

Sambhunath Auddy Vs. Tarak Nath Auddy and ors.

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Court : Kolkata

Decided On : Jan-15-1965

Reported in : AIR1965Cal450

Judge : D.N. Sinha and ;A.K. Mukherjea, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rule 16 - Order 34, Rules 7 and 8; ;Calcutta High Court (Original Side), Rules - Rule 13

Appeal No. : A.F.O.O. No. 138 of 1964

Appellant : Sambhunath Auddy

Respondent : Tarak Nath Auddy and ors.

Disposition : Appeal allowed

Judgement :

Sinha, J.

1. This is an appeal against an order passed by Ray, J. on May 19, 1964 whereby the learned Judge has dismissed an application made by the plaintiff appellant for amongst others the following reliefs:

(a) That the time to make payment into Court in terms of the decree dated May 20, 1957 in suit No. 2477 of 1955 be extended till one week after the date of the order, or till such time as this Hon'ble Court may seem fit and proper;

(b) That the petitioner be permitted to pay the the sum of Rs. 2166.42 nP. or such other sum as this Hon'ble Court may direct into the credit of the said suit within such extended time:

(c) That upon payment as aforesaid, the respondent Tarak Nath Auddy do deliver all documents in his possession relating to premises No. 30B, Ramdhan Mitra Lane, Calcutta to the appellant and if necessary, release for or reconvey the said premises to the appellant and deliver quiet and peaceable possession of the same.

2. The short facts in this case are as follows: One Anandalal Auddy was the owner of premises Nos. 30, 32, 34 and 36 Ramdhan Mitra Lane in the city of Calcutta. On the 13th August, 1934 he created an equitable mortgage in respect of his properties in favour of one of his sons, Tarak N(sic) Auddy, the respondent No. 1 in this appeal. On the 11th December, 1937 the said Anandalal Auddy executed a deed of trust under which he appointed his wife Padmabati Dassi as trustee. The proper-t ties were

divided into five lots. Padmabati was to enjoy the income for life and after her death the trust was to come to an end and of each of the said lots the five sons including Tarak and Sambhu was to get one lot absolutely. The trust was made subject to payment of the mortgage in favour of Tarak On the 1st October, 1941 Anandalal died. Some time in 1946, Tarak filed a suit against Padmabati for enforcement of his mortgage being suit No. 598 of 1946 (Tarak Nath Auddy v. Padmabati Dassi). In that suit, a final decree for sale of the mortgage property was made on the 20th September 1948. On the 11th October, 1948 Padmabati died. Thereupon, the trust came to an end and each of the five sons became owner of his respective lot. Sambhuath became the owner of No 30B Ramdhan Mitra Lane, while Tarak became the owner of 34 Ramdhan Mitra Lane. Sambhunath thereupon offered to redeem his lot on payment of a proportionate share of the mortgage debt, on the ground that the mortgagor, having become a part owner of the mortgaged property the integrity of the mortgage had been broken. It is stated, however, that Tarak refused to accept payment He, on the other hand, made an application for execution of the final decree in the said mortgage suit. On the 80th August, 1955 Sambhunath filed a redemption suit against Tarak claiming to redeem premises No. 30B, Ramdhan Mitra Lane, upon payment of a proportionate share of the mortgage debt. This was numbered as Suit No. 2477 of 1966 (Sambhunath Auddy v. Tarak Nath Auddy and Ors. On the 31st August, 1956 Sambhunath made an application in Suit No. 2477 of 1955 for stay of the execution of the decree in Suit No. 598 of 1946. What happened was that Tarak had applied for execution by sale of the said premises No. 30B Ramdhan Mitra Lane. On the 28th November, 1955 P. B. Mukharjj, J. made an order that the reference for sale in Suit No, 598 of 1946 be proceeded with but the report of the Registrar of this Court therein will not be confirmed till the disposal of the Suit No. 2477 of 1955. The learned Judge gave certain directions as to the hearing of the suit. As there was no stay oi sale in execution of the mortgage decree, premises No. 30B Ramdhan Mitra Lane was sold by the Registrar and was purchased by Tarak on the 5th January, 1957. On the 20th May, 1957 a decree was passed in suit No. 2477 of of 1955. It was declared that Sambhunath was entitled to redeem the mortgage in respect of premises No. 30B Ramdhan Mitra Lane. The decree inter alia provided as follows:--

'And it is hereby further ordered and decreed (i) that the plaintiff do pay into Court to the credit of his suit within two weeks of the date of such countersignature or any later date upto which time for such payment may be extended by the Court, such sum as may be found due and the taxed costs of the suit awarded to the defendant Tarak Nath Auddy.

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit as also that the costs in Suit No. 598 of 1946 as aforesaid and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908, the defendant Tarak Nath Auddy shall bring into Court all documents in his possession or power relating to the mortgaged property in so far as it relates to the plaintiff's share is concerned in the plaint mentioned and all such documents in respect of the plaintiff's share in the premises No. 30B, Ramdhan Mitra Lane be delivered over to the plaintiff or to such person as he appoints and the defendant Tarak Nath Auddy shall if so required reconvey or retransfer the said property in so far as it relates to the share of the plaintiff (hereinafter referred to as the said portion of the property) free from the said mortgage and clear of and from all incumbrances created by the defendant Tarak Nath Auddy or any person claiming

under him or any person under whom he claims and shall, if so required deliver upto the plaintiff quiet and peaceable possession of the said portion of the property.

And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant Tarak Nalh Auddy may proceed with the confirmation of sale and take all steps in suit for realisation of costs in the said suit No. 598 of 1946.' On the 14th October, 1961 Sambhunath by a conveyance sold his right, title and interest in premises No. 30B Ramdhan Mitra Lane to his wife Sm. Narayani Auddy. On the 8th January, 1968 the Registrar's report as to the amount payable for redemption of the said property was countersigned by the Court. Rs. 1286.55 nP. was found to be payable on account of the mortgage debt, together with Rs. 879.87 for costs; two sums of Rs. 728.78 and Rs. 170 were found payable by Tarak to Sambhunath. On the 22nd January, 1963 the time to make payment under the said decree expired. On the 21st April, 1964 an application was made by Tarak for confirmation of sale of the said property made in Suit No. 598 of 1946. On the 29th April, 1964 Sambhunath made an application asking for the reliefs abovementioned, which application was dismissed by Ray. J. on the 14th August, 1964. The learned Judge was not given any judgment. It is against this order that this appeal has been preferred. We are told the the learned Judge was impressed by the argument advanced on behalf of the respondent Tarak that the appellant Sambhunath, having transferred his right, title and interest in premises No. 30B Ramdhan Mitra Lane to his wife, could no longer maintain the application. Mr. Gouri Mitter appearing on behalf of the appellant has taken several points in connection with the appellant's locus standi to apply for execution of the decree, which are as follows: (1) That by the conveyance dated 14th October, 1961 Sambhunath transferred his right, title and interest in premises No. 30B Ramdhan Mitra Lane to his wife, but the decree passed in Suit No. 2477 of 1955 had not been transferred thereby and there are no express words in the conveyance transferring the decree. (2) Even if the said conveyance is considered to be a transfer of the decree, the whole decree has not been transferred but only a part thereof, e.g., amounts payable by Tarak to Sambhunath, as appears in the report of the Registrar, have not been transferred. A part of a decree cannot be transferred in law. Where there is such a transfer, the assignee cannot apply for execution of the decree. (3) Transfer of a decree does not by itself take away the right of the assignor to apply for execution of the decree, but the assignee has a right to make an application under Order 21 Rule 16 of the Civil Procedure Code, and it is only then that the Court has jurisdiction to allow execution to be levied by the assignee. Unless such an application is made, the Court is bound to allow the recorded decree-holder to proceed with the execution. Even if the Court comes to know of the assignment, it cannot prevent the assignor from executing the decree but in an appropriate case may safeguard the interest of the assignee.

3. Assuming that the appealant has got the right to apply for execution of the decree in spite of the conveyance of his right, title and interest in the property in favour of his wife, the next point is as to whether he is entitled to ask for extension of time for payment of the money. Upon this point, Mr. Mukherjee appearing on behalf of the respondent No. 1 has argued that, by the decree dated 20th May, 1957 the appellant was called upon to pay into Court the amount due within two weeks of the date of the countersignature by the Court of the report of the Registrar, which event took place on the 8th January, 1963 or upon such date as may be extended by the Court. He argues that the appellant did not pay within two weeks and did not ask for any extension of the time for over a year, and the default clause operated and Tarak had asked for confirmation of sale and is entitled loan order of confirmation. In fact, on

the same date after dismissing the appellant's application for extension of time to pay and other reliefs, the learned Judge dealt with the application of Tarak for confirmation of sale and has made an order confirming the sale in Suit No. 598 of 1940, Against that order also an appeal is pending which is next in our list for disposal. He argues that after the time to pay has expired and the default clause had operated. no further extension of time can be granted and the order for confirmation of sale was rightly made and the prayer for extension of time to pay in Suit No. 2477 of 1955 has been rightly rejected.

4. I shall now proceed to deal with the point of locus standi. Order 21 Rule 16 of the Civil Procedure Code deals with applications for execution by the transferee of a decree. The relevant provisions run as follows:

Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder: Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution

5. It will be necessary in this connection to consider certain reported decisions. In *Jasoda Dey v. Kirtibash Das*, ILR 18 Cal 639. It was held by a Division Bench of the High Court presided over by Tattenham, J that the person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under Section 232 of the Civil Procedure Code, that he has taken the decree-holder's place. Section 232 of the Civil Procedure Code of 1882 corresponds to Order 21 Rule 16 of the Code of 1908. The facts of that case were as follows: One Jasoda Dey obtained decree in her capacity of widow of her late husband Kashinath Das. Before the decree had been obtained, a suit had been brought by the judgment-debtor as reversioner to the estate of Kashinath Das to obtain possession of the estate and remove the widow from possession. In that suit, a receiver was appointed and by the decree in that suit the widow was ousted. The receiver took no steps to put himself on the record as decree-holder and did not apply for execution under Section 232 of the Code of Civil Procedure. The widow applied for execution and the judgment-debtor took the objection that it is only the receiver who was competent to execute the decree. The learned Subordinate Judge held in favour of the judgment-debtor and dismissed the application, against which there was an appeal to the High Court. The learned Judges stated as follows:

'It has been urged before us that the Subordinate Judge had no choice under the Code of Civil Procedure but to grant execution at the instance of the recorded decree-holder, unless the assignee, whether by conveyance or, as is alleged in the present instance, by operation of the law, should come in under Section 232.

Authority for this contention has been shown to us in the case of *Khettur Mohun Chuttopadhya v. Isur Chunder Surma*, 11 Suth W.R. 271, where it was held that the Court was bound to allow execution at the instance of the recorded decree-holder unless intimation had been given in the regular way prescribed by law for the admission of another person in the decree-holder's place. And we think that the

contention is sound that the decree-holder who appears upon the face of the decree is entitled to execute, unless it be shown by some other person under Section 232 that he has taken the decree-holder's place.

'It seems to us, therefore, that in this case we must direct that the execution to proceed at the instance of the decree-holder, Jasoda Deye;''

The learned Judges gave certain directions for protecting the interest of the receiver. The next case to be considered is a Division Bench decision of this High Court presided over by Sir Ashutosh Mukherjee--Monmotho Nath Mitter v. Rakhal Chandra Tewary 10 Cal L.J. 396. It was held that the Court was bound to allow execution at the instance of the recorded decree-holder unless intimation has been given in the regular way prescribed by law for the admission of any person who obtained leave to carry on execution as an assignee Mukherjee, J. however gave directions, for the protection of the assignee. The next case to be considered is a Division Bench judgment of the Bombay High Court, Sitabai Rambhau v. Gangadhar Dhanram AIR 1935 Bom 331. Rangne-kar, J. said as follows:

'As regards the first point, the position seems to me to be clear. In the first place Order 21 Rule 16, Civil P. C., does not compel the assignee to come forward and have himself substituted on the record in place of the judgment-creditor. It gives him an option to do so; he has a right to bring himself on record if he wants to see that his rights are enforced, but he is not bound to do so. And the Darkhast, which is regularly filed by the holder of the decree, cannot come to an end because, pending execution, the judgment-creditor has assigned his interest in favour of another person. It is well established by decisions of this Court, that an assignee does not become a holder of the decree within the meaning of Order 21, Rule 16 and Section 2 Civil P. C., unless he applies to the Court to bring himself on record in place of the judgment-creditor I need only mention the authorities. They are: 18 Cal 639, 14 Lab 744, 4 Rang 426, 10 Cal L.J. 396.'

A similar view was taken by the Oudh High Court in Atma Ram v. Shyam Kumar Singh, AIR 1948 Oudh 176. Misra, J, said as follows:

'Section 146 of the Code authorises the taking of proceedings or the making of an application by or against a person claiming under the decree-holder. It follows that a decree may be executed either by the decree holder himself or by those who claim under him namely his assignees. The fact that Order 81, Rule 16, Civil P. C., makes a provision for execution of the decree by the assignees does not debar the person in whose name the decree stands from taking an action for satisfaction of the decree or for keeping his decree alive.'

In the instant case, Sambhunath is the recorded decree-holder and no application has been made, by his wife to whom he appears to have conveyed his right, title and interest in premises No. 30B Ramdhan Mitra Lane. Therefore, following the principles laid down in the abovementioned cases, there is no impediment in Sambhunath making application for execution. On the question of locus standi, this conclusion is quite sufficient. I do not think that in this application I should decide points Nos. 1 and 2 raised by Mr. Mitter. The first is that a mere transfer of property is not a transfer of the decree. Mr. Mitter has cited a decision of the Madras High Court, Perumal Naidu v. Marti-krithammal : AIR1927Mad240 . In that case, two persons applied for execution. One claimed to be the purchaser of the property which

was the subject-matter of the decree and the other person claimed to be the assignee of the decree. It was held that an application for execution can only lie at the instance of the assignee of the decree and not of the property. So far as the assignee of the property was concerned, his only remedy was to file a suit. The second point is that a transferee of a part of a decree cannot make an application for execution. Mr. Mitter has cited several eases, e.g., a decision of the Bombay High Court, *Narayandas Sundarlal v. Tejmal Mohanlal*, AIR 1934 Bom 59. It was held there that a decree for purposes of execution must be regarded as a whole and indivisible; when it is sought to execute it, it must be executed as a whole and not split up into parts. Hence, an assignee of a part of a decree is not entitled to execute his part of the decree, nor even the whole decree as he cannot be regarded as a joint decree-holder. It appears that this view is supported by the Allahabad High Court in *Hansraj Pal v. Mukhraj Kunwar* ILR 30 All 28. It was held that when the decree-holder holding a decree for possession of immovable property sells a portion of such property, the sale does not, without express provision to that effect, give the purchaser any right to execute the decree himself. It appears, however, that there are contrary views of the Calcutta and Madras High Courts. See *Kishore Chand Bhakat v. Gisborne and Co.* ILR 17 Cal 341 and *Muthia Chettiar v. Govindadoss* AIR 1921 Mad 599 (F.B.). In these two cases, it was held that there was no objection to a part assignee of a decree making an application for execution thereof. In my opinion, in the present case we should not decide these two points finally. It is sufficient to hold that Sambhunath can make the application with which we are concerned. The alleged assignee has yet made no application under Order 21 Rule 16. These points may be considered if and when she does make such an application. After all, she is not before us and it may be prejudicial to her if we make observations on these points.

6. The next point to be considered is as to whether the court below should have extended the time for payment, or permitted Sambhunath to pay the necessary sums into court and there-upon directed Tarak to release and reconvey the premises in favour of Sambhunath. So far as extension of time is concerned. Mr. Mukherjee has argued that the time for payment has been laid down in the decree dated 20th May, 1957, whereby it is ordered and decreed that the plaintiff do pay into court within two weeks such amount as may be found due, together with the taxed costs or within such time as may be extended by the court. In that decree, there is a default Clause. As Sambhunath did not pay within two weeks and the time for payment had not been extended, the default clause operated and Tarak rightly applied for confirmation of sale and got an order. It is argued that now it is too late to make an order of extension. It is true that extension is a matter of discretion, and a court of appeal will not lightly interfere with an exercise of discretion by the lower court. But the discretion must be exercised judicially. It will, therefore, be necessary to find out whether there are factors which should have induced the court below to extend the time or to make an order directing payment into court. For this purpose it is necessary to look into the provisions of Order 34 Rule 7 and Rule 8. Order 34 Rule 7 deals with preliminary decrees passed in a redemption suit. It is provided that in a suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree ordering an account to be taken, declaring the amount so due and directing that if the plaintiff paid into court the amount so found or declared due, on or before such date as the court may fix within six months from the date on which the court confirms and countersigns the account, or from the date on which such amount is declared in court, then the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from all

incumbrances created by him and if necessary, put the plaintiff into possession of the property Sub-rule (2) provides that the court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due, or adjudged due in respect of subsequent costs, charges, expenses and interest. Rule 8 deals with a final decree in a redemption suit. It provides that where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree, the plaintiff makes payment into court of all amounts due from him, the court shall on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order ordering the defendant to deliver up the documents referred to in the preliminary decree and, if necessary, order him to re-transfer, at the costs of the plaintiff, the mortgaged property and also, if necessary, order him to put the plaintiff in possession. Coming now to the decree passed on the 20th May, 1957, it appears that it is a composite one. It has all the elements of a preliminary decree providing for accounting and payment of the money which must be done within two weeks or such time as may be extended by the court. This is on lines of Rule 7 of Order 34. It must be remembered, however that a sale had already taken place in the mortgage suit. So, it was ordered that if the payment was not made then the mortgagee would be entitled to proceed with the confirmation of sale in the mortgage suit. It will be observed that although under Rule 7 of Order 34 the time is fixed by the court for payment, which time may be extended by the court, still under Rule 8 the mortgagor can make payment into court right up to the time of confirmation of sale, and if he does so, then the court is compelled to direct that the property be reconveyed etc. In the present case, it is true that the time for payment fixed under the decree dated 20th May, 1957 had expired, but the mortgagor had still the right to put in the money into court before the sale was confirmed. If he did so, the court was bound to make an order in his favour and direct the mortgagee to make over the documents etc. If the mortgagor still had that right, the court should have taken that factor into consideration while deciding whether the time for payment should be extended or not. The next question is as to whether the mortgagor was entitled to avail himself of the provisions of Rule 8 as he had not put in the money into Court at the time he made the application dated 29th April, 1964. Mr. Mukherjee argues that he had obtained a certificate from the Registrar to the effect that the amount had not been paid into court up to the 14th day of February 1964. In my opinion, this does not help him because according to our rules an application has to be made before the court for payment into court, and most certainly so after a certificate of non-payment had been obtained. (See Chapter 24 Rule 13 of our rules in the Original Side). Therefore, Sambhunath could not, without obtaining an order, make payment into court and comply with the provisions of Rule 8. What he did was to tender the money to Tarak, which he did as early as in 1955. When the application in the court below was being heard, he offered to pay the money in cash. In our opinion, regard being had to all the facts and circumstances of the case, the time to pay should have been extended or Sambhunath ought to have been permitted to put the money into court in order to prevent the confirmation of sale. In this application, of course, we cannot do anything about the confirmation of sale, which we shall deal with in the next application. It will have to be set aside. The result is that this appeal should succeed and the order of Ray, J, dated the 19th May, 1964 is set aside and order made as follows:--

(a) That the time to make payment into court in terms of the decree dated May 20, 1957 be extended till one month after this order.

(b) Upon such payment, the terms of the said decree be carried out. Tarak will be entitled to the costs in the court below, but there will be no order as to costs in the appeal.

Arun k. Mukherjea, J.

7. I agree.

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