

(1916) 06 CAL CK 0038
In the Calcutta High Court

Srimati Jagattarini Dasi

APPELLANT

Vs

Prafulla Chandra Ghose and Others

RESPONDENT

Date of Decision : 01-06-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 5
Specific Relief Act, 1877 — Section 42

Citation : 35 Ind. Cas. 792

Hon'ble Judges : Teunon, J; Sheepshanks, J

Bench : Division Bench

Judgement

1. In this case it appears that one Rai Baroda Prosonno Shome Bahadur died on the 7th of May 1912. He had executed a Will dated 9th Aswin 1317= 26th September 1910, appointing the eldest son and the 2nd son of his eldest daughter Ushabati executor and assistant executor "respectively. He further provided that on their attaining majority the eldest sons of his 2nd and 3rd daughters should also become assistant executors.

2. Probate of this Will was taken out in the first instance by the two sons of Ushabati, and the eldest son of the 2nd daughter has since been joined with them as a co-executor.

3. On the 24th of September 1912, the two younger daughters brought the present suit substantially for the construction of the Will, and for the administration of the estate. They also prayed for the partition of certain specified landed properties. The contesting defendants are the eldest daughter Ushabati and her two sons, Prafulla Ghose and Hem Chandra, the executor and assistant executor first named in the Will.

4. After the framing of issues, and the disposal of a number of interlocutory applications and the examination of a number of witnesses on commission, the taking of evidence in Court began on the 11th and closed on the 17th of June 1914.

5. On the 30th of June the learned Subordinate Judge delivered judgment dismissing the suit on two specific grounds, viz., (1) that by reason of the provisions of Section 42 of the Specific Relief Act the suit is not maintainable, and (2) that in the title portion of the plaint the executor-defendants have not been described as such.

6. We are of opinion that on neither ground can the dismissal of the suit be supported. On the 1st ground it is stated that while there is a prayer for a declaration of title in respect of the properties sought to be partitioned, there is no prayer for possession. But we are of opinion that such a prayer is to be found in paragraph IP, Sub-clause (5), of the plaint and if anything more specific was required, then the amendments sought to be made by the plaintiffs in their applications of 7th July 1913, "paragraph 8 (ka)", and of the 19th July and of the 2nd November of the same year should not have been disallowed. Apart from this it is to be observed that even if we had agreed with the Subordinate Judge in his view of the plaint, we still could not have held him justified in dismissing the whole suit.

7. The 2nd ground is even less defensible. That defendants Nos. 1, 2 and 4 are executors to the Will in question is clearly stated in the 2nd paragraph of the plaint. Order II, Rule 5 of the Code of Civil Procedure, permits in certain circumstances the joining of claims against executors with claims against them personally and the difficulty which the Subordinate Judge apprehends in the drawing up of the decree, in accordance with the findings of the Court appears to us to be imaginary.

8. We have been urged by the respondents to affirm the decision under appeal on the ground that Section 167 of Act X of 1865 is a bar to the suit. But this is a question that has not been considered by the Subordinate Judge and in the absence of any findings of fact, we are unable to determine to what extent and in what manner the provisions of Section 167 and the following sections of Act X of 1865 will affect the suit and the action to be taken by the plaintiffs.

9. We have next been asked by the appellant to set aside the order of the Subordinate Judge dated the 17th July, in so far as it puts the plaintiffs to their election in respect of their claim for certain ornaments and in respect of the other properties, the subject-matter of the suit. The plaintiffs protested against the order but finally on the 21st July in compliance therewith elected to withdraw the claim for ornaments. It appears to be the case of both parties that these ornaments belonged to the estate not of the deceased testator, but of his wife Promodini. But it was also the case of the plaintiffs that it was as executors to the estate of the husband that they succeeded in obtaining possession of the ornaments in question. That being so, on the authority of the case of *Hafizaboo v. Mahomed Cassum Murad* 31 B. 105 : 8 Bom. L.R. 384 we hold that it was unnecessary to put the plaintiffs to their election in respect of that claim. We, therefore, set aside that part of the order and direct that the prayer for ornaments be reinstated in the plaint.

10. We need only say further that in our judgment it is lamentable that suits on which there has been much expenditure of public and private time and much expenditure of money, or indeed any suits should be thrown out on such insufficient grounds.

11. We decree the appeal and remand the suit to the Subordinate Judge to be tried out on all the issues and determined in accordance with law. Costs will abide the result.