 146 of the Code. In the aforesaid decision the Supreme Court referred to the earlier decision in *Jugal Dishore Saraf v. Raw Cotton Co Ltd.* AIR 1955 SC 376 where the plaintiff assigned book debts on which he had filed a suit and the suit was then decreed. The court held that the assignee of the book debts was entitled to execute the decree not under Order 21 Rule 16 because there was no assignment of the decree but under S. 146 of the Code as a person claiming under the decree-holder. It is clear from the aforesaid decision that to become a person claiming under the decree-holder as provided in S. 146 of the Code the claimant must acquire interest in the property or subject matter to which the decree relates either by act of parties or by operation of law from the decree-holder. In the present case this essential condition is not fulfilled by the Respondent No. 2 who seeks to execute the decree. Order 22 rules 10 apply only where a subsisting interest is assigned, created or devolved (see *Sardar Govindrao Mahadik v. Devi Sahai* AIR 1982 SC 987). In the present case there was no assignment, creation or devolution of interest in the property during the tendency of the suit as required by Order 22 rule 10 of the Code nor has the decree been assigned as mentioned in Order 21 Rule 16 of the Code. Moreover, in India there is no such thing as equitable ownership and when property is vested in a trustee, the owner is the trustee. The beneficiary can only have rights against the trustee, which are laid down by the Indian Trusts Act. Section 3 of the said Act expressly says -" the beneficial interest or interest of that beneficiary is his right against the trustee as the owner of the trust property." The right of the beneficiary is the right to call upon the trustee to administer the property so as to give the beneficiary his dues according to the provisions of the trust property." The right of the beneficiary is the right to call upon the trustee to administer the property so as to give the

beneficiary his dues according to the provisions of the trust under S. 55 of the Act or in a proper case to convey the property to the beneficiary under S. 56 of the Act.

6. I, therefore, hold that the Respondent No. 2 has no right to execute the decree in place of or jointly with the decree holder in this case. The application under S. 47 of the Code filed by the appellant should, therefore, succeed. The courts below proceeded on a wrong assumption of the term of the trust deed and came to an erroneous conclusion. The intention of the settler as expressed in the trust deed was that the trustee would convey and transfer the property in question to the Respondent NO. 2 on his attaining majority. In the absence of such conveyance or transfer by the trustee of the suit property the Respondent No. 2 cannot execute the decree under S. 146 read with Order 21 rule 10 of the Code. The decision of the court of appeal below cannot, therefore, be sustained.

7. The appeal is allowed. The judgment and order of the court of appeal below are set aside. The Misc. Case No. 42 of 1964 under S. 47 of the CPC are allowed and the connected execution case is dismissed.

There will be no order as to costs.