Biroo Gorain and others Vs Musstt. Jaimurat Koer

Court: Calcutta High Court

Date of Decision: June 2, 1911

Final Decision: Allowed

Judgement

1. We are invited in this Appeal to set aside an order by which the Court below has summarily refused to entertain an objection of the judgment-

debtors that the decree under execution has been cornpletely adjusted out of Court. The circumstances under which this objection was taken are

patent en the face of the record. The decree under execution was made in a suit for rent on the 24th of September 1908. An appeal was preferred

to this Court on the 8th January (sic). Three days later, the Appellants applied for a Rule to stay proceedings in the execution which had already

been commenced in the Court below. The Rule was granted and an ad interim stay was directed. On the 5th February 1909, the Appellants

presented an application to this Court in which it was stated that the matter in difference between the parties had been adjusted and that in

pursuance thereof they had agreed to withdraw the appeal. This application was directed to be heard on the 8th of February. On that date in the

presence of the Vakil for the Appellants and the Vakil for the Respondent the Court granted the application. The appeal was dismissed and the

Rule discharged; the Respondent also waived her right to the costs of the proceedings in this Court. On the 22nd of February, the Vakil for the

Respondent addressed a letter to the Deputy Registrar in which he prayed that as the appeal had been withdrawn, the order of this Court might be

sent down to the Court below as the records were required for the purpose of another case. Five days later, the order of this Court was

communicated to the Court below and the records were also returned. In the order, which was drawn up, it was stated that the Appellant''s had

intimated to the Court that the matter in difference between the parties had been adjusted and on that footing the appeal had been dismissed

without costs. On the 2nd March 1909, the Court below recorded an order to the effect that the record had been received back and (sic) sented

on the 4th November 1908 was disposed of by the Court below. It now transpires that on the 18th March 1909 the decree-holder presented a

second application for execution, but it was dismissed for non-prosecution on the nth May following. On the 6th of June 1910, the decree-holder

presented the application on the basis of which the proceedings now before us were initiated. The decree-holder ignored the settlement alleged by

the judgment-debtors in their application to this Court on the 5th February 1909, and prayed that execution might proceed on the footing of the

application of the 4th November 1908. Notice was served upon the judgment-debtors who promptly preferred objections on the 25th of July

1910. These objections were of a twofold character, namely, first, that the execution could not proceed because the decree had been adjusted in

full; and, secondly, that if the execution could proceed, the decree-holder was bound to proceed against the properties mentioned in the prayer

clause of the plaint before she could be allowed to proceed against the other properties of the judgment-debtors. The Subordinate Judge overruled

these contentions and held that as the alleged adjustment had not been certified, it was not competent to the Court to take notice of it. The

Subordinate Judge further held that upon the face of the objections the adjustment, if true, was between the decree-holder and persons who were

not parties to the execution proceedings, and consequently the adjustment could not be of any value to the judgment-debtors. The Subordinate

Judge also held that the discretion of the decree-holder to proceed in execution of her decree in any manner she chose, was not restricted by the

facts stated in the prayer clause of the plaint.

2. The judgment-debtors have now appealed to this Court. On their behalf the decision of the Subordinate Judge has been attacked substantially

on three grounds, namely, first, that although the adjustment has not been certified in the manner contemplated by r. 2 of Or. 21 of the Code of

1908, as the conduct of the decree-holder is fraudulent, it is open to the Court to investigate the allegations of fraud under, sec. 47 of the Code of

1908; secondly, that the provisions of r. 2 of Or. XXI of the Code have in substance been complied with; and, thirdly, that if it is open to the

decree-holder to proceed with the execution, she cannot sell the properties of the judgment-debtors in any manner she chooses, but must proceed

first against the properties mentioned in the prayer clause of the plaint.

3. In so far as the first of these objections is concerned, reliance has been placed upon the cases of Gadadhar Panda v. Shyam Churn Naik 12

C.W.N. 485 (1908), Ramayyar v. Ramayyar ILR 21 Mad. 356 (1897) and Trimbak Ram Krishna Ranade v. Hari Laxman Ranade ILR 34 Bom.

575 ; 12 Bom, L.R. 686 (1910). In our opinion, there is no foundation for this contention. Or. 21, r. 2 of the Code provides in cl. (3) that ""a

payment, which has not been certified or recorded as aforesaid, i.e., as explained in cls. 1 or 2 at the instance of either the decree-holder or the

judgment-debtor shall not be recognized by any Court executing the decree."" The contention of the learned Vakil for the Appellants in substance is

that in cases where the conduct of the decree-holder is fraudulent, it is open to the Court, in fact it is incumbent on the Court, to investigate the

allegation of fraud under sec. 47 of the Code of 1908, notwithstanding the clear and specific provisions of cl. (e) of r. 2 of Or. 21. This argument is

obviously fallacious. A proceeding under r. 2, Or. 21 is a proceeding under sec. 47 of the Code, inasmuch as it decides a question between the

parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. If the contention advanced on behalf of the

Appellants were to prevail, in all cases where fraud is imputed to the decree-holder, the provisions of cl. (3) of r. 2, Or. 21 would become

nugatory; in other words, the provisions of r. 2 would be superseded by the wider provisions of sec. 47. We are, therefore, unable, upon the clear

provisions of statutory law, to give effect to the contention of the learned Vakil for the Appellants.

4. As regards judicial decisions to which our attention has been drawn, Gadadhar Panda v. Shyam Churn Naik 12 C.W.N. 485 (1908) does not,

when analysed, support the contention of the Appellants. No doubt there are isolated expressions in that judgment which would support the view

that it is competent to the Court to deal with a case under sec. 244 of the Code of 1882 when an allegation of fraud is made in relation to a case of

payment or adjustment of a decree. But it is worthy of note that no question of limitation arose in that case. It cannot be held that the learned

Judges intended to lay down that although the period of limitation within which an application by the judgment-debtor under cl. (2) of r. 2 of Or. 21

is to be presented to the Court has expired, it is still open to him to secure an investigation of the very same matter by an application under sec. 47

of the Code of 1908. The only case which supports the contention of the Appellants is the decision in Ramayyar v. Ramayyar ILR 21 Mad. 356

(1897). It is sufficient, however, to point out that a contrary view was taken by the learned Judges of the Madras High Court in Periathambi v.

Vellaya ILR 21 Mad. 409 (1897) and the decision in Ramayyar v. Ramayyar ILR 21 Mad. 356 (1897) was expressly dissented from in

Ganapatty v. Chenga ILR 29 Mad. 312 (1905). On the other hand, a series of decisions of this Court amongst which may be mentioned, Kamini

Debi v. Aghore Nath 11 C.L.J. 91 : S.C. 14 C.W.N. 357 (1909), Nistarini Dasi v. Kazim Ali 12 C.L.J. 65 (1910), Monmohan Karmokar v.

Dwarka Nath Karmokar 12 C.L.J. 312 (1910) and Heramony Biswas v. Musa Khan 7 Indian Cases 625 (1910), show conclusively that the

contention of the Appellants ought not to prevail. The authorities on the subject were fully reviewed in the case of Monmohan Karmokar v.

Dwarka Nath Karmokar 12 C.L.J. 312 (1910), where it was pointed out that in a case in which an application under cl. (2) of r. 2 of Or. 21

would be successfully met by the objection of limitation, the judgment-debtor was not entitled, under the colour of sec. 47 of the Code of 1908, to

obtain an investigation of the objection that the decree had been satisfied or adjusted out of Court. We adhere to the view taken in that case. We

are also clearly of opinion that the decision in Trimbak Ram Krishna Ranade v. Hari Laxman Ranade ILR 34 Bom. 575 ; 12 Bom, L.R. 686

(1910) is of no assistance to the Appellants. We may further point out that even if it is established that the conduct of the decree-holders is

fraudulent the judgment-debtor is not entitled to obtain an extension of the time within which an application is to be made to the Court under cl. (2)

of r. 2 of Or. 21. Sec. 18 of the Limitation Act which deals with the effect of fraud, is clearly of no avail to the Appellants. That section provides

that ""when any person having a right to make an application has by means of fraud been kept from the knowledge of such right or of the title on

which it is founded or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for making

an application against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the

person injuriously affected thereby, or in the case of the concealed document, when he first had the means of producing it or compelling its

production."" If is not suggested on behalf of the Appellants that they were kept by means of fraud from the knowledge of their right to make the

application mentioned in cl. (2) of r. 2 of Or. 21. Their grievance is that they have been kept by means of fraud from the exercise of their right to

make this application; consequently, if we were to accede to the contention of the Appellants, we should have to substitute for the phrase ""from the

knowledge of such right,"" the phrase ""from the exercise of such right."" But clearly the knowledge of a right and the exercise thereof are

fundamentally distinct things. We are, therefore, of opinion that in so far as the first contention of the Appellants is concerned it must fail

notwithstanding the earnest appeal which the learned Vakil for the Appellants made to us that the view we propose to take might involve

considerable hardship to innocent persons. But if the judgment-debtor, notwithstanding the express provisions of cl. 2, r. 2, Or. 21, still enters into

an adjustment with the decree-holder out of Court and omits to take the necessary precaution of making an application within the time allowed by

law, he has no just ground of complaint when the decree-holder takes advantage of his omission to seek the protection of the law. Further, it is not

by any means clear that the judgment-debtor in a case of this description is really without any remedy, because it is well settled, as pointed out in

the case of Poromanand Khasnabish v. Khepoo Paramanik ILR 10 Cal. 354 (1884), that it is open to the judgment-debtor who has been

defrauded in this manner to institute a suit for damages for the fraud. It is also clear as laid down in Madhub v. Novodeep ILR 16 Cal. 126

(1888), R. v. Bapuji ILR 10 Bom. 288 (1886), R. v. Muthuraman ILR 4 Mad. 325 (1881) and R. v. Pillala ILR 9 Mad. 101 (1885), that the

decree holder who has recourse to such a fraudulent act, renders himself liable to proceedings under the criminal law. In the present case,

therefore, even if the Appellants were to fail in their contention, they would not be wholly without a remedy. The first contention of the Appellants

therefore fails.

5. In so far as the second contention is concerned, it raises the question whether the judgment-debtor has not in substance complied with the

requirements of cl. 2, r. 2, Or. 21. The learned Vakil for the Appellants has contended that the petition of objection presented to the Court below

on the 25th of July 1910 may be treated as in continuation of the application made to this Court on the 5th of February 1909 in which the fact of

the alleged adjustment was notified to the Court. In our opinion, this contention is well-founded and must prevail. No doubt an application under cl.

2, r. 2, Or. 21, ought to be presented to the Court in which the decree is under execution; and it ought to call upon the Court to issue a notice to

the decree-holder to show cause why the adjustment should not be recorded as certified. Tested from this point of view the application of the 5th

February 1909 might, at first sight, be deemed open to objection. But the circumstances of this case are of a very special character. No doubt an

application for execution of the decree of the Court below was pending before the Subordinate Judge, but the decree itself was under appeal to

this Court; and the only decree which could ultimately be enforced by the decree-holder against the judgment-debtor would be the decree of this

Court, whether that decree be one of affirmance, reversal or modification. Consequently when the judgment-debtors notified to this Court that the

decree had been adjusted, it could not be said that they had not acted in accordance with law. No doubt that application did not call upon the

decree holder to certify the alleged adjustment; but it was not necessary to take such a step at that stage. In fact, although the allegation of

adjustment was made, it was not repudiated by the learned Vakil for the decree-holder Respondent. On the other hand, the Vakil for the

Respondent gave up his cost not only in the Rule but also in the appeal. This fact undoubtedly points to the conclusion that there must have been

some arrangement between the parties. It is also inconceivable that if no arrangement had been entered into between the parties, the judgment-

debtor after having paid Rs. 365 as Court-fees on the memorandum of appeal presented on the 8th of January 1909, should have voluntarily

asked for leave to withdraw the appeal on the 5th of February 1909. It was only after the decree-holder had applied to the Court on the 6th June

1910 to execute the decree, ignoring the alleged adjustment, that it became necessary for the judgment-debtor to apply to the Court to compel the

decree-holder to certify the adjustment in question. We therefore hold, under the circumstances of this case, that, treating the application of the 5th

February 1909 presented to this Court and the petition of objection presented to the Court below on the 25th July 1910 as parts of the same

transaction, there was sufficient compliance with the provisions of the law. The Court is never astute to impose a technical bar so as to give effect

to a scheme of fraud, and it would be lamentable if we were constrained to hold that the application of the 5th February 1909 in which the

allegation of adjustment was made, was of no avail to the judgment-debtor for the purpose of proceedings under cl. 2, r. 2, Or. 21. In our opinion,

the Subordinate Judge ought to have entertained the objection taken in the application of the 25th July 1910 and investigated it on the merits. The

second contention of the Appellants must, therefore, prevail. In so far as the third contention is concerned, it is not necessary for us to determine

whether it is well-founded. But we must point out that the decree now under execution is a perfect specimen of the mode in which a decree ought

never to be drawn up. The decree as it stands is unintelligible and cannot be executed without reference to the judgment, possibly also without

reference to the pleadings. If the question arises later on as to whether, in the event of execution of the decree, the decree-holder is in any way

fettered as to the manner in which she should proceed against the properties of the judgment-debtors, the question must be re-investigated by the

lower Court with reference to all the proceedings in the suit. This question, therefore, will be left open for future investigation.

6. The result, therefore, is that this appeal is allowed, the order of the Subordinate Judge set aside, and the case remanded to him in order that the

objections taken by the judgment-debtors in their application of the 25th July 1910 may be investigated on evidence.

7. We must add that the Subordinate Judge took a very narrow view of his duties in this matter, when he held that as upon the face of the

pleadings the alleged adjustment purporte to have been entered into between the judgment-debtors on the one hand, and persons who are

strangers to the proceedings, on the other, the adjustment could not be of any avail to the judgment-debtors But the allegation of the judgment-

debtors is that the adjustment was entered into, for the benefit of the decree-holder, with her husband and her father-in-law. If this be so, the Court

will discover the real nature of the transaction, and not impose technical bars to effectuate a scheme of fraud; that is, in a matter of this description,

the Court is bound to look to the substance and not to the mere form of the transactions placed before it. The Appellants are entitled to their costs

in this Court. We assess the hearing-fee at 5 (five) gold mohurs.