

(1972) 05 GAU CK 0001
In the Gauhati High Court
Case No : First Appeal No. 79 of 1966

Bangshidhar Ghanshyamdas and another	APPELLANT
Vs	
Jalim Chand Seraugi	RESPONDENT

Date of Decision : 12-05-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 2, 47

Citation : AIR 1973 Guw 72

Hon'ble Judges : Baharul Islam, J

Bench : Single Bench

Advocate : T. C. Das, for the Appellant; K. C. Goswami, B. M. Goswami, for the Respondent

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This appeal by the plaintiffs is directed against the judgment and decree passed by the Subordinate Judge. Gauhati, in Title Suit No. 23/63. The plaintiffs are 4 in number. Plaintiffs Nos. 1 and 2 are two partnership firms and 3 and 4 are their partners. Plaintiff No. 3 is the son and plaintiff No. 4 is widow of late Ghanashamdas Bhagat.

2. The plaintiffs' suit was for declaration that the decree in Money Suit No. 44 of 1953 (Money Suit No. 52/60) of the Court of Additional Subordinate Judge. L. A. D. at Gauhati is "void inoperative and unenforceable and nullity" and is not binding on the plaintiffs. The plaintiffs also prayed for an injunction.

3. The material facts of the case are these: The defendant brought the aforesaid suit No. M. S. 44/63 in the Court of the Additional Subordinate Judge at Gauhati against plaintiffs 1, 2, 3 and late Ghanashyamdas Bhagat claiming Rs. 7,287-0-3 pies for recovery of an alleged amount of Rs. 5,897-4-0 as refund of excess payment and compensation of Rs. 942-14-3 pies arising out of a certain contract for supply of mustard oils and got an ex parte decree on 3-1-1961 for the amount claimed. The plaintiffs' further case is that Ghanshyamdas Bhagat who

was impleaded as defendant No. 3 in that suit, died in Calcutta on 10-1-1960 leaving behind plaintiffs 3 and 4 as his heirs and legal representatives. The plaintiffs further aver that the decree was fraudulent as the defendant suppressed the fact of the death of Ghanshyamdas Bhagat; and that the decree in question being a decree against dead man, was a nullity. They further allege that they came to know about the ex parte decree when it was transferred to Calcutta for execution and Execution Case No. 6/61 was started.

4. The defendant has filed a written statement and contested the suit. The defence inter alia is that the suit is not maintainable and that it is barred u/s 47 of the Civil Procedure Code.

5. The learned Subordinate Judge framed as many as six issues and after trial dismissed the suit. Hence this appeal.

6. Mr. T. C. Das, learned counsel appearing on behalf of the plaintiffs appellants, submits that the document Ext. 5 has been illegally eliminated from consideration by the learned lower court. Ext. 5 purports to be an extract from the Death Register of the Calcutta Corporation. The trial court fixed 6-3-1962 for filing of documents. The plaintiffs did not file this document. Ext. 5, on the date; but they filed it with an application for its acceptance on 18-6-1965 on which date the suit was fixed for peremptory hearing. Serious objection was taken by the defendant against the acceptance of this document filed at such a late stage. The learned trial court passed the following order:

".....The plaintiff filed 2 certified copies of documents with a petition No. 389/65 for acceptance. The defendant's advocate raised objection on the ground that these are filed at an undue late stage and they have no opportunity to scrutinise them. The plaintiff had sufficient time to file documents. I find that it is too late to accept any more documents at the late stage when there have already been 2 adjourned dates for hearing and the cause given for not filing the entries is not satisfactory. The petition is therefore rejected."

7. The case was then fixed for argument on 20-11-1965. On that date a fresh application was made by the plaintiffs for marking the document as an exhibit as it was a public document and the learned Judge, curiously enough, passed the following orders:

"Arguments heard. Heard also the learned advocates of both parties on the petition No. 738/65 filed by the plaintiff for marking the certified copy of the entry of death register filed by the plaintiff as an exhibited document. Let this document be marked Ext. 5 under objection of the Defendant"

8. Order 13, Rule 2, Civil Procedure Code, provides:

"No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof;

and the Court receiving any such evidence shall record the reasons for so doing."

9. In the application filed by the plaintiffs on 18-6-1965 the ground for late production of the document was that the document could not be filed earlier as it had not been obtained by the plaintiffs. But the document itself shows that it had in fact, been obtained on 10-7-1964, nearly a year ago. The ground shown, therefore, was false and the learned Judge by his order dated 18-6-1965 rightly rejected the application for acceptance of the document. The order dated 20-11-1965 marking the document as Ext. 5. after rejection of the same by the earlier order does not disclose any reason whatsoever as to why it was marked and accepted. The order dated 20-11-1965 was capricious and unsustainable. Although the learned Judge illegally marked the document (as Ext. 5) his ultimate elimination of Ext. 5 from consideration is right.

10. The plaintiffs' case was that Ghanashyamdas Bhagat died before the decree and they attempted to prove the death by Ext. 5 and the oral evidence of P. W. 1. Ext. 5 having been eliminated, the only evidence that remains is the oral evidence of P. W. 1. the material portion of which is: "Ghanashyamdas Bhagat died on 10th January 1960.....". There is no other evidence on record to support this piece of evidence. As this fact was seriously challenged by the defendant, the learned trial court, was justified in not relying upon this sole evidence to prove the death of Ghanashyamdas Bhagat.

11. The next submission of learned counsel is that the impugned decree is a nullity and is inexecutable as the decree, being for money, is indivisible.

12. The instant suit was in effect for the cancellation of the decree in M. S. 44/53. But the impugned decree has not been proved in the case. We do not know the nature of the decree. whether it was joint or joint and several, - whether it was divisible or indivisible. Be that as it may, if the decree, as submitted by the plaintiffs, is void and a nullity, the present suit will be incompetent as the court cannot set aside or cancel a decree which does not exist in the eye of law. They can only resist its execution in the executing court u/s 47 of the Civil Procedure Code. Section 47 provides:

"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."

Whether the impugned decree is inexecutable for whatsoever reason, can be decided only u/s 47 and not by a separate suit.

13. Supreme Court in Seth Hiralal Patni Vs. Sri Kali Nath, has held:-

"The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sensethat the defendant was dead at the time the suit had been instituted or decree passed or some such other ground which could

have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."

14. In *Dadu Raghu Patil and Others Vs. Tukaram Ranaba Dhere and Others*, in a Division Bench judgment Justice Shah (as he then was) held:

"A Court executing a decree is entitled to try all questions relating to execution, discharge or satisfaction of a decree: and an objection that the decree under execution is a nullity and incapable of execution is one which can be raised in execution proceedings."

15. A Full Bench decision reported in AIR 1934 75 (Oudh) on which reliance has been placed by learned counsel for the appellants, held:

"..... the decree passed by the Munsiff is a mere nullity because he lacked inherent jurisdiction to take cognizance of the matter and that in such a case the executing Court can go into the question of the validity of the decree, i.e., as to lack of inherent jurisdiction and refuse to execute it."

16. This judgment, in my opinion, is of no assistance to the appellants. On the contrary it goes against them. The present suit is barred u/s 47 of the Civil Procedure Code.

17. In the result this appeal has no substance and is dismissed with costs. The judgment and decree of the trial court are upheld.