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Court : Kolkata

Decided On : Feb-27-1950

Reported in : AIR1950Cal386

Judge : Harries, C.J. and ; Bachawat, J.

Acts : Specific Relief Act, 1877 - Section 42; ; Bengal Court of Wards Act, 1879 - Section 13 and 13A; ; [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115

Appeal No. : Civil Rule Nos. 7 and 26 of 1949

Appellant : Surendra Narayan Deb and anr.

Respondent : Bhairabendra Narayan Deb and ors.

Advocate for Def. : Amarendra Mohan Mitra and ; Nagendra Mohan Saha, Advs. (in No. 26), Atul Chandra Gupta, ; Ashutosh Ganguly and ; Jatindra Nath Banerjee, Advs.

Advocate for Pet/Ap. : Paresh Nath Mookerjee (Jr.) and ; Asoke Chandra Sen, Advs. (in No. 7)

Judgement :

Harries, C.J.

1. These are two petitions for revision of orders made by the learned Subordinate Judge of the First Court of 24-Parganas on 29th September 1948. By these orders

the learned Subordinate Judge held that two suits filed by the petitioners were not maintainable by reason of Section 42, Specific Relief Act.

2. The petitioners were related--one being the uncle of the other. Each of the petitioners had brought a suit claiming that the Bijni Raj which owned extensive zamindari property in Assam and other properties in Calcutta and Benaras, belonged to them. One based his claim on lineal primogeniture and the other on the rule of ordinary primogeniture. In both the suits two defendants were impleaded, namely, Kumar Bhairabendra Narayan Deb, the present holder of the Raj as defendant 1 and the same Bhairabendra represented by the Manager of the Bijni Raj Wards Estate, as defendant 2.

3. To appreciate the points at issue it will be necessary shortly to set out the history of litigation relating to this estate. The litigation actually started soon after March 1883 when the then holder of the Raj, Raja Kumud Narayan Bhup died. The Raja left surviving him two widows--Rani Abhoyeswari and Rani Siddheswari--and these two Ranis litigated. After the death of Rani Abhoyeswari Raja Jogendra Narayan Bhup, a brother's son of Raja Kumud Narayan, became the holder of the Raj. Raja Jogendra Narayan Deb, however, became insane and the Court of Wards took over the management of the estate in December 1918. It is to be observed that litigation went on relating to this estate and eventually the dispute was decided by the Judicial Committee of the Privy Council who pronounced judgment on 16th February 1942.

4. In order to put an end to this dispute relating to this Raj the Assam Government in the year 1931 enacted the Rijni Succession Act (Assam Act II [2] of 1931) which came to be considered in the Privy Council case which brought one stage of this litigation to a close. This Act declared that the then holder Raja Jogendra Narayan, was the owner of the estate and provided that the next holder of the estate would be Bhairabendra Narayan Deb, defendant 1 in the present suits Raja Jogendra Narayan whose estate was still being managed by the Court of Wards died on 18th June 1937 whereupon the Assam Government by a notification in the gazette declared that Kumar Bhairabendra Narayan Deb, defendant 1 in these suits had become the proprietor of the Bijni Raj. The Court of Wards continued in the

management of the estate ostensibly for the purposes of paying off certain debts and expenses incurred during their management of the estate for Raja Jogendra Narayau.

5. The two suits previously referred to which were brought by the plaintiffs were filed in the year 1910 and in each of the suits there is a prayer for a declaration that the plaintiff of that suit is entitled to the Bijni Raj. Both the plaintiffs in their respective plaints have made it clear that the decision of the Judicial Committee in the earlier suit was not binding upon them. Both the suits are purely declaratory suits and a court-fee of Rs. 20 was paid in respect of each of them. The suits are valued for purposes of jurisdiction at Rs. 92,000,00 and Rs. 89,60,991.

6. During the pendency of these suits the Court of Wards on 1st October 1944, released the estate in favour of defendant 1 Raja Bhairabendra Narayan. Shortly after the estate had been released, Bhairabendra, defendant 1 in the suits, raised a preliminary issue regarding the maintainability of each of these suits. It was contended on his behalf that Section 42, Specific Relief Act, was a bar to each of the suits and eventually this Court directed the trial Court to decide this preliminary issue before proceeding further with the case.

7. The preliminary issue was raised in two issues which had been framed by the lower Court:

Issue 7 : Can this suit proceed as framed Is it maintainable in view of Section 42, Specific Relief Act Has the plaintiff paid proper court fees ?

Issue 27 : Is the possession of the Court of Wards that of a stake-holder Has it retained charge of the properties in suit for and on behalf of the defendant Raja Bhairabendra Narayan Bhup

8. On behalf of the petitioners it was argued in the Court below that the suits were maintainable as in the circumstances existing when the suits were filed no relief other than that of a declaration was open to either of the plaintiffs. It was contended that the defendant Raja Bhairabendra was not in possession and that the Court of Wards was in possession as a stakeholder. That being so, a

declaration in favour of either of the plaintiffs would have the effect of compelling the stake-holder to hold the property for the successful plaintiff. As the Court of Wards was actually in possession as a stakeholder, a claim for possession by either of the plaintiffs was inappropriate and could not be made. Therefore, Section 42, Specific Relief Act would be no bar to the suits.

9. On behalf of the defendant Bhairabendra it was argued in the first place that even if the suits when filed were properly framed a claim for possession had become essential in the events that had happened. As I have said, the Court of Wards gave up the management of the estate and released the same to Bhairabendra during the pendency of the suit. Bhairabendra was thereafter clearly in possession and no declaratory suit could possibly, it was argued, be maintained after such release. It was contended, therefore, that even if Section 42, Specific Relief Act did not bar these suits when they were originally instituted, the section certainly barred each of the suits after the estate had been released in favour of Bhairabendra, defendant 1.

10. Section 42, Specific Relief Act, in so far as it is material is as follows :

'Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.'

11. It will be observed that the section does not actually state that where a plaintiff is able to seek further relief but seeks merely a declaration the suit should be dismissed, but it does provide that in such a case no Court shall make the declaration prayed for. What is suggested in this case is that each of the plaintiffs was able to seek further relief, namely, possession of the estate and that being so, a Court could not make a declaration simpliciter. After the estate was released during the pendency of the suits the plaintiffs could have asked for possession. But it is contended on behalf of the petitioners that if the suits as originally framed

were properly constituted the release of the property by the Court of Wards at a later stage could not affect the maintainability of the suit.

12. Before us, it was not contended with any persistency that the subsequent release by the Court of Wards in favour of Raja Bhairabendra made these suits unmaintainable if they were maintainable when they were actually filed. The effect of subsequent events on the maintainability of a suit of this nature was discussed in a Bench case of the Madras High Court in *Govinda v. Perumdevi*, 12 Mad. 136, in which it was held that where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on the plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died, the plaintiff was entitled to proceed with his appeal and further that he could not be permitted to amend his plaint and claim possession. It is unnecessary in the present cases to consider whether an amendment could be allowed. But there can be no doubt that this case is clear authority for the fact that where a suit for a mere declaration was properly constituted when filed it does not become unmaintainable by reason of the fact that subsequently the defendant acquires actual possession of the property.

13. The same, view was taken by a Bench of this Court in the case of *Sm. Annapurna Dasi v. Sarat Chandra*, 46 C. W. N. 355: (A.I.R. (29) 1912 Cal. 394). In that case the learned Judges who constituted the Bench were of opinion that where there is properly framed declaratory suit at the time of the institution thereof, but by reason of subsequent events a prayer for consequential relief becomes necessary, the suit will not be hit by Section 42; the Bench was of opinion that a Court of Justice could take note of subsequent events and could mould the decree according to the circumstances.

14. The learned Subordinate Judge was of opinion that the suits were not affected by the release which took place after the suits had been instituted and with that view I agree. Subsequent events could not attract the operation of Section 42 and, therefore, this Court must consider whether or not the suits were maintainable when they were actually filed.

15. There can be no doubt that when these suits were instituted the estate was under the management of the Court of Wards. On 21st June 1937 the Assam Government by a notification in the gazette had declared that under the Bijni Succession Act, Raja Bhairabendra was the person who succeeded to the estate. On 28th July 1937 the Assam Government by another notification declared Raja Bhairabendra as a Ward of the Court of Wards under Section 3 and Section 60B, Bengal Court of Wards Act, and declared that the Court of Wards were retaining possession of the estate under Sections 13 and 13A of the Act. On 1st November 1937, the notification of 28th July 1937 was corrected and it was stated that the Court or Wards were managing the estate on behalf of Bhairabendra under the provisions of Section 13 A of the Act and not under Sections 13 and 13A.

16. As I have already stated the notification of 21st June 1937 that Raja Bhairabendra succeeded to the estate was merely a notification of succession, as provided by the Bijni Succession Act. The Court of Wards had been in possession of the estate of Bhairabendra's immediate predecessor, Raja Jogendra Narayan, and by reason of the notification of 28th July 1937 and 1st November 1937 they continued in management of the estate. Section 13, Bengal Court of Wards Act, 1879, provides the procedure when succession to the property of a ward is disputed. The section reads as follows :

'Whenever, on the death of any ward, the succession to his property or any part thereof is in dispute, the Court may either direct that such property or part thereof be made over to any person claiming such property, or may retain charge of the same until the right to possession of the claimant has been determined under Bengal Act VII [7] of 1876, or until the dispute has been determined by a competent Civil Court.'

17. Section 13A of the Act gives the Court of Wards power to retain charge of the property of a deceased disqualified proprietor or of a proprietor who has ceased to be disqualified until certain debts have been discharged. The section reads as follows :

'If, when any disqualified proprietor dies, or ceases to be disqualified within the meaning of this Act. There remains undischarged any debts or liabilities which

were incurred by, or are due from, such proprietor or which are a charge upon his property or any part thereof or any liabilities which were incurred by the Court for the benefit of the property of such proprietor.

Then notwithstanding anything contained in the foregoing sections, the Court may either withdraw from the charge of such property or retain such charge until such debts and liabilities, as the Court considers necessary to be discharged, together with all interest due thereon, have been discharged :

Provided that, after the death of a proprietor, the Court shall not retain charge on account of any debt or liability which has been declared by a competent Civil Court not to be binding on his representative.'

18. As I have said earlier, the Assam Government by their notification of 28th July 1937 declared that the Court of Wards retained possession of the estate under both Section 13 and Section 13A, Bengal Court of Wards Act. Quite clearly the Court of Wards could not retain possession under both these sections. If possession of an estate is retained under Section 13, there can be no doubt I think that the Court of Wards would retain possession as a stake-holder. They would be holding and managing the property on behalf of the person whose right of possession had later been determined under Bengal Act VII [7] of 1876 or by a competent Court. Section 13 presupposes that there is no person in existence whose prima facie claim can be recognised by the Court of Wards and that being so the section entitles the Court of Wards to continue to manage the property and to hold it until one of the claimants to the property establishes his claim.

19. Section 13A, however, deals with entirely different circumstances. This section does not presuppose any dispute relating to the right to succeed to the property of a disqualified proprietor, but what it presupposes is the existence of certain debts which it is necessary to discharge before the Court of Wards releases the property to the successor of such disqualified proprietor or to the person who has ceased to be disqualified. The section in fact presupposes the existence of a rightful successor or of a proprietor not disqualified but merely gives the Court of Wards power to retain management of the estate of such successor or proprietor until certain debts of his predecessor have been discharged.

20. The Assam Government realised eventually that the Court of Wards could not retain management under both these sections and by the notification of 1st November 1937 the original notification was corrected and it was declared that the Court of Wards would continue in management of the estate under Section 13A.

21. It was contended on behalf of the petitioner that the Court of Wards were in fact stake-holders whether they managed under Section 13A of the Act. As I have already stated, the Court of Wards would appear to be stake-holders if they continued to manage the property under Section 13. But in my view they would not be stake-holders if they continued to manage the property of a disqualified proprietor under Section 13A. Under Section 13A the Court of Wards would in fact be managing the property of the heir or successor of the disqualified proprietor or of the proprietor who has ceased to be disqualified but only for certain purposes, namely, the discharge of debts due from the disqualified proprietor's estate.

22. It seems to me clear that where the Court of Wards manages property under Section 13A, the Court of Wards manages the property of a ward.

23. A 'ward' is defined in Section 3 of the Act and means 'any person who is under the charge of the Court of Wards,' or whose property is under such charge.'

24. Section 60B of the Act provides : 'For the purposes of Section 100, Part VII and Sections 60 and 60A, a person whose property is under the charge of the Court of Wards under Section 11 by reason of the fact that such person has become entitled to the property jointly with a disqualified proprietor, or charge of whose property has been retained under Section 13A, shall be deemed to be a ward, but only so far as regards such property.'

25. It is, therefore, clear that where the Court of Wards retains the management of property under Section 13A the owner of such property, namely, the lawful successor of the disqualified proprietor or the proprietor who has ceased to be disqualified is deemed to be a ward for certain purposes and the Court manages the property on behalf of such ward. It is true that the owner is not a ward in the true sense because he is not a disqualified proprietor. But he is deemed to be a ward in so far as it is necessary to enable the Court of Wards to manage the

property and to make provisions for the payments of the debts of the estate. It seems to me clear that under Section 13A of the Act the Court of Wards is not in the position of a stake holder. It is in much the same position as it is in when it has taken over the management of a disqualified proprietor's estate. It is managing the property of another though for certain limited purposes. The property belongs to the ward and the Court of Wards is merely a manager for certain limited purpose.

26. Where the Court of Wards manages the property of a disqualified proprietor there can, I think, be no doubt that the disqualified proprietor is the owner of the property and is in possession of it. He cannot sue and be sued except through the Court of Wards and if a person makes claim to property held by a ward he must claim possession of that property and sue the disqualified proprietor as represented by the Court of Wards. In short, he must observe the provisions contained in Part VII of the Act relating to suits brought against the Court of Wards. An outsider claiming possession of the property of a disqualified proprietor would have to sue the proprietor through the Court of Wards. A suit merely against the Court of Wards alleging the latter to be in possession could not possibly succeed as the possession of the Court of Wards if it can be said to be any possession, is merely possession as manager of the estate of the ward.

27. It appears to me that the position of a ward under Sections 13A and 60B of the Act is precisely similar to the position of a disqualified proprietor when a third party claims property said wrongly to form part of such ward's estate. The claimant is not claiming property in the possession of the Court of Wards but is claiming property, in the possession of the ward though under the management of the Court of Wards, Section 60B provides that such a person whose property, the Court of Wards is managing, is deemed to be a ward for the purpose of part VII of the Act and therefore must be sued as a ward through the Court of Wards as provided by Section 51 of the Act.

28. It appears to me that the provisions of Section 13A of the Act can never be applied if there is no holder of the property who can be regarded as a ward. Where such a person exists, the property is his though subject to the management of the Court of Wards and if possession of the property is claimed from such person then

a claim for possession must be made in which the so-called ward, through the Court of Wards, is made the defendant. That was precisely the position when these two suits were instituted by the petitioners. Each of the petitioners was in a position to claim further relief against Bhairabendra through the Court of Wards. They could have claimed possession and that being so, no declaration could be made by reason of Section 42, Specific Relief Act, and neither of the suits was consequently maintainable.

29. On behalf of the petitioners it was contended that no claim for possession could be made in either suit because even if it was established that either of the plaintiffs had a better title to the property than Bhairabendra, nevertheless the Court of Wards would be entitled to retain possession of the estate of the deceased disqualified proprietor until the debts were paid. If that were so the Court of Wards would be in the position of a stake-holder. But in my view by reason of Sections 3 and 60A of the Act the Court of Wards under Section 13A is clearly managing the property of a ward, and if the ward for whom the Court of Wards is managing has no title to such property, neither has the Court of Wards any right to manage such property. Under the section it has a right to manage the property of a particular person and if that person has no right to such property neither has the Court of Wards a right to continue in management.

30. It may be that if either of the plaintiffs succeeded in recovering possession of this property the Assam Government might notify that the Court of Wards should take over such property for the payment of the debts of the late Raja Jogendra Narayan. But in my view there could be no management of any estate successfully claimed by either of the plaintiffs without a fresh notification. The management of the estate of Bhairabendra could not become, by operation of law, management of the estate of either of the plaintiffs if he was successful in a claim for possession: Where the Court of Wards manages for a ward, the right of the Court to manage must depend upon the right of the ward to the property. If the ward loses the property to a person with a better title such person does not become ipso facto or by operation of law a ward of the Court. The Court would be bound to assume management of the estate of the successful claimant by some fresh notification or declaration. The case is entirely different from the case envisaged in Section 13 of

the Act where the Court of Wards is merely managing for the person who ultimately succeeds in establishing title to property. In my judgment as Bhairabendra was clearly a ward a claim to property held by him could be made and a suit could be brought for possession by suing Bhairabendra represented by the Court of Wards. This relief was open to each of the petitioners and therefore the suits which they filed which were purely declaratory suits were not maintainable.

31. It was also contended that declaratory suits were the only form of suits which could be brought in this case by reason of the fact that in earlier litigation an injunction had been issued restraining the Court of Wards from giving possession of the property to Bhairabendra. This injunction was not discharged until the end of the litigation in the Privy Council in 1942 and the injunction was therefore clearly in existence when these suits were filed in 1940. The contention is that as the Court of Wards could not give possession to Bhairabendra a suit for possession against Bhairabendra could not possibly succeed as the latter was not in a position to give possession. Reliance was placed upon an observation of Lord Thankerton in the case of *Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee, Sunder Singh Mallah Singh Rajpur High School*. The learned Lord observed : 'The Subordinate Judge held that a suit for declaration did not lie, on the ground that the plaintiff was neither in possession nor in control of the management of the school, and that the proper form of the suit would have been one for possession and management of the school and not merely a declaration of such right, and that the plaintiff had omitted to seek this further relief. The High Court took the contrary view, on the ground that the defendants were not in possession or in a position to deliver possession of the properties and that therefore there was no further relief available to the plaintiffs against the defendants. Their Lordships agree with the High Court in this view.'

32. It is contended that as an injunction existed restraining the Court of Wards from giving Bhairabendra possession the latter was not in a position to deliver possession and therefore no claim for possession could be made and suits for declarations simpliciter would be maintainable.

33. It appears to me, however, that this injunction was no bar to a suit for possession brought against Bhairabendra as represented by the Court of Wards, because once it was established that Bhairabendra had no title and that the same was in the successful plaintiff the Court of Wards' right to manage would cease. All that the injunction meant was that whilst the Court of Wards was in management of the property which it was entitled to manage, it should not hand over or release the property to Bhairabendra. The injunction would have no effect if it was established that the property belonged not to Bhairabendra but to a third person. He could recover possession as against Bhairabendra through the Court of Wards, as strictly, the possession throughout is the possession of the ward and not of the Court of Wards. All that the injunction really meant was that the Court of Wards should not release the property or give up management in favour of Bhairabendra. If, however, a successful claimant made good his title to the property the Court of Wards would not be acting in breach of the injunction in giving up the management. Bhairabendra through the Court of Wards could be ejected in execution of a decree and that being so, the fact that an injunction existed did not, to my mind, make it impossible for the plaintiffs in these suits to claim possession of the property.

34. Lastly it was argued that if Section 13A. contemplated a ward, the ward was in fact the deceased disqualified proprietor. Clearly such a contention is contrary to Section 60A of the Act. But reliance was placed upon the proviso to Section 13A which is as follows:

'Provided that, after the death of a proprietor, the Court shall not retain charge on account of any debt or liability which has been declared by a competent civil Court not to be binding on his representative.'

35. It was contended that this proviso suggested that the disqualified proprietor's representative was not a ward as contemplated in the Act. But I can see nothing in the proviso which can affect the matter in any way. The Court of Wards under Section 13A manages the property for its ward who is the legal representative of the deceased disqualified proprietor. If the debts or liability for the discharge of which the Court retains possession, are not binding on the ward then the Court

has no right to retain the management of the property.

36. For these reasons I am satisfied that the learned Subordinate Judge was right in holding that neither of the suits filed by the petitioners was maintainable.

37. It might be suggested that even if the learned Subordinate Judge was-wrong we could not interfere in this case under Section 116, Civil P. C. In my view, however, a wrong-decision of the learned Subordinate Judge in this question of the maintainability of these suits would amount to a denial of jurisdiction to decide the suits on their merits and that being so the applications could in my view be brought under Section 115, Civil P. C., and we could have interfered had we been of opinion that the Subordinate Judge was wrong. The point, however, does not arise, as in our view the decision of the learned Subordinate Judge cannot be assailed and therefore the petitions fail and each rule is discharged with costs. We assess the hearing fee in each case at ten gold mohurs.

Bachawat J.

I agree.