Sm. Saila Bala Dassi vs Sm. Nirmala Sundari Dassi And Another on 14 February, 1958

Equivalent citations: 1958 AIR 394, 1958 SCR 1287, AIR 1958 SUPREME COURT 394, 1958 SCJ 743, 1958 MPLJ 473

Author: A.K. Sarkar

Bench: A.K. Sarkar

PETITIONER:
Sm. SAILA BALA DASSI

Vs.

RESPONDENT:
SM. NIRMALA SUNDARI DASSI AND ANOTHER

DATE OF JUDGMENT:
14/02/1958

BENCH:
AIYYAR, T.L. VENKATARAMA
BENCH:
AIYYAR, T.L. VENKATARAMA
DAS, SUDHI RANJAN (CJ)
SARKAR, A.K.
BOSE, VIVIAN

CITATION:
1958 AIR 394 1958 SCR 1287

ACT:
Civil Procedure-Addition of Party-Tran sfer Pendente lite-Appeal filed by tyansferor-Right of transferee to continue appealCode of Civil Proceduye (Act 5 of 908), s. 146, 0. 22, Y. IO.

HEADNOTE:
The second respondent sold the properties to the appellant in ,952 and the deed of sale recited that the properties were sold free of all encumbrances. The first respondent who had obtained a mortgage decree in respect of the properties in 1935 did not take any steps to have the decree drawn up as required under the Original Side Rules of the Calcutta High Court until 1954, when she commenced

proceedings for sale of the mortgaged properties. The second respondent raised the objection that the execution of the decree was barred by limitation but that was overruled by a single judge of the High Court and an appeal against that order was preferred by the second respondent. Apprehending that the second respondent might enter into a collusive arrangement with the first respondent with a view to defeat her rights, the appellant made an application in the High Court under 0. 22, r. 10 of the Code of Civil Procedure praying that she might be substituted in the place of the second respondent, or in the alternative, be brought on record as additional appellant. The High Court having dismissed the application, the appellant brought the present appeal:

Held, that the application could not be sustained under 0. 22, r.10, of the Code of Civil Procedure because (i) assuming that

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the suit was considered as having been pending until the decree was drawn up in 954 no application was made to the Court where the suit was pending as provided in 0. 22, r. 10, and (ii) the application made to the appellate Court was also not within 0. 22, r. 10, as the transfer in question was made prior to the filing of the appeal and not during its pendency.

The application, however, falls within s. I46 of the Code of Civil Procedure and the appellant is entitled to be brought on record since an appeal is a proceeding within the meaning of that section and the right to file an appeal carries with it the right to continue an appeal which had been filed by the person under whom the appellant claims.

Jugalkishore Sayaf v. Raw Cotton Ltd., [1955] I S.C.R. 1369, Sitharamaswami v. Lakshmi Narasimha, (1918) I.L.R. 41 Mad. 510 and Muthia Chettiar v. Govinddoss Kyishnadoss, (1921) I.L.R. 44 Mad. gig, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No.350 of 1957. Appeal by special leave from the judgment and order dated August 6, 1956, of the Calcutta High Court on a notice of motion in Appeal No. 152 of 1955.

N. C. Chatterjee and P. K. Mukherjee, for the appellant. B. Sen and P. K. Ghosh (for P. K. Bose), for respondent No.

1. 1958. February 14. The Judgment of the Court was delivered by VENICATARAMA AIYAR J.-This is an appeal against an order of the High Court of Calcutta dated August 6, 1956, rejecting the application of the appellant to be brought on record as appellant in appeal No. 152 of 1955 pending before it. The second respondent, Sudhir Kumar Mitter, was the owner of two houses, No. 86/1,

Cornwallis Street and No. 7-C, Kirti Mitter Lane, Calcutta. On May 19, 1934, he executed a mortgage for Rs. 3,000 over the said houses in favour of the first respondent, Sm. Nirmala Sundari Dassi. She instituted Suit No. 158 of 1935 on this mortgage, and obtained a pre- liminary decree on March 8, 1935. The matter then came before the Registrar for taking of accounts, and by his report dated July 23, 1935 he found that a sum of Rs. 3,914-6-6 was due to her, and on that, a final decree was passed on April 20, 1936. Under r. 27 of ch. 16 of the Original Side Rules of the Calcutta High Court, a person in whose favour a decree is passed has to apply for drawing up of the decree within four days from the date thereof. The rule then provides that " if such application for drawing up a decree or order is not made within the time aforesaid, the decree or order,shall not be drawn up except under order of Court or a Judge to be obtained, unless otherwise ordered, by a petition ex parte ". The importance of this provision is that until a decree is drawn up as mentioned therein, no certified copy thereof would be issued to the party and without such a certified copy, no execution proceedings could be taken.

The first respondent who had acted with such alacrity and speed in putting her mortgage in suit and obtaining a decree, took no steps whatsoever to have the decree drawn up, for nearly 18 years. On May 12, 1952, the second respondent sold both the houses to the appellant herein for a sum of Rs. 60,000 which was, it is stated, utilised largely for discharging prior mortgages on which decrees had been obtained and execution proceedings taken. The deed of sale recites that the properties were sold free of all encumbrances. The first respondent who had so far taken no steps to have the decree drawn up now bestirred herself, and on February 17, 1954 obtained an ex parte order under r. 27 aforesaid, granting her leave to draw up and complete the decree. That having been done pursuant to the order, she filed on April 29, 1954 the final decree, and commenced proceedings for sale of the mortgaged properties. Coming to know of this, the second respondent appeared before the Registrar, and raised the objection that the execution of the decree was barred by limitation. The Registrar felt some doubt in the matter, and made a special report under ch. 26, r. 50 seeking the opinion of the Court on the question of limitation, and the first respondent was also directed to take out a notice of motion for directions. The matter then came before P. B. Mukharji J. and after hearing counsel for both the respondents, he held that the execution of the decree was not barred. Vide judgment reported in Nirmala Sundari v. Sudhir Kumar (1). Against this judgment, the second respondent preferred Appeal No. 152 of 1955, and that is still pending.

We now come to the application, out of which the present appeal arises. On July 25, 1956 the appellant applied to be brought on record as appellant in Appeal No. 152 of 1955. The allegations in support of the petition were that she had purchased the properties from the second respondent on May 12, 1952 free of all encumbrances, that the execution proceedings started by the first respondent were not maintainable as the decree had become time-barred, that the second respondent, Sudhir Kumar Mitter, had been conducting proceedings in opposition to the execution sale only at her instance and for her benefit, that he had filed Appeal No. 152 of 1955 also oil her behalf, that latterly he had entered into a collusive arrangement with the first respondent with a view to defeat her rights, and that therefore it was necessary that she should be allowed to come on record as appellant so that she might protect her interests. The prayer in the petition was that she be substituted in the place of the second respondent or in the alternative, be brought on record as additional appellant. The application was strenuously opposed by both the respondents. They stated

that they had entered into an arrangement settling the amount due to the first respondent at Rs. 17,670, that that settlement was fair and bona fide and binding on the appellant, and that further her application was not maintainable. This application was heard by Chakravarti C. J. and Lahiri J. and by their order dated August 6, 1956, they dismissed it. The appellant then applied under Art. 133 for leave to appeal to this Court, and in rejecting that application, the learned Chief Justice observed that the original application was pressed only under 0. 22, r. 10 of the Civil Procedure Code and it was dismissed, as it was conceded that the applicant, (1) A.I.R. 1955 Cal. 484.

not being a person who had obtained a transfer pending appeal, was not entitled to apply on the terms of that rule, that the prayer in the alternative that the applicant might be brought on record without being substituted under 0. 22, r. 10 which merited favourable consideration bad not been mentioned at the previous hearing, and that no certificate could be granted under Art. 133 with a view to that point being raised in appeal, as the order sought to be appealed against was not a final order. The appellant thereafter obtained special leave to appeal under Art. 136 of the Constitution, and that is how the appeal comes before us. It is contended OD behalf of the appellant that her application is maintainable under 0. 22, r. 10 of the Civil Procedure Code, because Suit No. 158 of 1935 must be considered to have been pending until the decree therein was drawn up which was in 1954, and the transfer in her favour had been made prior thereto on May 12, 1952. The decision in Lakshan Chunder Dey v. Sm. Nikunjamani Dassi (1) is relied on, in support of this position. But it is contended for the first respondent that even if Suit No. 158 of 1935 is considered as pending when the transfer in favour of the appellant was made, that would not affect the result as no application had been made by her to be brought on record in the original court during the pendency of the suit. Nor could the application made to the appellate Court be sustained under 0. 22, r. 10, as the transfer in favour of the appellant was made prior to the filing of that appeal and not during its pendency. This contention appears to be well-founded ; but that, however, does not conclude the matter. In our opinion, the application filed by the appellant falls within s. 146 of the Civil Procedure Code, and she is entitled to be brought on record under that section. Section 146 provides that save as otherwise provided by the Code, any proceeding which can be taken by a person may also be taken by any person claiming under him. It has been held in Sitharamaswami v. Lakshmi Narasimha (2) that an appeal is a proceeding for the (1) (1923) 27 C.W.N. 755.

(2) (1918) I.L.R. 41 Mad. 510.

purpose of this section, and that further the expression "

> claiming under" is wide enough to include cases of devolution and assignment mentioned in 0. 22, r. 10. This decision was quoted with approval by this Court in Jugalkishore Saraf v. Raw Cotton Co., Ltd. (1), wherein it was hold that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently passed therein, under s. 146 of the Civil Procedure Code as a person claiming under the decree-holder, even though an application for execution by him would not lie under 0. 21, r. 16, and it was further observed that the words "save as otherwise provided " only barred proceedings, which would be obnoxious to some provision of the Code. It would follow from the above authorities that whoever is

entitled to be but has not been brought oil record under 0. 22, r. 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the second respondent of the mortgaged properties would have been entitled to prefer an appeal against the judgment of P. B. Mukharji J.

It is next contended that s. 146 authorises only the initiation of any proceeding, and that though it would have been competent to the appellant to have preferred an appeal against the judoment of P. B. Mukharji J. she not having done so was not entitled to be brought on record as an appellant to continue the appeal preferred by the second respondent. We are not disposed to construe s. 146 narrowly in the manner contended for by counsel for the first respondent. That section was introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. It has been held by a Full Bench of the Madras High Court in Muthiah Chettiar v. Oovinddoss Krishnadass (2) that the assignee of a part of a (1) [1955] i S.C.R. 1369.

(2) (1921) I.L.R. 44 Mad. 919.

decree is entitled to continue an execution application filed by the transferor-decree-holder. Vide also Moidin Kutty v. Doraiswami (1). The right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims, and the petition of the appellant to be brought on record as an appellant in Appeal No. 152 of 1955 must be held to be main. tainable under s. 146. It remains to consider whether, on the merits, there should be an order in favour of the appellant. Of that, we have no doubt whatsoever. The proceedings in which she seeks to intervene arise in execution of a mortgage decree. She has purchased the properties comprised in the decree for Rs. 60,000 under a covenant that they are free from encumbrances. And after her purchase, the first respondent has started proceedings for sale of the properties, nearly 18 years after the decree had been passed. The appellant maintains that the execution proceedings are barred by limitation, and desires to be heard on that question. It is true that P. B. Mukharji J. has rejected this contention, but a reading of his judgment shows-and that is what he himself observes-that there are substantial questions of law calling for decision. Even apart from the plea of limitation, there is also a question as to the amount payable in discharge and satisfaction of the decree obtained by the first respondent in Suit No. 158 of 1935. Both the respondents claim that they have settled it at Rs. 17,670. But it is stated for the appellant that under the decree which is sought to be executed the amount recoverable for principal and interest will not exceed Rs. 6,000. In the affidavit of Sanjit Kumar Ghose dated December 20, 1956, filed on behalf of the first respondent, particulars are given as to how the sum of Rs. 17,670 was made up. It will be seen therefrom that a sum of Rs. 7,200 is claimed for interest up to March 8, 1956, calculating it not at the rate provided in the final decree but at the contract rate. Then a sum of Rs. 5,000 is included as for costs incurred by the mortgagee in suits other than (1) I.L.R. 1952 Mad. 622.

Suit No. 158 of 1935 and in proceedings connected therewith. The appellant contends that the properties in her hands could, under no circumstances, be made liable for this amount. A sum of Rs. 1,750 is agreed to be paid for costs in the sale reference, in the proceedings before P. B. Mukharji J. and in Appeal No. 152 of 1955. Asks the appellant, where is the settlement in this, and how can it bind me ? It is obvious that there are several substantial questions arising for determination in which the appellant as purchaser of the properties is vitally interested, and indeed is the only person interested. As a purchaser pendente lite, she will be bound by the proceedings taken by the first respondent in execution of her decree, and justice requires that she should be given an opportunity to protect her rights.

We accordingly set aside the order of the Court below dated August 6, 1956 and direct that the appellant be brought on record as additional appellant in Appeal No. 152 of 1955. As Sudhir Kumar Mitter, the appellant now on record, has dropped the fight with the first respondent, we conceive that no embarrassment will result in there being on record two appellants with Conflicting interest. But, in any event, the Court can, if necessary, take action suo motu either under 0. 1, r. 10 or in its inherent jurisdiction and transpose Sudhir Kumar Mitter as second respondent in the appeal, as was done in In re Mathews. Oates v. Mooney (1), and Vanjiappa Goundan v. Annamalai Chettiar (2). As for costs, the appellant should, in terms of the order of this Court granting her leave to appeal, pay the contesting respondent her costs in this appeal. The costs of and incidental to the application in Appeal No. 152 of 1955 in the High Court will abide the result of that appeal.

Appeal allowed.

(1) (1905) 2 Ch. 460. (2) (1939) 2 M.L.J. 551.