
(1978) 02 CAL CK 0050
In the Calcutta High Court
Case No : C.R. No. 1899 of 1977

Barendra Nath Das

APPELLANT

Vs

Panna Rani Das and Others

RESPONDENT

Date of Decision : 10-02-1978

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 35
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 66, Order 21 Rule 89
Partition Act, 1893 — Section 2, 7, 7(b)

Citation : 82 CWN 975

Hon'ble Judges : P.K. Banerjee, J;B.N. Maitra, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Bhaskar Ghose and Bimal Kumar Chatterjee, for the Appellant;S.C. Das Gupta and Soumendra Chandra Das Gupta, for the Respondent

Final Decision : Allowed

Judgement

P.K. Banerjee, J.—In this rule, an important question of law arises, namely, whether the sale under the partition suit and/or mortgage suit is a sale under Or. 21 and whether in such a case the sale can be avoided under Or. 21. R. 89 of the Code of Civil Procedure. The opposite parties Nos. 1 and 2 filed a suit, being Money Suit No. 32 of 1951, against the petitioner and four other defendants for realisation of mortgage dues by partition and sale of the mortgaged property being 1/3rd share of the defendant No. 1, namely, Sachindra Nath Das, in the suit property which was subsequently purchased by the petitioner and alternatively for realisation of the mortgage dues out of the 1/3rd share of the sale proceeds after auction sale of the entire suit property. The plaintiff's case is that the defendant No. 1 and the petitioner have got 1/3rd share each and the remaining defendants Nos. 3 to 5 jointly have got 1/3rd share in suit property being the three storied building on a land of about 3 kottahs 1 chittack in Chandernagore; that while in possession of the suit property the defendant No. 1

took loan of Rs. 1250/- each by executing two Notarial Mortgage Bonds both dated 18th February, 1949 in respect of undivided 1/3rd share in the suit property and the defendant No. 1 there after sold his said undivided 1/3rd share to the petitioner by a registered deed of sale dated 17th January, 1951 subject to the aforesaid mortgage and the mortgage dues amounting to Rs. 1459-12 annas each was neither paid by the defendant No. 1 nor by the petitioner inspite of repeated demand, as a result of which the said suit was filed. The petitioner stated that the predecessor of the opposite parties Nos. 3 to 6 became a co-plaintiff in the said suit for realisation of his decretal dues against the defendants Nos. 3 and 5. In the plaint it is stated that the suit property is not capable of being conveniently partitioned amongst the co-sharers and as such it should be put to sale in its entirety for recovery of the dues of the said three plaintiffs. Ultimately the suit was decreed in a preliminary form on contest. In the said preliminary decree it was provided as follows:-- It is ordered and decreed that a preliminary decree is passed on contest against the defendant No. 2 Barendra Nath Das and ex-parte against the defendants Nos. 1, 3, 4 and 5 declaring that rupees two hundred nine and annas twelve as interest are due to each of the first two plaintiffs Pannarani Das and Narendra Nath Das from defendant No. 2 Barendra Nath Das and that rupees two thousand six hundred eleven and annas eight and pies six and rupees two thousand three hundred seventy seven and annas fourteen four pies are due to plaintiff Nos. 3 Sashibhusan Das from the defendants Nos. 3 and 5 Dulal Chandra Das and Banku Behari Das respectively and directing that the said three defendants do pay into the court the said sums by 22.8.53 together with costs of this suit and that in default of such payment the plaintiffs shall be entitled to apply for a final decree directing sale of the entire joint property and division of the sale proceeds among the creditors and the owner-cosharers of the property according to law.

The said preliminary decree was made final on 29th December, 1953 in the same terms excepting some variation of interest.

The said preliminary decree was confirmed in appeal substantially on 29th December, 1953 with certain variation as regards the interests but we are not concerned with that part of the present case at the present moment. The whole point centres round whether Or. 21 R. 89 is applicable in the matter of sale as directed to be made u/s 2 of the Partition Act.

2. Mr. Ghosh on behalf of the appellant contended that Or. 21 is applicable. In fact, it is stated, that the decree-holder applied under Or. 21 R. 66 for the issue of a sale proclamation and thereafter all the steps for bringing the property for sale were taken under Or. 21 and it is also argued that after the sale is held, Or. 21 R. 89 must necessarily apply. Mr. Ghosh relied upon the cases reported in AIR 1923 Cal. 582, Nirod v. Amulya AIR 1963 P&H 531 Roshan Lal v. Gobind Raj and Rani Bala Bose and Others Vs. Hirendra Chandra Ghose and Others in support of his contentions.

3. Mr. Das Gupta on behalf of the opposite party however contended that the

decree as passed was a decree under the partition Act and section 2 of the said Act applies. It is further stated in the decree itself how the sale is to be made and how the sale proceeds should be divided amongst the parties. If Or. 21 Rule 89 applies then the part of the decree cannot be given effect to. Mr. Das Gupta referred to the cases reported in AIR 1921 Cal 169 and Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, .

4. Before we deal with the question raised it is, conceded by both the parties that this decree passed is not a mortgage decree but a decree under the partition Act and therefore we are not concerned in this case about the effect of Or. 21 rule 89 in a decree passed in a mortgage suit. The only question for our consideration is whether in sale in execution of decree passed in partition suit Or. 21 R. 89 of the CPC applies. It appears to us that in view of section 7 of the Partition Act it cannot be said that Or. 21 R. 89 is not applicable. Section 7 of the Partition Act runs as follows:--

Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:--

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the CPC in respect of sales in execution of decrees.

5. In the present case the property is outside the jurisdiction of the Original Side and it has been provided that the procedure prescribed in the CPC in respect of the sale in execution of a decree is to be followed until and unless the High Court has prescribed any other rules in the proceeding. It is nobody's case that the High Court has prescribed any other rules. Coming to the facts of the case it appears that the execution proceeding was started by the decree-holder under Or. 21 R. 66 by making an application for the execution of a decree in the tabulater form. Thereafter all the proceedings under Or. 21 R. 66 were followed. The sale proclamation was issued under Or. 21 R. 66. The notification was published in the newspaper for the sale. The sale was held on the date notified. The valuation of the property was also fixed. Different objections were made under Sec. 47 to the execution. Application was also made u/s 35 of the Bengal Money Lenders Act which was ultimately dismissed. It was held by this Court that section 35 of the Bengal Money Lenders Act had no application. The sale was effected ultimately and the property was sold in execution and under Or. 21 R. 89 the application was made by the judgment-debtor for setting aside the said sale. The learned Judge, it appears, considered section 7 but came to a finding that

the CPC is not applicable though the High Court has not provided the procedure for sales. In our opinion, the intention of the Legislature is clear in a partition decree that unless the High Court provides for a separate rule, Or 21 will be applicable for the execution of such decree. Once the procedure for sale u/s 21 is made applicable, in our opinion, Or. 21 R. 89 must also be applicable in such a sale. In that view of the matter, in our opinion, the learned Judge was wrong in rejecting the application under Or. 21 R. 89 was not maintainable. In the case reported in AIR 1923 Cal 582 : 27 C.W.N. 466 Nirode Nath Banerjee v. Amullya Dhone Banerjee the suit was for partition instituted in the High Court, matters in dispute between the parties were referred to arbitration by an order of Court. The arbitrators made their award directing the sale of one of the properties, subject matter of the suit, and the payment out of the sale proceeds of the ancestral debts as well as of certain sums to the plaintiff. A decree was passed on the award of the property was sold by the Registrar under an order of Court. The defendants then applied, with the consent of the plaintiff, for setting aside the sale under Or. 21, R. 89 of the Civil Procedure Code. The Court of first instance however dismissed the application under Or. 21 R. 89 on the ground that the sale was by consent and the mere fact that the Court was invited to carry out the sale did not make it a sale in execution of a decree. Their Lordships of the Division Bench held, inter alia that the sale was held in execution of a decree and Or. 21 R. 89 was applicable. It has been held that the property was sold in execution of a decree and that as the sale was held in execution of a decree. Or. 21 R. 89 is applicable. In the present case, there is no doubt that the decree was put in execution and the right under the final decree was sought to be enforced by execution of p. decree and therefore Or. 21 R. 89 in terms is applicable for setting aside the sale in execution of a decree. The same view has been taken in the case reported in Sita Ram Bishambar Dass Vs. Joginder Kumar and Others, . In the said case it has been held that the provision of Or. 21 R. 89 is applicable in a sale under the Partition Act in view of section 7 (b) of the Partition Act. In the case reported in Rani Bala Bose and Others Vs. Hirendra Chandra Ghose and Others , it has been held at page 749 that the sale under the Partition Act is a sale under a decree At page 751 it has also been held that in view of section 7 of the Partition Act and assuming Chapter XXXVII of the Rules of the Original Side is not applicable, still the Court has jurisdiction under the Code of Civil Procedure. Mr. Das Gupta however referred to the cases reported in 24 C.W.N. 1032, Virjibun Dass Moolji v. Bissesswar Lal Hargovind, 41 C.W.N. 908 National Insurance Co. v. David, and 45 C.W.N. 873 Bhabasundari v. Gopeswar, but all these cases are regarding sales under the mortgage decree but we are not concerned in this case with the mortgage decree but it is admitted by the parties that this is a partition decree. Mr. Das Gupta referred to the case reported in Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, but in our opinion it does not support Mr. Das Gupta's contention. Their Lordships of the Supreme Court held that Or. 21 R. 89 requires that two primary conditions relating to deposit must be fulfilled. In the case, before the Supreme Court one of the conditions has not been fulfilled and therefore the application under Or. 21 R. 89

is rejected. In the present case the application was dismissed on the ground that Or. 21 R. 89 is not maintainable. In our opinion, the Court below was wrong and we, therefore, set aside the order passed on an application under Or. 21 R. 89 and hold that such application is maintainable for execution of a decree in view of section 7 (b) of the Partition Act. We, therefore, refer the matter back to the executing Court for deciding whether conditions set out in Order 21 rule 89 has been followed. If it is found that the condition stated in Or. 21 R. 89 has been fulfilled the application should be allowed otherwise the Court will make such order in accordance with law.

The Rule is, therefore, made absolute to the extent indicated above.

There will be no order as to costs.

B.N. Maitra, J.

I agree.