

(1909) 08 CAL CK 0030
In the Calcutta High Court

Jagat Tarini Dasi and on her death her Heirs and Legal
Representatives Manmatha Nath Mitter and Others

APPELLANT

Vs

Pandit Rakhal Chandra Tewary and Others

RESPONDENT

Date of Decision : 11-08-1909

Acts Referred:

Bengal Tenancy Act, 1885 — Section 148(h)
Limitation Act, 1963 — Section 22

Citation : 3 Ind. Cas. 324

Hon'ble Judges : Vincent, J; Mookerjee, J

Bench : Division Bench

Judgement

Appeal No. 118.

1. The substantial question of law raised in this appeal is, whether it is competent to the appellants, who are representatives of an assignee of a decree for rent, to carry on proceedings in execution of the decree initiated by the original decree-holder. It appears that one Nobin Chandra Ghose held under Jagat Tarini Dasi a putni which had been created on the 3rd May 1874. On the 28th May 1895 Nobin Chandra created a durputni in favour of Kishori Lal Ghose. The latter obtained a decree for rent against the respondents on the 26th January 1903 and applied for execution thereof on the 26th January 1906. Meanwhile the putnidar had defaulted to pay rent to the zemindar who sued him, obtained a decree and in proceedings in execution thereof purchased the putni on the 15th August 1906. Subsequently on the 23rd December 1906 the zemindar, Jagat Tarini Dasi, the auction-purchaser of the putni, served a notice upon the durputnidar u/s 167 of the Bengal Tenancy Act and annulled his encumbrance on the 23rd January 1907. Kishori Lal executed a conveyance in favour of Jagat Tarini in respect of all arrears of rent realisable from the tenants as also of all decrees for rent obtained against them. The conveyance further authorised the purchaser to carry on all execution proceedings pending at the time and the transferor also covenanted that he would join in all applications for execution and if necessary, consent to be made a party-defendant. On the 4th

February 1907 Jagat Tarini applied to the Court of first instance where the execution proceedings instituted by Kishori Lal were still pending, for leave to proceed with execution. The judgment-debtors raised various objections to which effect was given by the Court. An appeal was then preferred to the District Judge who affirmed the order of dismissal of the application for execution. Jagat Tarini thereupon preferred the present appeal, and upon her death during the pendency of the appeal, her legal representatives, now appellants before this Court, were brought on the record.

2. On behalf of the respondents, a preliminary objection has been taken to the hearing of the appeal on the ground that as the appeal is directed against an order made in the course of execution proceedings, upon the death of the appellant, her legal representatives, are not entitled to prosecute the appeal, and in support of this proposition, reliance has been placed upon Order 22, Rule 12 of the Code of 1908. This preliminary objection is of a somewhat novel character and would not be worthy of serious consideration but for the insistence with which it has been pressed. The Rule to which reference is made provides that nothing in Rules 3, 4 and 8 of Order 22 shall apply to proceedings in execution of a decree or order. It has been seriously contended that this indicates that upon the death of an applicant for execution of decree, his legal representatives are not entitled to carry on the proceedings, and that their only remedy is to initiate a fresh proceeding, though in the latter event they may be successfully met by a plea of limitation on the part of the judgment-debtors. In our opinion, the Rule does not lend the remotest support to the Contention of the respondent Rules 3, 4 and 5 of Order 22, provide for the procedure to be followed in case of death of one of several plaintiffs or of the sole plaintiff or of one of several defendants or of the sole defendant during the pendency of a suit. Rule 12 then provides that this procedure shall not apply to proceedings in execution of a decree or order. It is difficult to appreciate how from this the inference can be legitimately drawn that Rule 12 indicates that upon the death of an execution-creditor or of a judgment-debtor the proceedings lapse. Rule 12 in substance gives legislative sanction to the fairly well-settled doctrine under the old Code that the provisions of the Chapter relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor. To take one illustration, under the Code of 1882, it had been ruled in the cases of *Gulabdas v. Lakshman Narhar* 3 B. 221 *Hiraohand Harikisandas v. Kasturohand Kasidas* 18 B. 224; *C. W. Stowell v. Ajndhia Nath* 6 A. 255 and *Abidunnissa Khatoon v. Amirunnissa Khatoon* 2 C. 327 : 4 I.A. 66 : 20 W.R. 305 that neither Section 102 of Act VIII of 1859 nor Section 355 of Act XIV of 1882 was applicable to proceedings in execution of decrees. In the first of the cases, it was expressly ruled that provision of the Limitation Act which governs an application by a person claiming to be the legal representative of a deceased plaintiff in a suit; does not apply to the representatives of a deceased judgment-creditor claiming permission to continue execution proceedings commenced by him, because the Code does not provide that an application for

execution shall like suits abate by the death of the judgment-creditor. There was some difference of judicial opinion, however, on the subject in the case of *Dulari v. Mohan Singh* 3 A. 759 and this controversy has now been set at rest by the legislature by Order 22, Rule 12 of the new Code. We must consequently hold that upon the death of the appellant during the pendency of the appeal, it was open to her legal representatives, to apply for leave to prosecute the appeal, and that the order in their favour in this behalf was rightly made. The preliminary objection must, therefore, be overruled.

3. In support of the appeal, three grounds have been urged against the decision of the learned District Judge, namely, first, that it was not necessary for the assignee to make a fresh application for execution u/s 232 of the Code of 1882, secondly, that the application which was actually made by the assignee was not barred by limitation u/s 22 of the Limitation Act, and thirdly, that notwithstanding the provisions of Section 148 (h) of the Bengal Tenancy Act, the assignee is entitled to execute the decree for rent under that Act.

4. With reference to the first point taken on behalf of the appellant, it is necessary to mention that the learned District judge has held that when decree has been transferred by assignment in writing or by operation of law, from the decree-holder to another person, the transferee is bound u/s 232 to present a fresh application for execution and that it is not competent to him to ask for leave to proceed with the execution previously initiated by the transferor and actually pending at the time. In our opinion this view cannot be supported. As pointed out by this Court in the case of *Jogendra Chandra Roy v. Shyam Das* (1909) 1 Ind. Cas. 168 : 36 C. 543 : 9 C.L.J. 271 there is no provision in the Code which renders necessary to actual substitution of the name of an assignee or legal representative for the validity of the proceedings in execution, all that Section 232 provides is that the assignee should apply for execution of the decree and that his name should be brought on the record. This position is amply supported by the cases of *Syud Nadir Hossein v. Baboo Pearoo Thovildarinet* 19 W.R. 255 : 14 B.L.R. 425 (Note); *Balkishoon v. Mahommed Tazivi Allee* 4 A.H.C.R. 90; *Shamapuddo Butt v. Nobin Chunder Bose* 15 W.R. 283 and *Javermal Hirachand v. Umaji Bayabati* 9 B. 179. What, therefore, the assignee of the decree has to do is to apply for leave to the Court to execute the decree or to carry on the execution then pending at the instance of the assignor. This is also the practice which is followed in England under Order 42 Rule 23 of the Rules of the Supreme Court. We must consequently hold that it was competent to Jagat Tarini to apply to the execution Court as she did, on the 4th February 1907 for leave to carry on the execution proceeding which had been commenced by Kishori Lal on the 26th January 1906. The first ground taken on behalf of the appellant must, therefore, prevail.

5. As regards the second point urged on behalf of the appellant, we find that the learned District Judge has held upon the authority, of the decision of the Full Bench in *Abdul Rahman v. Amir Ali* 34 C. 612 : 5 C.L.J. 486 : 11 C.W.N. 521 : 2

M.L.T. 312 that the application of the 4th February 1907 is barred by limitation u/s 22 of the Limitation Act. It is manifest, however, that Section 22 applies only to suits and does not govern execution proceedings. This by itself would be a sufficient answer to the contention of the respondent which found favour with the learned District Judge. But it may be farther observed that the application was not, as in the case before the Full Bench, made u/s 372 of the Code of 1882, for as we have already pointed out, that section has no application to proceedings in execution. It is manifest, therefore, that the view taken by the Courts below cannot be supported. The second ground also urged on behalf of the appellant must consequently prevail.

6. The third ground taken on behalf of the appellant raises a question of considerable importance, the solution of which depends upon the construction of Section 148(h) of the Bengal Tenancy Act. That section provides that notwithstanding anything contained in Section 232 of the Code of Civil Procedure, an application for execution of decree for arrears of rent obtained by a landlord shall not be made by an assignee of the decree, unless the landlord's interest in the land has become and is vested in him. The substantial question in controversy between the parties is, whether this provision of the law debars the appellants from proceeding with execution of the decree either as a decree for money or as a decree for rent. It has also been strenuously contended, however, on behalf of the respondent that the appellants are not entitled to execute the decree at all because the landlord's interest in the land has not become and is not vested in them. This view has been sought to be supported by a reference to Section 167, Sub-sections 1 and 3, of the Bengal Tenancy Act. That section provides the procedure to be followed by a purchaser at a sale for arrears of rent if he desires to annul an encumbrance and it is laid down that on service of the notice mentioned in the section, the encumbrance shall be deemed to be annulled. Stress has been laid upon the word annulled," and it has been argued that the effect, of the service of the notice u/s 167 on the 23rd December 1906 was to annul, that is, to extinguish the interest of the durpatnidar, so that it cannot be contended that the interest of the durpatnidar as landlord has vested in, the superior landlord. In our opinion, this contention, though apparently supported by a literal construction, of the section, is fallacious. Let us examine, for a moment, the effect of the sale of a tenure in execution of a decree for arrears of rent which, u/s 65, is a first charge thereon. Section 159 provides that what passes at the sale to the purchaser is the whole tenure, subject to protected interests but with power reserved to the purchaser to annul encumbrances. In other words, liberty is reserved to the purchaser to allow the encumbrances to continue or not as he chooses. When, therefore, he exercises his option against the encumbrancer, it must be taken that the entire tenure vests in him. If this view is not taken we shall be driven to the position that one of the links in the chain of rights vanishes and yet the chain remains continuous. To take one illustration suppose the entire aggregate of rights in a certain parcel of land is vested in A as zamindar, B as patnidar under him, C as a durpatnilar

under B, and D as a raiyat under C A in execution of a decree for rent against B; purchases the putni and takes it with liberty to annul the durpatni of C. He follows the statutory procedure and by service of notice "annuls" the encumbrance of C. If we hold that the legal effect of this transaction is to destroy the right of C, what is the position? After his purchase, according to this view, A retains his original right, and acquires that of B, the interest of C vanishes so as not to enlarge the interest of either A or D, a position obviously inconsistent with first principles. It is more in harmony with them to hold that the effect is to vest the rights of both B and C in A, so that A is brought into direct contact with D who thereupon becomes liable to pay to A the same rent as he had previously paid to C, in other words, as was suggested by the learned Vakil for the appellant the grant by B in favour of O in derogation of the interest of A no longer continues in operation. The right of C to intercept a portion of the rent payable by D vanishes while the right to collect rent from D directly vests in A. The distinction though somewhat refined is perfectly intelligible. The contrary view would logically lead to the position that A could not get any rent at all not from C, because, his tenancy had been brought to an end, nor from D because the latter was bound to pay rent to O alone or his representative in interest. Let us now turn for a moment to Section 148(h) and examine whether the landlord's interest in the land has become and is vested in the assignee. It may be observed that the section does not speak of the assignor's interest but of the landlord's interest. There can be no room for controversy that in the events which have happened in the case before us, the landlord's interest has become and is vested in the appellants. By their purchase at the sale in execution of the decree for rent due on the putni and by the subsequent service of notice u/s 167 of the Bengal Tenancy Act they have superseded the rights of both the putnidar and darpatnidar and have become entitled to realise rent directly from the defendants. If, therefore, they are now the landlords of the defendants, it cannot be seriously maintained that the landlord's interest has not become vested in them. Reference was, however, made to the case of Dwarka Nath Sen v. Peari Mohan Sen 1 C.W.N. 694 as an authority in support of the contrary view; but that case is clearly distinguishable. Thereafter an ijara had expired, the ijaradar sold to the superior landlord a decree for rent. It was ruled under these circumstances that as the ijara had expired, the interest of the ijaradar did not vest in the landlords. It is not necessary for us to express any opinion as to the correctness of this decision because the determination of a lease for a term is obviously different in its legal consequences from a purchase of a permanent tenure like a putni and the annulment of a subordinate durpatni created by the patnidar in derogation of the rights of the zemindar. We must consequently hold that the appellants are the assignees of the decree for rent and that the landlord's interest in the land has also become and is vested in them.

7. The next question which requires consideration is, whether under these circumstances the appellants are entitled to carry on the execution of the decree as a decree for rent or only as a decree for money. Reliance has been placed by

the respondents upon the case of Dinanath Dey. v. Golab Moahini Vasi 1 C.W.N. 183, in support of the proposition that the appellants are entitled to execute the decree only as a decree for money. In that case the question raised was, whether or not a claim by an assignee of a judgment-debtor could be entertained u/s 278 of the Civil. Procedure Code when it was preferred in proceedings in execution of a decree for arrears of rent carried on at the instance of an assignee of the decree who had also obtained an assignment of the landlord's interest in the land. The learned Judges appear to have held that the assignee could not at all execute the decree till he had obtained an assignment of the landlord's interest in the land and that when he had obtained such an assignment, he would be entitled to execute the decree, not as a decree for rent under Chapter XIV of the Bengal Tenancy Act, but as a mere decree for money under the provisions of the Code of Civil Procedure. It is not necessary for us to express an opinion as to the correctness of that decision, and if the question arose in a case precisely similar to the one then before the Court, we should probable feel ourselves called upon to refer the matter for decision to a Full Bench, for as was pointed out in the case of Manurattan Nath v. Hari Nath Das 1 C.L.J. 500 , there is a conflict of Judicial opinion upon the question of the true effect of Section 148(h). Such a reference, however, is rendered unnecessary in the present case which on its own special facts is distinguishable from all the other cases reviewed in the judgment of this Court in the case last mentioned. In the case now before us Kishori Lal Ghose was the landlord "when he obtained the decree for rent, and also when he applied for execution of that decree. During the pendency of execution proceeding, the interest of the landlord by operation of law, vested in the superior landlord who thereby became the direct landlord of the tenants defendants. Under these circumstances Kishori Lal transferred his interest in the decree for rent to the superior landlord and authorized him to carry on the execution already initiated in the name of either the assignor or the assignee. The zemindar, but for the intervention of the patni interest created by himself, would be prima facie entitled to collect rent directly from the raiyat when the patni interest as also the subordinate durpatni carved there out, re-vest in him, there is no conceivable reason why he should not realise rent, whether current or in arrears, in the same manner as if the patni had never intervened. Under such circumstances, Section 148 Clause (h) does not, in our opinion, debar the superior landlord from executing the decree for rent in the same manner as Kishori Lal might have done. The policy of the legislature which underlies Section 143 Clause (h) was indicated in the case of Manurattan Nath v. Hari Nath Das 1 C.L.J. 500 and if we bear that in mind, it becomes fairly obvious that Section 148 (h) does not, in a case like the present, debar the landlord from executing the assigned decree as a decree for rent. Undoubtedly, the section does not explicitly state that when the landlord's interest has vested in the assignee of the decree, the decree can be executed only as a decree for money. The view we take is supported by the principle on which rests the decision of this Court in the cases of Sashi Kumar Mirbahar v. Sitanath Banerjee 7 C.L.J. 425 and Khetra Pal Singh Roy v. Kritarthamoyi Dasi 33 C. 566 : 3 C.L.J. 470 : 10 C.W.N. 547. The third

ground taken on behalf of the appellants must consequently be decided in their favour.

8. The result, therefore, is that this appeal must be allowed, the orders made by the Courts below discharged, and execution directed to proceed at the instance of the appellants on the basis of the application presented by Kishori Lal Ghose on the 26th January 1906.

9. The appellants are entitled to their costs throughout these proceedings. We assess the hearing fee in this Court at three gold mohurs.

Appeals Nos. 146 and 147.

10. These appeals, it is conceded, will be governed by the above Judgment. They will, therefore, be allowed with costs throughout and execution will proceed.

Appeal No. 273.

11. This appeal has been preferred on behalf of the judgment-debtor and is directed against an order of the District Judge by which he has allowed execution to proceed. In this case the assignee, Jagat Tarini, did not apply for leave to carry on the execution proceeding initiated by Kishori Lal Ghose. Thereupon objection was taken by the judgment-debtor that as Kishori Lal had transferred his interest in the decree, execution ought not to be allowed to proceed at his instance. The Court of first instance gave effect to this contention. Upon appeal the learned District Judge has reversed that order and has held that the mere fact that a decree-holder has assigned his rights is no reason why execution should not proceed at his instance. In our opinion, the view taken by the District Judge is manifestly sound. It was pointed out by this Court in the cases of *Khettur Mohun Chuttopadhya v. Ishur Chunder Surma* 11 W.R. 271 and *Jasoda Deye v. Kittibash Das* 18 C. 639 that the Court is bound to allow execution at the instance of the recorded decree-holder unless intimation has been given in the regular way * prescribed by law for the admission of another person who obtains leave to carry execution as an assignee. It is of no consequence to the judgment-debtor whether execution is carried on at the instance of the recorded decree-holder or of the alleged assignee. The Court may, however, if satisfied that the decree has really been assigned, direct that the proceeds realised are not to be taken out by the recorded decree-holder, but retained for the benefit of the assignee. The District Judge has, in the present case, given directions to this effect.

12. The result, therefore, is that the order of the District Judge must be affirmed and this appeal dismissed.