

(1977) 07 CAL CK 0025
In the Calcutta High Court
Case No : A.F.O.O. No. 28 of 1972

M. Gulamali Abdul Hussain and Co.

APPELLANT

Vs

Binani Properties (P) Ltd. and Others

RESPONDENT

Date of Decision : 06-07-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 146

Citation : AIR 1978 Cal 53

Hon'ble Judges : Sankar Prasad Mitra, C.J;Salil Kumar Datta, J

Bench : Division Bench

Advocate : Somnath Chatterjee, Anindya Mitter and A.N. Ray, for the Appellant;
B.C. Dutt, T.P. Das, B.N. Banerjee, R.P. Banerjee and M. Dutt, for the Respondent

Final Decision : Allowed

Judgement

S.K. Datta, J.—The respondent No. 1 Binani Properties (P) Ltd. obtained a decree for recovery of possession on 11th June, 1959 against the appellant and others in respect of the suit premises, The said decree was affirmed on appeal on 18th April, 1969. On 10th October, 1969 a fresh application for execution of the said decree was filed by the plaintiff decree-holder and on that application Mr. Justice Ghose passed an order on 20th November, 1970 directing that the Sheriff of Calcutta would, in the mode prescribed under Order XXI Rule 35 (1) and (3) of the CPC put the plaintiff respondent no. 1 in possession of the said premises. The order further provided that the plaintiff decree-holder respondent no. 1 would be at liberty to take police help, if necessary, for taking possession of the premises in execution of the said decree. The present appeal is against this order.

2. It transpires from the affidavits of the parties that on the 17th September, 1970, an order was passed by Mr. Justice R.M. Datta sanctioning a scheme of amalgamation of the Binani Properties (P) Ltd. with the Binani Investment Co. (P) Ltd. Under the scheme so sanctioned, all properties, assets, rights, liabilities etc. of the Binani Properties (P) Ltd. vested in the Binani Investment Co. (P) Ltd. on and from 1st January, 1970. The scheme further provided that all proceedings

then pending by or against the transferor company would be continued by or against the transferee company and Binani Properties (P) Ltd. would be dissolved without winding up from the date of filing of the certified copy of the order with the Registrar of Companies.

3. Even though the scheme of amalgamation included all the properties belonging to Binani Properties (P) Ltd., another order was passed by Mr. Justice Salil K. Roy Chowdhury on 10th April, 1973 at the instance of the companies concerned including premises No. 81 in the scheme as one of the properties which had vested in the Binani Investment Co. (P) Ltd. under the scheme of the amalgamation. It further transpires that on 20th July, 1973, an order was passed by Mr. Justice Sabyasachi Mukharji dismissing an application filed by one Abdul Hossain Sheikh challenging the aforesaid order of Mr. Justice Salil K. Roy Chowdhury dated 10th April, 1973. It is stated before us that an appeal has been preferred against this order which is still pending.

4. It further transpires that on 21st October, 1975, an order was passed by Mr. Justice Rose of the High Court at Bombay sanctioning the scheme of amalgamation of the Binani Investment Co. (P) Ltd. with the Metal Distributors Ltd. whereby all properties, assets, rights, liabilities etc. of the Binani Investment Co. (P) Ltd. stood transferred to Metal Distributors Ltd. as from 1st of Jan. 1975. It may be mentioned here that in this appeal, an application was filed by Metal Distributors Ltd. for substitution of the said company in place and stead of the Binani Properties (P) Ltd. in this appeal or alternatively for addition of Metal Distributors Ltd. as a party in this appeal. By an order passed by this Court on May 18, 1977 the Metal Distributors Ltd. was added as respondent No. 23 in this appeal.

5. On the facts as disclosed above, it appears to us that the Binani Properties (P) Ltd., in view of its amalgamation and dissolution, was not competent to execute the decree obtained by it in Suit No. 800 of 1959. The fact of amalgamation of Binani Properties (P) Ltd. with Binani Investment Co. (P) Ltd. was not disclosed before Mr. Justice Ghose when the impugned order under appeal was passed. In this state of affairs, disclosed above, it is obvious that the order under appeal purporting to allow Binani Properties (P) Ltd. to proceed with the recovery of possession of the decree in execution cannot be sustained.

6. Mr. B.C. Dutt appearing for the added respondent No. 23 Metal Distributors Ltd. has submitted that in view of the provisions of Section 146 of the Code of Civil Procedure, this Court is in a position to allow the said company to proceed with the execution in substitution of the decree-holder Binani Properties (P) Ltd. In support of his proposition he has also referred to the decision in the case of Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, . In course of the judgment, the Supreme Court referred to the decision of the Madras High Court in the case of P.M.A.R.M. Muthiah Chettiar Vs. Lodd Govinda Doss Krishna Doss Varu and Another, , wherein it was observed in considering Section 146 of the C.P.C. that the assignee of a part of a decree is entitled to continue an execution

application filed by the transferor decree-holder. Mr. Dutt submitted that such order should be passed in favour of his client in this appeal enabling him to continue execution started by the decree-holder which is still pending. It however, appears to us that Section 146 confers a right on a transferee to continue the execution proceeding but it does not in terms confer any right to a respondent in an appeal to ask for such order enabling it to continue the execution started by its predecessor. We are, therefore, unable to allow the prayer as made but at the same time we give liberty to Mr. Dutt's client, if so advised, to take such step for continuing execution application filed by the Binani Properties (P) Ltd. by substitution or otherwise in accordance with law.

7. In view of the above, we allow the appeal and set aside the impugned order of Mr. Justice Ghose dated 20th November, 1970 with the liberty given as indicated above.

8. Mr. Dutt's client will also be at liberty to withdraw from the Advocate on record Mr. S.R. Shah whatever amount as may be lying with him on account of deposit by the appellant of the arrears of rent and/or mesne profits under the decree or pursuant to the orders passed by this Court, This withdrawal by Mr. Dutt's client would be without prejudice to the rights and contentions of the parties in pro tanto satisfaction and discharge of the amount due by the appellant on account of arrears of rent and/or mesne profits in respect of the suit premises.

9. It is also recorded that the order passed by this Court dated 18th May, 1977 adding the Metal Distributors Ltd. as a party to this appeal would not operate as res judicata in respect of any step that may be taken by the Metal Distributors Ltd. for continuing the execution proceeding.

10. There will be no order as to costs.

11. This order will be drawn up expeditiously.

Sankar Prasad Mitra, C.J.

12. I agree.