Sm. Bibhabati Debi and Others Vs Ramendra Nabayan Roy and Another

Court: Calcutta High Court

Date of Decision: Dec. 18, 1936

Judgement

S.K. Ghose, J.
This is an application for stay of execution under Or. 41, r. 5 of the CPC and sec. 151 of the CPC and it arises out of a

first appeal which is described for the present as F.A.F. 17618 of 1936. In the District of Dacca there is a large estate, commonly known as

Bhowal Raj Estate, which at the material time was owned by three brothers Kumar Ranendra Narain Roy, Kumar Ramendra Narain Roy and

Kumar Rabindra Narain Roy, sons of Raja Rajendra Narayan Roy who died in 1901. It is said that the first Kumar died in 1910, the second in

1909 and the third in 1918. All the three Kumars died childless, leaving behind only widows. The Petitioner Defendant No. 1, Sreemati Bibhabati

Debi was the widow of the second Kumar, Opposite Party Defendant No. 2 was the widow of the first Kumar and the Petitioner Defendant No.

4, Sreemati Ananda Kumari Debi was the widow of the third Kumar. The Court of Wards assumed charge of the entire Bhowal Estate in 3911-

12 and has been managing it ever since. It further appears that in 1919 the estate of the third widow Ananda Kumari Debi was released but the

Court of Wards Continued to manage it in her behalf. She also adopted Defendant No. 3, Ram Narain Roy, as her son and according to the

Petitioners this adopted son would also be reversioner in respect of the remaining two-thirds share. The Plaintiff Opposite Party No. 1 instituted a

title suit, viz., Title Suit No. 70 of 1930, renumbered as 38 of 1935, in the Court of the 1st Additional District Judge of Dacca for a declaration of

title to one third share and for an injunction restraining the present Petitioners from interfering with his right and further for a declaration that he is

Kumar Ramendra Narain Roy, the second son of the late Raja Rajendra Narain Roy. The main allegations upon which the Plaintiff"s suit was

based were that he, the second son of the late Raja Rajendra Narain Roy, went to Darjeeling in April, 1909, in company of the Petitioner No. 1,

Sm. Bibhabati Debi and others and was administered poison there and left for dead on the cremation ground at Darjeeling on the night of 8th May,

1009. But on account of severe rain and storm he was left there and was subsequently rescued by certain Naga Sanyasis with whom he wandered

about throughout India for 12 years, having completely lost his memory. He came back to Decca in 1920-21 and being recognised by certain

persons was prevailed upon to declare himself as the second Kumar of Bhowal. He then began to collect rents from the tenants, but the Court of

Wards interfered with his possession and so he brought the present suit. The defence of the Petitioners inter alia was that the Plaintiff was a Punjabi

Sannyasi and an impostor. The second Kumar died of billiary colic at Darjceling at about midnight of 8th May, 1909, and duly cremated on the

following morning. The Petitioners alleged that the aforesaid impostor was put forward by certain designing persons, dismissed officers and some

dissatisfied tenants. Sm. Saraju Bala Debi, the widow of the first Kumar, supported the Plaintiff in this case. The others resisted it. The hearing of

the suit lasted for two and half years. The judgment was delivered on 24th August, 1986. It will be relevant to refer to the decree. The material

portion of it runs as follows:

It is ordered and decreed that it be declared that the Plaintiff is the Kumar Ramendra Narain Roy, the second son of the late Raja Rajendra Narain

Roy, Zemindar of Bhowal, and that he be put in possession of an undivided one-third share in the properties in suit-the share now in enjoyment of

the first Defendant jointly with the other Defendants'' possession over the rest.

There is no decree for mesne profits. Upon this decree being made, the present Petitioners filed an application before the trial Court for interim

stay pending the filing of an appeal before the High Court and this application was made on 21st September, 1936. On 5th October the learned

Judge below made an order directing stay of execution on terms, the main condition being that the Court of Wards undertook not to pay the

income of the estate to Sm. Bibhabati Debi, Defendant No. 1.

2. The appeal was filed before the High Court on 5th October, 1936, but has not yet been registered. The present application was filed before the

High Court on 10th November, 1936. The parties to the petition who are also parties to the appeal are (1) Sreemati Bibhabati Debi, (2) Ram

Narain Roy, (3) Sreemati Ananda Kumari Debi Wards of Court, represented by Rai Sahib U.N. Ghose, Manager, Court of Wards and (4)

Sreemati Bibhabati Debi in her individual capacity. Defendants, Appellants, Petitioners versus (1) Ramendra Narain Roy, Plaintiff-Respondent,

and (2) Sreemati Saraju Bala Debi, pro forma Defendant No. 2 Respondents, Opposite Parties.

3. Upon the petition of appeal being filed the Stamp Reporter put up a note to this effect.

The appeal is not in form as the Appellant No. 1 did not appear in her individual capacity in the trial Court. She seems to appear here in a new role

affecting the question of her status. She is appealing here as a Court of Wards represented by the Manager and also in her individual capacity. In

her different capacities though there might be common interest to some extent, still there might be some interest which may be at variance with that

of the Court of Wards. In that case there might be conflicting interests represented by the same Appellant in the same appeal. So it is disputable

matter whether she can join in an appeal filed by the Court of Wards in their representative capacity. If not, a separate appeal has got to be filed

by her on payment of proper Court-fees.

4. Thereupon a Rule was issued by this Court upon the Opposite Parties to show cause why pending the hearing of the appeal in this Court,

proceedings in execution of the decree appealed from should not be stayed or such other order or orders made as to this Court might appear fit

and proper. At the same time a copy of the Stamp Reporter''s report was issued along with Rule. Both matters have come up for hearing before us

now.

5. The first question is that raised in the report of the Stamp Reporter, namely, whether Sm. Bibhabati Debi can appeal both as represented by the

Court of Wards and also in her individual capacity and, if she can, whether separate Court fees are payable by her upon a separate appeal. The

question of court-fees has not been seriously argued before us by either side. Mr. S. M. Bose, appearing for the Petitioners, has contended that

Bibhabati Debi is entitled to appeal because she is affected by the decree. Mr. Chatterji appearing for the Plaintiff Opposite Party has contended

that Bibhabati Debi cannot file an appeal at all. It seems to us that the question to decide here is whether Bibhabati is entitled to file an appeal at all.

If she is, there is no point in asking her to file a separate appeal and no question of her paying separate court-fee arises. Therefore the question is

whether she is entitled to appeal at all. Now, the decree which I have quoted above shows that it affects her both-ways, that is to say, both with

regard to her estate and also individually, inasmuch as there is a declaration to the effect that the Plaintiff Opposite Party is her husband or rather

that he is the second son of the late Raja Rajendra Narain Roy and therefore he is her husband. Mr. Chaterji''s main contention is that the Court of

Wards is not entitled to come at all, because it has become functus officio, and it is suggested that for this reason the lady has chosen to become a

party to the appeal in a dual capacity. Mr. Chatterji has drawn our attention to certain sections of the Court of Wards Act, viz., secs. 6, 8 and 10

going to show under what conditions the Court of Wards can take charge of the estate and it is argued that all the conditions have ceased to exist

by reason of the decree and therefore the Court of Wards can no longer be any party. By way of analogy he refers to the case of a minor attaining

majority. This may be easily distinguished, because the case of a minor attaining majority is a circumstance outside the decree. But here the reason

why the Court of Wards is stated to be functus officio is the decree itself. Therefore Mr. Chatterji appears to us to beg the question when he says

that this application cannot be granted, because the Court of Wards has ceased to exist and therefore cannot make an application. It seems that

Mr. Chatterji has reached an impossible position, because his contention is that neither the Court of Wards nor Bibhabati Debi can make the

application and therefore there can be no application for stay of the decree. On the face of it the Petitioners are a party to the decree and Bibhabati

is a proper person to make this application also in her individual capacity because, as I have pointed out, she is affected by the decree in her

individual capacity. Consequently she is a proper party and there is no reason to ask her to file a separate application and pay separate court-fees.

6. The next point which arises is whether the present application is maintainable at this stage. Mr. Chatterji has contended that it is not, because the

appeal itself has not yet been admitted and he has drawn our attention to the rules of this Court on the Appellate Side, viz., Rules Nos. 12-14,

Chapter V, page 28. These are rules of office routine which cannot and do not oust the provisions of the Code and, further, it is not shown to us

that the present application was incompetent by reason of any rules of the Court not having been complied with. On the contrary all that appears is

that the appeal was properly filed and that thereupon the Stamp Reporter made his report in accordance with the rules of the Court for a decision

by the Court. The present application, as I say. is one made under Or. 41, r. 5 of the CPC and it cannot be said that the Appellate Court has no

seisin of the matter when it appears that the appeal itself has been preferred in accordance with Or. 41, r. 1. When the appeal has been preferred

in this way, certain preliminary conditions have got to be fulfilled, namely these contained in rr. 2, 3 and 4. Then comes r. 5. The procedure on

admission of appeal is dealt with from r. 9 onwards. Mr. Chatterji has referred to the case of Furshottam Saran v. Hargulal ILR 43 All. 198

(1920) and the same case at page 513 of the same volume. That was a case in which the application for stay was filed before the Vacation Judge

who was given an assurance that the appeal would be filed on the date the Court re-opened and he accepted that assurance. The appeal was

actually filed on the date when the Court re-opened. It was there held that the order granting stay of execution was without jurisdiction But in the

present case, as I have mentioned already, the appeal was actually filed before the present application for stay of execution was made. We do not

think therefore that there is any substance in Mr. Chatterji''s contention and we hold that the present application is maintainable.

7. I now come to the main question, namely whether the Plaintiff should be restrained from executing his decree. We have before us the present

petition for stay of execution, the affidavit in support of it, the counter-affidavit, and the affidavit in reply. Ordinarily Plaintiff would be entitled to

execute his decree, but execution may be stayed on terms under Or. 41, r. 5, or it may proceed on terms as under r. 6, or whether it is stayed or

proceeded with, a Receiver may be appointed under the Court''s powers under the provisions of Or. order 40 rule 1. These are relevant

considerations in the light of the argument which have been made before us. In a matter under Or. 41, r. 5 of the Code the Court has the power to

make an order staying execution if there is sufficient cause. But this expression in sub-r. (1) must be read along with the conditions in sub-r. (3) and

each of the three conditions mentioned therein must be taken to be a necessary ingredient before stay of execution may be granted. If authority is

needed for this proposition I refer to the case of G. Sundaram Chettiar v. P.A. Valli Ammal ILR 58 Mad. 116 at p. 125 (1934) and the case of

Srinibash Prasad Singh v. Kesho Prasad Singh ILR 38 Cal. 754; s.c. 15 C.W.N. 475 (1911). With regard to the latter case, I may say that

despite differences it would appear to be an apposite authority in the present case and it will have to be referred to again. Now the point has been

argued in this way. Mr. Bose contended that there is no question that the application has been made without unreasonable delay as the dates

already mentioned would show. Then it is contended that his clients would suffer substantial loss unless the stay of execution be granted. Then on

the third question, namely that security should be given by the applicants, Mr. Bose appeared to be in a difficulty. When the application was made

to the lower Court for an interim stay, the same question arose and it appears that the same difficulty was felt. The lower Court remarked as

follows:

The Petitioners have not given and do not propose to give any security so that an order under r. 5 (2) is out of the question.

8. Then he goes on to say:

the circumstances of this case are very peculiar and all that is wanted is not an order that will enure for the whole period of appeal or until a final

decree is made but a stay till the appeal is filed, so that the Appellate Court might deal with the question of stay, and the learned Advocate for the

Petitioners stated that the Court of Wards undertook to hold the income of the share decreed, less cost of management, and such litigation as

management needs, until the order asked for expires, and not to pay any part of it to, or for the benefit of the first Defendant.

9. Ultimately the lower Court made the order directing stay of execution as follows:

I direct that execution be stayed till the 21st November, 1936, on condition that applicants produce an undertaking by the Court of Wards, as

above, and file it in Court on or before 17th November, 1936, when the Court opens after the vacation. In default the application will stand

rejected and execution will issue. Execution will also issue before the 21st November, 1936, if before that date the Appellate Court refuses a stay.

10. In accordance with this order an undertaking was filed by the Secretary to the Board of Revenue. Mr. Bose did not suggest that his clients

were in a position to offer any other security, nor did he seriously suggest that the undertaking as offered in the lower Court, or something like it,

would be acceptable to this Court as security for the present application. It is obvious that such an undertaking cannot be enforced as a personal

security under sec. 145 of the CPC and its legal validity is also not free from doubt. The same difficulty arose in Srinibash Prosad''s ease ILR 38

Cal. 754: s.c. 15 C.W.N 475(1911). On the other hand Mr. Bose suggested that much the better course would be to appoint the Manager of the

Court of Wards Receiver, his argument being that in that case the property itself would be placed in the hands of the Court and no further security

would be needed, and he sought to distinguish the case of Srinibash Prasad Singh v. Kesho Prasad Singh ILR 38 Cal. 754: s.c. 15 C.W.N

475(1911), on the ground that there the Court of Wards wanted to use the income and did not offer to keep it aside and did not ask for the

appointment of Receiver. Mr. Chatterjee for the Plaintiff Opposite Party then argued, in the first place, that there would be no substantial loss to

the applicants if the execution of the decree were proceeded with, and that in any case Plaintiff would give security for the loss that might ensue to

the applicants, and further that his client would be willing to appoint the Manager, Court of Wards, Manager under him. At this stage of the

argument Mr. Bose on being questioned by the Court stated that his client Sm. Bibhabati Debi would be willing to offer security through some

approved guaranteed Association, but (said Mr. Bose) still the better course would be to appoint the Manager of the Court of Wards, Receiver.

However, in face of Mr. Chatterjee''s offer Mr. Bose took time to consult his clients and thereafter he stated to the Court that there would be

some difficulty in the way of the Manager, Court of Wards, being appointed Manager under the Plaintiff. At the same time he conceded that his

argument that the aforesaid Manager might be appointed Receiver was weakened, and he suggested that so far as his clients were concerned, they

would prefer to offer security through some guaranteed Association. It is apparent that the matter before us, by reason of the arguments which

have been developed on both sides, has drifted out of the four corners of Or. 45, r. 5. But we may say, with respect, that we consider that

Counsel have acted properly throughout, because these are matters which do arise out of the application and in any case they are bound to arise in

course of the execution proceedings. It is to the interest of all parties that the questions should be settled at least for the time being and it is within

the Court"s power to make a proper order without driving the parties to file separate applications.

11. The first question is whether substantial loss may result to the applicants unless the order is made. Mr. Bose has pointed out that the property

in dispute is a one-third undivided share and there is no question of mesne profits, thereby distinguishing this case from the case of Srinibash Prasad

Singh v. Kesho Prasad Singh ILR 38 Cal. 751: s.c. 15 C.W.N. 475 (1911). Further in this case there is a declaration to the effect that the Plaintiff

Opposite Party is the husband of the applicant No. 1, Sm. Bibhabati Debi. Then with regard to the management of the estate Mr. Bose has

contended that thousands of suits and certificate proceedings are pending in Courts against the tenants and it will be difficult to carry on these

litigations if the decree is allowed to be executed. It is further alleged that the collection of rents has been almost paralysed by the confusion created

by the judgment inasmuch as the tenants are refusing to pay rent to the Court of Wards on the plea that the receipt granted by the Court of Wards

will not be a valid acquittance. It is further alleged that the Plaintiff is a sannyasi and a person of no substance and that once he gets possession of

the estate, he will ruin it in no time. It is pointed out that the Court of Wards has already been in possession for a long time and that the Plaintiff has

been out of possession with knowledge of his rights. Mr. Bose has referred to the dissenting judgment of Teunon. J., in the case of Srinibash

Prasad Singh v. Kesho Prasad Singh ILR 38 Cal. 751: s.c. 15 C.W.N. 475 (1911) and pointed out that there would be serious danger, waste and

injury if the estate is handed over to the Plaintiff Respondent. I may note here in passing that Teun8on, J., in taking this view, was apparetly

impressed by the fact that settlement proceedings under the Bengal Tenancy Act were in progress in 900 villages and so he thought that the estate

at this stage"" should not be handed over to a different person. Mr. Chatterjee on the other hand has contended that the idea of substantial loss is

exaggerated and based on speculative grounds and that in any case the tenants would pay their 1/3rd share to the Plaintiff. He has pointed out that

proceedings for realisation of rent may be started under sec. 148A of the Bengal Tenancy Act and that in any case although the Plaintiff himself

might be in difficulty, the Court of Wards might realise the 2/3rds share without much difficulty. Still the question to be considered would be

whether the present Petitioners, if successful, would be able to recover their property. In reply to this Mr. Chatterji made his offer, namely the offer

of security and secondly management by the Court of Wards. Now, with regard to the enquiry as to substantial loss, the Court cannot ignore such

an offer when it is made. An offer like this also was made before Mookerjee, J., in the case of Srinibash Prosad Singh v. Kesho Prasad Singh ILR

38 Cal. 754: s.c. 15 C.W.N. 475 (1911). For ourselves we attach importance to this consideration that there should be minimum disturbance of

possession consistent with the decree-holder"s rights and this is to be taken into consideration along with Mr. Chatterji"s second offer of keeping

the management under the Manager of the Court of Wards, an offer which was not made in Srinibash Prosad Singh"s case ILR 38 Cal. 754: s.c.

15 C.W.N. 475 (1911) and so Teunon, J., had not to consider it. If these two conditions offered by Mr. Chatterji are complied with, it seems that

point is taken out of Mr. Bose"s argument and it cannot be said that substantial loss to the applicants is made out. In this view the question of

security offered by Sm. Bibhabati Debi does not arise.

12. The short point then comes to this, that the Court of Wards is to remain in possession and the question is whether it is to remain as Manager

under the Plaintiff or as Receiver under the Court. The second question also does not arise if the first question, is decided in favour of Mr.

Chatterji"s client. Now Mr. Bose has stated that there are difficulties in the way of the Manager, Court of Wards, being Manager under the

Plaintiff, because their interests might conflict. The Manager, Court of Wards, as the guardian of the Wards has already been fighting the suit

against the Plaintiff and therefore the interest of the Manager of the Court of Wards as representing the applicants might be different from his

position as manager under the decree-holder Opposite Party. But Mr. Bose had urged strongly for the appointment of the manager as receiver and

he has had to concede that his position was inconsistent, though the receiver would be accountable to the Court. Mr. Bose had to shift his ground

advisedly because of the offer made by Mr. Chatterji. Mr. Chatterji has contended that so far as the Plaintiff is concerned, he is willing to take the

risk and there is no question of personal animosity as between the manager of the Court of Wards and the Plaintiff. Further under sec. 52 of the

Court of Wards Act it is possible for the Court of Wards to appoint another person to be the next friend or guardian in the suit. Mr. Chatterji has

also pointed out that the Defendant Sm. Saraju Bala Debi has supported the Plaintiff and now she is Respondent in the appeal and an Opposite

Party to this application. It is further pointed out that the Manager of the Court of Wards acted as manager for the widow of the third Kumar. Sm.

Ananda Kumari Debi for 13 years and Mr. Chatterji has offered that he should be appointed manager under the Plaintiff on the same terms. In

answer to the Court''s question Mr. Bose stated that if it should be decided that the Plaintiff should be allowed to obtain possession by reason of

the decree then, rather than give up possession, the Manager of the Court of Wards would remain as manager under the Plaintiff. For ourselves we

see no force in the difficulty suggested by Mr. Bose and, as I have already said, we attach importance to this that by this arrangement there would

be no change of actual physical possession of the estate. As regards the appointment of the manager as receiver under the Court, Mr. Chatterji has

pointed out that that would deprive the Plaintiff of the fruits of the decree in spite of the fact that he has gone a long way to meet the wishes of the

applicants. It has been said that the policy of the Legislature is that decree-holder should be allowed to reap the fruits of the decree unless sufficient

cause is made out. Having regard to the circumstances before us, it is difficult for us to say that it is necessary that any one should be appointed

receiver at this stage. We therefore make the following order:

The present application for stay of. execution be refused. The Plaintiff decree-holder has already applied to the lower Court for execution of the

decree and a conditional order has been made by the learned Subordinate Judge as I have already mentioned. Therefore execution will proceed.,

but subject to the following conditions:-As regards the amount of security, it is not disputed that the annual income of the one-third share in dispute

is one lac of rupees and it is suggested that the appeal may last two years. Therefore the amount of two lacs of rupees would be the proper amount

of security. Plaintiff will furnish security for this amount to the satisfaction of the Registrar of the Appellate Side in this Court.

13. Next the Manager, Court of Wards, will be appointed manager of the one-third share in dispute on the same terms as in the case of the one-

third share possessed by Sm. Ananda Kumari Debi, Defendant Petitioner No. 3.

14. Should the appeal be not disposed of within two years, the applicants will have liberty to apply to have the question of security reconsidered.

15. The costs of this Rule, the hearing-fee of which is assessed at five gold mohurs, will be costs in the appeal. The security as above must be

furnished within two months as suggested by Mr. Roy on behalf of the Plaintiff Opposite Party. Pending the two conditions being satisfied the

execution of the decree will remain stayed.

Mcnair, J.

I agree.