

(1958) 02 CAL CK 0049
In the Calcutta High Court
Case No : A.F.O.O. No. 118 of 1956

Sree Sree Iswar Sridhar Jew

APPELLANT

Vs

Jnanendra Nath Ghose and Others

RESPONDENT

Date of Decision : 03-02-1958

Acts Referred:

Calcutta Original Side Rules — Rule 15
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, 47, 92

Citation : AIR 1960 Cal 718

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

Bench : Division Bench

Advocate : P.K. Sen, for the Appellant;Sridhar Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

Chakravartti, C.J.—This is an appeal against an order of P. B. Mukharji, J. dated 22-2-1956, upholding with certain modifications an order made by the learned Master on the 19th of December, 1955, directing execution of what may be called a scheme decree. By the order of the learned Judge, respondent No. 1, Jnanendra Nath Ghose, was directed to be put into joint possession of certain rooms of premises No. 41A Grey Street and also to be put into joint possession of the rest of the premises occupied by tenants in such manner as such property admitted of. The appellant complains of that order, but in order to understand the nature of its many pointed Complaint, it is necessary to state briefly certain facts.

2. It appears that there was a debutter constituted of two houses, namely 41A Grey Street, Calcutta, and 40/2A Grey Street, dedicated to Sree Sree Iswar Sridhar Jew, the appellant before us. Sometime before 1948, the members of the settlor's family, or some of them, purported to reconvert the debutter property into a secular one by the consent of all the members of the family and under the distribution of the properties which followed, the two houses were allotted to one of them. The allottee mortgaged the houses to a third party and in execution of a

decree, passed in a suit brought on the mortgage, they were sold and purchased by certain persons who may be called the Dutts, On 19-7-1948, a suit was brought by the appellant before us, as represented by its next friend, one Debabrata Ghose, who is the virtual appellant, against respondent No. 1 and other members of the family as also the purchasers at the mortgage sale. The appellant asked for a declaration that the properties belonged to it absolutely and that the transactions had with regard to them by the defendants were utterly void. That suit was decreed, the absolute title of the appellant before us in the said properties being found,, but not stopping at making that declaration, Bose, J., who heard the suit, also directed a scheme to be framed. In pursuance of that direction, a reference was made to the Assistant Referee of this Court for drawing up a scheme.

3. The Dutts did not accept that decree and appealed to the appellate Division of this Court. Their appeal failed, but they proceeded on further appeal to the Supreme Court. That appeal was also unsuccessful. The judgment of the Supreme Court is reported in *Sree Sree Ishwar Sridhar Jew Vs. Sushila Bala Dasi and Others*, .

4. I have omitted to mention that with regard to-one of the properties, namely 40/2 Grey Street, the appellant's suit failed on the ground of limitation, sits success, therefore, was limited only to the other property, namely premises No. 41A Grey Street, which is also the subject-matter of the present appeal.

5. The Assistant Referee of this Court framed a scheme in due course and made his report on 7-3-1955. The scheme was a most elaborate one, but for the purpose of the present appeal, I need refer only to three of its clauses. By Clause 6 it was declared that the name of the then shebais, who are also the present shebais, were Shri Jnanendra Nath Ghose, that is to say, respondent No. 1 before us, and Shri Debabrata Ghose, that is to say, the next friend of the appellant in the present appeal. By Clauses 7 and 8, which may be taken together, it was provided that the estate "shall be duly and properly administered and managed jointly by the shebais hereinbefore, mentioned", and further that "the management of the debutter estate shall devolve upon the shebais jointly and they shall be jointly responsible for the management of the debutter estate". Clause 13 declared that each of the shebais would have the right "to reside in the debutter estate viz, at No. 41A, Grey Street" and after setting out how the remaining rooms were to be utilised, the clause proceeded to say that three rooms with the kitchen. and latrine in the second floor would be set apart from the use of the shebais jointly. Among the duties of the shebais, which were prescribed in great detail in Clause 9 of the scheme, was the duty to realise rents from the tenants and to eject or induct tenants into the tenanted parts of the debutter house.

6. The report of the Assistant Referee, together with the scheme framed by him, came up for confirmation before P.B. Mukharji, J., on 10-6-1955. The learned Judge confirmed the report and passed a final decree. In the meantime, on

23-8-1954, Debabrata Ghose had brought a suit in his own name as also in the name of the deity, being Suit No. 2589 of 1954, for the removal of Jnanendra Nath Ghose, respondent No. 1 before us, and for other reliefs. In confirming the scheme, P. B. Mukharji, J., made the reservation that the confirmation would be without prejudice to the result of that suit.

7. Thereafter respondent No. 1 proceeded to execute the decree as confirmed and filed a tabular statement in the usual form. The relief asked for was joint possession of one room in the ground-floor and three rooms with the kitchen and the latrine on the second floor of the premises and also symbolical joint possession of that part of the premises which was in the occupation of tenants. On that tabular statement, the learned Master made an order on the 19th at December, 1955, to the effect that there would be the usual order for possession under Order XXI, Rules 35 and 36 of the Code of Civil Procedure. As drawn up, the order directed the Sheriff to put the applicant, that is to say, Jnanendra Nath Ghose, in possession of those rooms of the premises which were then in possession of Debabrata Ghose under Order XXI, Rule 35 of the CPC and also to put the applicant in possession of the tenanted rooms under the provisions of Order XXI, Rule 36. The order thus read as if it was directing the property to be put into the sole possession of Jnanendra Nath Ghose.

8. Against that order of the learned Master, the appellant before us took out a Chambers Summons on the 25th of January, 1956, returnable on the 31st of January, following. By the summons it was prayed that the ex parte order made by the Master in the execution proceedings might be set aside and the principal ground, taken was that the decree which was being sought to be executed was not a decree for possession at all, but merely "a decree confirming a scheme, as framed under the directions of the Court. Respondent No. 1 resisted the application on the merits and also took the ground that it was barred by limitation. By an order made on 22-2-1956, P. B. Mukharji, J., upheld the order of the learned Master with the modification or clarification that the applicant for execution would be put in joint possession along with Debabrata Ghose, both of the residential part of the premises and the tenanted part. It is against that order that the present appeal is directed.

9. In support of the appeal, Mr. Sen has urged before us four points. His principal point is what had been urged on behalf" of his client before the learned trial Judge and he has contended that there was nothing in the decree, confirming the scheme, which was capable of execution. A scheme decree, he has contended, cannot be executed. His next point is that neither Rule 35, nor Rule 36 of Order XXI of the CPC could apply to the present case and, therefore, the order directing execution in accordance with those Rules was erroneous. His third point is that the applicant for execution was the defendant in the suit in which the decree was made and was a judgment-debtor under the decree and, therefore, being a judgment-debtor, he could not execute the decree as if he was a decree-holder. His last point is that, in any event, even assuming that the decree is a decree for

possession, it is a decree for joint possession in favour of both Debabrata Ghose and Jnanendra Nath Ghose. and, consequently, being one of the joint decree-holders, Jnanendra Nath Ghose could not execute the decree against the other decree-holder.

10. On behalf of the respondent Mr. Chatterjee has contended that the appellant's appeal before the learned Judge against the order of the learned Master was plainly barred by limitation under Rule 15 of Chapter VI of the Rules of the Original Side. He has next contended that there is no absolute rule that a decree, framing or confirming a scheme, cannot be executed in any circumstances and that where a decree is by its terms capable of execution, no valid plea against its executability can be taken. Mr. Chatterjee further contended that the fact that Jnanendra Nath Ghose was a defendant in the suit and a Judgment-debtor under the decree could not disable him from seeking to execute it, if the decree gave him any rights which were capable of being enforced by execution. Mr. Chatterjee did not deal specifically with the appellant's argument based on Rules 35 and 36 of Order XXI of the Code of Civil Procedure, but conceded with his usual fairness that he realised that the decree being a joint decree in favour of his client and Debabrata Ghose, there was great difficulty in the way of one seeking to execute it against the other.

11. If Mr. Chatterjee's objection on the ground of limitation be a good one, it will be unnecessary to examine any other point, but it appears to me that the objection must fail. It is true that Rule 15 of Chapter VI of the Original Side Rules does lay down that an appeal from an order made by the Master must be made "within five days after the decision complained of," but the Rule adds a qualification, namely "or such further time as may be allowed by a Judge or the Registrar or Master". The point of limitation was taken in Jnanendra Nath Ghose's affidavit-in-opposition in the baldest possible manner, all that was said being that the appellant's application was barred by limitation. That manner of stating an objection as to limitation hardly gives any warning to the adversary as to what the point really is and I think Mr. Chatterjee's point before us could be properly met by the answer that if his client had pleaded limitation in concrete terms, the appellant might have brought to the notice of the Court facts by which the objection as to limitation could be adequately answered. It is, however, not necessary to rely upon the defect in the pleading in order to overrule the objection of Mr. Chatterjee. The Rule clearly says that a period of five days prescribed by it can be extended by the Judge. The objection as to limitation was specifically taken in the affidavit-in-opposition and Mr. Chatterjee, who was also in the Court below, has informed us that he actually urged it. The order of the learned Master was made on the 19th of December, 1955, and the application by way of an appeal was not made till the 31st of January, 1956. Prima facie, therefore, the application was time-barred and if the learned Judge was not prepared to extend the time, he would obviously have thrown out the application on the ground of limitation and not troubled himself with it further. In fact, however, the application was not thrown out, but an order of a positive character

was made. It is thus perfectly clear that the learned Judge entertained the application and made an order upon it and he could not have done so, unless he was willing to treat the application as made within time. Mr. Chatterjee submitted that the order nowhere said that the time had been extended, but since the application was not dismissed, but, on the other hand, an order was made on it, it must be presumed that the learned Judge extended the time. The point of limitation taken by Mr. Chatterjee must, therefore, fail.

12. Taking now the appellant's points, the first point is that the decree in the present case, being merely a decree confirming a scheme, was not by its very nature executable. In support of that argument reliance was placed on the decision of this Court in *Atul Krishna Roy v. Manmatha Nath* AIR 1949 Cal 215. That also was a case where an application was made for the execution of a scheme decree relating to a debutter. It appears that the deity was not made a party to the application so that it was bound to fail in any event, but the learned Judges, while referring to the defective constitution of the application, did also hold, in agreement with a decision of the Madras High Court, that a scheme decree was not executable. They gave no reasons of their own, but merely relied on the decision in *Bava C. Vaithilinga Mudaliar Vs. The Board of Control, Sri Thyagarajaswami Devasthanam Tiruvarur*, .

13. There are earlier decisions of the Madras High Court as also a decision of the Bombay High Court where it has been held that a scheme decree is not per se unexecutable and that what is to be seen in each case is what the directions contained in the decree are. That is the view which appears to have been taken by the Madras High Court in its earlier decision in *(Board of Control) Sri Thyagarajaswami Devasthanam Vs. Balayee Ammal and Others*, , followed in *Vythinga Pandarasannadhi, Trustee Kattalai, Kamalalayam South Bank Vs. The Board of Control, Sri Thiagarajaswami Devasthanam*, and by the Bombay High Court in *Damodarbhat v. Bhogilal Karsondas* ILR 24 Bom 45. Mr. Chatterjee contended that the correct view was that taken in the decisions to which I have just referred and that whether or not a scheme decree was executable would depend upon the construction of the decree in each particular case.

14. It appears to me that for the purpose of the present case, we may accept the modified proposition of Mr. Chatterjee rather than proceed on the absolute proposition of Mr. Sen. There can be no doubt that convenience and equity are all in favour of a scheme decree being executable, because if the rights declared by such a decree can be worked out in execution, the delay and the disadvantage of further litigation by way of a protracted suit can be avoided. At the same time, if a decree is not by nature executable, the inconvenience resulting from the parties not being able to execute it can be no reason for holding that it is executable. If a scheme decree is merely of a declaratory nature, it is obvious that it is not executable, because a declaration, contained in a scheme decree, can no more be executed than a declaration contained in any other decree. Whether it is also correct to say that even if a scheme decree may contain some

provisions of a directory, nature, it will not be executable even as regards those provisions, as the Madras High Court has held in its later decisions, it is not necessary to consider in the present case. It appears to me that even if we apply the test formulated by Mr. Chatterjee, the decree in the present case cannot be held to be executable.

15. The decree of P. B. Mukherjee, J., merely refers to the report of the Assistant Referee and gives the following direction: "The scheme embodied therein be and the Same is hereby confirmed". For the actual provisions of the decree one has, therefore, to go to the scheme itself. I have already referred to the clauses of the scheme which are material for our present purpose. Clause 6 does no more than declare who the present shebait is. Clauses 7 and 8 do no more than declare the right of Jnanendra Nath Ghose and Debabrata Ghose to manage and administer the debutter properties jointly. Clause 13 again does no more than declare that three rooms of the house with the kitchen and the latrine on the second floor would be set apart for the joint use of the shebait and that each of the shebait shall have the right to reside in the debutter estate. As regards collection of rents from the tenants, clause 9 merely mentions it among the duties of the shebait. Nowhere does the decree say that the shebait or either of them is to be put in possession of the house, whether actually or symbolically, and nowhere does the decree direct anything positive to be done. It concerns itself only with declaring the rights of the then shebait and stops at making that declaration. It appears to me to be clear from the provisions of the decree that however executable a scheme decree may be in regard to provisions of a directory nature which it may contain, the decree before us is not executable, because it does not contain any such provision. The first point taken on behalf of the appellant must, accordingly, succeed.

16. As regards the point based upon Rules 35 and 36 of Order XXI of the Code of Civil Procedure, I think it correct to say that those Rules do not apply to the present case in terms. I do not, however, think that it could be urged against the execution of the decree by Jnanendra Nath Ghose that he was a defendant in the suit and a judgment-debtor under the decree. If the decree was otherwise executable and gave any rights to Jnanendra Nath Ghose which could be enforced by execution, the fact that he was formerly a defendant in the suit and a judgment-debtor under the decree, could not possibly prevent him from working out the decree by execution. Under a scheme decree, as under a decree in a Partition Suit, all the parties may have rights and all of them may be in the position of plaintiffs or defendants.

17. The last point taken on behalf of the appellant, however, is one to which also effect must be given. In fact, Mr. Chatterjee conceded frankly that he was unable to furnish an adequate answer to it on behalf of his client. Even assuming that the decree is a decree for possession, it is a decree for joint possession and a decree for joint possession is to be executed in the manner laid down in Rule 15 of Order XXI of the Code. But that Rule obviously contemplates execution by the

joint decree-holders against persons liable under the decree. Execution of a decree for joint possession by one of the joint decree-holders against the other appears to me to be an impossible notion. Mr. Chatterjee with his usual candour conceded that he was unable to make out a case to the contrary.

18. If the last point taken by the appellant to which we are giving effect be fatal to the application for execution, it was really not necessary to discuss the general question as to whether the decree in the present case is or is not executable. We have done so, however, in deference to an argument of Mr. Chatterjee that since his client has undoubtedly certain rights under the decree, which he may seek hereafter to enforce by means of a Suit, he may be met with an objection u/s 47 of the Code unless, in dismissing his present application for execution, we make it clear that, in our view, the decree is not executable and, therefore, the question of his right to joint possession which he may raise in a suit will not be a question relating to the execution or satisfaction or discharge of the decree. We have, accordingly, thought it proper to consider the principal argument advanced before us on behalf of the appellant and to express our views thereon.

19. For the reasons I. have given, this appeal must, in my view, succeed. Mr. Chatterjee has contended that even if the appeal is allowed, his client ought not to be saddled with its costs. In my view, the submission of Mr. Chatterjee is, in the facts of the case, an eminently reasonable one. There can be no doubt whatsoever that although Jnanendra Nath Ghose has been declared to be a co-shebait with Debabrata Ghose, not only by this Court as a Court of first instance and on appeal, but also by the Supreme Court, persistent attempts have been made by Debabrata Ghose in the name of the deity to keep him out of the fruits of the decree. After Bose, J., had directed a reference to be made to the Assistant Referee for the framing of a scheme, he made an application for an injunction restraining Jnanendra Nath Ghose from participating in the framing of it. Then, even after the scheme had been confirmed and a final decree made, he made an application for an injunction on Jnanendra Nath Ghose, restraining him from taking any steps for obtaining possession of the debutter properties or from taking part in their management. He made a third application for liberty to be given to him alone to realise the rents of the debutter property. All these applications were dismissed. If his present attack against the attempted execution of the decree succeeds, it succeeds for a purely technical reason, because Jnanendra Nath Ghose has mischosen his remedy. The fact, however, remains, as seems to, have been held repeatedly by this Court when dismissing the successive applications made by Debabrata Ghose, that he has been persisting in his attempt to exclude his co-shebait from participation in the rights and duties of the sebaitship, in spite of the declaration of the co-sebait's right, made by the Courts, which has now become final.

20. In the above circumstances, we allow the appeal, set aside the order of P. B. Mukherjee, J., dated the 22nd of February, 1956, as also the order of the Master dated the 19th of December, 1955 and dismiss the application of Jnanendra Nath

Ghose for execution. At the same time, we direct that there shall be no order for costs.

Lahiri, J.

21. I agree.