

(1942) 04 CAL CK 0015

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 237 of 1941

Dindayal Shah

APPELLANT

Vs

The Trustees for the Improvement of Calcutta

RESPONDENT

Date of Decision : 30-04-1942

Acts Referred:

Citation : (1942) 04 CAL CK 0015

Judgement

Mukherjea, J.—The facts giving rise to this appeal may be shortly stated as follows. The Appellant Dindayal Shah owned two plots of land at Khidirpore which were acquired by the Trustees for the Improvement of Calcutta. After acquisition the Appellant was allowed to remain as a tenant in occupation of both these plots of land under the Trust. In March, 1928, there was an agreement arrived at between the Appellant and the Trust under which the latter agreed to sell these plots of land to Dindayal at a certain price. The transaction, however, was not completed and in 1935, Dindayal as Plaintiff brought a suit against the Trust restraining them from selling these two plots of land to anybody else except the Plaintiff. The suit was registered as Title Suit No. 99 of 1935. The trial Court dismissed the suit and against that an appeal was taken to this Court which ended in a consent decree on the basis of a solenama, dated the 5th of June, 1939. The terms of the compromise decree in substance were: that the Trust will convey the bigger of the two plots which was marked B in the plaint to the Plaintiff Dindayal on receipt of a consideration of Rs. 1,31,692-8. The Plaintiff's claim in respect of the other plot which was marked A was dismissed. The Plaintiff, however, undertook to pay to the Trust all arrears of rent whether decreed or not with regard to both the plots let out to him and which were roughly estimated at Rs. 22,235-11, within three months from the date of the order made by this Court on the compromise together with all costs and arrears of taxes payable by him in his occupier's share. On failure of the Plaintiff to pay the aforesaid amounts within the stipulated period, the appeal was to stand dismissed and the Trust would be at liberty to take vacant possession of plot No. B and sell it to anybody they liked and also to take necessary steps for

realisation of the dues for arrears of rent, taxes, costs, etc. It was further provided that the Trust would be at liberty to take vacant possession of plot B in execution of the decree passed on the compromise without recourse to any other suit or proceeding.

2. Dindayal, it is admitted, failed to make the payments within the period mentioned above and the Respondent Trust thereupon put the compromise decree in execution in Execution Case No. 19 of 1940 in the Court of the Third Subordinate Judge at Alipore. There were prayers in the execution petition for delivery of possession of plot B by ejecting the Appellant there from and also for recovery of the sum of Rs. 22,235-11 as representing the rents due by the Plaintiff to the Trust in respect of both these plots of land. It may be mentioned here that the Respondent Trust at the same time started execution proceedings in connection with the five rent-decrees which they already obtained against the Appellant, although the sums for which these execution cases were instituted were included in the application for execution of the decree in the Title Suit. The judgment-debtor filed objections in all these cases. His objection in Execution Case No. 19 of 1940 mainly was that the terms of the compromise decree enabling the decree-holder to take vacant possession of plot B of the plaintiff or to recover the sum of Rs. 22,235-11 as arrears of rent from the judgment-debtor were wholly outside the scope of the suit and consequently could not be included in the operative part of the decree. The remedy, if any, of the decree-holder was to institute a separate suit to enforce these terms of the compromise. The objection of the judgment-debtor in the several rent execution cases was that these rent-decrees were not separately executable as they all merged in the compromise decree mentioned above. All these objections were heard together by the learned Subordinate Judge and in his judgment dated the 8th of March, 1941, he held that the decree-holder was competent to pray for delivery of possession of plot B as well as to realise rents amounting to Rs. 22,235-11 from the Appellant by execution of the decree obtained in Title Suit No. 99 of 1935 and that these terms were not extraneous to the suit. The result was that the judgment-debtor's objections in Title Suit No. 19 of 1940 were dismissed. With regard to the execution cases started by the decree-holder in connection with the several rent-decrees, the objection of the judgment-debtor was in a sense upheld and it was held by the learned Subordinate Judge that these decrees were not separately executable after the compromise was made in Title Suit No. 99 of 1935. The judgment-debtor took an appeal against this decision in so far as it dismissed his objections in the title execution case to the Court of the District Judge of Alipore. The Additional District Judge who heard the appeal concurred with the view taken by the Subordinate Judge and dismissed the appeal. It is against this decision that the present appeal has been preferred.

3. Mr. Gunada Charan Sen who appears in support of the appeal has contended before us that the Court below ought to have held that the terms of the compromise decree relating to delivery of vacant possession of plot B in the plaintiff and also to the realisation of outstanding rents amounting to Rs.

22,235-11 were extraneous to the suit and could not come within the operative part of the decree. It was contended that these terms could be enforced only by means of a separate suit. The question is certainly not free from difficulty. As was observed by Mitra and Caspersz, JJ., in *Gobinda Chandra Pal v. Dwarka Nath Pal* I. L. R. 35 Cal. 837 s. c. 12 C. W. N. 849 (1908)

The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by section 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit.

4. The facts undoubtedly have to be looked at as a whole; [vide, the observation of Sir George Rankin in *Shashi Bhusan Shaw v. Hari Narain Shaw* I. L. R. 48 Cal. 1059 (1921).] and a matter which is not covered by any of the issues in the suit may come within its scope if it constitutes a consideration for any of the matters in the suit and formed an integral part of the adjustment of the claim in relation thereto. In the present case, the suit was one for an injunction restraining the Defendant from selling the two" plots of land which were the subject-matter of the suit to anybody else except the Plaintiff. The foundation of the suit, we are told, was the agreement of 1928, on the basis of which the Plaintiff claimed a conveyance of the property to him. The compromise allowed the Plaintiff to purchase one of the two plots on payment of a cash consideration of rupees one lac, 31 thousand and odd. He also undertook to pay all outstanding arrears of rent due by him to the Defendant as landlord in respect of these plots within a period of three months from the date of this Court's orders. As we have said already, the right of the Plaintiff to have a conveyance of the property was involved in the suit itself and it was quite within the scope of the suit to provide that the Plaintiff would be allowed to purchase one of the plots by payment of a certain sum of money within a fixed period. We can regard the condition relating to the payment of rents and taxes as an additional consideration for the conveyance which was to be executed by the Defendant in favour of the Plaintiff; and it admits of no doubt that if the Plaintiff had carried out his part of the agreement and the Defendant still refused to sell the land to the Plaintiff the latter would have been justified in enforcing his right by execution of the compromise decree itself without being under any necessity to institute a fresh suit for specific performance.

5. Let us now look to the provisions of the compromise decree as to what would happen if the Plaintiff failed to perform his part of the contract. In case the Plaintiff did not pay the money within the stipulated period, the suit for injunction would undoubtedly fail and the Defendant would have the right to sell the property to anybody they liked without any restriction whatsoever, but the

compromise secured to the Defendant two other rights. One was a right to get vacant possession of the land in execution proceeding itself without the necessity of a fresh suit or proceeding and the second was the liberty to take steps for the realisation of the arrears of rents, taxes, etc. It seems to us that the relief given to the Respondent in the compromise decree relating to recovery of rents from the Appellant was not an effective relief at all. The compromise did not say that on the failure on the part of the Plaintiff to complete his purchase within the stipulated period, the Respondents would be entitled to realise the rents due by the Plaintiff in execution of this compromise decree itself. All that it said was that the Trust will have the liberty to take all necessary steps in the matter of realisation of such rents and taxes and they would be entitled to revive the proceedings already pending in the Alipore Court. This term in the compromise was more or less redundant. It simply kept intact the rights of the Trust which they had independently of the compromise and in our opinion it meant nothing more than this that the Trustees would be at liberty to execute the decrees for rents already obtained by them and they could also sue for rents for which no decrees were yet obtained. As, in our opinion, there was no decree passed on the basis of the compromise entitling the Trustees to recover rents from the Appellant on the failure on the part of the latter to complete his purchase within the period of three months from the date of the order, the question whether such a term would or would not relate to the suit, strictly speaking, does not arise. The Respondent's only remedy according to the terms of the compromise decree itself was to proceed with the execution cases started by them and the learned Subordinate Judge was entirely wrong in holding that the rent decrees were not executable after the compromise was made in Title Suit No. 99 of 1935. A difficulty is caused by the fact that the Respondent Trust did not prefer any appeal against the order of dismissal made by the trial Judge with regard to the five execution cases that were started by them and the order must now, therefore, be taken to be final and conclusive. Had appeals been taken against these orders as well to the lower Appellate Court as well as to this Court, we could have dealt with all the matters together and could have allowed the Respondents the right to proceed with the execution cases and the fact that there was a term relating to recovery of rents in the compromise petition would not in the least stand in their way.

6. Mr. Bose has argued before us that the judgment-debtor himself took up the position in the trial Court that the rent-decrees had no separate existence but were completely merged in the compromise decree made in the suit for injunction and as this position was accepted by the trial Court which allowed the decree-holder to realise these rents in execution of the compromise decree itself, there was no necessity on the part of his client to prefer an appeal against the order of the Subordinate Judge dismissing his execution applications in connection with the rent decrees. To a certain extent Mr. Bose is right. The judgment-debtor had really taken up that position in the trial Court and it was he who invited the Court to hold that these rent decrees were not separately

executable after the consent decree was made in the injunction suit. He, however, contended further that the terms in the compromise decree itself were not executable but had to be enforced by a separate suit. We cannot, therefore, say that the Appellant is estopped from contending here before us that the rent-decrees had become merged in the compromise decree and consequently we are left to the position that the only, remedy of the decree-holder is to proceed with the execution cases which were started by him in the Alipore Court. It is true that appeals against these orders will now be time-barred but the decree-holder can certainly apply for extension of time under sec. 5 of the Indian Limitation Act and we have no doubt that this application should be properly considered by the Court in view of the circumstances mentioned above.

7. We now come to the other part of the compromise decree which relates to the delivery of vacant possession of plot B. Mr. Sen argues and in our opinion rightly that no such claim could have been put forward by the Defendant in the injunction suit itself. It has been argued by Mr. Bose that it might be regarded as a consideration for the indulgence that was shown by the Respondent in allowing the Plaintiff to remain in possession of the property for a period of three months more; but the Plaintiff was admittedly a tenant under the Defendant and so long as the tenancy was not determined in any manner recognised by law, the Defendant was not entitled to turn the Plaintiff out. The utmost that could be said is, that as the Defendant refrained from selling the plot of land immediately after the case was disposed of they might insist on some consideration for this in the shape of the promise given by the Plaintiff that they will vacate the land immediately after the period of three months is over if in the meantime the property was not purchased by payment of the amounts specified in the compromise petition. We do not think we can accept this contention as sound. We hold however that whether or not this clause related to the suit, it can be enforced in execution proceedings on the authority of the well-known decision in *Pisani v. Attorney-General for Gibraltar* L. R. 5 P. C. 516 (1874), which has been followed in a long series of decisions in this Court. The judgment-debtor here deliberately agreed to insert a term in the compromise petition that he would give delivery of possession of plot B to the Respondent in execution proceedings and in our opinion he is not competent to resile from that position now and contend that not with standing this provision in the decree, the decree-holder must be driven to file a separate suit. It was held by their Lordships of the Judicial Committee in *Sadasiva Pillai v. Ramlinga Pillai* L. R. 2 I. A. 219 : 19 B. L. R. 383 (1875). following the decision in *Pisani's case* L. R. 5 P. C. 516 (1874), that the parties should be held to the agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*. This rule has been applied to a long series of cases as we have said above and reference may be made amongst others to the cases of *Thakur Dayal Singh v. Sarju Pershad Misser* I. L. R. 20 Cal. 22 (1892), *Indramani Dasi v. Surendra Nath Mandal* 35 C.L.J. 61 (1921), *Hridoy Mohan Sanyal v. Khagendra Nath Sanyal* 34 C. W. N. 213 (1929). and *Mano-mohan*

Sanyal v. Khaliskhali Co-operative Bank 41 C. W. N. 480 (1937).. The principle, in our opinion, is established that when there is no inherent want of jurisdiction in the executing Court over the subject-matter of the dispute or in respect of the parties before it, it is open to the parties to arrange the procedure by agreement among themselves and give jurisdiction to the executing Court which it otherwise would not possess. The decision in Pradyumna Kumar Mullick Millick L. R. 64 I. A. 302 : s c. 41 C. W. N. 1093 (1937). upon which reliance has been placed by Mr. Sen does not touch this proposition at all. In that case something was sought to be added by agreement of the parties after the decree was obtained and we do not find any observation of the Judicial Committee which would throw any doubt upon the proposition enunciated in the cases mentioned above.

8. The result, therefore, is that we allow the appeal in part. We agree with the Additional District Judge that the decree-holder has the right to get delivery of possession of plot B in the execution proceeding itself and there is no necessity to institute a separate suit. As regards the right to recover rents, we hold that the proper remedy of the Respondents is to proceed with the execution cases in connection with the rent decrees already obtained by them and to institute suits for rent with regard to which they have not yet obtained rent decrees. It would be open to them to file appeals or present applications for review against the orders of dismissal made by the executing Court and pray for extension of time under sec. 5 of the Limitation Act. We make no order as to costs in this appeal.

9. Let the records be sent down as soon as possible.

Blank, J.

I agree.