

(1948) 03 CAL CK 0016
In the Calcutta High Court
Case No : A.F.O.O. No. 38 of 1947

Midnapore Zemindary Co., Ltd., Sikarpur	APPELLANT
Vs	
Kumar Chandra Singh Dudhoria and others	RESPONDENT

Date of Decision : 02-03-1948

Acts Referred:

Citation : (1948) 03 CAL CK 0016

Judgement

G.N. Das, J.—The judgment-debtor, Midnapore Zemindary Company appeals against the decision of Mr. R.K. Dutta Gupta learned Subordinate Judge, Nadia, whereby a petition of objection filed by the appellant to the execution of a decree, was disallowed.

2. Shortly stated the facts are that in 1865 the predecessors-in-interest of the respondents granted a patni potta (Ex. 1) in favour of the predecessor-in-interest of the appellant in respect of certain lands within Touzi No. 523 of the Murshidabad Collectorate at an annual rent of Rs. 5483-5-1 only; one of the terms runs as follows:

If you make default in payment of the said settled rent or any kist thereof, you shall pay interest for default of kist at the rate of Re. 1 per cent per month, and we shall realise the arrears of rent with interest and cess by auction sale, of the said patni taluk upon making application and instituting proceedings according to the provisions of Regulation 8 of 1819 or of any other law for realisation of rent which is now in force or may come into force in future (torn). If (torn) amount be not realised thereby, then we shall realise the balance by auction sale of your other movable and immoveable properties.

3. Certain lands accreted to the said patni taluk. The accreted lands were formed into a Diarah touzi No. 3653 and a Garmokarari tenure for a term of 15 years viz., from 1st April 1921 to 31st March 1936, was recorded under the predecessor-in-interest of the respondents and rent was assessed at Rs. 1028-2-0 only under the provisions of part II chapter x of the Bengal Tenancy Act.

4. In 1925 the respondents instituted a suit for rent of the said tenure for the period 1328 to 1331 B.S. In 1929 another suit for rent for the subsequent period viz. 1332, to 1335 B.S. was instituted. Both the suits were decreed on contest. The appellant preferred two appeals to this Court against the said two decrees; these were registered as F.A. Nos. 23 and 24 of 1936 and were heard together. The appeals were allowed by this Court. The respondents preferred two appeals to His Majesty in Council which were numbered as P.C. Appeals Nos. 23 and 24 of 1938 and were consolidated as P.C. Appeal No. 11 of 1940. Their Lordships of the Judicial Committee of the Privy Council allowed the appeals and set aside the decrees passed by this Court and restored those of the trial Court with costs. The order of His Majesty in Council was passed on 18th January 1941. The said order was transmitted by an order of this Court to the Court of the Sub-ordinate Judge, Murshidabad, for execution. The execution case was numbered as Rent Execution case No. 51 of 1946, the amount claimed was Rs. 17,994-10-0 only. The only mode of execution prayed for was realisation of the sum by appointment of a receiver in respect of a patni held by the appellant under the respondents and bearing a rent of Rs. 50 only.

5. The appellants filed a petition of objection under S. 47, Civil P.C., and urged at the hearing the following objections, viz., (1) that one execution proceeding was not maintainable in respect of two separate decrees passed in two separate suits; (2) that the order of His Majesty in Council was not properly transmitted, (3) that the decree-holder cannot resort to any other mode of execution without first proceeding against the tenure, firstly as a matter of law on a proper construction of S. 168A, Bengal Tenancy Act, secondly on the terms of the lease; (4) that in the facts of the present case, the Court should now allow equitable execution by the appointment of receiver. These objections were overruled by the Subordinate Judge. The judgment debtor has preferred this appeal.

6. Mr. Gupta, who appears for the appellant has abandoned the first two points urged before the trial Court and has confined his arguments to the last two points only.

7. Mr. Gupta first contends that on a proper interpretation of S. 168A, Bengal Tenancy Act, a decree for rent cannot be executed in any manner except by a sale of the tenancy. Mr. Gupta concedes that his contention is opposed to the decision of the Special Bench in the case of Sudhir Krishna Ghose and Another Vs. Satish Chandra Hui and Others, . As this decision is one of a Special Bench of this Court, he has not addressed us any arguments but merely submitted that the decision is not correct.

8. Mr. Gupta next contends that the decision of the Special Bench does not decide the point now under consideration as in the present case, the tenure is still liable for sale in execution of the decree for rent. In our opinion, this contention is not sound. The decision of the Special Bench proceeds on the view that the modes of execution mentioned in S. 51, Civil P.C. are restricted only to the extent mentioned in S. 168A, Bengal Tenancy Act. The decision refers to the

decision of Henderson J. in *Bahadur Singh Singhee Vs. Sanyasi Charan Ghosh*, and of Mukherjea and Sharpe JJ. in *Anil Kumar Basu Vs. Roy Biman Behari Mitra for Self and Executor to Estate of Roy Banku Behari Mitra and Others*, , and the clear implication is that the view taken in these cases is accepted. Mitter J. who was a party to the decision of the Special Bench understood the decision of Special Bench in this way. See *Pratul Chandra Ghose v. Naresh Chandra Bose*, 50 C.W.N 655 (656) : (A.I.R. 1946 Cal. 498).

8a. Mr. Gupta relies strongly on the following passage at p. 836 of 48 C.W.N. 835:

Where the defaulting tenure is liable to be sold in execution of the decree and is not actually sold the tenant has no further liability as the decree becomes satisfied and the question of execution of the decree does not arise. Where, as in the present case, the defaulting tenure is not available to the decree-holder and cannot be sold in execution of the decree, S. 168A(1)(b) does not come into operation, the personal liability of the judgment-debtor under the decree continues and there is no reason why the decretal amount cannot be realised by modes of execution other than the attachment and sale of the judgment-debtor's properties.

This observation in the judgment of the Special Bench was not intended to forbid any other mode of execution where the tenure was still unsold. Such a view would be opposed to the previous portion of the judgment where the two previous decisions of this Court are presumably referred to with approval. The contention of Mr. Gupta would have the effect of putting different constructions on the section in different sets of circumstances. The contention is also not borne out by the express words of the section. In the case of *Anil Kumar Basu Vs. Roy Biman Behari Mitra for Self and Executor to Estate of Roy Banku Behari Mitra and Others*, the tenure was available for sale, nevertheless execution of a decree for rent by attachment of a decree obtained by the tenant judgment-debtor was allowed. The principle was thus stated by Mukherjea J. at p. 345:

The section is an encroachment upon the rights which the landlord decree-holder had under the ordinary law and certainly it cannot be extended beyond what is warranted by the actual language of the section.

9. In this view, we are not prepared to accept the above contention of Mr. Gupta.

10. Mr. Gupta next contends that on a proper interpretation of the term in the lease already quoted the decree holder is limited to execution of his decree in the first instance by a sale of the defaulting tenure. This interpretation is not correct. The clause referred to is an enabling one and merely sets forth the right of the landlord to execute his decree in the various ways mentioned therein. It is not restrictive of his powers under the law to choose his own mode of execution.

11. In this view, it is not necessary to express any opinion on the question whether the terms of the potta Ex. 1 would be attracted to the accreted tenure in default and govern its incidents.

12. The last contention of Mr. Gupta relates to the propriety of the mode of execution by the appointment of a receiver in the facts of the present case.

13. The appointment of a receiver in execution is not a matter of right, and a proper case must be made out to justify the exercise by the Court of its discretion to make the appointment. It is a form of equitable relief and is granted on the ground that there is no effective remedy by execution at law. It is, however, not always necessary that legal execution should be exhausted before an appointment of a receiver by way of equitable execution can be obtained: per C.C. Ghose J. in (Raja) Promothanath Malia Vs. H.V. Low and Co., .

14. It is, therefore, necessary to consider the relevant facts. The defaulting tenure has been in the possession of the appellant since its formation. The best evidence of the income of the tenure would be the collection papers. These are in the custody of the. appellant but have not been produced. The unchallenged statement of the respondent's witness 1 Heramba Chandra Majumdar, is that the value of the tenure would be about Rs. 4000 or Rs. 5000. The decretal dues amount to Rs. 17,994 10-0. The tenure is situate in a temporarily settled estate and its rent is liable to be reassessed at the periodical settlements of land revenue though subject to the result of a suit under S. 104H Ben. Ten. Act. It is situate in a diara mahal and is liable to fluctuation consequent on the changes in the course of the river. An execution sale of the tenure is likely to fetch a small portion of the decretal dues. In these circumstances, it is difficult to say that the decree-holder should be compelled to pursue the doubtful and inadequate remedy of legal execution by a sale of the tenure before he can be allowed to proceed by way of equitable execution by appointment of al receiver. It cannot be said that the exercise of its discretion by the trial Court necessitates our" interference in appeal.

15. All the contentions raised by Mr. Gupta fail and this appeal must be dismissed with costs.

B.K. Mukherjea, J.

16. I agree.