Sm. Ratan Mala Mondal and Another Vs Gopal Lal Daga and Others

Court: Calcutta High Court

Date of Decision: July 9, 1954

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 15, 38

Citation: AIR 1955 Cal 14 : 58 CWN 994 : (1956) 1 ILR (Cal) 341

Hon'ble Judges: Mallick, J; Guha, J

Bench: Division Bench

Advocate: Nirmal Chandra Chakrabarty, Muktipada Chatterjee, Rama Prosanna Bagchi, Satya Santi Mukherjee and Bimal Kumar Banerjee, for the Appellant; Purushottam Chatterjee and Rameswar Saha, for the Respondent

Final Decision: Dismissed

Judgement

Mallick, J.
This appeal arises out of a petition for execution of a decree obtained by some of the plaintiffs in a suit for specific

performance. The facts leading to the present appeal may be stated as follows:

2. By an agreement for sale dated 19-12-1936, the defendants, who for convenience may be referred to as the Mandals, as vendors agreed to sell

and convey to Sachindra Nath Goswami as purchaser of the land and premises referred to in the said agreement. On 5-6-1939, a suit for specific

performance of the said agreement was instituted in the Court of 3rd Subordinate Judge of 24th Parganas against the said Mandate. The plaintiffs

in the said suit are 5 Dagas and the said Sachindra Nath Goswami. It is pleaded in the plaint that Goswami entered into the said agreement with the

Mandals for and on behalf of the Dagas as their agent and benamidar so that the real beneficiaries under the agreement are the Dagas and not

Goswami. Needless to say that plaint bears the signature of all the Dagas and Goswami.

The suit was contested taut ultimately a decree was passed on 29-1-1945 in favour of the plaintiffs. One of the Mandals being defendant No. 1

settled the suit with the plaintiffs and a compromise petition was put in. The operative part of the decree in so far as it is material runs as follows:

It is ordered that the suit is decreed on compromise against the defendant No. 1 in terms of petition of compromise filed and on contest against

defendant Nos. 2 and 3 in part with 2/3rd costs on contested scale. The defendant Nos. 2 and 3 do execute a Deed of Sale in respect of

properties in suit in terms of the agreement on receipt of the balance of the consideration due for their share of 2/3rd and also register the sale deed

at the cost of the plaintiffs within one month hereafter"".

3. The decree was put to execution by the Dagas by filing the tabular statement on 18-7-1945. In column 2 of the tabular statement, where the

names of the plaintiffs are to appear, the Dagas described Sachindra Nath Goswami as the ""pro forma judgment-debtor"" and in column 11 of the

tabular statement it was prayed ""that the judgment-debtor Nos. 2 and 3 be directed to execute and register the sale deed as per draft filed

herewith."" In the draft filed the purchasers named are the Dagas and not Sachindra Nath Goswami.

4. Against the decree passed by the learned Subordinate Judge an appeal was taken to this Hon''ble Court on 16-5-1945, being First Appeal No.

152 of 1945. By an order of this Court in the said appeal the execution of the decree was stayed. On 27-11-1950, the appeal was dismissed and

the order for stay was vacated. Thereupon the Dagas took steps in execution already filed by them on 16-7-1945 as hereinbefore stated. Against

the said application for execution a petition of objection was filed by Amulya Charan Mandal, one of the judgment-debtors on 18-4-1951 u/s 47,

Civil P. C. This objection was numbered as Misc. Case No. 11 of 1951.

Various grounds were taken in the said petition of objection of which two were pressed before the executing court, namely, (1) that a certain

phrase in the draft conveyance should be clearly specified and (2) that the agreement for sale having been in favour of Sachindra Nath Goswami,

the Dagas are not entitled to a conveyance, in the absence of any nomination by Goswami. The executing court accepted the first objection and

directed the phrase to be clearly stated bringing it on the lines with the agreement for sale. The second objection was overruled on the ground that

the judgment of the High Court in the said F. A. No. 152 of 1945, D/- 27-11-1950 (Cal) (A) clearly indicated that the Dagas were the real

beneficiaries under the agreement and Sachindra Nath Goswami was their agent or benamdar. Against this order the present appeal has been,

taken.

5. Mr. Nirmal Chandra Chakraborty who appeared in support of the appeal contends that the decree directs the defendants to execute a deed of

sale in terms of a deed of agreement. Under the said agreement the defendants are bound to execute a conveyance in favour of Sachindra Nath

Goswami or his nominee. There being no nomination by Goswami the conveyance must be in favour of Goswami and nobody else. The

conveyance filed however named the Dagas as the purchasers. This is not in terms of the decree and the learned Subordinate Judge should have

dismissed the application on this ground. He contends that the decree by itself is clear and unambiguous in that the purchaser would be Sachindra

Nath Goswami in whose favour alone the conveyance could be executed. Inasmuch as the conveyance claimed in the execution case is in favour of

the Dagas the court should have dismissed the application.

He further contends that if in the judgment the Dagas are held to be the real purchasers and are entitled to a conveyance there is a contradiction

between the Judgment and the decree, and the executing court should give effect to the decree and not to the judgment. He relies on the decision

reported in -- ''Shoshi Kanta Acharji v. Raja Sarat Chandra 35 Cal LJ 339, in support of his argument.

6. On looking to the decree, however, we are satisfied that the decree is not clear. The decree purports to be in favour of all the plaintiffs, that is,

the Dagas and Goswami in whose favour a decree for specific performance has been passed. The decree, however, refers to the agreement in

which the Dagas do not appear as purchasers. This is a case of clear ambiguity and hence to resolve the ambiguity the executing court is bound to

look to the judgment and the pleadings. On referring to the pleadings we find that the suit was instituted on the footing that the Dagas are the real

purchasers and Goswami their agent. Goswami himself has signed the plaint and clearly, therefore, accepts that position. The position, therefore, is

that Goswami nominated Dagas as purchasers in whose favour the conveyance is to be executed.

This court in -- ''F. A. 152 of 1945 (Cal) (A), took the view in its judgment delivered on 27-11-1950 that the Dagas are the real purchasers and

that Goswami entered into the agreement with the defendants for and on behalf of the Dagas as their agent. It is clear, therefore, that according to

the judgment referred to, the Dagas are the purchasers and are entitled to a conveyance from the defendants. After this it is not open to the

appellant to contend that the Dagas are not the real purchasers and are not entitled to a conveyance.

7. It is next contended that the decree is in favour of all the plaintiffs, viz., the Dagas and: Goswami. Dagas are not competent to execute the

decree without Goswami, one of the joint decree-holders. In reply it is contended by Mr. Purshottam Chatterjee who appears for the respondents

that under Order 21 Rule 15 some of the joint decree-holders are competent to execute the decree for the benefit of all. In this case Dagas have

applied to execute the decree for their own benefit, it is true, but that is so because it has been held that they alone are beneficially entitled to the

agreement, Goswami having been held to be mere agent or benamidar. The Court having discretion to allow execution of a joint decree at the

instance of some of the decree-holders, it is urged, the Court should in the circumstances of this case, exercise its discretion in favour of the Dagas

who alone have interest in the agreement.

This argument has considerable substance and must prevail. The case reported in 35 Cal. L.J. 339, cited by Mr. Chakraborty is clearly

distinguishable. In that case the judgment and decree could not be reconciled and the decree was unambiguous and hence it was held that the

Court should execute the decree and ignore the judgment. But here the decree is ambiguous and by referring to the judgment, the ambiguity can be

resolved. Hence principles laid down in 35 Cal LJ 339, have no application to the facts of this case. We hold, therefore, that the present petition

for execution of the decree by the Dagas alone is competent and is maintainable in law.

8. The second point urged by Mr. Chakraborty is that after the dismissal of the -- "F. A. No. 152 of 1945 (Cal) (A)", the decree of the Trial

Court which has been put to execution is merged in the decree of the appeal court and the only decree that is executable is the decree of the

appeal court. There are authorities in support of the propositions that after appeal the decree of the trial court is merged in the decree of the appeal

court and the only executable decree is the decree of the appeal court (see -- AIR 1926 93 (Privy Council); Gajadhar Singh Vs. Kishan Jiwan Lal

and Others, (D); "Syam Mandal v. Satlnath Banerjee", AIR 1917 Cal 728, and the cases referred to in the notes u/s 38 of the CPC by Sir

Dinshaw Mulla.)

An examination of the authorities, however, shows that the court has applied the theory of merger in two classes of cases only, viz., for the purpose

of determining the point of time when limitation would run and for the purpose of amending the decrees. It has been held that limitation would run

from the date as provided in the decree of the appeal court and not that of the trial court and appeal court alone is competent to amend the decree

even if the appeal court decree is a decree of dismissal of the appeal and confirmation of the decree of the trial court. The court has never applied

the doctrine of merger for the purpose of defeating an execution petition of the decree of the trial court when the appeal has been dismissed and

the decree of the trial court con-firmed.

Although it is true that technically the decree of the trial court merges in the decree of the appeal court, it cannot be said that even when the decree

of the trial court is affirmed in appeal, the decree of the trial court is wiped out for all purposes. To apply the doctrine of merger in such cases

would lead to palpably absurd and inequitable result. The decree-holder would be put to the inconvenience of filing a fresh petition for execution of

the decree of the appeal court which is nothing but the same decree of the trial court and pursue the execution proceedings "de novo". There could

conceivably be no point in such senseless multiplicity of proceedings. Filing of the appeal does not operate as a stay of execution of the decree. On

what principle can it be said that the dismissal of the appeal will operate as a dismissal of the pending execution case of the decree of the trial court,

when the appeal court does nothing but dismiss the appeal and confirm the decree of the trial Court? I can find none.

No direct authority of this High Court on the point has been referred to us. But there are authorities of the other courts in support of the

proposition that the fiction of merger should not be carried too far in cases like the present because it would lead to obvious injustice (see --

Ekram Hussain Vs. Mt. Umatul Rasul and Others, ; AIR 1942 84 (Oudh); Pateshwari Prasad Singh Vs. Abdul Karim and Others,).

Of these authorities the facts in the Oudh. case are on all fours with the facts in this case. In the Oudh case as in this case during the pendency of

the execution of the decree of the trial court an appeal was filed by the judgment-debtor and execution of the decree was stayed. After the

dismissal of the appeal the stay order was vacated. Thereupon the decree-holder applied to the executing court to resume the execution

proceedings. The judgment-debtor objected that the decree of the trial court- was no longer executable and the only decree executable was the

decree of the appeal court even though the decree of the appeal court was a decree affirming the decree of the trial court. The Court consisting of

Ghulam Hasan and Agarwal JJ. overruled the objection and allowed the decree-holder to resume the execution proceedings of the decree of the

trial court still pending. At p. 86 their Lordships observe:

We do not think that in a case where the appellate decree merely affirms the decree of the trial Court, and does not affect the terms of that decree

in any way whatsoever, the fiction of merger should be carried so far as to lead to such a palpably absurd and inequitable result that the decree-

holder should be put to the in- convenience of filing a fresh application in the Court which originally passed the decree, getting a fresh transfer

certificate to another Court and pursuing the proceedings for execution in that Court. We are not prepared to hold that even where a decree of the

trial Court has been affirmed by the appellate Court, its result is to wipe out the decree of the trial Court for all purposes.

With this observation we respectfully agree as also with the reasonings given by Fazl Ali J. in -- Ekram Hussain Vs. Mt. Umatul Rasul and Others,

. Even if the revival of the pending execution proceeding after the dismissal of the appeal is considered to be bad it is only bad in form and is

merely an error of procedure Which is curable u/s 99, Civil P. C. (see -- Harilal Dalsukhram Saheba Vs. Mulchand Asharam, (I)). We overrule

the second point urged by Mr. Chakraborty in support of the appeal.

9. Mr. Purushottam Chatterjee appearing for the respondent contended that the appellant should not be permitted to raise the second point on two

grounds -- first the point was not taken in the petition of objection filed by the judgment- debtor and second that by reason of the order No. 5

dated 1-3-1951 directing execution to proceed which has not been set aside the judgment- debtor is debarred from agitating the question on

principles of ''res judicata''.

10. As regards the first point it is true that apart from taking the general ground that the decree is not executable, the point has not been taken in

the objection petition. We find, however, from the paper book, and it is the common case, that the appeal has been dismissed, the certified copy

of which was filed in the executing court (see order dated 28-2-1951). Thus, the facts being admitted the question becomes a pure question of law

which can certainly be taken for the first time in appeal. The first point of Mr. Purushottam Chatterjee therefore fails. In view of our decision on

merit in favour of Mr. Purushottam Chatterjee''s client, we need not decide the question of ''res judicata'' raised by Mr. Chatterjee. That disposes

of all the points raised before us.

11. The result is that the appeal fails and is dismissed. In the circumstances of this case, we make no order as to costs.

Guha, J.

12. I agree.