(1925) 07 CAL CK 0016

Calcutta High Court

Case No: None

Ananda Priya Baishnavi		APPELLANT
	Vs	
Bijoy Krishna Ray		RESPONDENT

Date of Decision: July 20, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 2(1)
- Evidence Act, 1872 - Section 92

Citation: AIR 1926 Cal 643 : 91 Ind. Cas. 705

Hon'ble Judges: Graham, J; Babington Newbould, J

Bench: Division Bench

Judgement

Graham, J.
This appeal is directed against an order of the First Subordinate Judge of Tippera and arises out of certain proceedings in execution of a decree. The facts which have led up to it are shortly these:

The judgment-debtor respondent Bejoy Krishna Ray brought a Title Suit (No. 1004 of 1917) against the decree-holder appellant Sreemutty Ananda Priya Baishnavi in the Court of the Subordinate Judge at Camilla, which was dismissed, There was an appeal to the High Court which was decreed on the 14th December 1921. On the 14th March 1922 Bejoy Krishna filed an application for leave to appeal to the Privy Council which was granted on the usual terms on the 10th April 1922. On the 21st July 1922 the appeal was allowed to be withdrawn it having been represented to the Court on the 14th July that a compromise was likely to be effected. In the meanwhile on the 31st March 1922 the decree-holder had applied for execution of the decree amounting in all to Rs. 4,237-5-6. Execution proceedings followed and in the course of these the judgment-debtor on the 31st July 1922 filed an objection under Order XXI, Rule 2 of the C.P.C., praying the Court to record an amicable adjustment of the decree alleged to have been arrived at between the parties on the 29th June 1922

whereby the decree-holder relinquished her claim to costs in both the Courts on condition that the judgment-debtor withdrew his appeal to the Privy Council. To this the decree-holder replied by a petition filed on the 28th October 1922 denying that there had been any adjustment of the decree. The Court then went into evidence and allowed the objection of the judgment-debtor as stated above.

2. On behalf of the appellant two points only have been urged before us. It is first contended that the alleged adjustment does hot come under Order XXI, Rule 2 of the C.P.C., and that in any view of the matter an oral agreement in substitution of the decree could not be proved having regard to the provisions of Section 92 of the Evidence Act. Secondly, it is urged that upon the evidence and regard being had to all the facts and circumstances of the case the Court below ought to have held that the adjustment had not been proved.

3. In my opinion the first of these contentions is without substance. The words "otherwise adjusted" in Rule 2(1) of Order XXI appear to be wide enough to cover such an adjustment as is stated to have taken place in this instance.

4. As regards Section 92 of tile Evidence Act the portion of that section which is relied on is the portion containing the following words "or any matter required, by law to, be reduced to the form of a document" the argument being that a decree is a matter required by law to be reduced to the form of a document, and that a new agreement is clearly a matter contradicting or varying the terms of the decree. In support of this contention reference has been made if the case of Lachhmi Das v. Ram Nath 64 Ind. Cas. 990 : 44 A. 258 : 20 A.L.J. 65 : AIR (1922) (A.) 13 where one of the learned Judges Walsh, J., held that Section 92 of the Evidence Act applies to a decree. The point, however, was not, it appears, necessary for the determination of the appeal. Nor are we bound by that decision. No case of this Court has been brought to our notice in which it has been held that a decree conies within the purview of Section 92 of the Evidence Act, and looking to the language of that section and Section 91 which precedes it, and to the principle which underlies them, it appears to me that they refer only to what are known as "dispositive documents," and that the words "or any matter required by law to be reduced to the form of a document" must be read in that sense.

5. It remains to deal with the second contention that the Court below ought on the evidence, and upon all the facts and circumstances to have held that the adjustment had not been proved. The decision of this matter was dependent to a great extent upon the view taken of the oral evidence, and the learned Advocate for the respondent has conceded that the only material witnesses were the judgment-debtor himself, his brother Probodh Chandra Ray, and the execution mohurrir Sarat Chandra Chaudhury. The Subordinate Judge has accepted the evidence of these witnesses as proof of the fact of adjustment and has observed that the two former belong to a respectable family, and that he was impressed by their demeanour in the witness-box. In this connection the learned Advocate for the

respondent has drawn our attention to the case of Bombay Cotton Manufacturing Co. v. Motilal Shivlal 20 Ind. Cas. 229 : 42 I.A. 110 : 19 C.W.N. 617 : 17 M.L.T. 408 : 28 M.L.J. 593 : 21 C.L.J. 528 : 17 Bom. L.R. 455 : 2 L.W. 521 : 39 B. 386 : (1915) M.W.N. 788 (P.C.) where it was held by the Privy Council that generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, and that the view of the Trial Judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the Appellate Court. This is a doctrine which is well recognised, in every system of law and is certainly entitled to be treated with respect. It must not, however, be allowed to become a fetish, and, as was pointed out in a more recent case of the Privy Council Palchur Sankcurareddi v. Palchur Mahalakshmama 70 Ind. Cas. 949 : 27 C.W.N. 414 : AIR (1922) (P.C.) 315 : 31 M.L.T. 307 : 17 L.W. 1 (P.C.), where the question does not depend upon witnesses demeanour and manner in the box, but upon inference from facts the, Appellate Court is as good a Judge of fact as the, Trial Court. Now it appears to me that the present case is a case of that description, and further that the estimate, which has been formed by the Court below as regards the reliability of the witnesses, can be demonstrated to be erroneous.'' Apart too from this there are facts and circumstances in the case, not referred to by the learned Subordinate Judge in his judgment, which go to show that no adjustment ever took place, and that the story of the adjustment has been concocted in order to deprive the decree-holder of her costs in the litigation.

6. I propose to deal first of all with the witnesses relied upon by the Court below: and then to go to a consideration of the salient facts and circumstances which td my mind throw a flood of light on the truth or otherwise of the alleged adjustment.

7. As I have already stated, the material witnesses are the judgment-debtor Bijoy Krishna, his brother Probodh, and the execution mohurrir Sarat Chandra. The Court below being impressed with their demeanour has accepted their evidence. Some reliance has also been placed on the telegram and letter said to have been sent by the judgment-debtor to his Vakil Upendra-Kumar Ray at Calcutta informing him of the compromise. But it is clear that the evidence of the Vakil is essentially of a hearsay character and is not of much evidentiary value for the purpose of proving the adjustment. Such a telegram and letter could easily be sent, and if accepted as proved (though the evidence as to this is not satisfactory), would not establish that the adjustment had taken place.

8. I will now deal briefly with each of the three witnesses referred to above, Bejoy Krishna Ray, the judgment-debtor, whatever his demeanour may have been in the witness-box, is obviously not a person upon whom any reliance can be placed. Apart from the fact that he is vitally interested in the result of the case, his landed properties including his homestead having been attached by the decree-holder, it is clear that he is capable of making the most reckless, if not deliberately false

statements. For example in his petition (Ex. A) of the 3rd April 1922 he represented to the Court that he had obtained leave to appeal to the Privy Council, though in point of fact that leave was not given until a week later. Then again he has stated that he deposited Rs. 200 or Rs. 300 as preliminary costs of the Privy Council appeal, though the order-sheet shows that the actual amount deposited was only Rs. 100.

9. In this connection he has made the following statements in his evidence "I do hot know how much I was asked to deposit. My Pleader did not tell me that I was to deposit a further sum. I would have deposited the sum, if my Pleader told me of that. I don''t know that my Pleader repeatedly told him (sic) to deposit money." The total amount required to be deposited was Rs. 4,237, and these statements of the judgment-debtor that he knew nothing of the matter are palpably false. Probodh Chandra Ray describes himself as first cousin of the judgment-debtor by adoption but says he was his brother before adoption. On his own admission he is involved in debt, his wife gets a monthly allowance of Rs. 50 from the judgment-debtor, and he has on two previous occasions borrowed money from the judgment-debtor. He further admits that he has a share in the dwelling-house in Govindapur. He is clearly, therefore, a very much interested witness.

10. Sarat Chandra Chaudhury, the execution clerk, is the most important witness on the side of the judgment-debtor, but there are obvious indications that he is a partisan witness. He has admitted that he is on friendly terms with Bejoy, and that the letter might have requested him to withhold the attachment till the order for withdrawal of the appeal from the High Court was received.

11. This fact, and the fact disclosed in the evidence of Bijoy that he was present at the final adjustment show the interest which he was taking in the matter. There are also the two additional circumstances that this witness was responsible for the delay from the 30th June to the 11th July in sending the writ of attachment to the nazarat, and that he failed to carry out the order of the Court, dated the 28th July 1922 for issue of notice under Order XXI. Rule 66 of the C.P.C., thus necessitating a fresh application by the decree-holder on the 25th November 1922.

12. As against the evidence of these three witnesses we have the evidence of the decree-holder herself, her son-in-law and am- mukhtar Dakshina Ranjan, and grandson-in-law Upendra Chandra Rakhit, who have emphatically denied that. any adjustment ever took place. The decree-holder has deposed in her evidence that there was no talk of amicable settlement but this is negatived by her petition of objection filed on the 28th October 1922 wherein she admitted (vide para. 6) that the judgment-debtor had made a proposal for amicable settlement. It seems clear that this fact has been suppressed by the decree-holder, possibly because it may have been felt that such an admission would weaken her case. Be that as it may the crucial point is not whether there was talk of a compromise, but whether in fact a final ad judgment was arrived at between the parties and as to that it seems to me that the evidence of the decree-holder and her witnesses is entitled to as much

weight as that of the witnesses oh the other side. The onus was heavily upon the judgment-debtor, and to my mind the evidence of the three witnesses examined oh his behalf wholly fails to discharge that onus. These wit nesses are clearly hot to be relied on, and the following facts and circumstances which are established by the evidence, but have not been taken into account by the Court below, go to show beyond a shadow of a doubt that the adjustment was never made.

13. Firstly there is the prima facie improbability that the decree-holder would give-up her claim to the costs which she had obtained in this protracted litigation, especially in view of this strained relations existing between the parties. It is in evidence that she had already refused to compromise at a previous stage (vide evidence of Upendra Kumar Ray.

14. Secondly there is the significant fact that the alleged ad judgment was never embodied in any written document, though the Importance of this was clearly present, to the minds both of the judgment-debtor and his Vakil. The Vakil had in fact suggested that this should be done. (See his evidence and cross-examination of Bejoy).

15. Thirdly there is the fact that the telegram and letter said to have been sent by the judgment-debtor to his Vakil have not been, produced.. The statement of the Vakil that he received them may be accepted but the fact that they have not been produced is suspicious especially in view of the anxiety shown by the Vakil to have something definite to go upon. It might have been expected in these circumstances that both the telegram and letter would have been kept. But, as I have already stated elsewhere, the mere fact that such a telegram and letter were sent would not be evidence of any value for the purpose of proving that the adjustment took place. They might obviously have been sent merely for the purpose of creating evidence.

16. Fourthly the judgment-debtor''s account of the manner in which the compromise was effected seems highly improbable. The decree-holder is a pardanashin lady of 70. No one was present on her behalf, though the matter was obviously one of considerable importance to her. Neither her son-in-law, who generally acted for her in such matters, nor her grand-son-in-law was present. No Pleader was present. Her Pleader in the original suit, one Jotindra Nath Sen, lives close to her, but he also was not present. The adjustment, as the judgment-debtor has stated in his evidence, took place with Ananda Priya alone. The son-in-law and grand-son-in-law were admittedly in the house, but took no part in the affair. The judgment-debtor attempts to moderate this damaging admission by saying that they "took no active part", whatever that may mean. In this connexion the learned Subordinate Judge has observed in his judgment that it is "very natural" that they did not take any part in the compromise. It seems tome on the contrary that it was most unnatural, and that, if there had really been any adjustment, they, as the nearest male relatives and advisers of the decree holder, would have been concerned in it.

17. Again in so far as the fact of withdrawal of the Privy Council appeal has been relied upon in the Court below as a ground for accepting the adjustment as true, there is another explanation which is quite sufficient to account for the withdrawal of the appeal, and that is that the judgment-debtor was without the funds necessary for the purpose. If prosecuting it. There is ample evidence that he had been in need of money for some time and had been selling his properties piecemeal "vide Exs. C, E, E(1), E(2) and E(3)." In January 1922 he tried without success to obtain a loan of Rs. 1,000 from; the Comilla Loan Office (Ex. N). The learned Subordinate Judge has referred in this connexion to the loan which the judgment debtor-obtained from Babu Bhudar Chandra Das (Ex. E-2),but the amount in question was only Rs. 2,500 and some of that (it is not stated how much) was borrowed to pay off money previously borowed. The balance would soon v have been swallowed up in connection, with the Privy Council application. The, extracts from the judgment-debtors Rokar Book (Ex. D) show what the state of his finances was. It is clear too that he did not comply with requisitions for money on account of the Privy Council appeal. As he, himself has said, he was always in need of money.

18. Then there is the very material fact that independent and reliable evidence, which might have been adduced to prove the adjustment has not been given. Indeed to attempt has been made to do so. When he judgment-debtor was told by this Vakil that it would have been better if the matter had been put into writing, he replied that no difficulties would arise, as it was done in the presence of so many respectable witnesses. None of these persons has been examined. But apparently this is another instance of the untruthfulness of the judgment-debtor; since he has deposed in his evidence that, he never, made any such statement. We, may accept the version of the Vakil on the; point. The judgment-debtor, however, says, that he informed Pleaders Akhil Babu, Kamini Babu, Sachindra Babu and many other Pleaders that the case had been compromised. Not one of these persona has teen called.

19. Lastly there is fact that the judgment-debtor had undoubtedly a strong motive for concocting a story about adjustment of the decree. The decree-holder had taken out execution of her decree on the 31st March 1922. Thereafter the judgment-debtor succeeded in delaying execution pending receipt of orders from the High Court. But the security amounting to Rs. 4,237 was to be deposited as a condition of the stay of execution. This was not complied with and on the 30th June 1922 a writ of attachment of the, judgment-debtor''s Immovable properties was issued. On the 29th June, therefore, when this adjustment is alleged to have taken place, the judgment-debtor was in an awkward predicament and was under the necessity of promptly taking action of some kind to extricate himself. If he could prove an adjustment, he could evade the unpleasant consequences of the decree, including attachment of his dwelling-house.

20. It may be noted here that on the 30th June 1922 no steps of any kind were taken by the judgment-debtor though time had been allowed to him up to that date, and as a consequence the writ of attachment was ordered to be issued. If the adjustment had taken place on the previous day, it is difficult to understand why the judgment-debtor who was admittedly at Comilla, did not take steps to bring to the notice of the Court that the parties has effected an adjustment. He has stated that the decree-holder promised to certify the amicable arrangement to the Court. That being so, it might have been expected that he would go to Court in order to satisfy himself that she meant to carry out her promise, As a matter of fact his own application was not made till the 31st July. It may be argued that he had to wait till the Privy Council appeal had been withdrawn, but he could at all events have asked for postponement of the writ of attachment.

21. In my opinion the comulative effect of all the above facts and circumstances taken in conjunction with the weak and unsatisfactory evidence adduced on behalf of the judgment-debtor goes to show that no adjustment ever took place, and that the entire story, except for the fact that there was some vague talk of a compromise, is a concoction pure and simple designed with the object of defrauding the decree-holder.

22. But quite apart from these considerations there is another aspect of the case, which to my mind would in itself be fatal to the appellant, even if the appeal did not fail on other grounds, audit is this. It has been laid down in a recent decision of the Privy Council Sarat Kumari Dasi v. Amulyadhan Kundu 71 Ind. Cas. 632 : 27 C.W.N. 629 : 17 L.W. 481 : AIR (1923) (P.C.) 13 : 32 M.L.T. 137 : 25 Bom. L.R. 548 : 37 C.L.J. 501 : (1923) M.W.N. 393 (P.C.) that the principle that those who rely upon deeds and powers executed by a pardanashin lady should satisfy the Court that they had been explained to and were understood by her, applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details, and legal technicalities involved was understood by her and that disinterested and competent persons, with a fair understanding of the whole matter advised her to execute it.

23. What are the facts here? The decree-holder is a pardanashin lady aged 70. The evidence of her grand-son-in-law, which has not been contradicted, is to the effect that she can only sign her name, and is unable to read or write. The judgment-debtor himself has stated that he does "not know; whether she can read and write well". This lady is alleged to have entered into a compromise whereby she agreed to give tip her claim to costs amounting to over Rs. 4,000, and to settle in rent-free right with the judgment-debtor certain lands, which had been decreed in her favour. Admittedly no one was present on her behalf to advise her, and no attempt of any kind was made to explain to her the nature and consequences of the transaction into which she was entering. Such a proceeding cannot be defended, and in my judgment applying the principle laid down in the case referred to above

and in numerous other cases it was incumbent upon the judgment-debtor to see that the lady had competent legal advice, or that at least some one was present who could explain the matter to her. Nothing of the kind was, however, done.

24. For the reasons stated I am of opinion that the order of the Subordinate Judge cannot be supported, and that the appeal must be allowed with costs both in this Court and in the Court below, The hearing-fee is assessed at 5 gold mohurs.

Newbould, J.

5. I agree.