Madhusudan Nag Vs Dhananjoy Nag

Court: Calcutta High Court

Date of Decision: April 10, 1992

Citation: (1992) 2 ILR (Cal) 228

Hon'ble Judges: S.K. Mookherjee, J; Abani Mohan Sinha, J

Bench: Division Bench

Advocate: N.R. Chatterjee and K.N. De, for the Appellant;Shyama Prasanna Roy Chowdhury, R.D. Manna, G. Ghosh and M. De, for the Respondent

Final Decision: Dismissed

Judgement

Abani Mohan Sinha, J.
This revisional application, at the instance of the Defendant in Title Suit No. 107 of 1981 of the Eighth Court of

Asstt. District Judge, Alipore, is directed against the judgment and order passed by the learned Asstt. District Judge in the Execution Case being

Title Execution Case No. 13 of 1985 arising out of that suit. The opposite party No. 2, the Plaintiff, brought the above suit, inter alia, praying for

declaration that the Deed of Trust dated March 29, 1974, in favour of his two sons, namely, the opposite party No. 1 and the present revisionist,

in respect of the part of premises No. 17A, Hem Chandra Naskar Road and also Deed of Gift dated January 31, 1975, in favour of opposite

party No. 1 are void and not acted upon. He also prayed for cancellation of the deeds on the ground of fraud and misrepresentation. The parties

entered appearance in the suit. The suit was ultimately compromised and decreed in terms of the petition of compromise filed on March 30, 1984.

It was agreed by the parties to the suit that the opposite party No. 2 would execute two deeds of gift in favour of his two sons who were

Defendants in that suit in respect of the sail property which belonged to him. The opposite party No. 1, one of the Defendants, put the compromise

decree into execution and the executing Court refused to proceed with the execution case holding, inter alia, that there was no scope to execute

any deed of gift in favour of either party to the suit through Court. It is alleged that no notice of such proceeding was served on the revisionist.

Subsequently, the opposite party No. 1 filed an application u/s 151 of the CPC for recalling the earlier order. The Court allowed such prayer and

recalled the order and the Court asked for report of the Sheristadar as to the propriety of the draft deed of gift filed by the opposite party No. 1.

The Court accepted the draft on the report of the Sheristadar and directed the execution of the deed of gift through Court. All these orders, it is

alleged, were passed in the absence of the revisionist. The opposite party No. 2 who was the Plaintiff of the original suit, however, on August 5,

1989, executed a deed of gift in favour of the revisionist in respect of the disputed property. He took over possession of such property in terms of

the compromise decree and paid Rs. 18,000 towards the Municipal Taxes. The opposite party No. 2 and the revisionist contested the application

u/s 151 of the CPC filed by the opposite party No. 1. But they were unsuccessful. The Misc. case brought u/s 47 of the CPC by the opposite

party No. 1 met the same fate. Thereafter, the revisionist filed an application u/s 151 of the CPC for recalling such orders as entire proceedings

were taken out in his absence and without his knowledge. The opposite party No. 1 filed an application for amendment of the execution petition

for including the prayer for delivery of possession of the suit property in his favour with the help of Police. The Court rejected the Petitioner''s

application u/s 151 of the CPC for recalling the order passed in favour of the opposite party No. 1 while allowing the application for execution of

the deed of gift through the Court and amendment of the execution petition. Being aggrieved by and dissatisfied with the judgment and order of the

Court below passed on September 14, 1990, the Petitioner has come up in revision.

2. It has been urged by Sri N.K. Dey the learned Advocate, duly assisted by Sri N.R. Chatterjee, representing the revisionist that the Court should

not have rejected application filed by the revisionist u/s 151 of the CPC as all the proceedings were taken out in the absence of the revisionist. It

has further been urged that the compromise decree is not executable as it related to extraneous matter not being the subject-matter of the suit.

According to him, the deed of gift could not legally be executed through Court and the decree passed in this regard is a nullity and without

jurisdiction.

3. Mr. S.P. Roy Chowdhury, the learned Advocate representing the opposite party, has on the other hand urged that the application under

Sections 151 and 152 of the CPC filed by the revisionist in the Court below was misconceived as there was no scope for adding to or subtracting

the compromise decree and that the executing Court cannot go behind the decree. According to him, the revisionist should have moved the Court

below Under Rule 3 of Order 23 of the CPC which, inter alia, provides that in case of any dispute as to any adjustment or any satisfaction arrived

at between the parties preceding the compromise should be decided by such Court. He has drawn our attention to Rule 3A of the same Order

which lays down that no suit shall lie to set aside a decree on the ground that the compromise on which the decree was based was not lawful.

4. His further argument is that the executing Court is not entitled to adjudicate upon the finding of the trial Court on adjustment.

5. The compromise petition which forms part of the decree is Annexure A. The present dispute is only Clause (d) of such petition of compromise.

It has been laid down there that the Plaintiff, the father of the revisionist, and the opposite party No. 1, the owner of the property would transfer

and adjacent back side of vacant land by an appropriate deed of gift in favour of the Defendant No. 1 of the suit and the revisionist, the Defendant

No. 2 of the suit in equal share. It is further stated that the Defendant No. 1 will get in his share, under the gift, land adjacent to his building and the

rest of the land will be gifted to Defendant No. 2, the revisionist. The Plaintiff, the father, was allowed to appropriate the rent of the tenanted room

in the vacant land during his lifetime and that a 10'' wide common passage would be left in the vacant land from east to west. It appears that the

opposite party No. 1, Dhananjoy Nag, filed an execution case in respect of compromise decree. The executing Court by its order No. 60 dated

July 3, 1989, however, rejected the execution case holding that there was no scope for the Court to execute any deed of gift on behalf of either

party to the suit. Later, by order No. 61 dated July 19, 1981, on the application filed by Madhusudan u/s 151 of the CPC recalled the said order

and directed the Sheristadar to check and report the draft deed of gift filed by Madhusudan along with his application holding that the Plaintiff of

Title Suit No. 107 of 1981, the father of Madhusudan, the present Petitioner under the terms of compromise decree was to execute the deed of

gift in favour of Madhusudan and also of Dhananjoy, the opposite party No. 1, and as such deed was not executed within the time specified in the

decree, the execution case was maintainable for execution of such deed of gift. An objection u/s 47 of the CPC was taken out by the Plaintiff

against the excitability of such decree. Ultimately, that Misc. Case was dismissed. It appears from the submission of Mr. Roy Chowdhury in

reference to the list of dates that both opposite parties Nos. 1 and 2 prayed before the Court for appointment of a survey-passed Commissioner

for determination of the excitability of the deed of gift with reference to the map or plan filed along with the decree. The Commissioner submitted a

report and it was objected to by Biswanath, the opposite party No. 2. The Court accepted the Commissioner''s report and overruled the objection

and directed for execution of the deed of gift within 3 months. All these happened before filing of application for execution by the opposite party

No. 1. So, it is quite clear that the parties were in the know of the proceedings of execution. They unsuccessfully objected to the execution of the

decree. Later, when the Court passed final order for registration of the deed of gift after directing Madhusudan to put in stamp duties, opposite

party No. 2, the father moved an application u/s 151, Code of Civil Procedure, which too was rejected. Thereupon, the present Petitioner on

December 5, 1989, filed an application under Sections 151 and 152 of the CPC resisting the execution of the decree. Ultimately, the Court by the

impugned order dated September 14, 1990, rejected such application. The Court, however, allowed the application of the opposite party No. 1

for amendment of the execution petition by including prayer for delivery of possession with Police help. The sequel of events clearly indicates that

the Petitioner was not kept out of knowledge of the execution proceeding as strenuously urged before us in this revision. Our attention has been

drawn by Mr. Roy Chowdhury to the fact that as the Petitioner in violation of the terms of compromise decree attempted to carry on construction

on the disputed land, Dhananjoy, the opposite party No. 1, brought the Title Suit No. 43 of 1984 in the Eighth Court of Asstt. District Judge,

Alipore, for permanent injunction. In the said suit the Defendants were permanently injected from changing the nature and character of the suit

property in violation of the terms of the compromise decree recorded in Title Suit No. 170 of 1981. This fact has been disclosed by Dhananjoy in

his affidavit-in-opposition which was accompanied by the xerox copy of the judgment. This point on oath has not been denied by the revisionist.

Mr. Roy Chowdhury has urged that the revisionist"s only aim is to delay the execution of the decree which was obtained by the parties long

before. According to him, there is no jurisdictional error in the impugned order as it is based on application of the correct procedure.

6. Mr. De though addressed us on the question of excitability of the decree with reference to catena of decisions, we are of the view that this Court

in revision cannot go into such question. The revisionist is a party to the decree. He cannot go back on the compromise decree alleging that it is not

capable of being executed or it is otherwise illegal. He has not taken out any objection Under Order 23, Rule 3 against such decree before the

appropriate Court at the appropriate time. There is no allegation of fraud or collusion. Mr. De has strenuously urged that the decree relates to

extraneous matters which are not strictly the subject-matter of this suit. We cannot accept this argument in view of the amended provision of Rule 3

of Order 23 of the Code which lays down that a compromise may be affected in a suit between the parties to the suit whether or not the subject-

matter of the argument, compromise or satisfaction is the same as the subject-matter of the suit. After the amendment a compromise decree may

relate to the subject-matter which has not been involved in the suit. The parties on the principle of give and take and settle their disputes with

regard to subject-matter of the suit and even with regard to subject-matter which are not in suit.

7. Mr. De, in the next place, has urged that the compromise is not lawful as the deed of gift cannot be a consideration for the compromise and a

deed of gift, if not made on account of natural love and affection, is not to be acknowledged as a valid document within the meaning of Section 25

of the Indian Contract Act. We may say that his argument cannot be accepted. For a gift, if made in writing and registered according to law on

account of natural love and affection, will be exception to the rule as contained in Section 25 of the Indian Contract Act to the effect that an

agreement made without consideration is void. Explanation (1) of Section 25 of the Indian Contract Act may be looked into. In the present case,

the parties are related as father and sons. It cannot be denied the father has natural love and affection for his sons and that he wanted to settle the

properties in favour of his two sons by canceling arrangement effected earlier by him by executing deed of trust and deed of gift Clause (2) of

Section 25 also honors the agreement containing a compromise to compensate a person who has already voluntarily done seeming for the

promises. In the present case the contest in T.S. No. 107 of 1981 was given up by the parties and the parties agreed to settle the dispute and there

was also an agreement to compensate the party for not contesting the suit to the end. So, it can be said that this was a good consideration for

settling the dispute and as such can be acknowledged by a Court of law. Mr. Roy Chowdhury has referred to a decision of the Supreme Court in

support of his argument, Ram Charan Das Vs. Girjanandini Devi and Others, that where the compromise decree was in substance a family

arrangement is binding on all the parties to it, it being a compromise of conflicting claims. The parties recognized each other"s rights to property,

which they had earlier disputed. If the party interested compromised and arrived at a settlement amongst them as family members and had taken

benefit under the transaction was not entitled to turn round and challenge its validity. He is stopped from doing so because the other party acted on

the document. The Courts should give effect to a family settlement upon the broad and general ground that its object is to settle existing or future

disputes regarding property amongst members of a family. The consideration for such a settlement is the expectation that it will result in amity and

good will amongst persons bearing relationship to one another. That consideration having passed by each of the disputants, the settlements

consisting of recognition of the rights asserted by each other cannot be permitted to be impeached thereafter.

8. Next, Mr. Roy Chowdhury has urged that the revisionist should not be allowed to approbate and reprobate as he was a party in Title Suit No.

107 of 1981 and to the compromise decree passed in that suit. He has relied on a decision, Nagubai Ammal and Others Vs. B. Shama Rao and

Others, which lays down that the persons who are parties to a transaction cannot approbate or reprobate with regard to a such transaction or

claim any relief in respect thereof. He may be put to election as to approving or repudiating a particular transaction if he does not elect and accept

the transaction, or the benefit there under he cannot be heard to say that the transaction is invalid and ask to set it aside or to set up t6 the

prejudice of the persons who have relied upon it. According to him, the revisionist gave up the contest in the suit and got the benefit of the decree

of compromise and as such he could not be allowed to challenge his decree as some part of it has gone against him.

9. It has further been contended by Mr. Roy Chowdhury that the consent decree is not a nullity and that it is at best voidable and stands until it is

effectively set aside. He relied on Charles v. Edward Hubert AIR 1929 P.C. 289, in support of his contention. He has also referred to the

explanation of provision of Order 23 Rule 3 of the Code which lays down that an agreement or compromise which is void or voidable under the

Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of Rule 3. The revisionist could not prove that the agreement of

compromise arrived at was void or voidable. It is only alleged that it is fraudulent and collusive, but nothing has been produced before the Court to

prove fraud and collusion. No attempt was made by the revisionist for assailing the compromise decree in a proceeding in terms of the proviso of

Rule 3 of Order 23. The decree of compromise has not been set aside although the revisionist has made several attempts to undo the effect of the

compromise by filing an application in Execution Proceedings or u/s 151 of the Code. All his attempts were proved abortive. It further appears

from Annexure A that T.S. 43 of 1984 was brought by the opposite party against the revisionist. The suit was decreed in favour of the opposite

party who was the Plaintiff and the Defendants, the revisionist and others were permanently injected from changing the nature and character of the

suit property in violation of the terms of compromise recorded in T.S. 107 of 1981.

10. The decision in Km. Sonia Bhatia Vs. State of U.P. and Others, relied upon by Mr. De in support of his contention that the agreement is not

lawful as it was without any consideration and cannot be attracted to the facts of the present case. As already stated, that the compromise in

question is an agreement which satisfies the test of Section 25(1) and (2) of the Indian Contract Act. Other decision, namely, Kantilal v. Azizul

Haque 61 C.W.N. 309 which lays down that the High Court under Article 227 can interfere with an invalid order or an order passed by Tribunal

without jurisdiction has no application to the present case inasmuch as the compromise decree cannot be said to be a decree passed without

jurisdiction or is invalid on account of some inherent infirmity. Similarly, the decision reported in Sunderdas v. Ramprakash 1977 (2) S.C.C. 622

which lays down that the executing Court can go behind the decree if it is pleaded with such decree is a nullity and is without jurisdiction is not

applicable in the present case in view of the fact that the impugned decree has not yet been proved to be a nullity or can be termed as one passed

without jurisdiction.

11. Thus, on consideration of the entire facts and the laws applicable to such facts, we find no reason to interfere with the impugned order. It has

been well-settled by preponderance of judicial decision that the High Court in revision would not interfere with the findings of facts either under

Article 227 of the Constitution or Section 115 of the CPC and that even on erroneous finding of fact or erroneous decision made by subordinate

Courts would not call for interference unless there is failure of justice on account of the passing of the impugned order.

12. In our View, the compromise decree has not caused any failure of justice in the present case. So, the revision petition is dismissed on contest

with cost which is assessed at 30 G. Ms.

S.K. Mookherjee, J.

13. I agree.

14. Application dismissed.