Mrityunjai Barma Vs Tejeshwari Barma

Court: Calcutta High Court

Date of Decision: Dec. 10, 1998

Citation: (1999) 1 ILR (Cal) 62

Hon'ble Judges: Bhaskar Bhattacharya, J

Bench: Single Bench

Advocate: Sudhis Das Gupta and Tapan Kumar Mitra, for the Appellant;Hirak Mitra, Shanti Raichand and Ms Ity Dutt, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This revisional application u/s 115 of the CPC is at the instance of a Plaintiff in a suit for partition and is directed

against order dated February 15, 1997 passed by the learned Assistant District Judge, 2nd Court, Alipore in Title Suit No. 83 of 1968 thereby

allowing an application filed by the Defendants No. 4 to 9 under Order 23 Rule 3 read with Section 151 of the CPC for setting aside preliminary

decree dated May 23, 1978 passed on compromise.

2. The Petitioner filed the aforesaid suit No. 83 of 1968 against opposite parties for partition and accounts.

3. It appears from the record that on May 8, 1978 a compromise petition was filed by the Plaintiff and some of the Defendants for passing a

compromise decree in terms of the said application.

4. In the said application, Defendants No. 4, 5 and 7 to 9 were shown as minors and the said compromise application was signed by their mother

as natural guardian on their behalf. Defendant No. 6 Smt. Pratima Barma did not put any signature on the so called agreement.

5. On July 23, 1996 the Defendant Nos. 4 to 9 filed the aforesaid application for setting aside ex parte decree on the allegation that Defendant

Nos. 5, 7 and 8 had attained majority long before passing of the said consent order and as such the guardian-at-litem had no power to signify

consent on their behalf. It was further contended that Defendant No. 6 had not at all signed the agreement.

6. The aforesaid application was contested by the Plaintiff by filing written objection thereby contending inter alia that the said application was a

mala fide one and the Defendant Nos. 5 and 7 to 9 having been represented by their natural guardian and their guardian-at-litem the said decree

was binding upon them The further contention of the Petitioner was that the Defendant Nos. 5 and 7 to 9 even did not challenge the said decree

after attaining majority within the period of limitation.

7. By the order impugned, the learned trial Judge allowed such application and set aside the compromise decree passed by his predecessor.

8. Being dissatisfied, the Plaintiff has preferred the instant revisional application u/s 115 of the Code of Civil Procedure.

9. Mr. Dasgupta, the learned Counsel appearing on behalf of the Petitioner has advanced fourfold submissions before this Court.

10. The first point taken by Mr. Dasgupta is that if after attaining majority, a major Defendant permits the guardian-at-litem to continue on his

behalf, and a decree is passed, such decree is binding upon the major. In support of such contention Mr. Dasgupta has relied upon a Division

Bench decision of this Court in the case of Drupad Chandra v. Bindumoyee A I.R. 1926 Cal. 1053. Mr. Dasgupta has also relied upon the

decisions in the case of Gulab Chand and Ors. v. Kishori Kuer A I.R. 1942 Pal. 348 and in Ratan Prasad v. Bridhi Chand A.I R. 1939 Pal. 601.

11. The second point advanced by Mr. Dasgupta is that assuming for the sake of argument but not conceding that the compromise decree is not

binding upon the major, the proceeding must be initiated for setting aside such compromise decree within the period of limitation prescribed under

Article 137 of the Limitation Act and such limitation will run from the date of decree. The compromise decree having been passed in the year 1978

and the present application for setting aside the said decree having been filed in the year 1996, Mr. Dasgupta contends, the same was barred by

limitation. In support of such contention Mr. Dasgupta relies upon the decision of the Apex Court in State of Punjab v. Ashoke Kumar AIR 1991

S.C. 2219 and also of the Full Bench of this Court in the case of Asmatali Sharip Vs. Mujaharali Sardar and Others,

12. Mr. Dasgupta next contends that there is no dispute that the parties are governed by Mitakshara system of Hindu Law and from the materials

on record it will appear that one, J.L. Barma was acting as karta of the family. According to Mr. Dasgupta if there is an agreement among the

coparseners of the property by which some of the coparseners separates their share from the property and the remaining coparseners agree to

remain joint such an agreement can be arrived by karta on behalf of others. Thus, in the instant case, J.L. Barma having signed such agreement,

that will be binding upon the present Defendant Nos. 4 to 9. In support of such contention Mr. Dasgupta has relied upon the observation of Mulla

in principles of Hindu Law vide Article 248.

13. Mr. Dasgupta lastly contends that all these disputed questions, at any rate, cannot be adjudicated on the basis of affidavits and it was the duty

of the learned trial Judge to take evidence for the purpose of deciding all these disputes. Thus, according to Mr. Dasgupta, the learned trial Judge

acted illegally and with material irregularity in setting aside the compromise decree on the basis verified application filed those Defendants without

taking any evidence.

14. Mr. Mitra, the learned Counsel appearing on behalf of the Defendants has, however, supported the order passed by the learned trial Judge

and disputed the aforesaid contentions of Mr. Dasgupta.

15. As regards the first point taken by Mr. Dasgupta, Mr. Mitra contends that only contested decree passed in a suit can bind a major if after

attaining majority he remains silent; but such principle has got no application to a case of consent decree which is nothing but agreement between

the parties.

16. As regards the question of limitation, Mr. Mitra contends that application for setting aside such a compromise decree is undoubtedly governed

by Article 137 of the Limitation Act but the limitation will run not from the date of such decree but from the time when such decree was sought to

be enforced against the applicant. Mr. Mitra contends that although the decree was passed in the year 1978, till date, no final decree has been

drawn up in terms of the said agreement nor has the Plaintiff enforced the said decree against the applicants. In this case, during commission work,

the applicants came to know of the said decree in the year 1995 and filed this application in 1996 i.e. well within the period of limitation. Mr.

Mitra, however, contends that so far Pratima, the Defendant No. 6 are concerned, she being not a signatory to the agreement is not at all bound by

the said decree. Mr. Mitra submits that his clients were entitled to maintain the application within three years from the date of dispossession by

virtue of such decree.

17. As regards the other point taken by Mr. Dasgupta that J.L. Barma acted as karta, Mr. Mitra contends that the compromise decree itself will

show that the said J.L. Barma signed for self and on behalf of five of the parties only. Thus, on the face of it, it cannot be said that J.L. Barma

acted as a karta on behalf of the mitakshara family.

18. Lastly Mr. Mitra contends that in view of the admitted fact that although applicants had attained majority much prior to the date of agreement

because their father died in the year 1958 and in view of the fact that Pratima did not sign at all in the agreement which will be apparent on the face

of record, no further adjudication is necessary and the compromise decree is ex facie illegal. Thus, Mr. Mitra prays for dismissal of the revisional

application.

19. As regards the first point raised by Mr. Dasgupta, there is no dispute with the proposition of law that a decree passed against a Defendant

after attaining majority is binding and will be res judicata in subsequent suit even though after attaining majority he did not apply for discharge of the

guardian. However, in my opinion, the said principle cannot have application to a compromise decree which is nothing but an agreement between

the parties with the seal of the Court. In case of compromise, the same is not a decision of a Court but merely an agreement of the parties with the

sanction of the Court. Such a decree does not operate as res judicata. (See Baldevdas Shivlal and Another Vs. Filmistan Distributors (India) P.

Ltd. and Others,

20. Thus, the decisions cited by Mr. Dasgupta have no application to a compromise decree.

21. As regards the second point submitted by Mr. Dasgupta, there is no dispute with the proposition that an application for setting aside

compromise decree must be filed within the period of limitation prescribed in Act, 137 of the Limitation Act. But I do not subscribe to the

submission of Mr. Dasgupta that time runs from the date of passing of the decree. I find substance in the contention of Mr. Mitra that in such a

case limitation should run from the time when such decree is sought to be enforced against the applicant. Mr. Mitra in this connection has relied

upon a decision of Apex Court in Merla Ramanna Vs. Nallaparaju and Others, where it was held that an application by a party to the suit to

recover possession of properties which have been taken delivery of under a void execution sale would be in time if it was filed within three years

from dispossession. It was further observed that it is not until the purchaser acting under colour of sale interferes with his possession that the person

whose properties have been sold is really aggrieved and at that point of time the right to apply acrues.

22. Thus, in my opinion, a right to apply for setting aside compromise decree really acrues not from the date of such decree but from the date

when such decree is sought to be enforced against the applicant.

23. Therefore, in the instant case no final decree having been passed on the basis of compromise decree nor the Plaintiff having initiated any

execution proceeding. the application is well within the period of limitation. Moreover, Defendant No. 6 is not at all party to such compromise and

as such even knowledge of such decree will not preclude her from challenging the said decree so long her possession is not disturbed in execution

of the said decree.

24. In the case of State of Punjab and Ors. v. Ashoke Kumar (Supra) cited by Mr. Dasgupta, the Apex Court held that if the dismissal of an

employee is wrongful or ultra vires, it is to be set aside by filing a suit and the period of limitation for such suit is governed by Article 113 of the

Limitation Act.

25. In the said decision, the Apex Court turned down the submission that in case of a void order, there is no period of limitation for filing a suit for

setting aside the void order. Mr. Mitra did not dispute the aforesaid proposition of law but he claimed, as indicated earlier, by relying upon the

case of Merla Ramanna (Supra) that right to sue does not acrue unless the illegal compromise is enforced against his clients.

26. Thus, the aforesaid decision is of no avail to Mr. Dasgupta''s client.

27. Similarly, the decision of the Full Bench in the case of Asmat Ali Sharip (Supra) cannot be of any assistance to the Petitioner. In that case

question was what will be the period of limitation of an application for pre-emption u/s 26F of the Bengal Tenancy Act at the instance of a non-

notified co-sharer for which there was no provision in the said Act whereas the Act provided the period of limitation for such an application at the

instance of a notified co-sharer as four months from service of notice of sale. The Full Bench answered the question by holding that Article 181 of

the then Limitation Act was applicable and such limitation started from the date of sale when the right to sue accrued.

28. As indicated earlier, in the instant case right to apply accrues when such compromise is sought to be enforced and not from the mere passing of

compromise decree.

29. As regards the third point advanced by Mr. Dasgupta, I find from the compromise decree itself that J.L. Barma never acted as karta but was

acting as constituted attorney on behalf of the four of the Defendants. Thus, the point raised by Mr. Dasgupta has got no factual application to the

present case, and I find no substance in it.

30. As regards the last point, in my opinion, the said point is equally devoid of any substance when admittedly it is found that Defendant No. 6 is a

party to the suit but not party to the compromise petition. Over the above, it appears from the written objection filed by the Plaintiff against

application for setting aside compromise decree that the fact that the applicants had attained majority at the time of compromise was not

specifically disputed. To say that such fact is not admitted, is no denial. Moreover, admittedly the father of the said Defendants having died in

1958, in 1978 they must have attained majority.

31. Thus, in fact of the present case there was no necessity of disposal of the said application after taking evidence. As indicated earlier so far

Defendant No. 6 is concerned, she is not a party, and it was a mistake on the part of the learned trial Judge to record any such compromise

decree in a partition suit excluding the said Defendant when the Plaintiff himself admitted Defendant No. 6 to be a co-sharer of the property.

32. Thus, I find that the learned trial Judge rightly set aside the consent decree which was erroneous on the face of it, and I find no reason to

interfere with the order passed by the learned trial Judge.

33. In the facts and circumstances of the case there will be, however, no order as to costs.

Application dismissed.