
(1996) 09 PAT CK 0051

In the Patna High Court

Case No : Appeal from Original Order No. 293 of 1995

Allahabad Bank, Main Branch

APPELLANT

Vs

Hotel Satkar (Pvt.) Ltd. and Another

RESPONDENT

Date of Decision : 13-09-1996

Acts Referred:

Citation : (1996) 09 PAT CK 0051

Judgement

Ravi Nandan Sahay, J.—This matter arises from a suit filed for declaration that the compromise decree in Title Mortgage Suit No. 213 of 1986 is void and not binding on the plaintiff because the respondents fraudulently obtained the compromise decree by undue influence. Title Money Suit No. 213 of 1986 instituted by the appellant was decreed in terms of compromise entered into by the parties by a decree dated 26.3.1991. The appellant-decree holder levied Execution Case No. 3/93 to execute the decree by auction sale the properly mortgaged with the appellant. The judgment-debtor respondents contends that execution is barred in terms of Order XXXIV, Rule 14 of the Code of Civil Procedure. Learned Subordinate Judge being Prima facie satisfied that the suit was barred under Order XXXIV, Rule 14, CPC enjoined the appellant from proceeding in the execution case and for executing the decree by auction sale of the mortgage property.

2. The grounds on which compromise decree was assailed to be fraudulent and result of undue influence, can be gathered from para-3 of the order under appeal extracted hereunder:

3. So far the first point taken by the plaintiff that the compromise petition filed the T.M.S. 213/86 was a fraudulent one and the same was caused due to undue influence created upon the plaintiff. It is said that the plaintiff was in need of money for salvage of its hotel out of the sickness and the BICICO and BSFC, the another financiers of the plaintiff, had agreed on the basis of rehabilitation proposal for advancing further rehabilitation loan to the plaintiff but on the condition that the defendant No. of this suit, namely, Allahabad Bank will creates

pari passu charges with respect of the properties mortgaged with the defendant No. 1. It is further said that the defendant No. 1 began to exert undue influence over the plaintiff to enter into compromise in T.M.S. 213/86 filed by defendant No. 1 in order to creating pari passu charge and to give free hand and consent to BICICO for granting rehabilitation loan to the plaintiff. It is said that as the plaintiff was under great stress for rehabilitations loan, the defendant No. 1 exploited the said situation of the helplessness of the plaintiff by exerting undue influence over the plaintiff to file compromise petition in T.M.S. No. 213 of 1986 and, therefore, the compromise filed by the plaintiff was due to undue influence. It is" also stated that in compromise petition the sum of Rs. 53.56 lacs were calculated upto 31.12.88 according to the plaintiff the said calculation was made on the principal term loan of Rs. 6 lacs only and, therefore, according to the plaintiff the calculation of the interest and amount given in the compromise petition was not correct rather unconscionable and so, the plaintiff has claiming the compromise decree as a fraudulent one.

3. The appellant repelled the attack on decree of compromise and came out with a powerful and convincing case. To have an idea of the defence for forward by the decree-holder Pare 4 of the order under appeal can be referred to as extracted below:

Now, in this respect, the defendant No. 1 has denied all the allegations alleged by the plaintiff with regard to the fraudulent and undue influence in respect of the compromise petition. In this respect, the defendant has referred to the letter dated 16th Jan, 1989 given by the, Allahabad Bank, the defendant No. 1 to the plaintiff as well as on behalf of the plaintiff. This letter is with respect of rehabilitation proposal of M/s. Hotel Satkar Ltd., and enclose a copy of the minutes of the meeting held in the office of the Allahabad Bank on 10.1.1989. From perusal of the enclosure of this letter i.e. minutes of the meeting held on 10.1.1989 it appears that a joint meeting of Allahabad Bank, BSFC and BICICO was convened by Allahabad Bank to sort the issue relating to the rehabilitation package of Hotel Satkar, the plaintiff and it appears that in the said meeting Sri B.P.N. Singh, the managing director of Hotel Satkar was also present along with other officials of Allahabad Bank, BICICO and B.S.F.C under the chairmanship of A.G.M. Allahabad Bank further from perusal of the enclosure it appears that A.G.M. Allahabad Bank placed special condition for approval of rehabilitation package and pari passu charge in which the condition of filling compromise petition and calculation of interest on normal interest and repayment of the loan amount as per repayment schedule given by the bank. It is also appeared that a draft of the compromise petition was placed before the meeting by Chief Zonal Manager of Allahabad Bank and the same was accepted and approved with some modification and amendment as suggested by A.G.M. Allahabad Bank and Chief Manager, Allahabad Bank. It is also stated that Allahabad Bank and M/s. Hotel Satkar agreed to take effective steps for filling the compromise petition by 31st Jan, 89. Thus, the defendant No. 1 has tired to show that the draft of the compromise petition was a fraudulent one or it was due to undue influence. It is

said with if the plaintiff had any objection with regard to the terms of the compromise petition the plaintiff may oppose the same in the meeting. Apart from this, it is submitted that the compromise petition filed in T.M.S. 213/86 has been fully signed by the plaintiff and again if the plaintiff was not consented to the said compromise petition there is no question of signing the compromise petition. The records of T.M.S. 213/86 has been also called for on the prayer of defendant No. 1 in order to show that no fraudulent and undue influence was created in filing of compromise petition in the said suit by the plaintiff and defendant No. 1. From perusal of the order sheet of T.M.S. 213/86 it appears that the compromise petition was filed on 16.3.89 and one of the defendant namely, defendant No. 4 had raised objection and the order in the said suit on the basis of compromise petition was passed on 26.3.91 So, the order on the basis of compromise petition is not passed in haste and hurry rather it was passed after quite a long time with due consideration of all the points raised by the parties. So far the amount of interest and the total sum of loan amount to be paid by the plaintiff given in the compromise petition is concerned that there is specific mention of all the facts in the compromise petition in para-2(a) of the compromise petition and when the plaintiff has signed the compromise petition it will be deemed that the plaintiff has signed after considering all the said facts in the compromise petition and now the plaintiff is not entitled to challenge the same.

4. It was contended on behalf of the appellant that compromise decree was passed on 26.3.1991 and the plaintiff waited for four years to file the present suit.

5. the moot question for consideration is whether the subordinate Judge allowed the prayer of injunction on correct interpretation of provisions contained in Order XXXIV, Rule, 14, CPC and whether this was a fit case for grant of injunction.

6. Mr. A.J. Bahadur, learned Counsel for the appellant in support of this appeal in the forceful argument submitted that the Subordinate Judge transgressed his jurisdiction in granting injunction in the instant case. Learned Counsel vehemently argued that the suit itself is barred having regard to Rule 3-A of Order XXIII which lays down on suit shall lie to set aside the decree on the ground that the compromise on which the decree is based was not lawful." Rule 3-A has been inserted by Amendment of 1976 in the interests or finality of litigation to resolve the conflict of decision on the questions whether validity of a decree can be challenged on the ground of illegality of the compromise on which it is based. The new rule has been given effect to the decision of the High Court of Bombay in Govind Waman Vs. Murlidhar Shrinivas and Others, , Andhra Pradesh Venkateshaya v. Virayya AIR 1958 A.P. 1 and the decision of this Court in Baihnath v. Rampal A.I.R 1962 Pat 73 (FB). It has been held in these decision that where compromise decree passed by the court of competent jurisdiction contains a term which is opposed to law or public policy and the decree has not been set aside in a proper proceeding, it can be pleaded as constituting res

judicate and estoppel.

7. In *Anant Mahadeo Godbole Vs. Achut Ganesh Godbole and Others*, the question for consideration was whether Rule 3-A have a reference only to the cases which would fall within the contemplation of Section 23 of the Indian Contract Act. In other words, if cause of action alleged covers cases which are treated as not lawful by Section 23, then only the her of the Rule 3-A would be attracted. Learned Judge held that the words "not lawful" have wide connotation and include cases where compromise suffers from want of authority or exceeding of authority. Bombay High Court held that a party to the suit which was decreed by accepting compromise, is only relegated to the remedy of questioning the same under Rule 1-A of Order XLIII and the second suit based on the cause of action with the compromise itself was not lawful clearly barred.

8. In my considered opinion the bar imposed by Rule 3-A of Order XXIII of the CPC cannot apply to a consent decree which is challenged on the ground of fraud or undue influence as contented by the learned Counsel for the appellant.

9. Mr. Ram Balak Mahto, learned Senior Counsel appearing for the plaintiff-respondent submitted that in any view of the matter the execution of compromise decree by auction sale of the mortgaged property is barred under Rule 14 of the Order XXXIV of the CPC and that is why the Subordinate Judge has enjoined the appellant from executing the decree.

10. Sri A.J, Bahadur, learned Counsel for the appellant vehemently argued that in view of several authorities, the execution of decree is not barred under the aforesaid order.

11. Rule 14 of the Order XXXIV provides that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.

12. This rule is a re-enactment of Section 99 of the Transfer of Property Act with some changes. The object of the present rule is to prevent the mortgagee to sell the equity of redemption and execution of money decree, which may be obtained in respect of the claim arising out of a mortgage, he can do so by instituting suit for sale u/s 67 of the Transfer of Property Act and obtaining a decree under order XXXIV, Rules 4 and 5. But the mortgagee is at liberty to bring the mortgaged property to sale if he has obtained a money decree against his mortgagor in respect or any claim not arising under mortgage.

13. In *Ramaswamy Nayudu Vs. K.N.S. Subbaraya Thevar and Others*, , it was held that creation of a charge by the decree in a money suit does not convert the suit into a mortgage suit and make the provisions of Order XXXIV of the CPC applicable.

14. In *Sukumari Devi Vs. Mungneeram Bhangar and Co.*, . in a money suit a

decree was granted on a compromise which provided that a security of immovable property was to be furnished for the due performance of the decree and a clause was added that on failure to pay three consecutive instalments, the whole amount of the decree to become payable. The security was duly given by the wife of judgment-debtor hypothecating immovable property. On default having been made in payment of the instalments, a question arose in the execution proceeding whether property hypothecated could be sold in such proceeding. The following remark occurs in the judgment of Rankin, J:

However, in this case the parties concerned in this joint bond, viz, the defendant and his wife, charged different interests in the same property which it would be convenient and wasteful to realize separately by sales in different times. I see great difficulty in realizing this defendant's interests save by proceedings u/s 47 and as I think that both intended to agree that the matter should be thrashed out in execution, I think the judgment of the learned Judge should be supported.

The consequences was that the property hypothecated was allowed to be sold in execution proceedings.

15. In *Srimati Indramani Dasi Vs. Surendra Nath Mondal and Others*, , it was held that Rule 14, Order XXXIV, C.P.C. does not apply unless the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge and further that where a compromise decree provided that the decree holder would be entitled to realize the amount by sale of the properties mentioned therein it is not open; to the judgment-debtor to resile in execution proceeding and contend that notwithstanding the express provision of the decree the decree-holder must be driven to a separate suit.

16. In *Sheonandan Pandey Vs. Mt. Asarfi Kuer*, , it was held that the prohibition under Order XXXIV, Rule 14 appeals only to claims arising under the mortgage. Where a decree for future maintenance provides that certain specified properties, the claim does not arise under any mortgage or charge but arises under the decree itself, the charge is provided by the decree itself only as an additional safeguard for the decree-holder in securing its enforcement.

17. In *Kashi Chandra Chakravarti Vs. Priyanath Bakshi and Others*, , decided by Mookerjee and Newbould, JJ., the compromise decree proceeded as follows:

The defendants will pay to the plaintiff Rs. 4,400/- on account of the claim and costs as per instalments mentioned below. If default is made in payment of any one instalment the plaintiffs will then be entitled to realise the whole amount due for all instalments at one and the same time by taking out execution. The properties mortgaged until the amount due for the last instalment has been paid.

The judgment-debtor urged before the Calcutta High Court that the remedy of the decree holder was not by way of execution but by way of regular suit to enforce the consent decree. In support of this contention, reliance was placed on

the provisions of Rule 14 of Order XXXIV of the Code of Civil Procedure, 1908, Rejecting the contention, learned Judges of the Calcutta High Court observed:

In the case before us, as already stated, it was expressly provided that if default was made in payment of one instalments the decree-holders would be entitled to realise the whole amount due for all instalments at one and the same time by taking out execution. There is no reason why a restricted meaning should be placed upon the expression "taking out the execution". We cannot accept the contention of the appellant that this refers merely to taking out execution of the decree as a money decree against properties of the judgment-debtor other than the hypothecated properties. The intention of the parties plainly was that if default was made by the judgment-debtor, the decree-holder would be at liberty to take out execution against the mortgaged properties which have were to remain charged until the amount due for the last instalment should be paid. This view is supported by the decision in *Abir Paramanik v. Jahar Mahntud Mondal* ILR(1917) Cal 530 and *Ambalal Bapubhai v. Narayana Tatyaba* ILR (1919) Bom. 631 . The parties in the case before us were obviously anxious to avoid recourse to a fresh suit on the basis of the decree, such as, might be necessary in view of the decisions already cited.

18. In *Srimati Indramani Dasi Vs. Surendra Nath Mondal and Others*, , it was observed as follows:

The principle that a person who holds a mortgage or charge should have recourse to a suit is recognised for the benefit of the person against whom the mortgage or charge may have to be enforced and it is clearly competent to such a person to waive the protection accorded to him by the provisions of Section 99, T.P.A. or the corresponding provision of the Civil Procedure Code.

This view was indicated by Morris J. in *Aubhoyessury Debee v. Gouri Sankar Pandey* (1985) 22 Cal. 859 in the following observation:

We do not think that the decree which no doubt, is nothing higher than an agreement between the parties, can be construed as Mr. Hill suggests. If the decree had said that in default of payment in Calcutta of the said sums shall immediately become due and realizable by execution by the attachment and sale of the properties set forth in the schedule, there might have been some force in the argument.

The decree in the case before us in these terms and it is not competent to the judgment-debtors, after they had deliberately agreed to a decree in those terms of resile in execution proceedings and contend that notwithstanding the express provision of the decree, the decree-holder must be driven to a separate suit.

19. Whether the compromise decree is executable or not can be decided by the executing court. Section 47 of the Code of Civil Procedure, 1908 says that all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of

the decree, shall be determined by the Court executing the decree and not by a separate suit.

20. In *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others*, , the Supreme Court observed that the matter regarding execution of decree is strictly related to the facts and circumstances of the case and so u/s 47 of the Code of Civil Procedure, this matter can be determined by the Court executing the decree. The plaintiffs' suit for auction sale of suit property is barred under Order XXXIV of the Code of Civil Procedure. The matter cannot be decided by the Appellate Court.

21. Learned Subordinate Judge held that the suit was barred by Order XXXIV, Rule 14 of the CPC without going deep into such complicated question. I do not wish to express any final opinion on this question at this stage since it may prejudice the parties. The compromise decree is under challenge on the ground of fraud and undue influence. Further the decree was obtained by fraud which should be decided in suit. It cannot be decided in an interlocutory proceeding.

22. Considering the facts of the case, the order of the Subordinate Judge, VIII, Patna granting injunction is set aside and it is directed that the execution proceeding and the suit shall proceed. The plaintiff may file objection in the executing Court, who shall decide the question preferably within two months. In case, objection filed by the plaintiff is rejected, auction sale of the suit properly will not take place for three months. In the meantime, the Subordinate Judge shall decide the suit itself within four months of receipt of this order. The parties are directed to appear before the Subordinate Judge, Patna, within two weeks from today. This appeal is disposed. However, there shall be no order as to costs.