

CALCUTTA HIGH COURT

Dinanath Kumar

Vs.

Nishi Kanta Kumar

Civil Revn. Case No. 529 of 1951

(B.K. Guha and Guha Roy, JJ.)

07.08.1951

JUDGMENT

Guha, J.

1. The petitioner before us is one Dinanath Kumar father of Nishikanta Kumar, opposite party. In 1946 a mortgage suit being mortgage suit No. 46 of 1946 was instituted in the name of Nishikanta. A preliminary decree was passed in that suit on June 30, 1947. In January, 1948 there was a partition suit being partition suit No. 25 of 1948 for partition of ancestral properties. In that partition suit both Dinanath and Nishikanta were parties. That partition suit was decreed on compromise, the compromise petition being dated 25th May, 1949. In paragraph 7 of that compromise petition there was a reference to the preliminary decree which is the subject matter of the present dispute between the parties. According to that provision in the compromise decree the instalment decree that is, the preliminary decree in the mortgage suit "will remain intact in favour of Dinanath and to that Nishikanta or his heirs would have no claim or concern." It appears that in July, 1949, Dinanath, the petitioner before us, received the first instalment due on the preliminary decree. On 28-7-50 Dinanath filed an application under Order 1, Rule 10, Civil Procedure Code in Mortgage suit No. 46 of 1946 for being added as a plaintiff or substituted in place of his son Nishikanta, the original plaintiff, mainly on the allegation that he was the real plaintiff in that mortgage suit, his son Nishikanta being only his benamdar. This prayer of Dinanath under Order 1, Rule 10, Civil Procedure Code was strongly resisted by Nishikanta whose contention was briefly that he was not the benamdar of his father in the mortgage suit, that his father was not a necessary party at all, that his father had got no legal status to the mortgage bond in question unless he established his right by regular suit in a proper Court and that it would not be proper to allow his father to intervene at this belated stage in a simple mortgage suit for determination of a complicated question as regards the point as to whether he, that is, Nishikanta was the benamdar for his father. It was his contention that the determination of the question of 'benami' was not germane to the present suit, especially after a preliminary decree had been

passed more than three years before the application under Order 1, Rule 10 was made. These objections found favour with the learned Subordinate Judge who rejected the application of Dinanath under Order 1, Rule 10.

2. We have heard the learned Advocates for the parties at considerable length and without going into all the details of the various arguments that have been advanced before us, we are impressed by the contention put forward by the learned Advocate for the petitioner before us viz., Dinanath, that if we permit Dinanath to intervene for adjudication of the question as to whether his son Nishikanta was merely benamdar for him, that will save multiplicity of proceedings and obviate much needless harassment to the mortgagors who are not challenging the right of Dinanath. Even though a preliminary decree has been passed in the mortgage suit, the suit is still pending and there is no legal bar in appropriate circumstances to Dinanath being permitted to come in even at this stage. It is obvious that the father and the son have fallen out for some reasons and if by refusing the prayer of Dinanath under Order 1, Rule 10, we drive the parties to further litigation, the mortgagors will be put to much unnecessary harassment for no fault of theirs. We feel that in the circumstances of the present case Dinanath's presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In these circumstances we are of opinion that Dinanath's prayer for being added as a party to the proceedings should be allowed. We express no opinion, however, on the question as to whether Nishikanta was or was not a benamdar for Dinanath or regarding other aspects of the case. It will be for the trial Judge to pronounce upon these matters on a proper appraisal of all the materials that may be placed before him. All that we say at the present stage is that Dinanath's application under Order 1 Rule 10 should not be thrown out summarily at this stage but the matters in dispute between the parties should be adjudicated upon in his presence.

3. With these observations we make this Rule absolute and set aside the order of the lower Court.

4. In the circumstances no order is made as to costs in the Rule.

Guha Roy, J.

5. I agree.

Rule made absolute.