

(1998) 11 CAL CK 0022

Calcutta High Court

Case No: A.P.D. No. 944 of 1992 and Suit No. 746 of 1977

National Jute Manufacturers
Corporation Ltd.

APPELLANT

Vs

Ramnagar Cane and Sugar
Company Ltd.

RESPONDENT

Date of Decision: Nov. 6, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2(2), 47

Citation: 1 CWN 540 : (2000) 1 ILR (Cal) 205

Hon'ble Judges: Vidyanand, J; Ajoy Nath Ray, J

Bench: Division Bench

Advocate: Ashim Kumar Banerjee, for the Appellant; Pratik Prakash Banerjee, for the Respondent

Judgement

Ajay Nath Ray, J.

This is an appeal from an order passed on February 13, 1992 by the Executing Court.

2. The suit itself was filed in 1977 and it resulted in a decree dated September 23, 1985.

3. The decree was to this effect that the National Jute Manufacturers Corporation Limited do deliver up quiet and peaceful possession of the generating set in question in good condition to the Plaintiff within three months from the date of the decree; the decree contained a default Clause to this effect that in default of delivery of such possession within the time limit the N.J.M.C. do pay the Plaintiff Rs. 15 lac.

4. Disputes arose in the Court below as to whether the N.J.M.C. had duly complied with its duties under the decree in relation to the return of the generator set.

5. Within a period of two years of the passing of the decree but after the lapse of the period of three months mentioned in the decree itself the Plaintiff made an

application for execution and obtained an order. That order was obtained without prior service of notice on the Defendant as the Plaintiff applicant was under no obligation to serve such notice in regard to the execution application made within two years of the passing of the decree.

6. That ex parte order was passed on September 9, 1986. The order appointed a learned Receiver, directed sale of the generator set and further permitted raising of Rs. 15 lac, in case of shortfall, and the decree-holder was put at liberty to take appropriate steps for realisation of the decree.

7. We are told that pursuant to this order of September 9, 1986 the generator set has already been taken possession of and sold for a sum of Rs. 4,50,000.00 approximately. We have gone by oral submissions of Learned Counsel in this regard as the papers before us do not reveal any exact figure.

8. Thereafter, the N.J.M.C. made an application for having this relief, that they be declared as not liable to make any further payment as they had done all they had to do for return of the generating set; the order appealed from was passed on that application. There is also included in the Paper Book a set of papers relating to a further execution application taken out by the Plaintiff as was allowed by the order of September 9, 1986.

9. In the judgment and order in the Court below the learned Judge has proceeded on the basis that as the order of September 9, 1986 was not appealed from, the matter was concluded thereby between the parties. As such it was not open to the Executing Court to relieve the N.J.M.C. from further liability to pay under the decree. His Lordship stated as follows:

There might have been some doubt as to whether the default Clause in the decree had come into operation or not or whether the generator set had been placed at the disposal of the decree-holder. But all these points were taken into consideration in the earlier order which was passed on September 9, 1986 against which no appeal was preferred.

10. It was argued before us that either the order of September 9, 1986 and the order appealed from are both appellable, or, in the alternative both are unappealable. This was argued by the Respondent before us. They submitted that in case both these orders in execution are appealable, the learned Judge finding that the matter was concluded by the first order of September 9, 1986 becomes unchallengeable. If on the other hand both are unappealable we would have to dismiss the appeal itself on the ground of un-appealability.

11. So far as the order appealed from is concerned there is absolutely no doubt that it is an order u/s 47 of the Code of Civil Procedure. It relates to the satisfaction of a decree and disputes have arisen between the parties to the suit in regard thereto.

12. Prior to the 1976 amendments, an order u/s 47 would be appealable in the same manner as a decree. The 1976 amendment, however, removed the express mention of Section 47 from the definition of a decree contained in Section 2(2) of the Code of Civil Procedure.

13. The Respondent argued that because Section 47 was removed from Section 2(2), all orders u/s 47 thereby became unappealable. They emphasised that orders in execution are not made appealable either under Order 43 or by reason of any other provision of the Code. In our opinion, the removal of Section 47 does not mean that all orders thereunder become thereby unappealable.

14. We are of the opinion that removal of Section 47 from the definition of a decree as contained in Section 2(2) has this effect:

(i) If an order is made u/s 47, it does not get an automatic appealable status as much as it got prior to the 1976 amendments;

(ii) When an order is passed u/s 47, and a point of its appealability arises, the Court would have to decide the point by assessing whether the order finally disposes of a controversy which had arisen between the parties and the decision of which this way or the other affected, the rights of the parties in a substantial and final way. By applying these tests the order appealed from, in our opinion, is clearly appealable.

15. In so far as the order of September 9, 1986 is concerned, we are of the opinion that the ex parte order is appealable only at the choice of the judgment debtor who was affected. In case of an order passed ex parte in execution within the period of two years after the decree/the judgment debtor has a choice either of coming in appeal; directly from that order if the judgment debtor's rights are substantially and finally affected, or it can follow the second alternative of going before the executing Court and raising the disputes there and having a decision on the disputes by the First Court.

16. The matter is very much like the Defendant who suffers an ex parte decree; such a Defendant has a choice of making a setting aside application or appealing directly. However, in an execution matter no issue of sufficient cause for non-appearance will arise, but the issue there will be whether the order in execution has unjustly or illegally affected the absent judgment debtor.

17. Mr. Ashim Kumar Banerjee appearing for the Appellant gave us the case of [Ramchandra Spg. and Wvg. Mills Vs. Bijli Cotton Mills and Others](#),

18. He pointed out that in that case, which involved an execution sale, money had been tendered to the Amin after Court hours who had gone to the learned Judges residence and went up alone to the Judge, leaving the party who had tendered the money outside. As he was the officer of court he was entitled to do so, as the Supreme Court observed. The tender was held to be valid in these circumstances. Mr. Banerjee submitted that there were letters written by N.J.M.C. which would

similarly in the circumstances of this case, show that the generator had been validly tendered to the decree holder in the stipulated time.

19. Regarding the point of appealability Mr. Pratik Prakash Banerjee gave us the case of [Deo Narayan Goala, \(Deceased by L.R.\) and Others Vs. Jagadish Pandit](#), and more importantly, case decided by the Supreme Court in [Shah Babulal Khimji Vs. Jayaben D. Kania and Another](#),

20. He then showed us a Division Bench judgment of our High Court in the case of *Indramal Shyamsukha v. Bhagat Singh Dugar* (1991) 2 C.L.J. 321 where Khimji's case was noticed and followed.

21. To the best of our understanding the tests of appealability in regard to Section 47 orders mentioned by us above tally with the observations in the Supreme Court case as well as with the observations of the Division Bench case.

22. In these circumstances we are of the opinion that the learned Judge in the Court below, with respect, erred in not considering the case of N.J.M.C. at all as to whether it had validly offered the generator set within the time stipulated in good condition and had in all manner discharged its obligations under the decree. It was not proper to dispose of the matter without such consideration of the technical ground that the order of September 9, 1986 had set the matter at rest between the parties without possibility of any further recourse as that order had not been appealed from. His Lordship fell into this error because His Lordship did not correctly appreciate, with respect, the double recourse open to a judgment debtor when faced with an ex parte order taken in execution against it within two years of the decree.

23. The order under appeal is, therefore, set aside. The matter is remanded to the Executing Court, which will give its decision on merits in the light of the observations made by us herein. We clarify that we have not entered into the merits as to the propriety or fulness of the discharge of N.J.M.C.'s obligations under the decree and the executing Court will enter into the merits in that regard and give its decision.

24. It is also necessary that other facts regarding sale of the generator set, the exact price obtained and the other pending execution application, if any, be brought out fully and clearly before the executing Court. Thus parties will be at liberty to pray there for filling further affidavits and the executing Court will give directions as it might think fit and proper.

25. The costs in the Court below and before us incurred upto now in this matter is assessed at Rs. 20,000.00 but that will abide by the result of the application in the executing court when it takes its decision on remand.

26. All parties and all others concerned to act on a signed xerox copy of this dictated order on the usual order on the usual undertakings.

Vidyanand, J.

27. I agree.