

(1927) 03 CAL CK 0025
In the Calcutta High Court

Azizur Rahman Choudhury and Others	Vs	APPELLANT
Aliraja Choudhry and Others		RESPONDENT

Date of Decision : 23-03-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 4

Citation : AIR 1928 Cal 527

Hon'ble Judges : Roy, J; Mukerji, J

Bench : Full Bench

Judgement

Mukerji, J.—This appeal has been preferred by the judgment-debtors from an order passed by the District Judge of Cachar affirming on appeal an order passed by the Sadar Munsif at Silchar overruling the judgment-debtors' objection in connexion with certain execution proceedings. The proceedings in the Courts below have been so irregular that it is necessary to set out the facts somewhat in detail in order to understand what has exactly happened. The execution proceedings relate to a decree that was passed on 23rd November 1921, in a suit which had been instituted by two persons Aliraja Choudhury and Elim Miah Chowdhury as the plaintiffs against Mansur Miah, Abdul Jalil and Azizur Rahman as the principal defendants. The decree declared the plaintiffs' right of easement on a certain pathway, directed the removal of certain obstructions that had been caused therein and granted a perpetual injunction restraining the defendants from putting up such obstructions in future. The defendants thereupon preferred an appeal from the aforesaid decree to the Court of the Subordinate Judge of Cachar. During the pendency of this appeal one of the defendants, namely, Mansur Miah died and at the hearing of the said appeal it was represented to the Court on behalf of the defendants that there had been adjustment of the said decree and that, therefore, the appeal would not be proceeded with. The adjustment was thus brought to the notice of the Court on 7th May 1923, and on that day the Court disposed of the appeal in the following words:

Appellant's pleader says that he will not proceed with the appeal as his clients

who are alive informed him that there has been a compromise out of Court. The appeal is, therefore, dismissed for default.

2. From the certified copy of this order which is on the record it appears that the order was shown to two pleaders, one Babu R.R. Dutt and the other Babu B.L. Dhar and they put down their initials under the said order with the endorsement "Seen." It may be presumed that these two gentlemen were the pleaders of the parties to the said appeal. On 15th September 1923, an application was filed purporting to have been made by the two decree-holders Aliraja Chowdhury and Elim Miah Choudhury for the execution of the said "decree. On 13th November 1923 the two defendants Abdul Jalil and Azizur Eahman who were then the surviving judgment-debtors, Mansur Miah having died, as I have already stated, during the pendency of the appeal, objected to the execution going on, on the ground that the decree that was sought to be executed had been adjusted out of Court by the judgment-debtors having given the decree-holders a pathway somewhat different from what had been awarded to the decree-holders by the decree and because on accepting the same the decree-holders had given up their claim to the decretal costs. This objection was taken up for the consideration by the learned Munsif before whom five witnesses were examined on 8th December 1923. The fact that the said witnesses were examined appears from the record of the depositions of the said witnesses but it is curious that the order-sheet does not contain any entry under that date showing that any witnesses had been so examined. One of these witnesses so examined was one of the decree-holders Elim Miah who supported the objection that was put forward on behalf of the judgment-debtors and who stated that there had been such an adjustment and who further represented to the Court that his name had been signed in the execution proceedings by his son, but that he himself did not want to proceed with the execution. The record does not show that the learned Munsiff arrived at any finding on the question as to whether there was such an adjustment or not. But on 10th December 1923, an application was put in on behalf of the judgment-debtors in which they stated that if the Court would care to go to the locality it would be apparent to the Court that there had been such an adjustment and that the parties had been acting upon the said adjustment for a good long time. The Munsif went to the locality on 24th December 1923 as appears from certain statements that are to be found in the petitions that were subsequently filed on behalf of the parties. I may note here again that this local investigation is not referred to in the order-sheet of these execution proceedings and there is no trace whatsoever therein as to what transpired in the course of this local investigation.

3. The next order in the order-sheet which has any bearing on this matter is dated 5th January 1924 which shows that on that date a petition was filed on behalf of the judgment-debtors stating that on the spot at the time of the local investigation there were certain proposals for giving the decree-holders another pathway and that the said proposals had been accepted and the ultimate result of the negotiations was embodied in a draft agreement a copy of which was filed

along with the petition. The judgment-debtors prayed that effect might be given to this agreement that was reached between the parties on the local investigation as aforesaid. On this the decree-holders took time once on 5th January 1921 till 12th January 1921, again on 12th February 1921 and thereafter again on 12th February 1924 till 1st March 1924. On this day the Court made an order to the effect that the parties should bring evidence to prove the compromise mentioned in petition 210. Petition 210, it may be stated, was the petition which had been filed on behalf of the judgment-debtors on 5th January 1924 alleging that there had been a compromise on the-spot and filing along with it the draft agreement to which I have already referred. Thereafter the matter was again adjourned from time to time till 10th May 1924. On the last mentioned day an objection was taken on behalf of the decree-holders that the compromise could not be given effect to by reason of the provisions of Order 21, Rule 2, Civil P.C. This objection must have referred not to the compromise that was alleged to have been arrived at on the spot because that was in the course of the execution proceedings themselves and the fact that there had been such a compromise was brought to the notice of the Court well within 90 days from the date on which it had been arrived at but it must have referred to the earlier adjustment which is said to have taken place during the pendency of the appeal. There is a note of this objection in the ordersheet, but it does not appear that the Court came to any finding as regards this objection at any time during the pendency of the proceedings.

4. We find next that after several adjournments of these proceedings, on 17th May 1924 three witnesses were examined in the case, namely, two on behalf of the judgment-debtors and the decree-holder Aliraja Choudhury himself - all these witnesses having deposed to the adjustment that was alleged to have been arrived at on the spot during the local investigation. On 2nd June 1924, the learned Munsif disposed of the case holding that there was no doubt about the compromise but that the compromise could not be given effect to inasmuch as the terms thereof were at variance with the terms of the decree and because to allow this compromise to stand would be to substitute for the decree in execution a new executable decree which is not permitted under the law. He referred to the decision in the case of Ladd Govindoss Krishnadoss v. Ramdoss Vishnadoss [1915] M.W.N. 225. The judgment-debtors thereupon preferred an appeal to the District Judge who affirmed the decision of the Munsif holding that the compromise had not been satisfactorily proved and further that even if it was proved, the agreement could not be acted upon because it was arrived at in the course of execution proceedings. He relied upon the aforesaid case reported in Ladd Govindoss Krishnadoss v. Ramdoss Vishnadoss [1915] M.W.N. 225. The judgment-debtors thereupon preferred an appeal to the District Judge who affirmed the decision of the Munsif holding that the compromise had not been satisfactorily proved and further that even if it was proved, the agreement could not be acted upon because it was arrived at in the course of execution proceedings. He relied upon the aforesaid case reported in Ladd Govindoss

Krishnadoss v. Ramdoss Vishnadoss [1915] M.W.N. 225 as also on the provisions of Order 23, Rule 4, Civil P.C. From this order the present appeal has been preferred on behalf of the judgment-debtors.

5. Now, as regards the adjustment which is sought to have been arrived at on the spot during the local investigation we have looked into the terms of the compromise that is alleged to have been so arrived at and which are embodied in the draft agreement that was filed on behalf of the judgment-debtors and we find that the adjustment, did not consist of stipulations that had been carried out but consisted merely of terms that had to be carried out in future. Such an adjustment does not come within the purview of Order 21, Rule 2, Civil P.C., and must, if at all, come within the purview of Order 23 of the Code. Under Order 23, Rule 4, however, the provisions of that order do not apply to execution proceedings. The reason of the provision contained in Order 23, Rule 4 is that Order 21, Rule 2 and Section 47 taken together provide a complete procedure for recording compromises arrived at in execution proceedings. The adjustment referred to in Order 21, Rule 2 is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed. The view taken in the case reported in 28 I.C. 376, in my opinion, is correct and accordingly even if the latter compromise or adjustment is said to have been proved, in view of the terms thereof, it cannot be given effect to in the course of the execution proceedings.

6. Turning now to the earlier adjustment, namely, the one which is said to have taken place while the appeal was pending: it was argued before us on behalf of the appellants that the said adjustment should have been given effect to by the learned Munsif. On behalf of the respondent it has been urged that having regard to the conduct of the judgment-debtors as disclosed in the statement which they made in the petition that they filed in the executing Court after the local investigation was held, it should be held that the judgment-debtors no longer relied upon the earlier adjustment, but only relied upon the latter one as affording a bar to the execution proceedings. Having examined the materials that are on the record it is not possible for us to hold that the judgment-debtors ever abandoned the position that they had taken up in the first instance, namely, that the decree under execution had already been adjusted before the appeal was disposed of. I am, therefore, of opinion that this argument advanced on behalf of the respondent should not be allowed to prevail. The question then is whether this adjustment can be taken cognizance of by the executing Court and if so, what is the order that we should pass.

7. It has been argued on behalf of the decree-holders that this was an adjustment which took place before the appellate decree was passed and therefore the objection that such an adjustment stood in the way of execution of the decree is really an objection u/s 47 as to the executability of the decree itself

and it need not be certified to the Court under the provisions of Order 21, Rule 2, Civil P.C. This contention, in my opinion, is not well founded. For if the adjustment be taken as having been prior to the decree, then it was, in effect, an agreement not to execute the decree which in future would be passed. According to the uniform current of authorities of this Court such an agreement cannot be taken cognizance of by an executing Court but to avail of it the judgment-debtors will have to institute a separate suit, to restrain the decree holders from executing the decree : see Hassan Ali v. Ganzi Ali [1904] 31 Cal. 179 and Benode Lal Pakrashi v. Brajendra Kumar Saha [1902] 29 Cal. 810 though the other High Courts have taken a different view on this point e.g., Laldas v. Kishordas [1898] 22 Bom. 463, Subramania Pillai v. Kumara Velu [1916] 39 Mad. 541, Chidambaram Chettiar v. Krishna Vathiyer [1917] 40 Mad. 233 and Gavri Singh v. Gajadhar Das [1909] 6 A.L.J. 403.

8. It has next been contended on behalf of the decree-holders that inasmuch as fraud was alleged, Order 21, Rule 2, his no application and that on account of the allegation of fraud the matter is brought within (the purview of Section 47, Civil P.C. This proposition also is not well founded because although it has for its support some earlier cases of the Bombay and the Madras High Courts, it is well settled now, the decisions of this Court having all along been consistent on this point, that it is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by Order 21, Rule 2, even if fraud is imputed to the decree-holder, Biroo Gorain v. Jaimurat Koer 16 C.W.N. 923 Jogendra v. Ashutosh [1916] 24 C.L.J. 462, Periatambi v. Vellaya [1898] 21 Mad. 409, Ganapathy Aiyar v. Chenga Reddi [1906] 29 Mad. 312, Budruddin v. Gulam Mohideen [1913] 36 Mad. 357, Mehbunissa Begum Vs. Mehmedunissa Begum, and Imamuddin v. Bindabasini [1920] 5 Pat. L.J. 70.

9. The last contention on behalf of the appellants is of considerable substance. Having regard to the fact that the adjustment was notified to the appellate Court at a time when that Court was in seisin of the whole case and the statement that there had been such an adjustment not having been objected to on behalf of the decree-holders as is clear from the endorsements "Seen" of their pleaders to which I have already referred, the said representation made to the appellate Court may well be taken in connexion with the subsequent petition that was filed before the executing Court and the two together may be regarded as satisfying the requirements of Order 21, Rule 2, Civil P.C. That this position is maintainable has been held by this Court in the case of Biroo Gorain v. Jaimurat 16 C.W.N. 923. The facts of that case are exactly on all fours with the facts of the present case. I am therefore of opinion that the adjustment cannot be said to be one which has not been duly certified within the meaning of Order 21, Rule 2 of the Code. As the learned Munsif does not seem to have arrived at any finding on the question of fact, namely, as to whether there had been such an adjustment or not the proper order to pass in this case, in my opinion, is to set aside the orders passed by both the Courts below and to direct that the case be remitted to the original

Court with a direction that it will now proceed to arrive at a finding on the question of the said adjustment upon the evidence that is on the record together with such further evidence as may be adduced by the parties and then pass proper orders as to whether the execution case will proceed or not.

10. The appeal accordingly succeeds. The appellants will have their costs of the appeal, the hearing-fee being assessed at two gold mohurs.

Roy, J.

11. I agree.