

(1955) 06 GAU CK 0004
In the Gauhati High Court
Case No : M.A. (F) No. 6 of 1951

Balaram Karmakar and Others

APPELLANT

Vs

Subodh Chandra Bose

RESPONDENT

Date of Decision : 20-06-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 12, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 8, 47

Citation : (1955) 06 GAU CK 0004

Hon'ble Judges : Sarjoo Prosad, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : P. Choudhuri, B. Sarama and G. Talukdar, for the Appellant; B.B. Goswami, for the Respondent

Judgement

Sarjoo Prosad, C.J.—This appeal is directed against an order in an execution case in relation to a final decree for partition. The decree in question was passed on 21-2-1949 in Title Suit No. 36 of 1947. This appeal has been preferred by three persons, Balasam Karmakar, Baljuri Das and Fakir Chand Das. They were not parties to the partition suit itself but they were impleaded as judgment-debtors in the execution case, they being judgment-debtors Nos. 14 to 16 respectively.

The decree-holder alleged in the execution petition that these judgment-debtors were tenants-at-will under the original judgment-debtor Sri Lakshmi Narayan Rewani and as such, they were liable to be evicted in execution of the decree for partition passed in favour of the decree-holder.

2. Balaram Karmakar died during the pendency of the appeal on 13-1-1954 and no attempt was made to substitute the heirs of Balaram until on 11-3-1955 when an application for substitution after setting aside abatement was filed on behalf of his widow and minor son. The learned Counsel for the appellants submits in the first place that no substitution is necessary as under Order 22, Rule 12, Civil P.C., Rules 3, 4 and 8 of that Order had no application to proceedings in execution of a decree or even to appeals arising out of such cases.

The consensus of opinion on this point how--ever appears to be in favour of the view that although Rule 12 applies to execution proceedings and as such the operation of Rules 3, 4 and 8 of Order 22 is excluded from those proceedings; yet so-far as appeals arising out of execution cases are concerned Rule 12 of Order 22 has no application. Such appeals are governed by Order 41, Civil P.C. and substitution in place of the heirs of deceased appellants or respondents in such appeals is as much necessary as in the case of any other appeal preferred under Order 41.

Accordingly Rule 12 of Order 22 refers only to proceedings before the executing court and not to those in the appellate court which hears appeals-from orders in execution proceedings: See "Ajudhia Pershad v. Sham Sunder" AIR 1947 Lah 13 (FB)(A); Trimbak Narhar Vs. Gopal Narayan, "Rajah of Kalahasti v. Jagannadha Rayanimgar" AIR 1932 Mad 574 (C) and Changa Mal and Others Vs. Chaubey Ram-Dulare Lal There is however a Full Bench decision of the Patna High Court in "Mohammad Taqi v. Fateh Bahadur Singh" AIR 1029 Pat 565 (FB) (E), where the majority of the Judges has taken an opposite view.

Das, J. the dissenting Judge in that case was also inclined to think that Rule 12 of Order 22 did not apply to appeals arising out of execution cases and as such substitution was necessary in those-appeals. As at present advised, we find ourselves in agreement with the view taken by the various-other High Courts in India that substitution in appeals arising out of execution cases is necessary as provided under Order 22, Rules 3, 4 and 8 and that their exclusion under Rule 12 is confined only to orders in execution proceedings passed in the original stage.

An application however has been made for substitution of the heirs. The heirs are the widow of the deceased Balaram Karmakar and his minor son who is under the guardianship of the widow. It is stated by them that they were not aware of this appeal preferred by Balaram and the other decree-holders and that they came to know of it for the first time on 4-3-1955 through one Digendra Chandra Banerjee and as soon as they came to know of it, they filed this application for substitution and setting aside the abatement on 10-3-1955. A counter-affidavit has been filed on behalf of the respondent-decree-holder alleging that the widow was aware of this appeal much earlier.

It is stated that Digendra Chandra Banerjee was the "tadbirkarak" acting on behalf of the judgment-debtors in the execution case and this "tadbirkarak" had informed the lady about the execution case as also about the pendency of the appeal. The allegations in the counter-affidavit are alrgely of a speculative character and we see no adequate reason: to disbelieve the statement made by the widow in the application for substitution and setting aside abatement. It is not improbable that Digendra Chandra Banerjee, if he was at all a "Tadbirkarak" acting on behalf of the judgment-debtors, or whosoever that person may be, may not have considered it necessary in view of the divergence of opinion on the point to make any substitution in the appeal. In the circumstances, we direct that the abatement may be set aside and the heirs who have applied to he

substituted may be brought on the record.

3. The next question" then is whether on merits the decision of the learned Subordinate Judge directing execution to proceed against these judgment-debtors can be sustained. I have already pointed out that the case of the decree-holder was that these judgment-debtors were tenants-at-will inducted on the land by one of the judgment-debtors, Lakshmi Narayan. In regard to judgment-debtor 12, Balaram Karmakar, the finding of the learned Subordinate Judge is that he was in occupation from 1948 when his tenancy started and he therefore came to occupy the land during the pendency of the suit in which the decree in question was passed as a tenant-at-will.

As to the other two judgment-debtors 14 and 15, the learned Subordinate Judge observed that these judgment-debtors had given no evidence to rebut the evidence of the decree-holder alleging that they were also tenants-at-will under judgment debtor 2. On these findings, he held that all these persons being merely tenants-at-will of one of the judgment-debtors who was actually a party to the suit, were liable to be evicted at the instance of the decree-holder who had never recognised them as tenants under him.

The finding on the point is assailed by the learned Counsel for the appellants. It is pointed out that these appellants not being parties to the suit itself, the decree could not be executed against them and the question of their title had to be decided in a separate suit. On behalf of the decree-holder, it is argued that the appellants being merely representatives of the judgment-debtor, he was entitled to execute the decree as against them, and under Order 21, Rule 35, C.P.C., he was entitled to get possession of the land allotted to him if necessary by removing any person bound by the decree who refused to vacate the property.

The decree-holder submits that as the representative of the original judgment-debtor Lakshmi Narayan, these defendants were also bound by the decree and were liable to be removed in giving possession of the land to the decree-holder. A number of cases have been cited by the learned Counsel for the decree-holder in support of his contention. In *Niranjan Mukherjee Vs. Soudamini Dasi and Others*, which is a Full Bench decision of five Judges it was held that a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.

In other words, after the partition the co-sharer who did not recognise the tenancy was entitled to possession of the land free from the encumbrance created by his other co-sharers. The principle therefore can very well be applied to execution cases as well. Here, it appears that these judgment-debtors had been inducted on the land by one of the co-sharers who was a party to the partition decree, the appellant-decree-holder not having recognised the tenancy of these judgment-debtors. As such, the appellant was entitled to get khas

possession of the land ignoring the existence of any such tenancy.

The principle indicated above finds support from another decision in "Jaminikanto Narendra Lal v. Bonomali Dey" AIR 1948 Cal 172 (G) where in an execution proceeding, it was held that when a decree for ejectment is passed against a tenant his sub-tenant would be bound by that decree and would be his representative as being a person who has, derived his interest from the tenant; and also from a decision in Ajodheya Lal Mahaseth and Another Vs. Mahanth Brij Kishore Das,

In all these cases, it was held that such a person occupies merely the position of a representative of the judgment-debtor, as contemplated by the term used in Section 47, C.P.C. The word "representative" in that section, is not limited merely to the legal representatives but includes persons on whom interest has devolved by assignment, transfer or otherwise. As such, a matter relating to execution, discharge or satisfaction of the decree arising between the decree-holder and his representative had to be decided by the executing court.

The contention therefore that the execution should proceed against these judgment-debtors as representatives of an original judgment-debtor is well founded. In regard to judgment-debtor 12, Balram Karmakar, it is urged that the receipts in fact show payment of receipt for 1947 and the finding of the court below that his tenancy commenced from 1948 is therefore misconceived. There is undoubtedly force in this contention. The statement of the judgment-debtor that his tenancy started from the time he first paid rent has to be considered in the light of the receipts and the years to which the payments relate.

That being so, it must be assumed that the tenancy of this judgment-debtor began sometime, in 1947. Even then, it would not affect the legal, position because as a tenant-at-will under judgment--debtor Lakshmi Narayan, this judgment-debtor, would be liable to be evicted in execution of the, final decree in favour of the decree-holder. In" regard to the other two appellants also, the case of the decree--holder is that these appellants had been inducted by Lakshmi Narayan as tenants-at-will and were therefore bound by the decree.

In the objection petition, these appellants took the plea that they had been in possession of the disputed plot for more than sixty years in their own right; it was therefore necessary to implead them as parties to the suit in order to eject these appellants. This was controverted by the decrees--holder in a counter-objection filed by him where he reiterated that these judgment-debtors were tenants inducted on the land by Lakshmi Narayan Rewani, only some years ago without the consent and concurrence of the petitioner-decree-holder or any other co-sharer and their assertion to the contrary was false and incorrect.

The decree-holder further gave evidence in support of that case and he stated that Baljuri and Fakira, the judgment-debtors were there from some five or six years before the partition suit as tenants of Lakshmi Narayan. The judgment-debtors did not adduce any evidence to the contrary and the learned Subordinate

Judge was therefore justified in accepting the evidence of the decree-holder on that point. He held that the co-sharer who inducted these judgment-debtors as tenants did so without the consent or concurrence of any other co-sharer and as such these defendants were liable to be evicted as after the passing of the decree they were in the position of trespassers.

We see no reason to differ from the view taken by the learned Subordinate Judge on the materials placed before him. It was open to the judgment-debtors to give evidence in proof of their assertion that they were not tenants-at-will but holding the land in their own right as such, but they never did so; and the evidence of the decree-holder on the point was unrebutted. The appeal therefore is without any substance and must be dismissed with costs.

4. There is an application on behalf of a person called Satya Ranjan De to be added as party to the appeal preferred by the other judgment-debtor-appellants. This person was impleaded as a party to the execution case being placed in the category of judgment-debtors, his serial number being 16. Admittedly, as stated in the execution petition itself, this person had purchased some portions of land from the decree-holder himself after the passing of the final decree.

I fail to understand how this person can be joined as party to this appeal. His position on the face of the execution petition itself is that of a decree-holder, because he is a purchaser of a portion of the land from the decree-holder himself. His description as judgment-debtor in the execution case is obviously a misnomer and cannot affect the legal position. We are therefore not inclined to entertain his application for being added as party to the appeal.

The directions of the learned Subordinate Judge in the order under appeal have to be confined to the judgment-debtors as such, and do not obviously affect the interest of this individual who is not a judgment-debtor on the face of the execution case itself and on the facts admitted by the parties. The application therefore is rejected but in the circumstances, there will be no order for costs of this application.

Ram Labhaya, J.

5. I agree.