(1970) 08 CAL CK 0019

Calcutta High Court

Case No: Appeal from Original Order No. 405 of 1959

Krishna Chandra Santra (Defdt. No. 7)		APPELLANT
	Vs	
Tarak Dassi and Others		RESPONDENT

Date of Decision: Aug. 4, 1970

Acts Referred:

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

Citation: 75 CWN 148

Hon'ble Judges: Borooah, J; A.K. Sinha, J

Bench: Division Bench

Advocate: Dhruba Kumar Mukherji and Bidyut Kumar Mukherji, for the Appellant;Shyama Charan Mitter and Satyajit Banerji, for the Respondent

Final Decision: Allowed

Judgement

A.K. Sinha, J.

This appeal is by one of the defendants No. 7, Krishna Chandra Santra, against a money decree passed by the Subordinate Judge, First Court, Hooghly in favour of the plaintiff. The plaintiff, Sm. Tarak Dasi, filed a suit for recovery of money amounting to Rs. 15,129.15.11 against several defendants Nos. 1-8 including the present appellant, the defendant No. 7. Her case, briefly, is that one Puma Chandra Das obtained a consent decree No. 265 dated 17th June, 1925 for Rs. 7,000/- against one Gunamoni Santra, father of defendants Nos. 1-5 and one Kangali Charan since deceased the husband of defendant No. 6, in the court of French Chandernagore. Subsequently by a notarial transfer deed No. 110 dated 9th May, 1942 Puma Das transferred that decree to one Sm. Purnabala Dassi on a recital inter alia that one Sidheswar Santra, the brother of Gunamoni the defendant No. 1 and Kangali Charan were jointly liable for the debt. Purnabala filed a suit against Gunamoni and wife of Kangali-the defendant No. 6 and the defendant No. 7 who is a son of Sidheswar Santra for the amount of interest payable on the principal under the French Law and

obtained a decree for Rs. 1,680/-against Gunamoni and defendant No. 6 but the name of defendant No. 7 was expunged as he was found not liable. Purnabala then filed another suit against Krishna Chandra, the defendant No. 7, in 1946 for a declaration that he and his brother Palai-the defendant No. 8 were jointly liable with Gunamoni and Kangali or their heirs and legal representatives for the debt under the consent decree and the decree of 1945 for interest and obtained a decree No. 62 dated 11th May, 1946 against them.

2. Thereafter, Purnabala by two notarial deeds Nos. 222 and 223 transferred her rights under the consent decree and also the decree of 1945 and 1946 to the plaintiff on 28th July, 1947. In these two documents the defendant No. 7 was also a consenting party and acknowledged the joint debt along with the other debtors and agreed that the debtors would pay off the existing debt within 5 years with interest at the rate of 8 per cent per annum. As the defendants failed to pay the plaintiff started a money execution case No. 23 of 1953 in the court of the Subordinate Judge of Chandernagore on 23rd March, 1953 for realisation of the dues under two notarial deeds. The defendant No. 7 raised an objection u/s 47 of the CPC against the executability of the two documents without recourse to suit. This objection was upheld and accordingly, the present suit has been instituted by her.

3. The suit has been contested only by the defendant No. 7, the present appellant. The written statement filed by him is one of denial of all material allegations. His specific case is that the suit is not maintainable and the consent decree is not binding on him nor he is liable for the debt under the decree of 1945. It is alleged that the decree of 1946 was passed without jurisdiction and void and both the notarial deeds of 28th July, 1947 are illegal and void.

Upon the respective pleading of the parties following issues were framed :

1. Is the suit maintainable ?

2. Is the suit barred by limitation ?

3. Is defendant No. 7 liable under the notarial deeds Nos. 222 and 223 dated 28th July, 1947 ?

4. To what relief, if any, is the plaintiff entitled ?

5. On the first issue the trial court took the view that though the grosse copies of both the notarial deeds were executable as decree under the French Law, there was no bar to a suit being instituted for enforcement of obligations arising out of these notarial deeds under the French Law as fresh and valid contract between the parties. The other reason which weighed with the court is that after the promulgation of Chandernagore (Application of Laws) Order of 1950 on and from 1st May, 1950 these two notarial deeds in question could not be termed as decrees within the meaning of the CPC and, therefore, the suit to enforce the contract embodied in these two notarial deeds was perfectly maintainable but it refused to

award any cost of the suit on equitable consideration. On the question of limitation the trial court found in favour of the plaintiff and held that the suit was not barred by limitation. On issue No. 3 the court took the view that since there was no denial of the execution of the documents nor there was any plea of want of service as was required under the then existing laws of Chandernagore or of fraud or mistake the notarial deeds were valid and binding. Accordingly, the court decreed the plaintiff''s suit but in part for Rs. 14,0001 - on application of Section 30 of the Bengal Money Lenders'' Act. It Is the correctness of this decision which has been challenged before us in the present appeal.

5. The identical points covered by the issues framed at the trial of the suit arise for consideration in the appeal before us. The first question as to maintainability of the suit is not free from difficulty. The controversy rests on a proper determination of the rights of the parties under the French law in force at Chandernagore at the material time. But at the outset we feel constrained to record that as yet there is no authentic publication by the State Government of copies of the complete French Code or their authorised translation containing amongst others relevant provisions both of substantive and procedural laws sought to be applied in the present case. It cannot be ever-emphasised that it is neither feasible nor desirable to make any judicial pronouncement on the rights of the parties involved in a legal proceeding unless the court gets a complete picture of the law which were in operation in French Chandernagore. This difficulty was felt by the learned Judges sitting in a Special Bench of this Court in (1) Union of India (UOI) Vs. Manmul Jain, , Sinha J. (as his Lordship then was) pointed out that the defect should be remedied by bringing out official publication of the relevant French law including the decrets, deliberations, arrets etc. which are likely to be reasonably required for such purposes and gave concrete suggestions in his judgment so that the court might be in a position to discharge their duty effectively and protect the rights of the citizens, otherwise, his Lordship gave a note of caution that ''justice would be found not to have been done on incorrect or incomplete materials before the court.'' Since then eight years have rolled by but nothing appears to have been done. Now the position has still become worse by sheer lapse of time. If in 1962 some copies of the French Code could be found or secured with great difficulties either in mutilated or incomplete condition it is hardly possible to secure any one of them to-day and this is frankly told by the learned Advocates for the parties before us. The instant appeal is not the last one in the list of this Court and it is quite likely that numbers of cases are still pending concerning the French laws at least in subordinate courts of Chandernagore. Even then, it is distressing to find that the concerned authorities seem to have paid no attention to this matter which is so urgent and important for effective judicial decision involving serious questions affecting rights of the parties.

6. Fortunately for us, however, in this case Mr. Mitter with great difficulty could produce a French Code containing the relevant articles and supplied their English translations though not authorised. Nevertheless, there being no other alternative

relying on these materials we proceed to determine the points raised in this appeal as far as possible.

7. In this case, it is not dispute! that under Article 20 of the decrets dated 24th August, 1887 of the French Code the grosse copies of the notarial deeds Nos. 222 and 223 of 28th July, 1947 (Exts. 1 and 1A) are executable as decrees. In fact, the execution case was started by the present plaintiff but with the ordinary copies (Exts. 2 and 2A) for realisation of the entire dues under these two notarial deeds. On the objection raised under Sec. 47 of the CPC by the present appellant the execution case was dismissed by the executing court on the view that a suit would lie and further without production of the ''grosse copies'' the execution was not maintainable. It is also found by the trial court that these ''grosse copies'' bore endorsement of 6th September, 1947 and the plaintiff failed to explain why the execution case was started in 1953 on the ordinary and not on grosse copies. In spite of dismissal of the execution case the question now raised is whether a suit is maintainable on the basis of the grosse copies.

8. The law in the French settlement of Chandernagore, it is agreed by the learned Advocates of both parties, could be found in quite a large number of provisions what are called ''decrets'' promulgated either in France or in French territories together with deliberations and arrets all made under or in accordance with French law. It appears, Articles 20, 22, 26 and 27 under a ''decret'' regulate the powers and duties of a notary of French settlement in India promulgated on November 23, 1887. The agreed English translation of relevant Article 20 is substantially as follows : "All notarial deeds make complete proof in justice, the conventions which it contains between the contracting parties and his heirs or who comes in their cause. They can be put in execution all over the territories of the Republic and to all French possession. Nevertheless, in case of complaint to forgery the executions of deed, which alleged to be forged is stayed tilll the decision of the forgery case but if the question of forgery is incidentally raised through the Court, according to circumstances and stay the execution of the deed alleged to be forged."

9. Two other Articles 146 and 545 of the French CPC contained provisions for execution of grosse copies of notarial deeds which when translated in English appear as follows :

Article 146-The copies of judgments will be entitled and terminated in the name of the King, according to Article 48 of the Constitutional Charter."

Article 545.-No judgment nor a deed would be put into execution if they do not bear the same title as of law, and are not terminated by an order to the officers of courts of justice as it is said in Article 146.

10. From a study of the above articles it seems quite clear that only the grosse copies of the notarial deeds are executory in the whole extent of the territory of the republic and in all French possession. The trial court on a reference to the above

''decret'' appears to have taken the view that though these notarial deeds were executory in character with grosse copies they are not decrees of civil courts and, in any event, it held that after the notification of 1st May, 1950 by virtue of which Chandernagore (Application of Laws) Order, 1950, the CPC came into force there on and from 2nd May, 1950 the grosse copies could not be termed as decree within the meaning of Section 2 of the Code and, therefore, could not be executed as decree. These points came up for consideration before the Division Bench in several cases in this Court. The uniform opinion of this Court is as revealed in these decisions that even after the CPC of India came into operation in Chandernagore the right and remedy of the holder of notarial deeds were not lost with the consequence that the grosse copies of the notarial deeds could be enforced by execution under the corresponding provision of the Indian Code of execution of the grosse copies having the force of a decree. In (2) Sourendra Kumar v. Bibhuti Roy, 63 CWN 961, the case was just the reverse. There the mortgagee first filed a suit and then after withdrawing that suit started an execution on the grosse copies of the mortgage deed. The question was whether even after the commencement of Chandernagore (Application of Laws) Order, 1950, by virtue of which the CPC came into operation in Chandernagore the grosse copies of the mortgage could be executed as a decree. After exhaustive study of the relevant French Laws and reviewing several acts and enactments by virtue of which the Indian laws came into operation in French territory of Chandernagore it was held that the grosse copies "could be enforced under the corresponding provisions of the Indian CPC for execution of an order having the force of a decree" relying on the unreported Bench decision of this Court in (3) Cour Mohan Sett v. Gokul Chandra Chatterjee (FMA 50 of 1953). Under almost similar circumstances the same view was taken in Tulsi Charan v. Kangali Charan with an obiter that "the grosse copies of notarial mortgage deeds delivered between May 2, 1950 and October 2, 1954 would only have the force of certified copies of mortgage bonds, but would not be executable as decrees." We respectfully agree with the above decision. In this case we are not concerned with grosse copies of the notarial documents delivered between the aforesaid dates for the disputed grosse copies were delivered in September, 1947. In our opinion, therefore, the decision of the trial court on this branch of the main question is not correct.

11. It now remains to be seen whether the plaintiff is entitled to take recourse to a suit without starting execution where grosse copies of notarial deeds, in the present context, could be executed as having the force of a decree. The trial court held on a construction of Article 1131 of the French CPC that the two notarial deeds are evidence of transfers of the decrees and embody also contracts between the transferee plaintiff and the original debtors or their successors-in-interest including the present defendant No. 7 who all agreed to repay the decretal dues under certain terms and conditions, viz., within a period of five years from the date of the agreement with interest in the mean time. It held on a reading of Article 1108 of the French Code that the agreements for repayment of the debts as contained in these

two notarial deeds constituted a valid contract and, therefore, the plaintiff was entitled to enforce such a contract by way of a suit even if she did not choose to put the grosse copies into execution. It also took the view that Section 47 could not operate as a bar as the execution was never started on the grosse copies of the notarial deeds. The point mooted before us by Mr. Mukherjee on behalf of the appellant on this aspect of the matter appears not to have been considered by the court below. He says that since even after the application of laws order, 1950 the grosse copies of the notarial deeds could be executed as held by this Court in above decisions according to the corresponding provisions of the Indian CPC as if it has the force of a decree. Section 47 of the Indian Code would certainly be a bar and no further suit for recovery of decretal dues should be maintainable. In support of this contention Mr. Mukherjee has relied on 44 Cal. page 816, (4) Budhu Lal v. Chatu Gope. This principle is unopposed but what Mr. Mitter on behalf of the respondent contends is that on the objection raised u/s 47 of the CPC against the execution started by the present plaintiff-respondent it was held that the two notarial deeds contained fresh contracts between the parties which were no longer capable of execution. The relevant portion of the judgment in section 47 proceedings (Misc. Case No. 63 of 1953) is as follows : "The presence of the petitioner to make the declaration end promise at the execution of the said two sale deeds was necessary to make the deeds binding upon him. The two deeds (Ext. 3 and Ext. 4) are therefore composite deeds of transfer and contract which are very common under French Law. The definition of a contract and its ingredients as contemplated in Articles 1101 and 1108 of the French Civil Code have been conformed to in these deeds. I therefore hold that these two deeds are fresh contracts between the parties over the subject matter of the said two decrees No. 265 of 1925 and No. 42 of 1945, which are therefore no longer capable of execution. The certified copies of the notarial deeds Nos. 222 and 223 (Ext. 3 and Ext. 4) show further that they are not ''grosse'' copies i.e. copies bearing the executory formula. They are therefore not executory. Decrees must therefore be obtained on suits instituted in relation to these deeds before execution can be prayed for."

12. This judgment, it is said, is final and conclusive at least so far as the present appellant is concerned and further objection against the maintainability of the present suit by the same defendant-appellant would be barred by principles of res judicata. The trial court, however, did not proceed on this principle as it took the view that the execution was not started on the grosse copies but on ordinary copies. In our opinion, this was not a correct approach. The execution case, it appears, was not dismissed for the only reason that it was started on ordinary copies and not on grosse copies of the notarial deeds. It has been clearly held that these two notarial deeds embodied fresh contracts and could be enforced by a separate suit. So, it is no longer open to the present appellant to raise the self-same objection against the maintainability of the present suit on the basis of these two notarial deeds. In this view of the matter, v/e do not think, it is necessary for the purpose of this case to

enter into the further question to see whether as held by the trial court the suit under the French Law is maintainable as fresh contract. In our opinion, therefore, the present appellant is bound by the judgment passed in Section 47 proceedings of the CPC and, accordingly, the present suit instituted by the plaintiff must be held to be maintainable.

13. Mr. Mukherjee has next contended that, in any case, these two notarial deeds are merely evidence of acknowledgment of liability by the present appellant but does not furnish any cause of action for the suit. In support of his contention he relies on two decisions of the judicial committee reported in 40 IA 74, (5) Lala Soni Ram v. Kanhaiya Lal and 62 IA 100, Dawson''s Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha and also a decision of the Madras High Court reported in AIR 1927 Mad. 777 (7) Parasuramayya v. Venkataramayya. In our opinion, in the facts and circumstances of the present case it is unnecessary to enter into this question for as already noticed the suit has been held to be maintainable in previous execution proceeding, and the plaintiff has founded his cause of action on several decrees mentioned in grosse copies which the present appellant agreed to repay along with the others. We, therefore, do not think there is much of substance in this contention.

14. Mr. Mukherjee has then contended that even if these two notarial deeds embodied a fresh contract they are barred under Articles 1108 and 1131 of the French Code which lays down conditions of valid agreement or obligation. We cannot allow him to press this point at this stage for it appears that there was neither any proper defence nor any issue was framed on this question in the trial court. The present appellant also did not adduce any evidence nor even any argument was advanced on the points now raised. These two articles substantially refer to the circumstances or conditions under which the contract can be said to be a valid contract. But the question is essentially one of the facts which will depend upon the proper pleading and evidence adduced by the parties. The trial court, therefore, in our view, held rightly that ''as there is no plea the defendants cannot raise any question under Article 1109".

15. This brings us to the question as to what amount should be decreed in favour of the plaintiff. On consideration of the several decrees embodied in the two notarial deeds (Ext. 1 and 1A) the trial court held, we think rightly, that they do not represent any View loan. Although, the trial court nevertheless treated the decree as loan payable with interest part of which has been converted to principle under Ext. 3A. Upon this applying Section 30 of the Bengal Money Lenders'' Act which came into operation in Chan-dernagore during the pendency of the present suit, the trial court decreed the plaintiff''s suit for Rs. 14,000/- as it held that on account of interest the plaintiff could not recover more than double on the original loan of Rs. 7,000/-. In our opinion, this is not a correct approach. For a sum of Rs. 7,000/- and other amount of Rs. 1,680/-which as decrees were embodied in the notarial deeds with

stipulation for payment of interest did not lose their character as decrees. These several sums could not be treated as loan any longer.

16. These decrees were passed by the competent courts during the French regime in Chandernagore. After merger of the French territories of Chandernagore with Union of India, the position, therefore, is that these decrees remain valid decrees, as if they were passed by Indian courts. The instant suit is also not based on original consideration but for recovery of decretal dues with interest on the basis of assignment under the aforementioned notarial deeds. Necessarily, therefore, in such a suit the only decree that remains to be passed by the Court is for the accumulated interest as provided in the first principal decree of Rs. 7,0001- or sum of Rs. 1,680/- being a decree for interest. But the courts of Chandernagore could not pass a decree for interest on the decrees already passed in view of Section 31 of the Bengal Money Lenders'' Act having already been made applicable at the material time which provides inter alia :-

31. Notwithstanding anything contained in any law for the time being in force, no court shall, in any decree passed in any suit to which this Act applies-''(a) if the loan to which the decree relates was advanced before the commencement of this Act, allow any interest on the decretal amount, or.....''

17. Such being the law, it seems clear that the plaintiff would be entitled to recover decretal amounts of Rs. 7,0001- under notarial deed No. 222 of July 28, 1947 and Rs. 1,8661- under deed No. 223 of the same date, i.e., in all a sum of Rs. 8,8661- without any interest and not a sum of Rs. 14,000/-as decreed by the trial court.

18. Accordingly, this appeal is allowed in part and we modify the judgment and decree of the trial court to this extent that the plaintiff would get a decree for a sum of Rs. 8,866/-. In all other respects the decree of the trial court stands. But in the facts and circumstances of this case we make no order as to costs.

19. Before parting with this case, we must notice another submission made by Mr. Mukherjee and, that is, about his client''s poverty. We are unable to deal with this question in the present appeal. All that we can say is that the appellant may pray in the court below for payment of the decretal amount by way of instalment if the law permits him to do so.

Borooah, J.

I agree.