
(1958) 07 PAT CK 0004
In the Patna High Court
Case No : A.F.O.O. No. 256 of 1951

Anantalal Daga and Others

APPELLANT

Vs

Debi Prasad Pandey and Others

RESPONDENT

Date of Decision : 25-07-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 41 Rule 20, Order 41 Rule 33, Order 41 Rule 4
Limitation Act, 1908 — Article 181

Citation : AIR 1959 Patna 258

Hon'ble Judges : V. Ramaswami, C.J; R.K. Choudhary, J

Bench : Division Bench

Advocate : Brishketu Saran Sinha, G.C. Mukherji, Bhabananda Mukherji and H.K. Banerji, for the Appellant; Sudhir Chandra Ghose, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Choudhary, J.—This appeal was originally filed by judgment-debtors 1 to 7, but by order No. 53 of this Court dated 21-1-1955 they have been transported to the category of the respondents and the heirs of respondent No. 1, since deceased, and respondents 10 to 18 have been transposed to the category of the appellants. Thus, the present appeal now is on behalf of some of the decree-holders.

2. The short facts are these. The judgment-debtors had certain interest in mokarrari tenure of surface right and certain interest in the underground right in Mouzas Tentulia and Thandabari which they mortgaged to the Chotanagpur Bank. Later on they mortgaged the same interest to certain other persons. In the year 1907 the Chota Nagpur Bank instituted a mortgage suit and in execution of the decree passed in that suit it purchased the mortgaged properties. Delivery of possession was obtained by it in due course.

In this mortgage suit, however, the subsequent mortgagees were not made parties. Some time in 1929 the subsequent mortgagees assigned the subsequent

mortgage to the decree-holders who instituted a mortgage suit, being Mortgage suit No. 54 of 1938, against the judgment-debtors. After litigation up to this Court, a final decree was passed in that mortgage suit on compromise between the parties. According to the terms of that final decree, the dues of the Chota Nagpur Bank up to February, 1940, was fixed at Rs. 57000 and this amount was payable by the decree-holders to the Bank within six months from the date of the compromise.

The judgment-debtors were held to be entitled to redeem the mortgaged properties on payment of the amount of Rs. 57000 due on the first mortgage and of the dues of the second mortgage within eight months from that date. On failure of such payment the dues had to be realised by the sale of the mortgaged properties. It appears that decree-holder No. 4, namely, Anantalal Daga, alone paid the above sum of Rs. 57000 to the Chotanagpur Bank in Sept. 1947.

There was an amendment of the final decree on 17-9-1949, and later on 14-11-1950 the said Anantalal Daga started execution of the decree in Execution case No. 108 of 1950 under the provisions of Order 21, Rule 15 of the CPC as the other decree-holders did not join in the execution proceeding. Under the terms of the final decree, as appears from the execution petition, the total amount of the decree including costs amounted to Rs. 82,821/1/-, and the above amount was sought to be realised in that execution case by sale of the mortgaged properties.

An objection was filed by the judgment-debtors to the execution of the decree u/s 47 of the CPC and Section 13 of the Bihar Money Lenders Act. On 17-4-1951 the parties came to terms and a compromise petition was filed, according to which the amount which the decree-holders were to get was settled instead of the above sum of Rs. 82,821/1/- at Rs. 1,05,000, and they were also given interest thereon at seven annas per cent from 1-1-1951.

The decree-holders agreed not to proceed with their prayer for sale in the execution case and the amount payable to them was to be realised in that execution proceeding by appointment of a receiver of the mortgaged properties and the abovenamed Anantalal Daga was appointed a receiver on certain terms recited in the compromise petition. It was also stipulated in the compromise that if the said Anantalal Daga could not perform the function of the receiver for any reason, the decree-holders will select one amongst them who will continue to be the receiver.

On 7-5-1951, the judgment-debtors filed a petition supporting the compromise and made a prayer for the appointment of a receiver in terms thereof. The learned Subordinate Judge, however, refused to record the compromise and rejected the application for recording the same and appointing a receiver. The judgment-debtors 1 to 7 thereupon, on 27-7-1951, filed the present appeal in this Court and prayed for an order recording the compromise. On 23-3-1952, Anantalal Daga died, and his heirs were substituted in his place.

On 10-9-1952, Gopallal Daga, one of the decree-holders, made an application in

this Court for being appointed a receiver on account of the death of Anantalal Daga and on the next day a consent order was pa-sed by this Court appointing Gopallal Daga as receiver. Long thereafter, on 7-1-1955. the judgment-debtors filed an application for withdrawing the appeal and a notice of this application was given to the decree-holders in advance on 23-12-1954.

Some of the decree-holders, therefore, made an application on 3-1-1955, for being transposed to the category of the appellants and for transposing the judgment-debtor-appellants as judgment-debtors-respondents. The prayer of the decree-holders was allowed on 21-1-1955, and the parties were transposed accordingly. On 7-1-1956, the estate of the judgment-debtors vested in the State of Bihar under the provisions of the Land Reforms Act and notice tinder Section 4(ee) of the Land Reforms Act was served on the State of Bihar and it has been added as a party respondent to the appeal.

It appears that one of the decree-holders was Chunilal Daga. After the order under appeal but before the filing of the appeal, this Chunilal Daga died, and bis heirs were substituted in the execution proceeding on 19-7-1951. In the appeal that the judgment-debtors-filed here on 27-7-1951, they, in ignorance of the death of Chunilal Daga and the substitution of his heirs in the execution case made him respondent No. 19 in the memorandum of appeal.

On 20-2-1957, the judgment-debtors, who now became the respondents in the appeal, filed an application that Chunilal Daga was dead and no substitution of his heirs having been made in the appeal, the same became incompetent. On 15-7-1957 the heirs, of Chunilal Daga made an application in this Court for being added as parties to the appeal. By an order of this Court this application was directed to be disposed of at the time of the hearing of the appeal itself.

3. Mr. Ghosh for the judgment-debtors-respondents has taken a preliminary objection that in the absence of the heirs of Chunilal Daga, one of the decree-holders, the appeal is incompetent. His contention is that the appeal was filed against a dead person and that his heirs not having been substituted within the time allowed by law, the appeal abated and has thus become incompetent. He has also contended that the application made by the beirs of the deceased Chunilal Daga to be made parties should; be rejected in limine as it was made more than three years after his death.

His submission is that the residuary Article 181 of the Limitation Act applied to the case and the application should have been made under that article within three years from that date. This article requires an application for which no period of limitation is provided elsewhere in the Limitation Act or by Section 48 of the Code of Civil Procedure, to be made within three years from the date when the right to make the application accrues. According to Mr. Ghosh. Chunilal Daga having died sometime before 27-7-1951, an application by his heirs to be made parties should have been made within three years from that date. I am unable to agree with the above contention.

4. As already stated. Chunilal Daga died after the order under appeal was passed and his heirs were substituted in the execution proceeding on 19-7-1951. before the present appeal was filed in this Court. Therefore, on the date on which the appeal was filed in this Court, Chunilal Daga was not a party to the execution proceeding and, as such, the addition of his name as a party respondent in the appeal amounted only to a person having been made a party in the appeal who was not a party in the proceeding from which the appeal arose.

The question for consideration then, however, is whether in view of the fact that the heirs of Chunilal Daga who had already been substituted as parties to the execution proceeding had not been made parties in the appeal, the appeal is competent, Counsel for the decree-holders-appellants has contended that under Order 41, Rule 4 of the CPC one of the decree-holders could prefer an appeal as the order under appeal proceeded on a ground common to all of them and has further submitted that under Order 41; Rule 33 of that Code the appellate court could make any order in favour of those decree-holders who are not parties in the appeal. Order 41 Rule 4 of the CPC runs as follows:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be"

and Order 41, Rule 33 of that Code is to the following effect:--

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection :

Provided that the appellate court shall not make any order u/s 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

Reading these two provisions together it is manifest that in the present case some of the decree-holders could prefer an appeal without making the other decree-holders as parties to the appeal and the appellate court can pass an order in favour of those decree-holder also who are not parties in the appeal. This view has now been well settled by a Full Bench decision of this Court in *Mt. Parwati Kuer and Others Vs. Manna Lal Khetan and Others*, . In that case it was held as under:

"If Order 41, Rule 4 and Order 41, Rule 33 are read together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, and if the appeal proceeds on a ground common to

all the defendants, the appellate court may exercise the power of varying the decree in favour of the non-appealing defendants, though they have not been made parties to the appeal.

The effect of these two rules, therefore, is that the appellate Court is authorised to pay a decree in favour of a party who has not been heard, but the appellate court is not authorised to pass a decree "against" a person who is not a party to the appeal. Thus the appellate court has power, under the provisions of Order 41, Rule 4 read with Order 41, Rule 53 to vary or reverse the mortgage decree granted by the lower court in favour of a defendant who is not impleaded either as a party appellant or as a party respondent, and whose name is ordered to be expunged from memorandum of appeal on account of a technical defect. There is no question of abatement in such a case."

That being the position, the appeal could not be said to be incompetent for non-joinder of the heirs of Chunilal Daga as parties to the appeal.

5. In this case, however, the heirs of ChuniLal Daga have made an application for being made as parties. The contention of the learned counsel for the judgment-debtors respondents that this application is barred under Article 181 of the Limitation Act is of no substance. Order 41. Rule 20 of the CPC enacts that where it appears to the Court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that suit person be made a respondent.

The facts of the present case clearly show that the heirs of Chunilal Daga were parties to the execution proceeding out of which the present appeal arises, but were not made parties to the appeal. It is also apparent that these heirs being co-decree-holders are interest in the result of the appeal. They could, therefore, be made parties even at the time of the hearing of the appeal and, in that view of the matter, the question of limitation under Article 181 of the Limitation Act does not arise at all.

It is noteworthy in this case that the non-implication of these heirs as parties to the appeal is due to the fault of the judgment-debtors respondents themselves who originally were the appellants and who had impleaded Chuni Lal Daga as a respondent. Taking all these things into consideration it appears to be a proper case in which these heirs should be made party-respondents to the appeal and they are accordingly added as party respondents in this appeal.

6. On the merit also counsel for the judgment-debtors respondents has raised several objections to the recording of the compromise and has supported the order under appeal on those grounds. The main contention is that by the compromise a new decree has been sought to be replaced in place of the decree under execution which could not be permitted to be done by a compromise in an execution case.

The contention is well-founded. By the compromise as already stated, the amount of the decree was increased from Rs. 82,821/1/- to Rs. 1,05,000 and provision was made for interest which was not provided for in the decree. The amount was sought to be realised not by sale but by appointment of a receiver in the execution case itself. The question of realisation of the decretal amount not by sale but by the appointment of a receiver relates only to the mode of realisation and, in my opinion, there is nothing in law to prevent the parties to the execution proceeding to come to terms in regard to the mode of realisation of the decretal amount under execution.

The stipulation to the above effect, therefore, could not be legally objected. So far as the question of interest is concerned, that may in some cases be allowed under the terms of the compromise even though there is no provision for the same in the decree: Provided that the stipulation of interest in the compromise is for the period subsequent to the date of the decree.

The reason is that if the decree-holders who could have realised the money at once make a concession in favour of the judgment-debtors by way of realising the decretal dues by instalments for a long period, they can impose by way of compensation a certain amount of interest on the decretal dues after the date of the decree to be paid to them" by the judgment-debtors. That in substance does not change the decree itself, or in other words, the above stipulation does not make a new decree in place of the original one. The position may be different if the stipulation for interest is made for the period prior to the date of the decree.

That would really amount to the introduction of a new decree in place of the old one which cannot be permitted to be done by agreement between the parties in an execution proceeding. Similarly an increment in the amount of the decree which was originally pronounced will have the effect of replacing the original decree by a new decree and that cannot be permitted to be done by agreement between the parties in an execution proceeding.

In the above view of the matter, it is manifest that in the present case the stipulation in the compromise petition for fixing up the decretal amount at Rs 1,05,000 in place of the original decretal amount of Rs. 82,821/1/- amounted to introduce a new decree in place of the original one and the learned Subordinate Judge was, therefore, perfectly justified in not recording the above compromise.

7. The view that I have taken gains support from the decision of the Privy Council in AIR 1937 256 (Privy Council) . In that case, the mortgagees obtained a final decree for sale of the mortgaged property which in execution of the above decree was directed to be sold by public auction on a certain date. The sale, however, was postponed for one year in accordance with the arrangement arrived at between the parties for the satisfaction of the claim of the decree-holders. It appears that a third person agreed to discharge the entire debt due to the decree-holders and also to advance another substantial sum to the judgment-debtors. After satisfaction of the dues of the decree-holders and payment of the

said sum to the judgment-debtors, two deeds were executed in favour of that third person.

One of them was a deed of assignment by the decree-holders of their rights under the preliminary and the final decrees for sale with the full benefit of all powers, rights, remedies and securities conferred upon them by the mortgage deed and the aforesaid decrees and the second document was a mortgage deed executed by the debtors by which they covenanted to pay to the plaintiffs both the amounts, namely, the amount paid to the decree-holder and that paid to them.

The mortgage money was to carry interest at 11 per cent, per annum, and the repayment thereof was secured not only by the property specified in the first mortgage deed, but also by two other houses conveyed by the second deed. There was a clause in the deed that in the event of the mortgagor's failure to redeem the property within the stipulated period, the mortgagee would include the newly mortgaged properties "within the order for sale contained in and orders by the said decrees as if the last mentioned properties had been comprised and included" in the earlier mortgage without having to institute a fresh suit on the footing of these documents and also to include the amounts due and owing upon these documents for the time being as having been included in the earlier mortgage and the decrees passed thereon.

The new mortgagee based his claim on the above clause allowing him to treat the money due to him on that instrument as having been included in the earlier mortgage deed and the decrees based thereon. In that connection their Lordships held that the parties had no authority to add to the decree something which was not included in the claim upon which it was founded, nor could they confer upon the court jurisdiction to enforce a claim which had not been embodied in a decree or an order having the force of a decree and that any attempt to enforce the claim in the manner prescribed by the clause was bound to fail. In that connection I may quote the following observation made by their Lordships:

"It appears that the court of appeal treated the second mortgage as an adjustment of the decree for sale within the meaning of Order 21, Rule 2, Civil Procedure Code; but the terms of the deed do not furnish any justification for that view. The mortgage was an independent transaction, by which new rights were created in favour of the mortgagee. The deed conveyed, by way of security certain, house property which was not previously mortgaged, and contained fresh covenants for personal liability. It provided for the payment of interest at a rate higher than that stipulated in the first mortgage deed. Moreover, the amount secured by the new deed exceeded the sum due on the first mortgage. It is true that the consideration for the new mortgage included inter alia, the sum calculated on the basis of the final decree; but that fact would not convert that mortgage into a transaction which can be held to be an adjustment of a decree.

There was, in their Lordships' opinion, no adjustment of the decree for sale, such as is contemplated by Order 21, Rule 2; and it was not the duty of the decree-holder to certify the alleged adjustment to the court executing the decree. Nor does Section 47 of the CPC apply to the case. The suit does not seek to execute the decree made in the previous case, but purports to enforce the rights conferred upon the plaintiff by the deed of 1924, which rights are materially different from the terms of the decree."

8. On behalf of the appellants, however, reliance has been placed on a subsequent decision of the Privy Council in AIR 1939 80 (Privy Council) , That was not, however, a case in which the amount of the decree was enhanced so as to substitute a new decree in place of the old one. That was a case where the rate of interest subsequent to the date of the decree was stipulated to be enhanced in view of the bargain made by the judgment-debtors with the decree-holders for extension of time for payment of the debt by instalments. Their Lordships accepted the validity of this agreement because they observed that it was not an attempt to bring under the decree a liability extraneous to the mortgage or to the mortgage suit. The following observation made by their Lordships is very important:

"Their Lordships see nothing in the Code requiring them to hold that, had the judgment-debtor paid the agreed instalments punctually, the appellants, after 1927, could have executed the decree for the whole sum outstanding contrary to the terms of the compromise. Nor do they think it reasonable that such a compromise, if enforced by the executing court, should not be enforced as a whole. They are not prepared to regard fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree, and the executing court u/s 47 has jurisdiction to ascertain its legal effect and to order accordingly."

Their Lordships further observed:

"Such bargains may take different forms and it is not possible to pre-judge the individual case. If it appears to the court, acting u/s 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with u/s 47."

9. Reliance has also been placed by the learned Counsel for the appellants on the cases of Chaube Mahendra Rao and Others Vs. Lala Bishambhar Nath and Others, ; Murlidhar Narsingrao v. Balmukund Jainarayan AIR 1946 Nag 313 and Harbans Narayan Singh and Others Vs. Uma Shankar Prasad, . So far as the Allahabad case is concerned, that was a case for remission given to the

judgment-debtors by compromise.

The case of remission, in my opinion, stands on a different footing and a decree holder is always entitled to make remission to the judgment-debtor. The Nagpur case was a case of a provision for interest subsequent to the date of the decree as a consideration for the extension of time given by the decree holders to the judgment-debtors for payment of the dues. In the Patna case the agreement was with respect to the payment of the decretal dues by instalments.

Of course, in that case the compromise recited also payment for a small cause court decree over and above the amount of the decree under execution, but the stipulation for the payment of the small cause court decree was not pressed and the question of recording the compromise related only to the mode of payment by instalments. These cases, therefore, have no bearing to the facts of the present case and are distinguishable.

10. In my opinion, as already stated, the compromise in the present case, as rightly held by the learned Subordinate Judge, attempted to substitute a new decree for an enhanced sum of money in place of the original decree and such an agreement could not in law be recorded by the executing court. The appeal of the decree-holders-appellants, therefore, fails on this very ground. It is not, therefore, necessary to deal with other objections raised by Mr. Ghosh on behalf of the judgment debtors-respondents.

11. In the result, the appeal fails and is dismissed with costs.

V. Ramaswami, C.J.

12 I agree.