
(1930) 05 CAL CK 0031
In the Calcutta High Court

Cherag Ali Sarkar and Another

APPELLANT

Vs

Nawab Khaje Habibulla and Others

RESPONDENT

Date of Decision : 21-05-1930

Acts Referred:

Bengal Tenancy Act, 1885 — Section 153
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : AIR 1931 Cal 782

Hon'ble Judges : Mitter, J;Graham, J

Bench : Full Bench

Judgement

Mitter, J.—In these four appeals by the defendants it is unfortunate that the respondents did not appear as the cases are of some intricacy and although the learned advocate for the appellants has done his best to present the cases with fulness and fairness the want of an opponent is a sensible disadvantage. We were at pains to investigate into the facts closely and with great care.

2. Out of these four appeals, Appeal No. 1429 must be dismissed as the appeal arises out of a suit for rent valued at less than Rs. 100 and none of the questions admittedly arise which permit an appeal having regard to the provisions of Section 153, Bengal Tenancy Act. This appeal is therefore dismissed but without costs.

3. I will now proceed to deal with Appeals Nos. 1426, 1427 and 1428. These three appeals arise out of as many suits for rent brought by Nabab Khaje Habibulla and others against the different defendants in these three cases. The plaintiff's title in these three suits based on a sale held under circumstances to which I will presently refer. Under the plaintiffs there was a patni tenure which was being held by one Abinash and Kironbala each of whom being interested in the tenure in equal shares. Abinash died sometime before the institution of these suits after having executed a will by which it is said he bequeathed his interest in an eight annas share in the tenure now in question to his wife Kumudini absolutely. On 6th July 1921 the Nawab sued Kironbala and Kumudini for rent in

respect of this patni tenure. During the pendency of the suit Kumudini executed a will by which she appointed five persons as executors. There are Lalit, Biraj, Bhuvan, Jitendra and Ananga. On 9th September 1921 Kumudini died while the suit was still pending. It is to be noticed that an application for substitution of the heirs of Kumudini was made with the result that Abani and Ananga were placed on the record as legal representatives of Kumudini and a decree was obtained against them. It appears from an order in the order sheet which has been made an exhibit in the case that on 12th January 1922, Lalit, Biraj, Bhuvan, and Jitendra wanted to intervene in the suit and prayed that they be added as defendants. This however was not done. On 23rd March 1922, the suit was decreed against Ananga and Abani. The executors appointed under the will except Auanga applied for a probate of the will and it is said that Ananga resisted the granting of probate. On 1st June 1923 a compromise was effected in the probate proceedings by which four of the five executors renounced their position as executors and probate was granted to the remaining executor, Ananga. In the meantime the decree which had been obtained against Ananga and his father Abani was put into execution and on 5th April 1923 the patni tenure was sold in execution of the rent decree and was purchased by the Nawab's estate for Rs. 2,75,000. Ananga and Abani both applied under Order 21, Rule 90, Civil P.C., to set aside the sale. They were however unsuccessful and the sale was confirmed. The present suits were consequently brought by the Dacca Nawab's estate against the defendants who were tenants under the patni for rent for the period from 1329 to 1332 B. S. In each of these suits the common defence of the defendants is that the interest of Kumudini did not pass by the patni sale of April 1923 as the estate of Kumudini was not represented in the suit of 1921. The defendants contend that the son and the grandson of Kumudini were made defendants in that suit in their capacity as heirs of Kumudini but Kumudini's estate was represented by the executors and that by the will there was an absolute dedication of the property in favour of the idol Kumudeswar Shiva and that the deity was not represented in the rent suit and that consequently the sale in execution of the decree of Kumudini's estate obtained against persons who did not represent the estate did not pass her share in the patni tenure and that the sale was void and without jurisdiction. This contention was given effect to by the trial Court which gave a decree to the plaintiffs for share of rents, cesses and damages in each of three cases for the period from 1330 to Pous kist of 1332 at the rates claimed by the plaintiffs with proportionate costs from the defendants of each case and the learned Munsiff disallowed the plaintiffs' claim for the rent of Chaitra kist 1329 in each case.

4. Against the decrees in the three suits appeals were preferred to the Court of the Subordinate Judge of Tipperah and the learned Subordinate Judge has reversed the decision of the Munsiff in so far as he refused to the plaintiffs a decree in respect of the half share of the rents, and the plaintiffs' suits were fully decreed with costs both incurred "in that Court and in the Court of first instance.

5. Against the decision of the Subordinate Judge in these three suits the present

appeals have been brought and the main contention urged before us is that the estate of Kumudini was not fully represented in the rent suit of 1921, that the sale did not pass her 8 annas share and that the sale must be regarded as one held without jurisdiction. It appears from the narrative of the facts already given that at the date when the rent decree was obtained probate had not been obtained by the executors of Kumudini's estate. The heir at-law namely, Ananga could not have represented the estate in view of the will by Kumudini by which the estate vested in the five executors u/s 213, Succession Act, as soon as the probate was obtained. The lower appellate Court in setting aside the finding of the Munsif to the effect that the sale of the 8 annas share of Kumudini was a nullity has reached the conclusion that as Ananga who was one of the executors appointed by the will became the sole executor by reason of subsequent renunciation by the other executors there was a proper representation of the estate of Kumudini on the record of the rent suit of 1921. It is to be noticed however that Ananga was not described as an executor in the previous rent suit.

6. It is not a mere matter of form as the lower appellate Court seems to think but a matter of substance. It is a matter of substance for at that time according to the will of the testatrix Kumudini's estate was to vest in the five executors named in her will. It is also to be noticed that Ananga had taken an attitude hostile to his position as an executor under the will for he had admittedly opposed the grant of the probate. It is true as the learned Subordinate Judge points out that the grounds on which he opposed the grant of the probate were not before the Court and that this argument that his attitude was antagonistic to the grant of the probate was based on a mere surmise. But the fact remains that he had opposed the grant of the probate for he had entered a caveat against the will. It appears clear therefore that the estate of Kumudini was not represented by Ananga being on the record in his capacity as an heir at law of Kumudini. It also appears from an examination of the will which has been proved in this case and which was placed before us that there was an absolute dedication to the idol Kumudeswar Shiva and that as such before the estate could be sold in execution of the decree obtained in the rent suit of 1921 the idol should have been made a party to the rent suit through some earthly representative. The words in the will which show absolute dedication to the idol are to the following effect. Each and every other of my

property wherever situate shall form or constitute the debuttar estate of Iswar Kumudeswar Shiva Linga, therein my heirs or representatives shall have no right, or title. The malik. of the said properties shall be said Iswar Kumu. deswar Shiva Linga. None shall have power to make a gift or sale or create incumbrances thereon, or in any manner alienate the same. Acts if any, so done shall be rejected at law.

7. Then the testatrix proceeds to state-that the properties which would be so dedicated would be burdened with certain charges which would be necessary for the maintenance of the ancestral deity. It appears that the learned Subordinate

Judge seems to think that there was no dedication to the idol by the will as it was said that certain debts had to be paid out of the estate of the testatrix either by the sale of the estate or by realizations made from the loan business which was being carried on as also from the decretal amount for the rents due. There is nothing contingent about this. It is quite possible that the debts might have been paid off from the realisations obtained from the loan business and no part of Kumudini's estate would be required to be sold for the debts. But if some portion of the estate were required to be sold to pay off these debts the deity should obtain the residue under the will. As such the deity was a necessary party to the suit of 1921, but as the deity was not made a party the deity's rights were not affected by the sale held in execution of the decree. The facts of these cases fall within the class of cases of which the case of *Harish Chandra Biswas v. Puridas-Das* 6 Ind.Cas. 627 is a type. The facts of the case seem to be in all fours with those in the present case there as here. During the course of the trial the defendant died leaving a will and the executor named in the will applied to be substituted in the suit in the place of the deceased. But the application was disallowed and the heirs intestate were substituted and a decree was obtained against them and the property of the deceased testatrix was sold in execution. It was held in that case that the estate of the deceased and the property covered by the will were not affected by the decree or by the sale in, execution. It is not possible to bring this case within the purview of the decision of the Judicial Committee in the case of *Malkarjan v. Narhari* [1900] 25 Bom. 337. That case is distinguishable in its fact from the present case. In that case the judgment-debtor died after decree but before execution was taken against a person whom the executing Court had erroneously held to be an heir of the deceased judgment-debtor. Under those circumstances their Lordships of the Judicial Committee came to the conclusion that it was open to the Court to decide the issue as to who was the real heir of the judgment-debtor. The Court decided wrongly as to who was the right person to represent the judgment-debtor but in doing so the Court was exercising its jurisdiction. It made a sad mistake, it is true. But the Court had jurisdiction to decide rightly as well as wrongly. If it decided wrongly the wronged party could only take the course which the law would allow him to take, namely, by applying to act aside the sale and if that course was not adopted in proper time the decision, however wrong, was not liable to be disturbed. The present case rather falls within the purview of the decision of the Judicial Committee in the case of *Khia Rajmal v. Daim* [1904] 32 Cal. 296 where their Lordships "said that the Court had no jurisdiction to soil the property of persons who were not properly represented on the record. We think therefore that the lower appellate Court has not taken the right view with reference to the question as to whether the 8 annas of Kumudini passed by the sale of the patni in execution of the rent decree.

8. The result therefore is that the judgment and decrees of the lower appellate Court in these three suits are set aside and those of the Munsif restored with costs in the lower appellate Court as well as in the Court of first instance.

Graham, J.

9. The respondent has not appeared in these appeals and we have not therefore had the advantage of hear-in;; the appeals argued from both points of view. I agree with the judgment of my learned brother but I do so with a little hesitation.

10. The question is whether the estate of Kumudini was properly represented at 1 be trial of the rent suits or not. The position was that a will had been left by her but that probate of the will had not yet been granted. That being so, it might be thought that the parties to the suit would be the natural heirs of Kumudini who as such had entered upon the possession of the property until such time as the grant of the probate had the effect of altering that position. What the plaintiffs did was to make parties to the suit the son, who was the natural heir, and the grandson of Kumudini. There is however ample authority for the view which has been taken by my learned brother, one of the cases on the point being *Harish Chandra Biswas v. Puridas Das* which seems to be practically on all fours with the present case. I agree therefore in the order which my learned brother has made.