

(1954) 12 CAL CK 0008

In the Calcutta High Court

Case No : A.F.O.O. No. 24 of 1954 (Award No. 171 of 1949)

Bishnu Bijoy Srimani

APPELLANT

Vs

Chandra Bijoy Srimany and Others

RESPONDENT

Date of Decision : 21-12-1954

Acts Referred:

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

Citation : AIR 1955 Cal 281

Hon'ble Judges : Chakravartti, C.J; Lahiri, J

Bench : Division Bench

Advocate : Dipak Datta Choudhri, for the Appellant; S.K. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

Chakravartti, C.J.—A preliminary objection has been taken in this appeal that, by reason of the death of one of the respondents and the failure of the appellant to bring his representatives on the record, the whole appeal has abated. Much as I regret the result, the objection, in my view, must be given effect to.

2. The facts are simple. It appears that there was a reference to arbitration in a partition suit and an award was made to the effect that a sum of Rs. 32,000./-, of which the appellant had had use and enjoyment, would be paid by him to four persons, each being paid a sum of Rs. 8,000/- and that each of the said four persons would have a charge upon a one-fourth share of that portion of premises No. 115/9, Cornwallis Street which was going to be allotted to the appellant. A decree in terms of that award followed. Thereupon the four persons, to whom I have just referred, adopted a somewhat unusual procedure of combining, in a single application and asking for an order for the sale of the southern Half-portion of the premises charged. It was thus a case of four different persons, holding charges over four different properties, combining in one proceeding and asking the Court for a joint order for the sale of the four properties with a view to

the joint dues of all of them being realised.

P. B. Mukharji J. passed the order asked for although he appears to have added a condition. The condition was that the appellant was given a year's grace within which he was to pay the amount payable by him to the four persons concerned. After laying down that condition, the learned Judge directed that if the amount was not paid within a year as directed -- by the amount the learned Judge meant the amount payable to all the four persons -- then the southern half-portion of the premises No. 115/9, Cornwallis Street would be sold by public auction. It appears that the learned Judge refers to southern half-portion of premises No-115/9, Cornwallis Street as "the property charged under the decree". The decree, however, was merely a decree upon the award and the award purported to charge not the southern half of the premises as a single unit, but one-fourth portion of the premises in favour of each one of the four persons.

3. Whatever the want of conformity between the decree passed on the award and the order, the fact remains that, rightly or wrongly, the learned Judge passed a joint order in favour of the four applicants, directed the payment of the entire amount due to the four and further directed that in default of the payment of the said amount, the entirety of the southern half-portion of premises No. 115/9, Cornwallis Street would be brought to sale.

4. It is the above order which is challenged in the present appeal. It has been pointed out to us that during the pendency of the appeal, respondent 2, Kherode Chandra Nundy, died and although the fact of his death was duly intimated to the appellant, no steps have been taken to bring his representatives on the record.

5. It appears to me that the omission on the part of the appellant to bring on record the representatives of respondent 2 and the consequent abatement of the appeal . as against that respondent have caused abatement of the entire appeal. Mr. Chaudhuri who has appeared on behalf of the appellant contended that the laches of his client, although laches there were, could not have the effect contended for, because Rules 3, 4 and 8 of Order 22, C. P. C. were not applicable to proceedings in execution of a decree or order. In support of that contention, the learned Counsel cited the decision of the Lahore High Court in the case of -- "Mir Khan v. Sharfu" AIR 1923 Lah 560 (A), and the decision of the Patna High Court in the Full Bench case of -- "Hakeem Syed Mohammad Taqi and Another Vs. Fateh Bahadur Singh and Others, (B).

6. Speaking of authorities, it appears that the Lahore decision has since been over-ruled by the same High Court in the case of -- "Ajudhia Pershad v. Sham Sunder" AIR 1947 Lah 13 (FB) (C). The High Courts of Madras, Bombay, Allahabad & Nagpur have all taken the view that the exception contained in Rule 12 of Order 22, which says Rules 3, 4 and 8 of the Order would not apply to execution cases is limited in its operation to proceedings in the trial Court, but does not extend to appeals. It is true that the Patna High Court has taken a different view, but it appears to me that both the weight of authority and the

force of good reason are against the view which commended itself to the learned Judges of the Patna High Court. It may be that when an execution case is started, the death of one of the parties is no bar to the further continuance of the whole of the proceeding. In such a case, no order has yet been made; but when an order has been made and one of the parties impleaded in the trial Court dies after an appeal has been preferred, it is quite impossible to give effect to the appeal, unless the representatives of the deceased party are brought on the record. The plain reason for that difficulty is that if the representatives of the deceased party are not brought on the record, the order appealed from, so far as it is in their favour, would stand. In those circumstances, if the appeal succeeded, the Court would be saying to the representatives of the deceased party that the order of the trial Court was a good order and could be put into execution or could be acted upon, whereas it would be saying to the remaining parties that the order was a bad order and was going to be set aside. No Court will ever make an inconsistent order and the main reason why even appeals from orders passed in execution cases have been held to abate wholly if one of the parties dies and his representatives, are not brought on the record, is that the Court will not make inconsistent orders.

7. In the present case although the award is distributive in character and the decree passed upon the award must be taken also to be distributive, the order passed by the learned Judge which is under appeal before us is a joint order in favour of all the four respondents. That being so, since respondent 2 is dead and his heirs were not brought on the record within the period of limitation, the appeal as against that respondent has abated and the order of the Court below is available to his representatives for execution. It will be remembered, it is an order for the sale of the whole of the southern half of premises No. 115/9 Cornwallis Street and a sale for the realisation of the entirety of Rs. 32,000/- payable to the four persons. It is that order which has now become available to the representatives of respondent 2. If the appeal, so far as it is against the three remaining respondents, is now proceeded with and if the Court makes an order in their favour, it will be saying on one hand that the order of the learned trial Judge is a good and subsisting order and . on the other that it is a bad order and it is being reversed. No Court can commit itself to such an impossible-position.

8. For the reasons given above, the preliminary objection must be sustained. In view of that decision to which we find ourselves forced, it is not necessary to go into the merits of the appeal, although I am free to. confess that if it were open to us to go into the merits, we would require very strong reasons from the respondents to be satisfied that the order could be supported, either as a joint order in favour of the four persons or as an order directing a sale without a suit to enforce the charges.

9. For the reasons I have given, the appeal cannot proceed and is dismissed.

10. In view of the circumstances, there will be no order for costs.

Lahiri, J.

11. I agree.